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HIMACHAL SERIES, 2016

EDITOR
RAKESH KAINTHLA
Director,
H.P. Judicial Academy,
Shimla.

ASSISTANT EDITOR
HANS RAJ
Joint Director,
H.P. Judicial Academy,
Shimla.

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(September, 2016)

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SUBJECT INDEX

'A'

Arbitration and Concilation Act, 1993- Section 8- Petitioner was awarded work of construction of road under Pardhan Mantri Gram Sarak Yojna- work was to be completed in 12 months- petitioner failed to start and complete the work in time- certain concerns were raised by the petitioner, which were not redressed on which petitioner rescinded the work- petitioner filed a petition for appointment of an Arbitrator- held, that clause 24 of the agreement provides for dispute redressal mechanism by way of amicable settlement- however, respondent has failed to resort to the mechanism – further, claim of the petitioner was rejected in the meeting- hence, there is no impediment in appointment of arbitrator - petition allowed and Arbitrator appointed to adjudicate the dispute raised by the petitioner as well as counter-claim preferred by the respondent. Title: M/s V.S. Saini Government Contractor Vs. State of H.P. through Principal Secretary, HP PWD and another Page-126

'C'

Code of Civil Procedure, 1908- Section 100- Plaintiff had taken a parking lot in the fourth floor - he was assured that access would be provided to the same - he had given a bid for Rs. 13.50 lacs, whereas, fifth floor was auctioned for Rs.9.5 lacs- possession of fourth floor was never given to the plaintiff- amount of Rs. 2,21,000/-was wrongly forfeited as possession was never delivered- suit was opposed by filing a written statement pleading that plaintiff had seen the particular area and had offered the highest bid of Rs. 13.50 lacs-, amount was forfeited on failure to take possession by the plaintiff as per terms and conditions of the auction notice - suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held in second appeal, plaintiff admitted that he had gone through the terms and conditions of the tender notice- it was specifically provided in Clause 2 that the bidder was required to deposit 20% of the bid amount at the fall of hammer and remaining amount would be paid within 30 days and in case of failure, initial amount would be forfeited- amount was forfeited strictly according to terms and conditions of the bid auction notice- appeal dismissed. Title: Sudershan Singh Rana Vs. Municipal Corporation, Shimla and another Page-447

Code of Civil Procedure, 1908- Section 100- Plaintiff underwent tubectomy- the operation was unsuccessful and she gave birth to a male child- she filed a civil suit for the recovery of Rs.2 lacs with costs- the defendants asserted that there was no negligence in the operation- there are chances of failure which were explained to the plaintiff- the suit was dismissed by the trial Court- the appeal was allowed and a decree of Rs. 70,000/- along with interest was passed- held, in second appeal that facts are not disputed- it was not disputed that plaintiff had undergone tubectomy operation and had delivered a male child within two years of the operation – assertion of the plaintiff that defendant No. 3 had assured that operation was successful and plaintiff would not conceive again was not denied specifically- the fact that plaintiff had conceived after the operation was not in accordance with the promise made to her – consent form is in English and plaintiff was unable to understand the same- sum of Rs. 70,000/- is not sufficient to bring up the child and to compensate the plaintiff for the pain and sufferings- appeal dismissed. Title: State of H.P. and another Vs. Sushma Sharma and another Page-550

Code of Civil Procedure, 1908- Section 100- Suit for recovery was filed pleading that work was awarded to the defendant- defendant executed a part of the work and had not completed the same- sum of Rs.1,64,124/- was recoverable from the defendant- defendant denied the claim of the plaintiffs and stated that plaintiffs had failed to make regular monthly payments- defendant was prevented from executing the work by the acts, conduct, omission and commission of the plaintiffs- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that Clause 2 of the agreement provided that defendant will ensure good progress during the execution of the work – site was handed over the site on 11.12.1996 and

work was to be completed by 10.6.1997, but he failed to do so- defendant was informed that he was nothing to pay compensation for failure to complete the work in accordance with the time schedule – plaintiffs called the defendant before the Superintending Engineer before determination of compensation- however, he had chosen remain absent and was rightly held liable to pay compensation- appeal dismissed. Title: Madan Gopal Sharma Vs. Himachal Pradesh Housing Board and anr. Page-297

Code of Civil Procedure, 1908- Order 6 Rule 17- An application for amendment of the plaint was filed pleading that photostat copy of agreement of sale was found in a box where the deceased used to keep his documents- the deceased used to remain under the influence of liquor and could not produce photocopy at the time of filing of the civil suit- production of the photocopy will not change the nature of the suit- the application was dismissed by the trial Court- held, in revision that application has been filed by widow and minors who are rustic villagers – tracing of copy of agreement is a subsequent event and the Court can take notice of the same – proposed event is essential to avoid multiplicity of proceedings – no prejudice would be caused to the defendants by allowing application- revision allowed - order of trial Court set aside and application allowed subject to the payment of cost of Rs. 3,000/-. Title: Saroj Devi widow of late Sh. Achhar Singh & others Vs. Gurinder Singh son of Smt. Surinder Kaur & another Page-1073

Code of Civil Procedure, 1908- Order 6 Rule 17- An application for amendment of written statement was filed for pleading that agreement to sell was not valid as no sanction was taken under Section 118 of H.P. Tenancy and Land Reforms Act and Section 17 of the Companies Act – suit has been filed for specific performance and question of competency of the executant will be relevant in such a suit- therefore, application allowed. Title: M/s Mukut Hotels and Resorts (Pvt) Ltd. Vs. M/s Khuller Resorts & others Page-386

Code of Civil Procedure, 1908- Order 6 Rule 17- Different wills were set up by the parties- however, plaintiff had not given the detail of the property in the plaint- hence, application for impleadment of the plaint was filed- application was allowed by the trial Court- held, that detail of the property would be essential for passing the judgment and the same is clarificatory in nature- it does not alter the nature, construction or complexion of the pleadings- therefore, application was rightly allowed- petition dismissed. Title: Deepak Bhatia Vs. Komal Bhatia & others Page-294

Code of Civil Procedure, 1908- Order 8 Rule 1A(3)- An application was filed for placing on record the original Will of the deceased, which was the allowed- aggrieved from the order, the present application has been filed- held, that both the parties are claiming right over the property originally belonging to J- the question is whether his property was inherited by the plaintiff on the basis of natural succession or on the basis of Will- the parties hail from the rural background and are not well conversant with the procedure of law- serious prejudice would be caused to the defendants by refusing the application – the petition dismissed. Title: Kiran Bala and others Vs. Mansha Devi and others Page-986

Code of Civil Procedure, 1908- Order 21 Rule 35- Warrant of possession was ordered by the Executing Court- petition for execution of decree of possession was filed- J.D. preferred objection pleading that plaintiff had not taken permission under Section 118 of H.P. Tenancy and Land Reforms Act- objections were rejected- held, in revision that Executing Court cannot go behind the decree and it cannot decide that decree is void – however, Court is bound to look into the fact that mandatory permission was not taken from the State of Government- evidence is to be taken in support of the same – Executing Court had not taken the evidence and had rejected the objections- petition allowed and trial Court directed to frame the issue on objections preferred by J.D. Title: Hardeep Kaur Gandhi and others Vs. Ajit Lajwanti Gujral Trust and others Page383

Code of Civil Procedure, 1908- Order 23 Rule 1- Plaintiff filed a civil suit for possession – application to withdraw the suit with liberty to file a fresh suit on the same cause of action was filed- application was allowed by the trial Court- application was filed on the ground that J had executed a valid Will- he was missing for last three years and his whereabouts were not known - a decree seeking declaration regarding civil death of J was not obtained, which is a technical defect- held, that Will would come into operation after the death of J and when proof of the death of J was not filed, suit was liable to be dismissed- no prejudice would be caused to the defendants by permitting the plaintiff to withdraw the suit- petition dismissed. Title: Vidya Devi alias Lachhi & anr. Vs. Om Prakash Page-574

Code of Civil Procedure, 1908- Order 26 Rule 9- Suit was decreed as having been compromised- parties were directed to maintain status quo qua the suit land till its partition- suit land has not been partitioned and the parties are in possession of the their respective shares- petitioner initiated proceedings pleading that path in existence was blocked by the respondent by laying slate tiles – respondent denied the existence of any such path- application for appointment of Local Commissioner was filed to determine the blockade of path- application was dismissed by the trial Court- held, that it was for the petitioner to prove the existence of the path and its blockage- allowing the application will amount to collection of the evidence by Court, which is not legally permissible- trial Court had rightly dismissed the application- petition dismissed. Title: Ved Parkash Vs. Mool Raj Padha Page-493

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a civil suit for seeking specific performance of the contract- application for interim relief was filed, in which order of status quo was granted by the trial Court- an appeal was preferred and Appellate Court reversed the findings of the trial Court- Appellate Court observed that defendant No. 1 was not holding the title of the property and was not competent to execute the agreement- held, that this fact was to be proved during the course of the trial – defendant No. 1 was an ostensible owner- petition allowed, order of the Appellate Court set aside and the parties directed to maintain status quo qua the nature. Title: Vinay Kumar Vs. Sangeeta Cheetu & another Page-46

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiffs filed a civil suit for declaration pleading that they are in joint possession of the suit land- suit land is coparcenery in which plaintiffs has a right by birth - defendant No. 1 had executed a gift deed in favour of defendants No. 2 and 5, which is illegal, null and void- suit was opposed by the defendants asserting that suit property was self acquired property of defendant No. 1- application was allowed by the trial Court- an appeal was filed, which was allowed- it was contended that documents proved on record that ancestral land of the parties was acquired for the construction of Bhakra Dam and the land was purchased from the proceeds of such acquisition- however, no such plea was made in the pleading of the parties- documents cannot be considered in absence of the pleadings - Appellate Court had rightly held that in absence of the pleadings, documents cannot be considered to establish the ancestral nature of the property- petition dismissed. Title: Vivek Sharma and others Vs. Ram Rakha and others Page-495

Code of Civil Procedure, 1908- Order 41 Rule 1- A civil suit was filed for seeking injunction, which was decreed- an appeal was filed, which was dismissed but the order of the trial Court was modified and 173.99 square metres area was incorporated in the decree- a second appeal was filed in which it was observed that Appellate Court had not specified in which part of khasra number area of 173.99 square metres is located and it was further held that remedy available to the defendants to file a review petition before the Appellate Court- a review petition was filed, which was dismissed- aggrieved from the order, present revision has been filed- held, that petitioner has challenged the judgment and decree passed by the trial Court which has attained finality- it was not specified as to what is an error apparent on the face of record- hence, review petition was rightly dismissed by the Appellate Court- petition dismissed. Title: Harpreet Singh and another Vs. Subhash Chand Page-933

Code of Civil Procedure, 1908- Order 41 Rule 33 - Plaintiff filed a civil suit for seeking permanent prohibitory injunction – suit was dismissed by the trial Court- an appeal was preferred- a Local Commissioner was appointed by the Appellate Court- Appellate Court held that the area under the house is to be presumed to be that of the person who owns the house- it was further held that it can be further presumed that stairs might have been constructed jointly by the parties- user of the stairs has been denied to the plaintiff by the construction of latrine and bath room by the defendants - held, in second appeal that finding of fact by the Court cannot be based on presumptions- Appellate Court should have taken into consideration the reasoning behind the findings reached by the trial Court and should have returned its independent findings- whole case is open in appeal for rehearing on question of fact and law - judgment of the Appellate Court must reflect its conscious application of mind – Appellate Court should record findings supported by reasons along with the contentions put forth and pressed by the parties – appeal allowed and case remanded to the Appellate Court for decision in accordance with law. Title: Bhupinder Singh and another Vs. Devinder Singh and others Page-631

Code of Criminal Procedure, 1973- Section 125- Wife filed a petition seeking maintenance pleading that marriage between the parties was solemnized as per Hindu Rites and Custom- her husband and his family members started maltreating and abusing her for bringing insufficient dowry- matter was reported to police- a compromise was effected between the parties, but the maltreatment continued - wife has no source of income while husband was earning Rs. 15,000/- per month- maintenance of Rs. 7,000/- per month was sought- husband pleaded that wife had left the home voluntarily without any reason – she has independent source of income- it was prayed that petition be dismissed- petition was allowed and the maintenance of Rs. 3,500/- per month was awarded from the date of the order- a revision was filed, which was dismissed- held, that District Judge had dissolved the marriage on the ground of cruelty and desertion on the part of wife- hence, she is not entitled to maintenance- it was duly proved that wife had resided in her matrimonial home for 3-4 days and had left the same without any reason- petition allowed and maintenance granted to the wife ordered to be cancelled. Title: Tota Ram s/o Sh. Balak Ram Vs. Kanchan Lata d/o Sh. Balak Ram Page- 868

Code of Criminal Procedure, 1973- Section 169- Complaint for the commission of offences punishable under Sections 420, 409, 466 and 120-B read with Section 34 of I.P.C was filed, which was forwarded to the police for investigation- it was found after investigation that no offence was made out- hence, a cancellation report was filed- objections were filed to the cancellation report, which were rejected and cancellation report was accepted- aggrieved from the order, present petition has been filed- held, that Court had passed a reasoned and speaking order justifying the acceptance of cancellation report - objections were also got investigated from the police and cancellation report was accepted after being satisfied that the objections were not valid - complaint and revision petition were filed for harassing the elected members of Gram Panchayat or public servants- petition dismissed with cost of Rs. 10,000/-. Title: Amar Nath Vs. State of HP & others Page-375

Code of Criminal Procedure, 1973- Section 256- Complaint filed by the appellant was dismissed in default by the trial Magistrate for want of appearance - complaint was listed for filing of process fee and correct address of the accused- Court had not come to the conclusion that presence of the complainant was absolutely essential and had straightaway dismissed the complaint under Section 256 of Cr.P.C- dismissal of the complaint for non-appearance is not automatic- there has to be an application of mind to determine whether order of dismissal should be passed or not- the Court has to see whether personal attendance of the complainant is essential and whether the situation does not justify the adjournment of the complaint-, dismissal of the complaint is not proper on singular default in appearance on the part of the complainant - order set aside. Title: M/s Gorsi Construction Pvt Ltd. Vs. Vinod Kumar Page-661

Code of Criminal Procedure, 1973- Section 299- Application was filed against the accused S and L- accused S absconded and was declared proclaimed offender- trial Court continued against accused L- accused L was convicted - in the meantime accused S was apprehended- statement was made on his behalf that statements of prosecution witnesses recorded in his absence be read against him- held, that statement recorded in the absence of the proclaimed offender can only be read in the event of deponents being dead, incapable of giving evidence, being not found and their presence being not procurable without an amount of delay, expense or inconvenience which under the circumstances of the case, appears to be unreasonable- it was not permissible to rely upon statements recorded in absence of the accused without satisfying the ingredients of Section 299 of Cr.P.C. – judgment passed by the trial Court set aside- case remanded for disposal in accordance with the law. Title: State of H.P. Vs. Shiv Chand (D.B.) Page-484

Code of Criminal Procedure, 1973- Section 311- Application for recalling PW-6 was filed on the ground that he had given statement contradictory to what was stated by him before Learned District Judge, Shimla - application was opposed on the ground that complainant had no locus standi to file the application- application was dismissed by the trial Court- held, that PW-6 was examined by Learned Public Prosecutor and was cross examined on behalf of the accused- application has not been signed by Public Prosecutor- mere change of counsel cannot be a ground for recalling a witness- witnesses cannot be expected to face the ordeal of appearing in the Court repeatedly- there is no perversity or illegality in the order passed by the trial Court- petition dismissed. Title: Mohd. Tariq Vs. Jaspal Singh and others Page-301

Code of Criminal Procedure, 1973- Section 311- Petitioner and her husband approached respondent for providing financial assistance of Rs. 2 lacs- petitioner issued a cheque of Rs. 2 lacs, which was dishonoured by the Bank- a legal notice was issued but the amount was not paid- complaint was filed- an application was filed by the respondent for placing on record certified copy of notice and postal receipt exhibited in other complaint- application was allowed by the trial Court- aggrieved from the order, present petition was filed- held, that respondent had dispatched two legal notices - one to the petitioner and other to R- inadvertently, notice issued to R was placed on record of present complaint along with postal receipt – notice which was issued to the petitioner was placed on record of other complaint filed against R- notices were not placed on record inadvertently - there is no illegality in the order passed by the trial Court- there is no merit in the petition and the same is dismissed. Title: Poonam Sharma Vs. Kamal Dev Sharma Page-192

Code of Criminal Procedure, 1973- Section 319- Principal offenders were charge sheeted for the commission of offences punishable under Sections 302, 341, 323 read with Section 34 IPC- application for impleading the petitioner was filed, which was allowed - held, that prosecution witnesses had stated the name of the petitioner- the Court is not to see whether statements are sufficient to record the conviction as only a prima facie inquiry has to be made at the stage of impleadment - trial Court had rightly exercised the discretion - petition dismissed. Title: Sunil Kumar Vs. State of Himachal Pradesh Page-121

Code of Criminal Procedure, 1973- Section 439- Accused was found in possession of 18 bottles of Corex, each containing 100 ml and one box containing 144 Capsules of Spasmo Proxyvon plus- held, that petitioner was previously involved in the similar kind of offence- he will temper with the prosecution evidence, therefore, discretion, to admit the petitioner on bail cannot be exercised- petition dismissed. Title: Deepak Kumar Vs. State of Himachal Pradesh Page-125

Code of Criminal Procedure, 1973- Section 439- An FIR has been registered against the petitioner for carrying 104 grams charas- he applied for bail- held, that petitioner is a permanent resident of District Mandi- there are no chances of tempering with the prosecution evidence and to flee from justice- application allowed- petitioner ordered to be released on bail of Rs. 50,000/- with one surety to the like amount. Title: Abhay Walia Vs. State of Himachal Pradesh Page-975

Code of Criminal Procedure, 1973- Section 439- An FIR has been registered against the petitioner for carrying 104 grams charas- he applied for bail- held, that petitioner is a permanent resident of District Kangra- there are no chances of tempering with the prosecution evidence and to flee from justice- application allowed- petitioner ordered to be released on bail of Rs. 50,000/- with one surety to the like amount. Title: Abhinay Rana Vs. State of Himachal Pradesh Page-976

Code of Criminal Procedure, 1973- Section 439- An FIR was registered for the commission of offences punishable under Sections 498-A and 306 read with Section 34 of I.P.C.- petitioner filed a bail application- held, that mere release of female co-accused is not sufficient to release the petitioner on bail as special provision of bail are applicable to female accused- innocence or guilt of the accused will be seen at the time of conclusion of trial and not at this stage- while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- in case of release of petitioner on bail, he can induce or threaten the prosecution witnesses- keeping in view the gravity of offence and interest of the public; it is not expedient to release the petitioner on bail- petition dismissed. Title: Anil Khan s/o Sh. Manir Khan Vs. State of H.P. Page-459

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offence punishable under Section 20 of N.D.P.S. Act- petitioner filed a petition seeking bail on the ground that he was falsely implicated- held, that question of guilt or innocence cannot be determined while considering the bail application but will be determined at the conclusion of trial- while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- quantity of contraband recovered from the accused is less than commercial quantity- refusal of bail will affect the personal liberty of individual – petition allowed- bail granted subject to furnishing personal bonds of Rs. 5 lacs with two sureties. Title: Sher Bahadur Singh son of Shri Bhim Bahadur Singh Vs. State of H.P. Page-780

Code of Criminal Procedure, 1973- Section 456- Five vehicles loaded with Oxen were checked- it was found that oxen were loaded in a cruel manner- drivers of vehicles did not give satisfactory answer- petitioner filed an application for releasing the oxen on the ground that these were purchased by him- application was dismissed by the trial Court- a revision was preferred, which was also dismissed- held, that certificate has been given by Chief Agriculture Officer Haridwar (Uttrakhand) that petitioner is an agriculturist by profession and had purchased the oxen from Ropar for agricultural purposes- no other person had filed application for releasing the oxen - the plea that oxen were being carried for slaughtering or for the purpose of agricultural is to be determined by taking evidence - petition allowed- oxen released on supardari of Rs. 1 lac with one surety subject to the conditions. Title: Vijay Kumar son of Sh. Babu Ram Vs. State of H.P. Page-576

Code of Criminal Procedure, 1973- Section 482- A complaint was filed for the commission of offence punishable under Section 27 (b) (ii) of Drugs and Cosmetics Act 1940 before Ld. C.J.M. who issued summons- it was contended that cognizance can be taken only by the Court of Sessions and C.J.M. was not competent to take cognizance - held, that C.J.M. committed irregularity by recording pre-charge evidence- he was bound to send the complaint to the Sessions Judge- however, it cannot be determined, whether accused persons were in-charge of and were responsible to the company for its conduct as it is a complicated question of fact, which cannot be determined at this stage- sanction for prosecution will be required at the time of framing of charge and not prior to that - petition partly allowed- Complaint withdrawn from the

Court of C.J.M. and assigned to the Court of Sessions Judge for disposal in accordance with law. Title: Varun Samra son of Shri Vijay Kumar and others Vs. State of H.P. Page-697

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Sections 341, 392, 323, 324, 504, 506, 149 and 120-B of I.P.C.- car was purchased on a hire purchase basis- possession was taken in accordance with the terms and conditions of the agreement- complainant filed a private complaint, in which a cancellation report was filed - objections were made to the cancellation report, which were accepted- further investigation was conducted and another cancellation report was filed- Court rejected the cancellation report and ordered the issuance of summons - petition was filed for quashing the order- held, that hire purchase agreement shows that complainant had not acquired absolute title over the vehicle- financer had right to retake the possession, in case of default- however, financer cannot take forcible possession on the basis of this condition- petition dismissed. Title: Nipun Jain & others Vs. State of H.P & others Page-308

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Sections 452, 307 and 34 of I.P.C- it was pleaded that matter has been settled between the parties- according to informant, FIR was got registered due to some misunderstanding but the matter has now been settled amicably- held, that petitioner is involved in heinous crime of putting respondent No. 3 on fire- FIR cannot be quashed, merely on the ground that parties have settled the matter- offence punishable under Section 307 of I.P.C. falls in the category of heinous and serious offences and is to be treated as crime against the society- possibility of putting pressure on respondent No. 3 to compromise the matter cannot be ruled out- petition dismissed. Title: Mazid Deen Vs. State of Himachal Pradesh and others Page-234

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the accused pleading that accused had forged the blank cheque and had wrongly filled the amount of Rs 5 lacs- police filed a cancellation report- objections were filed- Court accepted the objection and sent the case for re-investigation- again a cancellation report was filed- complaint was treated as a private complaint- accused was summoned on the basis of the evidence- petition has been filed for cancellation of the summoning order and order framing charge- held, that merely because second appeal is pending before High Court is no ground to quash the proceeding as Civil and Criminal proceedings can continue simultaneously – offences punishable under Section 138 of Negotiable Instruments Act and Sections 420, 467, 468, 471 and 474 of I.P.C. are separate and the proceedings cannot be quashed on the ground of pendency of criminal proceedings- innocence or guilt cannot be determined at this stage- petition dismissed. Title: Bal Krishan Rawat s/o Sh. Kewal Ram Vs. Mohan Lal s/o Sh. Shyama Nand and another Page-289

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Sections 409, 467, 468, 471 and 120(B) IPC- present petition has been filed for quashing the same and the consequent proceedings- held, that question of fact cannot be decided in the proceedings for quashing the FIR- inquiry report in departmental proceedings is not sufficient to quash the proceedings as nature of departmental and criminal proceedings is different- there are sufficient grounds to proceed against the accused on the basis of the statements made by the witnesses- truth or falsity of the prosecution version will be seen at the conclusion of the trial- petition dismissed. Title: Shyam Lal son of late Shri Jai Ram Vs. State of H.P. & others Page-663

Code of Criminal Procedure, 1973- Section 482- Application for maintenance was filed by V and U, which was partly allowed and maintenance of Rs. 500/- per month was awarded in favour of V- he filed an application for enhancement of maintenance allowance from Rs. 500/- per month to Rs. 10,000/- per month- Court appointed P, maternal aunt of V as next friend of minor- aggrieved from the order, present petition was filed- held, that notice was issued to V, natural mother of minor- she appeared and filed an affidavit regarding no objection for appointment of P,

next friend of minor- proceedings under Section 127 are quasi civil and next friend can be appointed in these proceedings - there is no evidence that P had adverse interest to the minor, thus, Court had rightly appointed her as next friend- petition dismissed. Title: Sunder Lal s/o Sh. Mishroo Ram Vs. Master Vikas (Minor) s/o Sh. Sunder Lal through next friend Smt.Pushpa Devi Page-618

Code of Criminal Procedure, 1973- Section 482- Petition was filed for cancellation of FIR registered for the commission of offences punishable under Sections 389 and 411 read with Section 34 of I.P.C on the ground of false implication- held, the plea whether petitioner has been falsely implicated or not cannot be gone into at this stage but it will be decided after the trial- complicated question of fact cannot be determined while quashing the FIR- the power to quash FIR should be exercised sparingly by the High Court with circumspection- normal process of criminal trial should not be cut short in a casual manner- FIR should not be quashed when charge-sheet has been filed - settlement between the informant and the co-accused will not help in quashing of the FIR as offence has been committed against the society- petition dismissed. Title: Ashish Bhuppal @ Gigi son of Shri Yuvraj Bhuppal Vs. State of H.P. Page-497

Code of Criminal Procedure, 1973- Section 482- Present petition has been field for quashing the complaint for the commission of offence punishable under Section 18 (a) (i) of Drugs & Cosmetics Act 1940 pending before C.J.M.- - held, the fact that accused was in-charge or responsible for day to day affairs and conduct of business of company cannot be seen in the proceedings for quashing the complaint but will be seen during the trial - similarly effect of guidelines of CDSCO will be determined after the trial- question of delay is complicated question of fact, which cannot be determined at this stage- there is sufficient material on record to proceed against the accused and the accused was rightly summoned by the trial Court- petition dismissed. Title: M/s Embark Life Science Private Limited and another Vs. State of HP and another Page-703

Constitution of India, 1950- Article 226- Himachal Pradesh Power Corporation Limited (HPCL) is setting up a 450 MW Hydro Electric project and most of the construction activities have been allotted to respondent No. 6 who had engaged various contractors to execute the work- there is violation of the various labour laws - workers are not even getting their salaries on which demand charters were presented- a meeting was arranged in which it was agreed that arrears of salary will be paid within two days- salary was not paid on which workers went on strike but prohibitory orders were imposed under Section 144 of Cr.P.C and to shield the contractors-respondents denied that there was violation of any labour law- a conciliation meeting was fixed but the workers went on strike- held, that members of the petitioner's Union are industrial workers - going on strike is recognized form of expression- however, strikers must obey civilized norms and not be vulgar or violent hoodlums- right to strike is not absolute- workmen cannot be permitted to take law into their own hands- demand charter was under consideration and a meeting was fixed- there was no occasion for the members of the petitioner Union to have illegally gone on strike- this only shows that they have no or scant respect for rule of law- hence, strike of petitioner is declared illegal- however, direction issued to comply with various labour laws and safety measures. Title: Shongtong Karcham Hydel Project Workers' Union Vs. State of Himachal Pradesh and others Page- 782

Constitution of India, 1950- Article 225- Status reports have been filed by the various respondents - Amicus Curiae requested to file response to the status reports and fresh suggestion- concerned authority directed to furnish copy of complete report including the application, which was moved for grant of permission, along with all the NOCs obtained by respondent No. 16 – respondent directed to comply with the direction issued by the Court from time to time and to ensure that no encroachment is made or no construction is made in violation of the sanction- direction issued to file status report regarding the encroachment made on Shimla - Dharamshala National Highway- steps taken for the removal of the encroachment and

its maintenance. Title: Court on its own motion Vs. State of Himachal Pradesh and others (D.B.) Page-833

Constitution of India, 1950- Article 226- A show notice was issued by sub Registrar Sub Division, Nahan- aggrieved from the notice, present appeal has been filed- held, that show cause notice is not a final order- it is for the petitioner to show cause and to take all the available grounds - petition disposed of with a direction to decide the matter within two weeks after seeking reply from the petitioner and giving an opportunity of hearing to him. Title: Rajinder Singh Vs. Registrar under Societies Registration Act and others (D.B.) Page- 906

Constitution of India, 1950- Article 226- Appellate Authority has to pass a speaking and well reasoned order- however order passed in this case is non-speaking and no order in the eyes of law- order set aside and the case remanded to the Appellate Authority to decide the same afresh within two months. Title: M/s USV Ltd. Vs. Himachal Pradesh State Electricity Board Ltd and others (D.B.) Page-367

Constitution of India, 1950- Article 226- Applications were invited for appointment of retail sale outlet dealers in different locations in the State of Himachal Pradesh – appointment was to be made by holding interview and according to prescribed criteria - petitioner and respondents No. 4 and 5 submitted applications- petitioner was awarded highest marks- a civil suit was filed by respondent No. 4, which was dismissed in default- State Government issued notification and the location was changed- petitioner was informed that the dealership selection for subject location had been cancelled- a fresh advertisement was issued- petitioner filed a writ petition, which was disposed of with a direction to hear the parties- order was issued justifying cancellation and re-advertisement – respondent No. 5 was declared successful- petitioner was placed at serial No. 2- petitioner challenged the order and selection- held, that same parties had responded to the earlier advertisement and the second advertisement- petitioner was earlier evaluated at number one but subsequently she was placed at serial No. 2- a complaint was filed by respondent No. 5, which was motivated complaint as the same site was offered- allegations in the complaint were not found to be correct- respondent-corporation is a public Corporation and has to act fairly and reasonably- writ petition allowed and selection of respondent No. 5 cancelled- Corporation directed to allot the retail outlet in favour of the petitioner. Title: Neetu Sharma Vs. Indian Oil Corporation Limited and others Page-148

Constitution of India, 1950- Article 226- Assessees are engaged in the manufacture and export of cotton yarn and woven fabrics - relief in excise duty was extended to them- subsequently, total exemption from payment of duty was extended – Assistant Commissioner Central Excise sanctioned the claim in cash- an appeal was filed, in which it was held that the rebate was required to be sanctioned by Cenvat Credit Account- a revision was filed and the order of the Appellate Authority was set aside- held, that Central Board of Excise and Custom has issued a circular clarifying that the duty must be refunded in cash- there is no dispute about the nature, quality, quantity, value, duty paid, character, actual export of good and verification of the claim within the time- once assessee is held entitled to rebate there is no discretion with the Sanctioning Authority and the payment was to be made in cash- petition dismissed. Title: Commissioner of Central Excise Vs. M/s Auro Weaving Mills (D.B.) Page-982

Constitution of India, 1950- Article 226- D, Husband of the petitioner served Dogra Regiment – he was awarded Pacific Star, Defence Medal and War Medal – he was declared freedom fighter- Tamra Patra was awarded to him and he was recognized as a freedom fighter – however, freedom fighter pension was not given to him – respondents stated that D never approached them for completion of prescribed formalities – hence, the pension could not be awarded to him- the petitioner had also not made available a certificate of Indian National Army along with her application- the pension cannot be sanctioned after the death of the freedom fighter- State had acknowledged that D was a freedom fighter as a Tamra Patra was awarded to him- identity card

of freedom fighter was also issued to him- pension was sanctioned to L who was serving with the petitioner - State cannot discriminate between two person- no genuine freedom fighter should be denied pension- the original scheme was not withdrawn and the guidelines cannot replace the same- petition allowed- direction issued to the petitioner to submit an application for grant of freedom fighter pension- the pension shall be granted from the due date failing which interest @ 9% per annum will be awarded. Title: Brahmi Devi Vs. Union of India and others Page-1028

Constitution of India, 1950- Article 226- Indian Oil Corporation Limited issued an advertisement for the purpose of award of Rajiv Gandhi Gramin LPG Vitrak (RGGVL) under Scheduled Caste category - petitioner applied for the same- she was selected in draw of lots - she was called upon to be present along with photo identity card – however, no letter of intent was issued – a fresh draw was held- respondent pleaded that mere qualification in the draw is not final selection- plot was found to be in the name of grandfather of the petitioner who was not family member and the petitioner was not eligible- held, that family has been defined to mean spouse and their unmarried children- In case of unmarried applicant family means parents and unmarried brother(s) and sister(s)- grandparents are not included in the definition of family unit- parents will include only father and mother and not grandparents- case of the petitioner was rightly rejected- petition dismissed. Title: Shefali Kumari Vs. Indian Oil Corporation Limited and others Page-855

Constitution of India, 1950- Article 226- It was stated that laws, Rules, Regulations, and Notifications, are occupying the field - Ghandal came under the Special Area Development Authority (SADA) and the Town and Country Planning Act- it is ordered that construction will be raised in and around Ghandal in view of Law, Rules and Regulation, Notifications, occupying the field. Title: Court on its own motion Vs. State of HP and others (D.B.) (CWPIL No.15 of 2014)) Page-293

Constitution of India, 1950- Article 226- Notification was issued by the Government of Punjab for acquisition of 12,396 Kanals and 1 Marla of land for setting up of a National Biological Research Institute at Palampur- award was passed for acquiring the land- a sum of Rs. 21 lac was deposited as compensation amount, which was disbursed to various land owners- land was subsequently transferred to the State of Himachal Pradesh - scheme for establishing National Biological Research Institute was dropped and part of the property was handed over to Regional Research Laboratory, Jammu - CSIR Complex was established, which was subsequently remained as Institute of Himalayan Bio-resource Technology (IHBT), Palampur- owner was asked to vacate the land- a civil suit was filed but the plaint was ordered to be returned by the Court as Civil Court had no jurisdiction- applications were filed for delivery of the possession before Collector, Palampur, which were dismissed- aggrieved from the order, present writ petition has been filed- held, land will vest absolutely in the Government free from all encumbrances after the taking of possession by the Collector- title of the owner is not disturbed till the possession is taken over- compensation was deposited and compensation was received by the predecessor-in-interest of the present owner- application for delivery of possession was dismissed on the ground that no credible evidence of possession of the owners was produced- it was contended that possession cannot be taken after the commencement of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013- if the possession remains with the land owners, possession cannot be taken and the State has to initiate fresh proceedings for the acquisition of the land- orders passed by the Land Acquisition Collector are cryptic but no fruitful purpose will be served by setting these aside as possession cannot be delivered after the commencement of Right to Fair Compensation Act- petition dismissed. Title: Council of Scientific and Industrial Research (CSIR) and another Vs. State of Himachal Pradesh and others Page-872

Constitution of India, 1950- Article 226- Order was passed by Regional Provident Fund Commissioner for assessing the amount due from the petitioner- amount was deposited and the

certificate of recovery of Rs. 6,75,522/- was withdrawn subsequently- a notice was issued as to why damages be not imposed upon the petitioner- reply was filed but damages of Rs. 5,05,808/- were imposed upon the petitioner- a writ petition was filed, which was disposed with a direction to file an appeal before Provident Fund Appellate Tribunal- an appeal was filed by the petitioner, which was dismissed- aggrieved from the dismissal, present writ petition has been filed- held, that the order passed by Employee Provident Fund Appellate Tribunal is non-speaking and unreasoned - contentions raised in the appeal were not noticed and were not disposed of- right to appeal is a statutory right and Appellate Authority was competent to take into consideration all the factual aspects of the matter as well as evidence produced by the parties - application of mind and recording of reasoned decision are the basic elements of natural justice- order passed by Appellate Tribunal set aside and the case remanded to Appellate Tribunal for decision afresh. Title: DAV Sr. Sec. School, Mandi & another Vs. Regional Provident Fund Commissioner, Shimla Page-378

Constitution of India, 1950- Article 226- Petition has been filed after 34 years - no explanation has been given for the delay- held, that petition of a person who does not seek relief within time has to be dismissed only on the ground of delay and laches, otherwise it would amount to gross misuse of jurisdiction and disturb the settled position- petition dismissed. Title: Hari Chand Vs. Hon'ble High Court of HP (D.B.) Page-701

Constitution of India, 1950- Article 226- Petitioner claimed that he was entitled to promotion prior to the promotion of R and M- however, his case was not considered- the writ Court rejected the claim of the petitioner on the ground that he had not sought the quashing of the order promoting R and M- held, that it was for the petitioner to plead and prove that he was entitled for promotion before R and M in which he had failed- had he been able to make out the case for his promotion, he would have been entitled for promotion and quashing the order of the promotion- petition dismissed. Title: Inder Singh Rahal Vs. State of Himachal Pradesh and others (D.B.) Page-972

Constitution of India, 1950- Article 226- Petitioner claims himself to be a ward of NRI- he sought admission in B.V. Sc. & AH programme- he was denied admission - writ petition was filed challenging the denial of admission - held, that purpose of reserving the seat for NRI is to bring him into Indian mainstream and to make available facilities in the country of his origin- admission could not have been given to NRI sponsored candidate- petitioner is residing in India and merely because his uncle is residing abroad will not make him NRI- admission was rightly refused to him- petition dismissed. Title: Manpreet Singh Vs. Chaudhary Sarwan Kumar HP Krishi Vishvavidyalaya and another (D.B.) Page-181

Constitution of India, 1950- Article 226- Petitioner filed a revision petition under Section 17 of the Himachal Pradesh Land Revenue Act against the order passed by the Court of learned Commissioner, Mandi- revision petition was dismissed in default- miscellaneous application was filed after 13 years for restoration of the revision petition along with an application for condonation of the delay- it was pleaded that petitioner was ill and could not appear before the Court- Counsel had also not appeared nor had he informed the petitioner about the dismissal of the revision petition - when petitioner came to the Shimla and made inquiry, he came to know about the dismissal – application was dismissed by the Financial Commissioner (Appeal)- aggrieved from the order, present writ petition has been filed- held, that order has been passed in exercise of statutory power- order is reasoned and speaking- no cogent explanation was given for delay in filing the application- allegations have been made against the Counsel without mentioning his name- petitioner had appeared on the earlier occasion, therefore, he was aware of the date of hearing- explanation given by the petitioner was not satisfactory and was rightly discarded- petition dismissed. Title: Anil Kumar Vs. State of Himachal Pradesh and another Page-579

Constitution of India, 1950- Article 226- Petitioner filed an application seeking admission in B. Tech three years course under Lateral Entry Scheme- she was called for counseling – however, she was not given admission- it was contended that seat falling vacant in general (IRDP) category was wrongly allotted to respondent No. 2 and that seat should have been allotted to the petitioner- held, that when the seat allotted to General (IRDP) Category was abandoned, the counseling for candidates belonging to General (main) category was in progress- respondent No. 2 was next in merit and he had obtained the seat, which had fallen vacant- petitioner is next in the merit in the General (Main) Category and in case any seat falls vacant, claim may be considered for admission against that seat- petition dismissed. Title: Shyamli Thakur Vs. Himachal Pradesh Technical University & anr. (D.B.) Page-275

Constitution of India, 1950- Article 226- Petitioner had sold the forest produce grown over his private land to the Corporation- petitioner was entitled to 50% of the basic rate on the basis of royalty- petitioner sought the increase of the amount as per notification dated 3.4.1991, which was upheld repeatedly by the Courts- notification provides for grant of benefit of higher prices to the owner of the produce - deprivation of statutory claim is nothing but an infringement of a constitutional right- right cannot be negated on the basis of delay- petitioner approached the authorities after the delivery of the judgment of the Apex Court- order rejecting claim of the petitioner quashed with a direction to the Corporation to calculate value of the forest produce sold by the petitioner in terms of notification dated 3.4.1991 along with interest @ 6% per annum. Title: Rajeev Chauhan Vs. State of Himachal Pradesh & others Page-713

Constitution of India, 1950- Article 226- Petitioner has sought quashing of order dated 26.6.1998- held, that the order was not challenged from 1998 till 2011- a person who does not seek relief within the time frame is not entitled to the same on the ground of delay and laches, waiver and acquiescence- petition dismissed. (Para-7 to 13) Title: **Inder Singh Rahal Vs. State of Himachal Pradesh and others** (D.B.) Page-

Constitution of India, 1950- Article 226- Petitioner is a Union registered with the Labour Department- petitioner claimed that respondent had sufficient accommodation- members of the petitioner-union had awarded accommodation as sufficient vacant accommodation is available with the respondents- respondents stated that members of the petitioner are engaged by the Contractor and there is an agreement executed between contractor and respondents- there is no provision for providing accommodation to the workers engaged by the contractor- held, that members of Union are not employee of the respondents and they had been engaged by the Contractor – Allotment Rules clearly provided that accommodation can be allotted to the employees who had been appointed against the regular post- agreement between respondent and contractor does not stipulate that accommodation will be provided to the workers- availability of vacant accommodation will not confer the right to claim the accommodation- contractor is under obligation to provide and maintain rest-room or other suitable accommodation to the contract labour- petitioner had not arrayed contractors as respondents- no resolution authorizing General Secretary to file the present writ petition placed on record- petition dismissed. Title: Satluj Jal Vidyut Nigam Contract Workers Union Vs. Satluj Jal Vidyut Nigam Limited & others (D.B.) Page-68

Constitution of India, 1950- Article 226- Petitioner made an application for grant of land to enable him to carry out the vocation of carpenter – such application was sent for investigation to Tehsilar who submitted his report and recommended sanction of one marla of land- Deputy Commissioner recommended the case to the Divisional Commissioner, Mandi for grant of lease- objections were raised by Local residents for the grant of lease – a civil suit was filed, which was dismissed and thereafter the land was allotted on 10 years lease basis to the petitioner- a writ petition was filed against the petitioner on the ground that he had encroached upon the government land- writ petition was disposed of with a direction to pass appropriate order within 6 weeks- before action could be taken, the petitioner filed a writ petition – held, that the petitioner

was a party to the earlier writ petition- he has not assailed the order passed in the previous writ petition- an order of ejectment has been passed by the Competent Authority and allowing the prayer of the petitioner would render the proceedings pending before the Competent Authority as infrucutous – the petition has been filed to scuttle the legitimate proceedings – hence, the same dismissed. Title: Sarwan Kumar Vs. State of H.P. and others (D.B.) Page-995

Constitution of India, 1950- Article 226- Petitioner was appointed as peon and was promoted to the post of process server in the year 2000- respondents No. 3 and 4 were directly appointed as Process Servers in the year 2005- applications were invited for two posts of clerk – respondents No. 3 and 4 were promoted as clerks- petitioner pleaded that he was senior to respondent No. 3 and 4 and should have been promoted - writ petition was allowed and the appointment was quashed- held, in appeal that petitioner was initially appointed as Peon and was promoted as Process Server against 50% quota- respondents No. 3 and 4 were directly appointed as Process Servers- since, respondents No. 3 and 4 were earlier appointed as Process Servers, therefore, they were senior to the petitioner- petitioner had not challenged seniority list- appointment could not have been made on the basis of first appointment as cadres of Process Server, Daftri, Orderly, Peon, Chowkidar, Chowkidar-cum-Sweeper, Safai Karamchari and Mali were different - their responsibilities were different and their pay was different- there is no rule that seniority is common- writ was wrongly allowed by the Learned Single Judge- appeal allowed and writ petition dismissed. Title: Monika Vs. State of H.P. & Ors. (D.B.) Page-60

Constitution of India, 1950- Article 226- Petitioner was running a Banquet Hall and Restaurant - one room is attached to the Banquet Hall which is primarily meant for the parties booking the hall for changing their clothes or keeping their belongings, but the same was never offered for rental - 4-5 ladies accompanied by two or three men came to the restaurant and placed an order- police party reached the restaurant and made inquiry from men and ladies- FIR was registered against the petitioner under Immoral Traffic (Prevention) Act - petitioner was taken in custody- he was asked to sign blank papers and on refusing to do so, he was abused and mercilessly beaten up by SHO- petitioner filed a writ petition seeking compensation and registration of FIR against the SHO- State filed a reply stating that injuries were noticed in the medical examination of the petitioner- petitioner was found to have sustained two bodily injuries- grievous injuries were noticed in the right ear of the petitioner- SHO was suspended to ensure free inquiry- FIR was lodged rightly- held, that custodial torture is not permissible in a civilized society- injuries were not noticed at the time of the arrest, thus, injuries were sustained during the custody- inquiry was not conducted fairly and is an attempt to shield the SHO- direction issued to register criminal case against the SHO and to proceed against him departmentally. Title: Amit Sood Vs. State of H.P. & Ors Page-805

Constitution of India, 1950- Article 226- Petitioners are Judicial Officers- they were senior to the private respondents in the cadre of Civil Judge (Junior Division)- however, private respondent scored a march over them in the promotion/selection to the post of Civil Judge (Senior Division)- writ petition was filed for challenging the appointment- held, that Selection Committee has power to assess the individual entries in the ACR and it is not bound by the ACRs– Court cannot sit in an appeal over the assessment made by DPC- DPC has power to record its own assessment which may be at variance with reporting officer or reviewing office –no allegations of mala-fides, violation or infraction of the rules were made against the committee - court cannot arrogate to itself the power to judge the comparative merit of the candidates and will not sit in appeal over the decision of DPC- proceedings of DPC were approved by Full Court and decision of the Full Court should not be reviewed in exercise of Writ jurisdiction except in case of extra ordinary circumstances - petitioner did not have any legitimate expectation of being promoted as promotion is to be made on the basis of merit-cum-seniority and not on the basis of seniority-cum-merit- rules and regulations have been framed by the High Court in accordance with the judgment of the Supreme Court- petitioner had participated in the selection process and cannot challenge the same, when

the result is not favourable- petition dismissed. Title: Ranjeet Singh Vs. State of HP & ors. (D.B.) Page-398

Constitution of India, 1950- Article 226- Petitioners had invoked the jurisdiction of the Labour Court- they were ordered to be re-engaged without any monetary benefits – awards were made subject matter of writ petitions, letters patent appeals and special leave petitions, which were dismissed- a writ petition was filed to implement the award and to modify the same by granting full back wages and interest/emoluments @ 18% per annum from the date of retrenchment – held, that the award passed by Labour Court is to be executed as a decree of Civil Court- no writ petition can be filed for execution of the award- writ petitions held to be not maintainable. Title: Raman Kumar Vs. State of H.P. and another (D.B.) Page-908

Constitution of India, 1950- Article 226- Petitioners successfully cleared the competitive examination and undertook training at Jaipur- they were appointed on contract basis- however, a subsequent advertisement was issued for filling up posts on permanent basis- they filed an original application before Administrative Tribunal for seeking appointment on permanent basis, which was dismissed- held, that where the contractual appointment was made in accordance with procedure and there is a need for continuation of the post, petitioners have right to claim regularization- petition allowed and respondent directed not to terminate the services of the petitioners and to consider them for regularization. Title: Shailendra Kishore Vs. Central Administrative Tribunal & others (D.B.) Page-43

Constitution of India, 1950- Article 226- Petitioners were appointed as teachers on different dates- Government has framed rules for providing grant for meeting the deficit in the net approved expenditure on salary of approved staff of privately managed schools- grant was to be released for the component of the salary and not for any other purpose - State Government had also framed rules providing appointment and methods of appointment- managing Committee of the petitioners' school terminated the services of the petitioners as it was not able to bear the expenses of classes 6th to 10th- writ petition was filed, which was dismissed on the ground of alternative remedy- an appeal was preferred, which was rejected on the ground that school was closed due to less strength- however, government has taken a decision to take over all existing 95% Government aided schools- staff receiving grant-in-aid from the Government and their services were required to be taken over by the State Government- services of the petitioners were not taken over – writ petition allowed and services of the petitioners deemed to have been taken over within a period of 10 weeks from the date of decision. Title: Shailender Kumar and others Vs. State of Himachal Pradesh and others Page-423

Constitution of India, 1950- Article 226- Predecessor-in-interest of respondents No. 4 and 5 filed an appeal under Section 30(3) of H.P. Holdings (Consolidation and Prevention of Fragmentation) Act, 1971 before the Settlement Officer against the order of the Consolidation Officer- appeal was allowed - a revision petition was filed against the order, which was dismissed – aggrieved from the order, a writ petition was filed, which was also dismissed- another writ petition was filed praying that the order passed by Settlement Officer and Director Consolidation of Holdings be quashed – writ petition was dismissed- held, in appeal that the order made by revenue officers cannot be set aside in writ proceedings unless it is pleaded and proved that revenue officers had committed any jurisdictional error or procedural mistake- the orders were passed by the authorities on the basis of the material placed on record and the factual situation- a finding arrived by the Revenue Authority was based upon erroneous admission of inadmissible evidence or erroneous objection of admissible evidence – no such plea was taken in the present case – further, the earlier writ petition was dismissed and no liberty was granted- hence, second petition is not maintainable- the petition dismissed. Title: Gian Chand Sharma Vs. State of H.P. & others (D.B.) Page-997

Constitution of India, 1950- Article 226- Predecessor-in-interest of the petitioner applied for grant of Nautor land in the year 1960- Nautor was sanctioned in his favour- T filed objections and the grant of Nautor was set aside on the ground that portion of sanctioned land was not suitable for horticultural purpose- Deputy Commissioner, Mandi/ Sub Divisional Officer (Civil) was directed to give alternative land to the petitioner- mutation was entered- jamabandi was prepared- names of the petitioners were shown as owners in possession- grant was challenged by one P by filing an appeal, which was dismissed- further, appeal was filed and the case was forwarded to the Financial Commissioner (Appeals)- Financial Commissioner remanded the case to Sub Divisional Officer (Civil) to decide the same afresh in the light of observations made by him- aggrieved from the order, present writ petition has been filed- held, that Commissioner had treated the appeal as revision and had recommended that Financial Commissioner (Appeals) should pass an appropriate order-Financial Commissioner had agreed with the recommendation and had set aside the order passed by Appellate Authority – powers of appeal and revision have been conferred upon different authorities and Commissioner has no power to convert the appeal into revision- power exercised by him is non-est and not sustainable in law- writ petition allowed-case remanded to Divisional Commissioner, Mandi for adjudication afresh in accordance with the law. Title: Jitender Kumar and another Vs. The Financial Commissioner (Appeals) and others Page-522

Constitution of India, 1950- Article 226- Respondent had not taken action against the persons who are indulged in illegal mining activities- such activities are going on in the entire State, therefore, Secretary (Industries), Director (Industries), State Geologist, H.P. Pollution Control Board through its Member Secretary, all the Deputy Commissioners and the Superintendents of Police of all the Districts, be arrayed as party respondents- fresh status reports ordered to be filed. Title: Court on its own motion Vs. State of HP & others (D.B.) (CWPIL No. 17 of 2016) Page-377

Constitution of India, 1950- Article 226- Respondent No. 2 invited application for allotment of 150 Small Hydro Power Projects up to the capacity of 5 MW- petitioner-Company also applied for allotment of the Project but the allotment was rejected and the project was allotted to respondent No. 3- it was contended that as per clause - 9 of the guidelines for private investors for participation in small hydro programme upto 5 MW in Himachal Pradesh"- project was allotted in the year 2010- a separate criteria was to be adopted for the allotment of the projects- held, that according to conditions (i) and (ii), an applicant who re-applied for the project in the year 2014 shall be entitled for five additional marks and that preference will not be given to an applicant of his being Himachali- however, applicant could not prove that he had applied in the year 2010 and had re-applied in the year 2014- therefore, applicant cannot claim any preference- petition dismissed. Title: SRS Real Infrastructure Limited Vs. State of H.P. and others (D.B.) Page-426

Constitution of India, 1950- Article 226- Respondent submitted that he is not in a position to pass requisite orders in terms of the policy/guidelines in view of the pendency of probate proceedings before the District Judge- keeping in view these facts, District Judge directed to dispose of the proceedings within three months. Title: Virender Kumar Walia and another Vs. Indian Oil Corporation Limited (D.B.) Page-374

Constitution of India, 1950- Article 226- Son of the petitioner fainted due to electrocution- he was taken to hospital, where he succumbed to the injuries- interim compensation of Rs. 2 lacs awarded in favour of the petitioner. Title: Dharamveer Sharma Vs. State of H.P. & others (D.B.) Page-886

Constitution of India, 1950- Article 226- State Government had leased 31 acre of land to respondent No. 5 at a token price of Rs. 1/- for 99 years for construction of ESIC Hospital & Medical College at Ner Chowk- amount of Rs. 750/- crore was spent but no efforts were being made to make Hospital & Medical College functional- it was contended on behalf of the

respondent that certain conditions were to be followed by ESIC before handing over the College to the State Government as per the decision of Government of India- formalities have been completed and steps are being taken by State Government to make College functional- hence, no further direction needs to be passed. Title: Yogesh Kumar Chandel Vs. Union of India & Others (D.B.) Page-625

Constitution of India, 1950- Article 226- State had decided to construct Government Degree College at village Kahan- Government changed its earlier decision to set up the College at Kahan and decided to construct it at Sarahan- a writ petition was filed for challenging this decision- held, that serious allegations of misuse of power were leveled against various public representatives of the area that too without placing on record any material evidence to substantiate the claim- land at Village Kahan could not be finalized because 2.43 hectares area was forest land- hence, decision was taken to shift the college to Sarahan- public had donated the land for construction of the college -proposal for setting up of Degree College in the area was hanging fire since year, 2007- no public interest is involved in the writ petition - petition dismissed. Title: Mohan Dutt & Anr. Vs. Union of India & Others (D.B.) Page-891

Constitution of India, 1950- Article 226- Writ petition was filed for quashing the order passed by the District Consumer Disputes Redressal Forum, Shimla- held, that Consumer Protection Act, 1986 contains the mechanism to deal with the complaints – it also provides mechanism for filing an appeal against the order of District Consumer Disputes Redressal Forum- petitioner has an alternative and efficacious remedy of filing an appeal- petition dismissed with liberty to file an appeal in accordance with law. Title: O.P. Thakur Vs. The Shimla Municipal Corporation and others (D.B.) Page-190

Contempt of Courts Act, 1971- Section 12- Directions were issued to the respondent – it was alleged that directions were not complied with – a reply along with the consideration order was filed- held, that fresh direction cannot be passed in contempt proceedings and the Court is to see, whether judgment passed by it has been complied with or not- respondents have complied with the direction of the Court and it is for the petitioner to seek appropriate remedy- petition dismissed- however, it was ordered that in case of filing a fresh petition, delay and laches will not come in the way of the petitioner in seeking appropriate remedy. Title: Soju Ram Vs. Vineet Chaudhary (D.B.) Page- 368

Contempt of Courts Act, 1971- Section 12- Directions were issued to the respondent – it was alleged that directions were not complied with – a reply along with the consideration order was filed- held, that fresh direction cannot be passed in contempt proceedings and the Court is to see, whether judgment passed by it has been complied with or not- respondents have complied with the direction of the Court and it is for the petitioner to seek appropriate remedy- petition dismissed- however, it was ordered that in case of filing a fresh petition, delay and laches will not come in the way of the petitioner in seeking appropriate remedy. Title: Mohan Lal Vs. Vineet Chaudhary (D.B.) Page-365

Contempt of Courts Act, 1971- Section 12- Petitioner was working as senior telecom Officer Assistant and was wrongly denied promotion to the post of junior telecom officer- she filed a writ petition, which was allowed – a special leave petition was filed, which was dismissed- the grievance of the petitioner is that respondents are not implementing the judgment of the Court- held, that the case of the petitioner was required to be considered against 15% quota but was wrongly considered against 35% quota – she was wrongly promoted from an earlier date and excess payment was made to her – the act of the respondents should be contumacious in order to constitute contempt - the mistake was committed by the respondents while implementing the judgment which can always be corrected- the petitioner has failed to prove that respondents had violated the judgment of the Court willfully – petition dismissed. Title: Bhadra Sheela Vs. A.N.Rai and others (D.B.) Page-977

Contempt of Courts Act, 1971- Section 2, 10, 11 and 12- An application was filed by the petitioner under the contempt of Courts Act, which was dismissed by the trial Court- a fine of Rs. 5,000/- was imposed on the ground that petitioner had misled the Court by filing false petition- held, that petitioner had made scandalous allegations against the judge and had also attributed motive to him- petitioner had made deliberate attempt to interfere with the due course of judicial proceedings and such action could be construed to be obstructive or attempting to obstruct the administration of justice- any allegation which has the tendency of interfering with due course of judicial proceedings or which scandalizes or has the tendency to scandalize, or lower or has the tendency to lower the authority of the court cannot be justified- litigant cannot be permitted to browbeat the court or terrorize or intimidate the Judges- Judges cannot be intimidated to seek favourable orders - judges shall not be able to perform their duties freely and fairly, if such activities are permitted or tolerated and justice would become a casualty- any action on the part of a litigant which has the tendency to interfere with or obstruct the due course of justice has to be dealt with sternly and firmly to uphold the majesty of law- hence, suo moto notice issued for initiating the criminal proceedings against the petitioner. Title: M.Alexander Vs. State of H.P Page-841

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H.P. Land Revenue Act, 1954- Section 163- Proceedings were initiated against the petitioner on the ground that he was in unauthorized occupation of the land in dispute- order of eviction was passed against the petitioner, which was unsuccessfully challenged before various authorities- writ petition was filed against the orders- held, that revision petition was dismissed on 27.10.2001 and the order was assailed after 9 years- the power should be exercised within a reasonable period and not after inordinate delay- Financial Commissioner had not adjudicated this question- plea of adverse possession was taken but the reply filed by the petitioner before Assistant Collector Ist Grade was not placed on record – all unoccupied lands are the property of the Government- it is for the person asserting the title in himself to prove the adverse possession- possession according to the version of the petitioner commenced in the year 1962- proceedings were initiated prior to the lapse of 30 years- in these circumstances, authorities had rightly rejected the plea of adverse possession- petition dismissed - eviction order to be carried out at the cost of the petitioner. Title: Mehar Chand Vs. State of Himachal Pradesh and another (D.B.) Page-355

H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971- Section 4- Proceedings were initiated for encroachment over the forest land, which resulted in the eviction of the petitioner - appeal was filed before Divisional Commissioner, Mandi, which was dismissed- held, that petitioner had admitted that she was an encroacher – she had also filed an application for regularization of encroachment - petitioner has failed to prove the plea of adverse possession – Collector-cum-Assistant Conservator of Forests had rightly ordered the eviction of the petitioner- petition dismissed. Title: Chhering Dolma Vs. State of H.P. & anr. Page-464

H.P. Tenancy and Land Reforms Act, 1972- Section 104- Plaintiff filed a suit for possession pleading that revenue entries showing the deceased as non-occupancy tenant were wrong- defendant No. 1 taking benefit of wrong revenue entries dispossessed the plaintiff from the suit land - suit was decreed by the trial Court- an appeal was preferred - Appellate Court returned the plaint for presentation in the Competent Court of law- held in second appeal, jurisdiction of the Civil Court is barred, when both the parties admit the status of landlord and tenant, but when there is a dispute about such status, then Civil Court alone will have jurisdiction- judgment of the Appellate Court set aside- case remanded to Appellate Court for decision afresh. Title: Swaran Singh (Deceased), through LRS. Vs. Darshan Singh (Deceased), through LRs. Page-620

H.P. Urban Rent Control Act, 1987- Section 14- An eviction petition was filed against the tenant on the ground of arrears of rent, material alterations, impairing the value and utility of the shop

in question- Rent Controller allowed the petition and ordered the eviction on the ground of arrears of rent as well as impairing the value and utility of the premises- an appeal was preferred, which was dismissed- held, in revision that PW-3 had found that cages were kept inside the shop, which were welded with the shutter- it was also proved that partition was constructed by the tenant after taking the premises on rent - tenant had made holes in the roof of the shop and had exposed the iron bars of lintel to hang the weighing scale- tenant admitted that he had made additions and alterations without the consent of the landlady- nature of the construction is permanent and in case of removal, damage would be caused to the premises- Courts had rightly ordered the eviction - petition dismissed. Title: Markar Masih Vs. Padma Sahni Page-146

H.P. Urban Rent Control Act, 1987- Section 14- Rent Controller ordered the eviction of the tenant- an appeal was preferred, which was allowed and the judgment of Rent Controller was reversed- tenant claimed that his family consists of himself, his wife, two children, father, mother, brother and his wife and two children- burden to prove that his brother and brother's family were ordinarily residing and were dependent upon him was on the tenant, which was not discharged - Rent Controller had rightly held that it was necessary for the tenant to place on record the ration card indicating that entire family was living jointly as a single unit- newly acquired premises consists of three rooms, one kitchen, one bathroom, one balcony, one terrace and attic, whereas, premises in question consists of two rooms, one kitchen, one bath-cum-latrine – thus, newly acquired premises is sufficient for meeting the requirement of the tenant and his family- Appellate Authority had wrongly reversed the judgment of the trial court- judgment of the Appellate Authority set aside while that of the Rent Controller restored. Title: Asha Tiwari Vs. Manoj Kumar Kansara Page-286

H.P. Urban Rent Control Act, 1987- Section 24(5)- Landlord filed a petition for eviction of the tenant, which was allowed by Rent Controller- inadvertently name of S was omitted in the memo of the parties- aggrieved from the order, an appeal was filed before the Appellate Authority- an application was filed before Appellate Authority for correction of memo of parties- matter was remanded to Rent Controller for correction of memo of parties- held in revision, that appeal is continuation of judicial proceedings and the Appellate Court has same power as Court of original jurisdiction- he was impleaded as legal representative of the deceased/tenant by Rent Controller- it was for the Rent Controller to correct error – matter was rightly remanded to Rent Controller for disposal- revision dismissed. Title: Reeta Gupta wd/o Sh. Ram Parshad and others Vs. Lal Chand and others Page-778

Hindu Marriage Act, 1955- Section 13- Marriage between the parties was solemnized according to Hindu Rites and Custom – husband filed a petition for divorce pleading that he was treated with cruelty by filing a complaint leveling false allegation of beating and keeping some concubine – she deserted husband for more than three years- wife filed a reply pleading that husband started picking up quarrel with her under the influence of liquor- he had sold her ornaments to satisfy his lust for liquor and to meet the expenses of his concubine- she had filed a true complaint - she would join the company of the husband, if she is treated with respect and dignity- petition was dismissed- held, in appeal that wife had not given any specific instance when she was treated with cruelty- name of the concubine was also not mentioned – filing of the complaint amounts to cruelty- further, relationship had broken down irretrievably- thus, severance of marital ties would be just and expedient- appeal allowed and marriage ordered to be dissolved. Title: Dr. Amarjeet Singh Vs. Vijay Laxmi Page-87

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Indian Limitation Act, 1963- Section 12 (2)- It was held by Commissioner, Mandi that Limitation Act is not applicable to the proceedings for the appointment of Anganwari Worker/Helper- held, that provision of Limitation Act applies to the proceedings conducted in the Courts as understood in the strict sense of being part of the Judicial Branch of the State- the

principles underlying the provisions of the Limitation Act may be applied to quasi-judicial tribunals so long as provision of Limitation Act are not specifically excluded- it was not pointed out that there was any clause of the scheme which expressly bars the applicability of the Limitation Act- provision of Section 12 excludes the time taken for getting the copy and if the copy is not supplied within the period of appeal, right of filing appeal cannot be lost- law does not compel one to do what cannot be possibly done - order of the Commissioner set aside. Title1: Heera Mani Vs. State of H.P. and others Page-889

Indian Penal Code, 1860- Section 120-B, 408, 420, 467, 468, 471, 201 read with Section 120-B- **Prevention of Corruption Act, 1988-** Section 7 and 13(1)(c)- Accused V was appointed as secretary – he was maintaining accounts of society – he prepared four pronotes in the pronote register each worth Rs. 4,000/-- it was found subsequently that amount of loan was repaid- interest of Rs. 225/- was charged- accused V was removed and another person took over the charge- it was found that amount of Rs. 53,000/- was shown in the audit note but the same was not given by the accused to S- it was also found that persons in whose names pronotes were issued had not signed them- accused were acquitted by the trial Court- held, that it was proved that J was cashier in society at the relevant time- J was not interrogated during investigation- duties of Secretaries were also not proved- it was also not established that J had entrusted the accused V with money - thus, charge of breach of trust was not established against the accused V- loans were sanctioned by the executive committee - it was admitted that resolution was passed at the time of advancement of the loan and it is entered in the proceedings book- it was not proved that accused had forged entry in the pronote register and had embezzled the money- proceeding register was not produced- prosecution version was not proved beyond reasonable doubt- view taken by the trial Court could not be said to be perverse- appeal dismissed. Title: State of Himachal Pradesh Vs. Vijay Singh and others Page-442

Indian Penal Code, 1860- Section 147, 148, 324, 307, 302 and 201 read with Section 149- Accused had assaulted PW-1 and B at about 4:30 P.M. with sticks, dandas and knives - A stabbed on leg of B – P gave blow of rod on his head due to which B fell down- accused were tried and acquitted by the trial Court- held, in appeal that PW-1 to 4, PW-11 and PW-14 had not supported the prosecution version- recovery witnesses also turned hostile- PW-1 had given a different version before Juvenile Justice Board- PW-26 is not an eye witness and the incident was narrated to him subsequently - his statement was recorded after three months - testimonies of prosecution witnesses cannot be said to be satisfactory- trial Court had rightly rejected them- appeal dismissed. Title: State of Himachal Pradesh Vs. Anil Kumar and others (D.B.) Page-915

Indian Penal Code, 1860- Section 148, 324/149 & 307/149- PW-4, PW-10 and PW-11 were going towards the house of PW-4- two vehicles were parked on the road side on the way- when the car crossed these vehicles, one of the occupants of the vehicles called PW-4- PW-4 stopped his vehicle and started moving towards the parked vehicle- accused attacked PW-10 with sword and Khukhari and other accused ran away from the spot- accused were tried and acquitted by the trial Court- held, in appeal that PW-4 had not identified the accused in the Court- PW-10 was contradicted with reference to his previous testimony - PW-11 was declared hostile- motorcycle was recovered from the spot falsifying the prosecution version that accused had fled away from the spot- statement of PW-10 was not recorded by the police- there was delay in recording the FIR- PW-10 admitted that exchange of hot words had taken place between PW-4, PW-10 and PW-11 and accused V and S- there are material contradictions and improvements in the statement of PW-10 – true version was not placed before the Court- Trial Court had rightly held that prosecution version was not proved beyond reasonable doubt- appeal dismissed. Title: State of Himachal Pradesh Vs. Parvesh Kumar and others (D.B.) Page-323

Indian Penal Code, 1860- Section 302 and 201- Accused had taken second floor of the house on rent from PW-1 and started residing there with his family- S informed PW-1 that number of house flies were seen in the room rented out to the accused- PW-1 came to the spot and found

the room locked from outside – the room was open in the presence of PW-2- clothes and bedding were found scattered on the floor - when clothes and bedding were removed, a dead body was found on the floor beneath the mattress - dead body was identified to be that of wife of the accused – the cause of death was found to be head injury and probable duration of death was five days- the accused was arrested and he made disclosure statements leading to the recovery of blood stained shirt- human blood group B was found in the blood sample of the deceased and the shirt of the accused- the accused was tried and acquitted by the trial Court- held, in appeal that there is no direct witness to the incident- in a case of circumstantial evidence, chain of circumstances should point towards the guilt of the accused and not to any other possibility- PW-1 admitted in cross-examination that he had not checked that accused and deceased were husband and wife- no inquiry was made to verify the relationship- PW-7 admitted in cross-examination that one S was residing with the deceased in the capacity of her husband which makes the prosecution version doubtful – recovery of dead body from the house of the informant does not lead to the inference of the guilt- it was also not proved that accused was last seen with the deceased- therefore, the absence of the accused will not prove the guilt- disclosure statement regarding throwing of darat in the river was also not proved and it was not reduced into writing – similarly, disclosure statement leading to the shirt and consequent recovery were not proved- the prosecution version was not proved beyond reasonable doubt and the trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Rayia Urav @ Ajay (D.B.) Page-213

Indian Penal Code, 1860- Section 302 and 201- Deceased was doing shuttering business- he left home for arranging shuttering- however, he went to a place called Taras along with some residents of village- they took meals and all except three went to Talwara for shopping - thereafter they went to police station for compromise in a complaint filed against PW-6- they went to their homes in a vehicle and got down at various places- however, deceased did not reach home- his dead body was found with injuries on his head- PW-4 made a statement that S and deceased had got down the vehicle together- S was arrested on the same day- he made a disclosure statement which led to the recovery of the clothes of the deceased- cause of death was head injury- accused was tried and acquitted by the trial Court- held in appeal, the fact that deceased was last seen with the accused was not proved satisfactorily- PW-4 had also not informed the police immediately about the deceased having been last seen with the accused- recovery was also not established- prosecution version was not proved beyond reasonable doubt- trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Sanjay Kumar (D.B.) Page- 757

Indian Penal Code, 1860- Section 302 and 201- **Indian Arms Act, 1959-** Section 25- Dead body of S was recovered from a dry well – accused T and J made a confessional statement that they had murdered the deceased with the swords and had dumped the body thereafter in a well – motive of the crime was possible involvement of the deceased with the sister of accused J and money dispute between accused, J and the deceased – accused T was tried and convicted by the trial Court for the commission of offence punishable under Section 302 read with Section 34 of I.P.C and acquitted of the commission of offence punishable under Section 201 read with Section 34 of I.P.C and Section 25 of Indian Arms Act- held, in appeal that prosecution case is based upon the circumstantial evidence- circumstances relating to the guilt should be proved satisfactorily and should be incapable of any interpretation other than the guilt of the accused – any confession made to the police cannot be used against the accused – even otherwise, the statements of witnesses to prove the confession were inconsistent- the motive for the commission of crime was also not proved- the disclosure statement was also not proved- purse was not proved to be belonging to the deceased- the circumstances do not establish the guilt of the accused- the trial Court had wrongly convicted the accused T- appeal allowed and accused T acquitted of the charged offences. Title: Taranjit Singh @ Badal Vs. State of H.P. (D.B.) Page-1044

Indian Penal Code, 1860- Section 302 and 34- A dead body was found by the police – dead body was identified to be that of H- accused U was tried and acquitted by the trial Court- accused O absconded – held, in appeal that case of the prosecution is based upon circumstantial evidence- prosecution version that accused was last seen with the deceased had not been proved- Medical Officer admitted that injuries sustained by accused could have been possible by way of fall on an unsmooth surface- extra judicial confession stated to have been made by the accused was also not proved- trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Umesh Singh Page- 801

Indian Penal Code, 1860- Section 302 and 380- Son of the informant noticed a trespasser in motor shed of Tube well of his uncle- he informed his father- informant armed with iron rod and his son armed with drat rushed to catch the trespasser but he ran away- informant and his son chased and apprehended him – injury was inflicted on his arm with darat- trespasser ran away after stabbing son of the informant- son of the informant succumbed to the injury on the way to the Hospital- M was apprehended as assailant - informant made representation against R - however, challan was presented against M- an application for impleading R was filed during trial- supplementary challan was presented against R- accused were tried and acquitted by the trial Court- held, in appeal that M was not implicated even by the informant- recovery was not proved as witnesses had not supported the prosecution version- no blood was found on the clothes and knife of M- it was stated that M had stolen bicycle from the house of S but this fact was also not established- foot print impression was lifted from spot but the report regarding foot print was not placed on record- case of the prosecution was not proved beyond reasonable doubt- accused were rightly acquitted by the trial Court. Title: Kalyan Singh Vs. Raghubir Singh and others (D.B.) Page-335

Indian Penal Code, 1860- Section 302- Deceased had left home in connection with his work- he heard cries of the deceased - when he came out of the house, he found the accused giving beating to the deceased with a danda- when the informant made inquiry as to why the accused was beating the deceased, he pushed the deceased due to which deceased fell down – deceased had sustained injuries- he was taken to hospital and died there- accused was tried and acquitted by the trial Court- held, in appeal that deceased had disclosed in the hospital that he had suffered injuries by way of fall- Medical Officer stated that injuries are possible if a person falls down after a push by another person or falls down under the influence of liquor- no injuries by stick were found in the post mortem- testimonies of prosecution witnesses are contradicting each other- no independent witness was examined to prove the incident - the deceased was heavily drunk and possibility of his fall in a state of intoxication cannot be ruled out- prosecution version that accused had given beatings to the deceased by the danda was not proved beyond reasonable doubt- accused was rightly acquitted by the trial Court- appeal dismissed. Title: State of Himachal Pradesh Vs. Krishan Lal (D.B.) Page-861

Indian Penal Code, 1860- Section 302- Deceased was married to the accused- she suffered burn injuries and was brought to the hospital- she made a statement that she had sustained injuries as a result of accidental fire- she was referred to Chandigarh, where she died- brother of the deceased stated that accused had set the deceased on fire, on which FIR was registered and challan was presented before the Court- accused was tried and acquitted by the trial Court- held, in appeal that compromise was executed between the accused and the deceased - accused had sworn an affidavit that he would not beat the deceased- parties resided together thereafter and no complaint was made - deceased had disclosed to the neighbour who arrived at the spot on hearing her cries that she had caught fire while preparing meals on gas stove – Doctor had not found any smell of kerosene – deceased had sustained burn injury to the extent of 30%- doctor had certified that deceased was fit to make the statement after which her statement was recorded- relatives of the deceased had not disputed the veracity of the dying declaration- there are several improvements, exaggerations and embellishments in the testimonies of prosecution witnesses making their version unbelievable- delay in lodging FIR has also not been explained- no

motive to commit murder was established- in these circumstances, guilt of the accused was not established- trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Sumit Kumar (D.B.) Page-690

Indian Penal Code, 1860- Section 302- **Indian Arms Act, 1959-** Section 25- Dead body of S was recovered from a dry well – accused T and J made a confessional statement that they had murdered the deceased with the swords and had dumped the body thereafter in a well – motive of the crime was possible involvement of the deceased with the sister of accused J and money dispute between accused, J and the deceased – accused J was tried and convicted by the trial Court for the commission of offence punishable under Section 302 read with Section 34 of I.P.C and acquitted of the commission of offence punishable under Section 25 of Indian Arms Act- held, in appeal that prosecution case is based upon the circumstantial evidence- circumstances relating to the guilt should be proved satisfactorily and should be incapable of any interpretation other than the guilt of the accused – any confession made to the police cannot be used against the accused – even otherwise the statements of witnesses to prove the confession were inconsistent- the motive for the commission of crime was also not proved- the disclosure statement and consequent recovery were also not proved- the circumstances do not establish the guilt of the accused- the trial Court had wrongly convicted the accused J- appeal allowed and accused J acquitted of the charged offences. Title: Jitender Kumar Vs. State of H.P. Page-1033

Indian Penal Code, 1860- Section 302 read with Section 34- Dead body was found in a room of Dharamshala in a blanket tied with a cloth- subsequently it was identified to be that of M - it was found during investigation that the deceased was murdered by the accused- accused were tried and acquitted by the trial Court- held, in appeal that prosecution case is based upon circumstantial evidence- signatures of accused were not present against his name in the register- an inference can be drawn that name was written by the Investigating Officer for implicating the accused- merely because, accused had not participated in the test identification parade cannot lead to an adverse inference - finger prints lifted from the spot tallied with the finger prints of the accused but the recovery memo was written in different handwriting – possibility of planting them in relevant room cannot be ruled out- photographs were also printed with different papers- recoveries of golden ring, bag and mobile phone at the instance of the accused were not proved- trial Court had appraised the evidence in whole some and harmonious manner- conclusion returned by the trial Court does not suffer from any perversity or absurdity – appeal dismissed. Title: State of H.P. Vs. Bhajan Singh (D.B.) Page-115

Indian Penal Code, 1860- Section 302 read with Section 34- Deceased was returning to his village in a vehicle being driven by PW-12- PW-11 and L were also with them- their vehicle scratched car of the accused coming from opposite side – PW-12 did not stop the vehicle, whereupon accused chased the vehicle of PW-12- they stopped their car in front of the pickup vehicle, pulled PW-12 out of the vehicle and started beating him- he was taken to police station, Jubbal and a case under Motor Vehicles Act was registered against him- the deceased was found missing after the incident- subsequently, his dead body was recovered with injuries- as per the prosecution version, the deceased had tried to save PW-12 and was killed by throwing him from the cliff – the accused were tried and acquitted by the trial Court- held, in appeal that there is no evidence to prove the guilt of the accused- PW-12 who was present with the deceased at the time of incident has not supported the prosecution version- the possibility of registration of the case under public pressure cannot be ruled out- the trial Court had rightly appreciated the evidence- appeal dismissed. Title: State of Himachal Pradesh Vs. Pawan Kumar & another (D.B.) Page-740

Indian Penal Code, 1860- Section 302, 201 read with Section 34- **Indian Arms Act, 1959**- Section 25- Deceased had left home by telling his daughter that he would first go to the house of K and thereafter to attend his duty - when he did not return, his daughter called him on his mobile phone but the phone was found to be switched off – when inquiry was made from the Office, it was found that her father had not attended the duties – accused S had a case pending

with the deceased in the High Court- accused S and R made a disclosure statement leading to the recovery of the dead body- two pellets marks were found on the stems of bushes- accused R made a disclosure statement leading to the recovery of empty/blank cartridge- cause of death was found to be gunshot injury- accused was tried and acquitted by the trial Court- held, in appeal that case of the prosecution is based upon circumstantial evidence- it was proved by medical evidence that deceased had died due to gunshot injury- recovery of the dead body at the instance of accused was duly proved- trial Court had wrongly held that I.O. had prior information regarding the place of hiding – gun licence was issued in the name of accused L- prosecution version was duly proved beyond reasonable doubt- trial Court had wrongly acquitted the accused- appeal allowed- accused convicted of the commission of offences punishable under Sections 302 read with Section 34 of the IPC and Section 25 of Indian Arms Act. Title: Neelam Sharma Vs. Satish Kumar and others (D.B.) Page-770

Indian Penal Code, 1860- Section 302, 323 and 324- Informant had solemnized love marriage with the sister-in-law of his maternal uncles N and S, which was not approved- N and S nourished ill will against him- he along with his friends D and B had come to maternal house of the informant to meet his maternal grandmother- N and S hurled abuses at the informant- informant and his two friends left the place on their motorcycles- B stated that he had dropped his purse somewhere and started looking for the purse- N and S came at the spot with R and started beating the informant and his friends- S gave danda blows, R Kicks and fist blows to the informant and his friends and N gave blows with a darat to the informant and D- the informant suffered injuries on his left hand as a result of the blow from the darat- D received darat blow on his face near left side of his neck and also on the right hand- informant and his friend ran away from the spot but D died at the spot- accused were tried and convicted by the trial Court- held, in appeal that PW-1 has supported the prosecution version- there are no contradictions in his testimony- his version is duly corroborated by MLC and the recovery of darat at the instance of N- PW-7 did not support the prosecution version but that is not sufficient to discard the same- blood group of the deceased was found on the darat- accused had motive to commit crime - all the accused were acting together and are liable jointly- trial Court had rightly convicted the accused- appeal dismissed. Title: Harjinder Singh alias Nirmal Singh & others Vs. State of H.P. (D.B.) Page-516

Indian Penal Code, 1860- Section 304 and 506 read with Section 34- Informant, her husband and one D were residing in a house- husband of the informant was taking liquor- accused R came and started taking liquor with the husband of the informant- husband of the informant slapped accused R and sent him to his house - subsequently, both accused came to the house of the informant and started quarreling with her husband- accused R picked him and threw him down from the upper floor- he suffered injuries- he was taken to hospital and died on the way- accused were tried and acquitted by the trial Court- held, in appeal that informant was a sole eye witness- she had raised hue and cry on which PW-4 and PW-17 arrived at the spot- no liquor was detected in the blood of the deceased- thus, possibility of accidental fall has to be ruled out- it was duly proved that accused had threatened to kill the husband of the informant and had subsequently thrown him from the first floor resulting in his death- prosecution version was proved beyond reasonable doubt- appeal partly allowed- accused R convicted of the commission of offence punishable under Section 304 (Part-II) of IPC, whereas, accused P acquitted. Title: State of Himachal Pradesh Vs. Ranjan Lama & another (D.B.) Page-613

Indian Penal Code, 1860- Section 304- Husband of the informant had gone to bazaar- his mobile was switched off- a missing report was lodged- his dead body was found in the khad- it was found on investigation that deceased had gone with the accused and had consumed liquor- a quarrel took place and the accused pushed the deceased into a nallah- accused were tried and acquitted by the trial Court- held, in appeal that there was no eye witness to the incident- prosecution has relied upon the fact that accused and the deceased were last seen together, motive for the commission of crime and the details of the mobile calls- however, it was not proved

that accused was last seen with the accused- motive was also not established- recovery of mobile phone of the deceased from PW-4 does not prove that accused had pushed the deceased into the nallah- informant had improved upon her earlier version- trial Court had taken a reasonable view – appeal dismissed. Title: State of Himachal Pradesh Vs. Raj Kumar (D.B.) Page-792

Indian Penal Code, 1860- Section 306 and 498-A- Deceased was married to the accused for 17-18 years prior to the commission of suicide by her- relationship between the parties was cordial for 8-10 years but the accused started harassing and torturing the deceased by giving beating to her under the influence of liquor- deceased committed suicide- accused was tried and acquitted by the trial Court- held, in appeal that allegations levelled by the prosecution witnesses are general in nature, which are not sufficient to hold the accused guilty of cruelty - accused and deceased were living together for 17-18 years and they were blessed with one son and one daughter – matter was never reported to Police, Panchayat or any other Authority- a single instance of quarrel, 2-3 days prior to the commission of suicide will not amount to cruelty - words uttered in quarrel or anger cannot be termed as cruelty sufficient to drive a person to commit suicide- instigation to commit suicide was also not established- trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Vijay Kumar (D.B.) Page- 1

Indian penal Code, 1860- Section 307 read with Section 34- Informant had gone to bring medicine for his ailing wife along with his son- when they reached a little ahead of his courtyard near the house of the accused, accused T, her son and her daughter attacked the informant- son of the T gave danda blow on his head, whereas, T and her daughter gave beating with fist and kick blows- son of the informant told his mother about the incident- father and wife of the informant reached at the spot and rescued the informant from the clutches of the accused- accused were tried and acquitted by the trial Court- held, in appeal that there are discrepancies in the testimonies of the prosecution witnesses- witnesses have also made improvement in their statement- recovery of danda was not proved satisfactorily- prosecution version that accused had given beating to the informant was not proved beyond reasonable doubt- trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Taro Devi & another (D.B.) Page-919

Indian Penal Code, 1860- Section 323 and 307 read with Section 34- Informant along with his daughter-in-law was irrigating his field when his cousin (accused No. 1) came to the spot armed with the spade along with his wife (accused No.2) who was armed with the sickle – they inflicted injuries on the person of the informant- he was taken to hospital – the accused No.1 was convicted for the commission of offences punishable under Section 324 of I.P.C, whereas, accused No. 2 was acquitted by the trial Court – aggrieved from the judgment, present appeal has been filed- held, that the accused had given one blow of spade in a spur of moment- there was no person to stop the accused and he could have inflicted a graver injury, if he so wanted – there is nothing on record to show that accused had an intention of causing death – a compromise was effected between the parties, which shows that injury was not considered serious enough or dangerous to life- the trial Court had rightly acquitted the accused of the commission of offence punishable under Section 307 of I.P.C.- the conduct of the accused is not such as to deny the benefit of Probation of Offenders Act to him- appeal dismissed. Title: Balwant Rai Vs. Ramesh Chand and another (D.B.) Page-648

Indian Penal Code, 1860- Section 326, 307, 504 and 506 read with Section 34- PW-4 was present at Gurdawara chowk along with his friends- he called A to inquire as to why latter was calling N, a girl known to PW-4- A abused PW-4, came out of his shop armed with the cutter in his hands and stabbed him in the abdomen – K was taken to hospital- accused were tried and acquitted by the trial Court- held, in appeal that incident had taken place as accused was unnecessarily calling N- however, N denied having any acquaintance with the informant and the accused – the genesis of the prosecution version is made doubtful by this fact- nature of injury

was not established – it was admitted in cross-examination that possibility of injury being sustained by a sharp edged weapon concealed in the loin area could not be ruled out – Medical Officer admitted that 2 c.m. wide wound could not be caused by paper cutter- the prosecution version regarding the infliction of injury was not proved in view of material contradictions and inconsistencies in the testimonies of the prosecution witnesses- the trial Court had correctly appreciated the evidence- appeal dismissed. Title: State of Himachal Pradesh Vs. Arun Soni and another (D.B.) Page-1017

Indian Penal Code, 1860- Section 341, 323 and 325 read with Section 34- Informant had gone to drop her daughter and was returning thereafter- accused attacked her- she raised cries on which her daughters came to spot- accused also gave beatings to both the daughters of the informant- they sustained injuries- accused were tried and acquitted by the trial Court- held, in appeal that FIR was received late from which an inference can be drawn that it was lodged belatedly- prosecution witnesses deposed contrary to each other- recovery was effected after one month and the evidence to support the same is not satisfactory- trial Court had rightly acquitted the accused- appeal dismissed. Title: State of H.P. Vs. Arun Kumar & another Page-313

Indian Penal Code, 1860- Section 341, 353, 332, 333 and 302- Deceased was employed as Assistant Lineman with H.P. State Electricity Board- he was asked to attend a complaint pertaining to a transformer - thereafter deceased did not report to the office- R and deceased had consumed liquor and a quarrel had taken place between them- this fact was reported to police- police help was sought- accused walked into the police Station and informed the police about the quarrel- deceased was bleeding from the cheek- deceased was admitted in the hospital on the next day- he had informed earlier that he was beaten by the accused- deceased expired subsequently- accused was tried and acquitted by the trial Court- held, in appeal that deceased was not certified to be competent to make statement- he was admitted in semiconscious state and was unable to speak- it was not proved that deceased was fit to make statement- deceased was not taken to hospital after altercation but was taken to home- when deceased walked into police station, no FIR was registered- he was allowed to go away with the accused- statement made by the deceased to his relatives is not believable - disclosure statement and the consequent recovery were also doubtful as witnesses have not supported the same- it was also not established that blood on the recovered articles matched the blood group of the accused or the deceased- police has suppressed the genesis of the crime- accused was rightly acquitted in these circumstances- appeal dismissed. Title: State of H.P. Vs. Rahul Kumar Sharma (D.B.) Page-643

Indian Penal Code, 1860- Section 353, 332 and 506 read with Section 34- Informant was plying bus- when bus reached near Ghora Hospital Cart Road, one of the accused appeared on a motorcycle- he was signaled by the police to stop the same- informant stopped his bus but the accused failed to stop the motorcycle and fell in front of the bus- accused came to the driver window and tried to pull out the driver and gave beatings to him- friend of the accused also tore the shirt of the informant- informant was saved by the conductor and passengers- accused were tried and acquitted by the trial Court- held, in appeal that prosecution witnesses had consistently deposed about the incident - their testimonies are corroborated by site plan and MLC- suggestions given to PW-3 in cross-examination show the role of the accused and their presence- Court had not appreciated the evidence properly- appeal allowed- accused convicted for the commission of offences punishable under Sections 332 and 506 of the IPC read with Section 34 of the IPC. Title: State of H.P. Vs. Vikas Sood and another Page-316

Indian Penal Code, 1860- Section 363, 366-A and 376- Prosecutrix went for tuition but did not return- accused told the father of the prosecutrix that she had been taken away by some boys- he was going to search for her - subsequently he informed father of the prosecutrix that she was with him – matter was reported to police- accused and prosecutrix were found in Khad- prosecutrix told that accused had sexual intercourse with her at Chintpurni without her consent and against her will- some documents were prepared at Nadaun- she was taken to Jawalamukhi,

where she was again assaulted sexually by the accused- accused was tried and acquitted by the trial Court- held, in appeal that prosecutrix had talked to her mother on telephone- despite this complaint was lodged after 4 days- justification given by the informant that he had reported the matter to panchayat was not substantiated from any material on record – the fact that matter was not reported to the police immediately is highly unnatural- an inference which can be drawn from his conduct is that he was aware of the fact that the prosecutrix had not been kidnapped by the accused and that she had gone with him out of her free will and volition- prosecutrix was taken in public transport to various places - no attempt was made by her to escape from wrongful custody- prosecutrix had not raised any hue and cry at the public place- no external injuries were found on the person of the prosecutrix, which falsifies her version that she had resisted the attempt of molestation - conviction can be based on the sole testimony of the prosecutrix, if found reliable- however, where there are contradictions and improvements in the testimony, it requires corroboration- evidence of the prosecutrix in the present case is not satisfactory or creditworthy- prosecution version was not proved beyond reasonable doubt- trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Prithvi Raj @ Joull (D.B.) Page-675

Indian Penal Code, 1860- Section 366, 376 and 120-B- Prosecutrix received telephonic call from the accused that he had arranged a party at Pin Valley Hotel- accused offered a cup of coffee to the prosecutrix- accused had sexual intercourse with her- she was subsequently informed that her obscene video clip was sent- matter was reported- accused was tried and acquitted by the trial Court- held, in appeal that PW-3 did not support the prosecution version regarding the obscene video clip – matter was reported after the delay of two months- trial Court had rightly appreciated the evidence- appeal dismissed. Title: State of H.P. V. Ajay Soni & another (D.B.) Page-105

Indian Penal Code, 1860- Section 366, 376, 212, 109 and 417- accused R kidnapped the prosecutrix and kept her in the house of his Aunt – prosecutrix was admitted in the hospital with the suspicion that she had consumed poison - she made a statement that she was taken by accused R with the assurance that he would marry her- she had consumed wrong medicine by mistake and was brought to hospital- accused had not completed his promise to marry her-other accused had abetted the commission of crime by R - accused were tried and acquitted by the trial Court- held, in appeal that it was custom in the tribe of the parties to perform customary marriage with the consent of the male and female by leaving their houses- accused R had left their village as per custom- FIR was lodged after the marriage of accused with another girl- prosecutrix and accused were 20-25 years old respectively- prosecutrix admitted that she had knowledge about the engagement of the accused – accused was proclaiming to marry the prosecutrix- prosecutrix was accompanying him in accordance with the prevailing custom in the belief that accused was her husband or would be her husband- her consent was not free consent- accused R held guilty of the commission of offences punishable under Sections 366 and 376 of I.P.C - Respondent No. 3 had allowed R to continue with the drama and abetted him in committing crime- appeal partly allowed- accused R held guilty for commission of offences punishable under Sections 366 and 376 of I.P.C and respondent No.3 held guilty for the commission of offences punishable under Sections 366 and 376 IPC read with Section 109 IPC. Title: State of Himachal Pradesh Vs. Rajeev Kumar & others (D.B.) Page-744

Indian Penal Code, 1860- Section 376 and 506- Prosecutrix used to go to the jungle to graze goats and cattle- accused also used to go to jungle to graze cattle and goats- accused had sexual intercourse with the prosecutrix without her consent - he also threatened the prosecutrix - she was found to be pregnant – she was mentally retarded and she delivered a female child- accused was found to be biological father of the child- accused was tried and acquitted by the trial Court- held, in appeal that prosecutrix had supported the prosecution version- her sister and mother corroborated her version- her IQ was found to be 62- she had mental retardation- accused had taken advantage of the mental retardation of the prosecutrix- it is duly proved that accused is

biological father of the baby of the prosecutrix- delay was properly explained- trial Court had wrongly acquitted the accused- appeal allowed- accused convicted of the commission of offences punishable under Sections 376 and 506 (Part-II) of I.P.C. Title: State of Himachal Pradesh Vs. Chaman Lal (D.B.) Page-608

Indian Penal Code, 1860- Section 376 and 506- Prosecutrix was subjected to forcible sexual intercourse by her brother-in-law during her stay at the house of her maternal grandmother – accused threatened to kill her in case of disclosure of incident to any person- prosecutrix was carrying eight months pregnancy- accused was tried and acquitted by the trial Court- held, in appeal that prosecutrix was more than 16 years of age at the time of incident- matter was reported to police belatedly without any satisfactory explanation- she had not disclosed the incident to her grandmother where she was residing and she continued to attend the school normally- this shows the consent on the part of the prosecutrix- trial Court had rightly acquitted the accused- appeal dismissed. Title: State of H.P. Vs. Pawan Kumar (D.B.) Page-482

Indian Penal Code, 1860- Section 376- Informant had engaged the services of the accused for painting her house – accused found the prosecutrix alone at home and raped her - accused was tried and convicted by the trial Court- held, in appeal, Medical Officer stated that no signs of struggle or violence were found on the body of the prosecutrix- it was not possible for Medical Officer to ascertain whether any act of sexual intercourse was committed or not - Chemical examiner found human semen on the vaginal swabs/slides- Doctor opined after the report of chemical examiner that the possibility of sexual intercourse could not be ruled out- DNA examination was not conducted to link the semen with the accused- prosecutrix was found to be having the mental age of 12 years and 6 months- however, Doctor had found the victim to be capable of understanding and responding to the queries- prosecution witnesses also stated that prosecutrix was a normal person- Court had also found her to be a competent witness - prosecutrix had not supported the prosecution version in cross-examination- she was not re-examined/cross-examined by the public prosecutor - there was delay in reporting the matter to the police- prosecution version was not proved beyond reasonable doubt and the Court had wrongly convicted the accused- appeal allowed and accused convicted of the commission of offence punishable under Section 376 of I.P.C. Title: Dalip Kumar Vs. State of Himachal Pradesh Page-327

Indian Penal Code, 1860- Section 376- Informant had gone to field for bringing the grass- her daughter(prosecutrix) was in the house – when the informant returned, prosecutrix started crying and told that accused had done something in her private part due to which she felt severe pain- informant checked and found that blood was oozing out from the private part of the prosecutrix - accused was tried and acquitted by the trial Court- held, in appeal that there was no delay in reporting the matter to police- informant admitted that she had taken the prosecutrix to the Doctor but no medical record was produced- there are contradictions in the testimonies of PW-1 and PW-2- medical officer stated that prosecutrix was a virgin – injuries noticed by her were possible by scratching and by fall- medical evidence does not prove the commission of rape- trial Court had considered all the circumstances and had arrived at the right conclusion that prosecution version was not proved beyond reasonable doubt- appeal dismissed. Title: State of Himachal Pradesh Vs. Bal Krishan (D.B.) Page-428

Indian Penal Code, 1860- Section 376- Prosecutrix was residing with her children in her home – accused came to the room of the prosecutrix and raped her- incident was narrated by prosecutrix to her father- accused was tried and convicted by the trial Court- held, in appeal that prosecutrix had supported the prosecution version- there are no significant contradictions in her testimony- her version was duly supported by her father- medical evidence also corroborated the version of the prosecutrix- delay was properly explained- prosecution version was proved beyond reasonable doubt- trial Court had rightly convicted the accused- appeal dismissed. Title: Bholu Ram Vs. State of H.P (D.B.) Page-33

Indian Penal Code, 1860- Section 376, 506 and 417- Accused used to commit sexual intercourse with the prosecutrix with an assurance to marry her- prosecutrix was taken to Solan, where accused married her and filed an application for registration of marriage- marriage was not accepted by the family of the accused- accused and the prosecutrix stayed in Rest House, Subathu, where accused committed sexual intercourse with the prosecutrix with the assurance to keep her happy- prosecutrix was taken to Parwanoo, where she was tortured physically and mentally- accused left the prosecutrix on Subathu Road Solan after telling her that the accused would not marry her- accused was tried and acquitted by the trial Court- held, in appeal that prosecutrix had admitted that application for registration of marriage was submitted to SDM, Solan who had asked them to come after one month- she further admitted that she had filed a complaint prior to the expiry of period of one month- she further admitted that her father was not liking the accused as the accused was not earning anything- statement of PW-7 also shows that father of the prosecutrix was not happy with the marriage of the deceased with the accused and was worried about future of his daughter- there are lots of contradictions, discrepancies and improvements in material facts which render the genesis of the prosecution version doubtful- version of the defence that false case was filed by the prosecutrix at the instance of her father is probable - contradictions and discrepancies cast doubt on the veracity of the prosecutrix- conduct of the prosecutrix makes her statement doubtful- trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. Title: Archana Chauhan Vs. Ashwani Kumar alias Biru & another (D.B.) Page-133

Indian Penal Code, 1860- Section 376, 506(B), 34 - **Protection of Children from Sexual Offences Act, 2012-** Section 8 and 12- Accused raped the prosecutrix aged 15 years and threatened to kill her- accused was tried and convicted by the trial Court- held, in appeal that prosecutrix had supported the prosecution version- there are no major contradictions in her testimony – she was minor and could not have consented to the act- medical evidence supported the prosecution version- DNA profile taken from Salwar of the prosecutrix matched DNA profile of the accused- prosecution version was proved beyond reasonable doubt and the accused was rightly convicted by the trial Court- appeal dismissed. Title: Inder Singh Vs. State of H.P (D.B.) Page- 90

Indian Penal Code, 1860- Section 419, 466, 468, 471 and 120B- Copy of an order passed by Hon'ble Supreme Court of India was received by Government of Himachal Pradesh along with a letter from Rasharapati Bhawan, New Delhi, appointing the accused to the post of Joint Secretary- letter of recommendation was signed by accused S as Authorized Signatory – no official intimation was received by the Government on which inquiries were made and it was found that no such recommendation was ever made in favour of the accused – FIR was registered against the accused- accused were tried - accused S was acquitted while accused A and J were convicted- an appeal was filed, which was dismissed- held, in revision that it was not stated by PW-11 and PW-12 that J had visited Shimla or the offices along with accused A- PW-4 did not state that J was seen with accused A- PW-3, PW-5 and PW-6 did not support prosecution version- mere production of documents does not prove the criminal conspiracy between A and J- accused S who was another signatory was acquitted- it was not permissible to convict against the accused J on the basis of same evidence- I.O. admitted that he had never confronted accused J with his signatures- handwriting expert had not examined the original document but had only examined carbon copy- further, opinion of handwriting expert is a weak kind of evidence and is corroborative in nature, which cannot be used for convicting the accused in absence of the substantive evidence- trial Court had wrongly convicted the accused J- petition allowed. Title: Jogesh Kumar Gomber Vs. State of Himachal Pradesh Page-469

Indian Penal Code, 1860- Section 420, 120-B and 511- Accused S produced two General Power of Attorneys for registration- S appeared as L- FIR was lodged against the accused- he was tried and acquitted by the trial Court- held, in appeal that incident had taken place in the presence of 'M' but he was not examined as witness- no identification parade was conducted- trial Court had

rightly acquitted the accused- appeal dismissed. Title: State of H.P. Vs. Sarwan Kumar & anr. (D.B.) Page-673

Indian Penal Code, 1860- Section 452 and 302- PW-1 heard the cries from the house of S, he went to the spot and saw the accused, who tried to run away - efforts were made to apprehend him but he ran away from the spot- PW-1 went inside the house and saw that 'K' was set on fire – she revealed that accused had poured kerosene on her and had set her on fire- she was taken to Hospital- she made a statement to the police in the presence of Medical Officer- subsequently, K succumbed to the injuries- accused was tried and convicted by the trial Court- held, in appeal that accused had forced K to marry him and on her refusal, accused poured kerosene oil on her and set her on fire- prosecution witnesses proved that K had told them about being set on fire by the accused- K had also made statement to the police- she was found fit to make the statement- she had also made statement before Tehsildar- dying declarations were consistent - minor contradictions cannot be ground to acquit the accused- prosecution version was duly proved beyond reasonable doubt and the accused was rightly convicted by the trial Court- further, directions issued not to mention the caste of accused, victim and witnesses in the police papers. Title: Krishan Kumar Vs. State of Himachal Pradesh (D.B.) Page-653

Indian Penal Code, 1860- Section 498-A and 306- Deceased was married to the accused M as per Hindu Rites and Custom – she was subjected to maltreatment, harassment and cruelty - she was not allowed to contact her parents telephonically – she was also not allowed to visit her relatives during family function and festival- accused R tried to molest the deceased- accused also demanded dowry- a compromise was effected but accused continued to maltreat the deceased – she committed suicide by pouring kerosene oil on her- she was taken to Hospital but she succumbed to her injuries- accused were tried and convicted by the trial Court- held, in appeal that father of the deceased has supported the prosecution version and stated that deceased had told him about the harassment and torture in her matrimonial home- his testimony was corroborated by PW- 2 and PW-3 - PW-13 also stated that deceased had committed suicide as she was fed up with the act and conduct of the accused – she had made a dying declaration, in which she deposed about attempt to molest her and demand of dowry – these circumstances clearly established the cruelty on the part of the accused- acts of the accused had led the deceased to commit suicide- minor contradictions are bound to come with the passage of time – testimonies of prosecution witnesses corroborated each other and are corroborated by dying declaration- however, name of accused N did not figure in the dying declaration or in the statements of witnesses- hence, appeal partly allowed- accused N acquitted of the commission of offence punishable under Sections 498-A and 306 of I.P.C- appeal dismissed regarding rest of the accused. Title: Manoj Kumar son of Shri Roop Singh & others Vs. State of Himachal Pradesh Page-340

Indian Penal Code, 1860- Section 498-A and 306- Deceased was married to the accused- when she was coming on motorcycle with accused, accused pushed her from the motorcycle causing injuries to her- accused used to torture the deceased without any reason - the deceased consumed poison due to maltreatment - accused was tried and acquitted by the trial Court- held, in appeal that parents and brother of the deceased had stated that deceased was residing with them for two months prior to commission of suicide- it was also admitted that they had asked the deceased 5-7 times to compromise the matter- forcing the deceased to compromise the matter could be a possible cause for committing the suicide – it cannot be said with certainty that behaviour of the accused was responsible for the death of the deceased - when two views are possible, the view favourable to the accused has to be preferred- trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. Title: State of H.P. Vs. Vijay Singh (D.B.) Page-193

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased was married to the accused J- accused S and J started beating and maltreating the deceased for bringing less

dowry - deceased was left at her parental house on the pretext that accused could not bear the expenses of the delivery of a child by her - she gave birth to a dead child but no one came from the side of the accused to meet the deceased- after 1¼ month, deceased was sent to the house of her in-laws- she disclosed that accused were demanding Rs. 50,000/-- deceased asked her brother to arrange five more suits in addition to 7 suits already agreed to be presented at the time of marriage of sister's son of accused S- she subsequently consumed poison and died- accused were tried and acquitted by the trial Court- held, in appeal that it was admitted by PW-1 that no dowry was demanded at the engagement and marriage- it was admitted that husband of the deceased had given Rs. 20,000/- to bear expenses of delivery- it was admitted that he had brought a nurse and had stayed at the time of delivery - this fact was also admitted by PW-2- all these contradictions and inconsistencies made prosecution version doubtful- trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Jatinder Paul and Another (D.B.) Page-198

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased was married to the Accused A- accused started maltreating her and leveled allegations qua her chastity- she was not allowed to attend the function in the house of her in-laws- subsequently, she committed suicide by hanging herself- accused were acquitted by the Trial Court- held, in appeal that specific acts of cruelty were not mentioned by PW-1- testimony of PW-3 is not credible as same suffers from improvement – mere presumption is not sufficient to implicate the accused- prosecution version was not proved beyond reasonable doubt - Trial Court had rightly acquitted the accused- appeal dismissed. Title: State of H.P. Vs. Samshya Devi & others (D.B.) Page-112

Indian Penal Code, 1860- Section 498-A, 315, 323 and 506 read with Section 34- Informant was married to accused R- accused K is mother-in-law, accused S is father-in-law and accused Surinder is brother-in-law of the informant- accused started torturing the informant mentally and physically- they used to demand dowry as well as Rs. 50,000/- from the informant- informant was forced to leave her matrimonial home while she was pregnant- accused came to the parental house of the informant and gave her beatings - matter was reported to police- accused were tried and acquitted by the trial Court- held, in appeal that prosecution had led tangible evidence to prove that accused were demanding dowry from the family of the informant- trial Court had erred in law by holding that family of the informant owed Rs. 50,000/- for undertaking repairs of the vehicle- father of the informant specifically denied that accused had incurred expenses for the repair of the vehicle – it was also wrongly held that there was civil dispute between the parties- Medical Officer had found 14-16 weeks old dead fetus in yellow coloured blood stained underwear – miscarriage could have taken place due to beatings - accused admitted their presence in the parental home of the informant- prosecution version was duly proved- appeal allowed- accused R convicted of the commission of offences punishable under Sections 498-A, 323 and 314- accused K convicted of the commission of offences punishable under Sections 498-A and 506(I) read with Section 34 of I.P.C. Title: State of Himachal Pradesh Vs. Ramesh Chand and others (D.B.) Page-753

Indian Succession Act, 1925- Section 63- Suit land was earlier owned by K who died intestate- defendants No. 1 and 2 got attested mutation of inheritance on the basis of bogus Will stated to have been executed by K- suit was opposed by the defendants by filing written statement pleading that K had executed a Will in favour of the defendants No. 1 and 2- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that propounder of the Will had played an active role in the execution of the Will- PW-4 stated that Will was already written prior to his arrival and the testator had not put his signatures in his presence- it was upon the propounder to remove the suspicious circumstances surrounding the execution of the Will- original Will was not produced and the reason for withholding it was also not satisfactory- no presumption can be drawn by the registration of the Will- Courts had rightly held that execution of the Will was not proved- appeal dismissed. Title: Chander Dev Vs. Roshan Lal & others Page-825

Industrial Disputes Act, 1947- Section 25- Petitioner was working as daily wage Road Inspector and Mason w.e.f. 01.10.1994 to 31.10.1994- he was disengaged on 1.11.1995 by oral orders- original application was filed before the Administrative Tribunal, which was dismissed for want of jurisdiction- a reference was made to the Labour Court-cum-Industrial Tribunal, which dismissed the petition- held, that employer had not placed on record any muster roll and a reasonable inference can be drawn that the workman was not allowed to perform duties- plea of abandonment taken by the employer cannot be accepted- petition allowed- award passed by Labour Court set aside- direction issued to re-engage the workman with continuous service without any back wages or monetary relief. Title: Ajeet Kumar Vs. State of Himachal Pradesh & Ors. Page-161

Industrial Disputes Act, 1947- Section 25- Petitioners were appointed as Fire and Safety Supervisors in the month of September, 1993 by the respondents – they continued till 1997 when their services were disengaged by the respondents – they raised an industrial dispute- the Tribunal dismissed the reference holding that petitioners had not proved themselves to be the employees of the respondents – held, in the writ petition that no appointment letters have been placed on record to demonstrate that petitioners were engaged by the respondents- no salary slip was placed on record- petitioners themselves stated before the Tribunal that they were not employees/workers of respondent No. 2- hence the Tribunal has rightly concluded that the dispute does not fall within the definition of industrial dispute- further, the finding of the fact recorded by the Tribunal cannot be interfered with in exercise of writ jurisdiction- petition dismissed. Title: Agya Ram Vs. State of H.P. & others. (D.B.) Page-762

Industrial Disputes Act, 1947- Section 25- Respondent filed a claim petition before the Labour Court contending that she was engaged on muster roll /daily wage basis in the month of May, 1999 and was working as such till 31.10.1999- her services were terminated orally – matter was referred to Labour Court, which directed the continuation of service with all consequential benefits, except back-wages- it was further directed that she be considered for regularization as per policy of the State Government- held, that there is no illegality or perversity in the award passed by the Labour Court-cum-Industrial Tribunal – petition dismissed. Title: State of Himachal Pradesh and Ors Vs. Padma Youdan Page-196

Industrial Disputes Act, 1947- Section 25- Rosin & Turpentine Factory Employees Union had been demanding remote locality/special compensatory allowance at par with the Central Government employees serving at different areas- this demand was not accepted by H.P. Forest Corporation- a dispute arose, which was referred to Industrial Tribunal-cum-Labour Court, Shimla- claim was allowed and corporation was directed to grant special compensatory allowance- aggrieved from the order, present writ petition has been filed- held, that there are two types of establishments in factory namely ministerial establishment and industrial establishment- ministerial establishment is governed by the pay and allowances of the Himachal Pradesh Government and Industrial establishment is governed by central pattern of pay scales and other allowances- evidence of the Union proved that they are governed by the Central Government pay pattern and allowances and have been getting remote locality/compensatory allowances on Central Government pattern- earlier this allowance was not revised- plea that special compensatory allowance was being paid unauthorizedly is not acceptable- Tribunal had rightly passed the award on the basis of the evidence- finding of fact recorded by the Tribunal on the basis of appreciation of evidence cannot be questioned in writ proceedings- petition dismissed. Title: The H.P. State Forest Development Corp. & Anr. Vs. Rosin & Turpentine Factory Employees Union & Anr. Page-4

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Land Acquisition Act, 1894- Section 18- Land of the father of the petitioner was acquired for the purpose of setting up a tube well- an award was passed- petitioner sought reference but no

reference was made- respondents stated that no person had objected to the award and the petition is not maintainable- held, that amount was received without any bill – attempts made subsequently to get something more without any basis and foundation- petitioner is not explained the delay, which cannot be brushed aside without any reason- mere participation will not assist the petitioner- petition dismissed with cost of Rs.10,000/-. Title: Gurbachan Singh Vs. State of Himachal Pradesh & another (D.B.) Page-508

Land Acquisition Act, 1894- Section 18- Land was acquired for the construction of Una-Talwara railway line- Collector determined the value of acquired land as Rs. 640 to Rs. 24005/- depending upon the category of land- a reference was filed and the Reference Court determined the market value as Rs.76,000/- per Kanal- held, in appeal that whole of the acquired land was used and no area was left for carrying any developmental activities- claimants are entitled to compensation for entire acquired land at the uniform rate regardless of categorization- there was no error in uniform determination of the market value of the acquired land- Reference Court had re-determined the market value on the basis of the award pertaining to the very same Up-Mohal-similarity of the acquired land with the land regarding which award was passed was never disputed - the Court had rightly re-determined the market value by placing reliance upon the award - appeal dismissed. Title: Nirmala Devi Vs. Land Acquisition Collector (Railways) & another Page-187

Land Acquisition Act, 1894- Section 18- Land was acquired for the construction of Parvati Hydro Electric Project- compensation was awarded by the Land Acquisition Collector – separate references were made and the Reference Court enhanced the compensation - sale deeds produced by the respondent were not taken into consideration by the trial Court on the ground that vendor and vendee were not examined - held, in appeal that sale deeds can be taken into consideration without examination of the vendor and vendee but the similarity of the land sold by the deeds has to be established with the land sought to be acquired – respondent had only examined the clerk to prove the execution of the exemplar sale deed- he is not local resident of the area- he was not aware of the area, nature or category of land- hence, exemplar sale deed could not be taken into consideration for adjudicating the rights and contentions of the parties- three exemplar sale deeds were produced by the claimants - witnesses examined by the claimants deposed that acquired land is just adjacent to exemplar land having similar potentiality with regard to the use, nature and similarity of classification and value- it was not proved that sale transaction was made or executed only in anticipation of the project coming in the near future- acquired land was put for a public use and no area was left for carrying any developmental activity- claimants are entitled for compensation for the acquired land, at uniform rates, regardless of its categorization- exemplar award had determined the market value at Rs. 4,00,000/- per bigha or Rs.20,000/- per biswa- trial Court had rightly re-determined the market value at Rs. 17,800/- per biswa or Rs.3,56,000/- per bigha- appeal dismissed. Title: Land Acquisition Collector, N.H.P.C. Vs. Tedhi Singh & another Page-174

Limitation Act, 1963- Section 5- An application was moved for the condonation of delay of 6 years 2 months and 7 days for the restoration of the writ petition- license of the Advocate who was representing the petitioner was suspended for five years- held, that suspension of license is a sufficient cause for the condonation of delay and the party should not be deprived of his legitimate right on account of delay. Title: Mukesh Singh Vs. Union of India and others (D.B.) Page-

Limitation Act, 1963- Section 65- Proceedings were initiated against the predecessor-in-interest of the plaintiffs for encroaching upon abadi deh- ejectment was ordered, which was challenged unsuccessfully – a civil suit was filed claiming that plaintiffs had become owners by way of adverse possession- suit was opposed by the defendants, which was dismissed- held, in second appeal that plaintiffs had claimed that portion of the house and saw mill were standing on the disputed land- however, it was not established that predecessor-in-interest of the plaintiffs and

thereafter plaintiffs remained in possession of the suit land- defendants proved that suit land had vested by escheat to them- defendants had a right to evict the plaintiffs - appeal dismissed. Title: Dayalu Devi and others Vs. State of Himachal Pradesh and another Page-20

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Motor Vehicle Act, 1988- Section 149- It was contended that driver of the vehicle was not having valid and effective driving licence at the time of accident- it was for the insurer to prove that driver was not having valid and effective driving licence at the time of accident but he had failed to do so- appeal dismissed. Title: Oriental Insurance Company Limited Vs. Gulam Hassan Sheikh and others Page-538

Motor Vehicles Act, 1988- Section 149 and 170- The application under Section 170 of Motor Vehicles Act filed by the insurer was allowed and he was permitted to contest the claim petition on all grounds available to it- factum of accident, rashness and negligence of the driver and disability suffered by the claimant were not disputed- insured had not committed any willful breach of the terms and conditions of the policy- driving licence shows that driver had a valid and effective driving licence- once the licence was allowed to be exhibited without any objection, insurer cannot raise any objection about its admissibility at a later stage- insurer was rightly saddled with liability. Title: Oriental Insurance Company Vs. Parveen and another Page-1065

Motor Vehicles Act, 1988- Section 149- Claimants pleaded that deceased was travelling in the vehicle along with goods- owner and driver admitted that deceased was travelling in the vehicle with goods- insurer has not led any evidence to prove that deceased was gratuitous passenger- hence, insurer was rightly held liable. Title: Roshan Lal Vs. Shetu Devi and others Page-272

Motor Vehicles Act, 1988- Section 149- Driver was driving a jeep unladen weight of which is 1720 kilograms -it falls within the definition of light motor vehicle- no PSV endorsement is required- Tribunal had rightly saddled the insurer with liability- appeal dismissed. Title: Oriental Insurance Company Ltd. Vs. Ramesh Kumar @ Naresh Kumar & others Page-961

Motor Vehicles Act, 1988- Section 149- Driver was driving a Mahindra Pick Up- unladen weight of which is 1610 kilograms - it falls within the definition of 'light motor vehicle'- no endorsement of PSV was required- driver was competent to drive not only light motor vehicle but also the tractor, medium goods vehicle, medium passenger motor vehicle, heavy goods vehicle, heavy passenger motor vehicles, which shows that authority had issued certificate to him after noticing his competency and expertise- it was not proved that owner had knowledge that driver was not having requisite age to have the driving licence- licence was issued by the Competent Authority and cannot be said to be void- insurer was rightly held liable to satisfy the award- appeal dismissed. Title: Barfi Devi Vs. Lal Singh and others Page-223

Motor Vehicles Act, 1988- Section 149- driver was driving a tractor-trolley – he had a licence to drive Light Motor Vehicle**-** Tribunal held that driver did not have valid driving licence at the time of accident- held, that tractor falls within the definition of light motor vehicle- a person holding a licence to drive car, jeep and motor cycle only, is also competent to drive tractor and the insurance company is liable to pay the compensation- insured and the insurer had not examined any witness to prove their version - insurer had failed to prove the willful breach of the terms and conditions of the policy- award set aside and the insurer saddled with liability- MACT has awarded interest @ 9% per annum, which is excessive and is reduced to 7.5% per annum. Title: Rajiv Kumar @ Raju Vs. Raksha Devi and others Page-968

Motor Vehicles Act, 1988- Section 149- Insurer had already satisfied the own damage vehicle claim – he cannot take U turn at this stage- the factum of insurance is admitted- thus, the

Tribunal had rightly saddled the insurer with liability. Title: Dhani Devi and others Vs. Narender Bhardwaj and others Page-1054

Motor Vehicles Act, 1988- Section 149- Insurer was held liable to pay compensation in another claim petition arising out of the same accident- an appeal was preferred, which was dismissed- further appeal was filed before the Supreme Court, which was also dismissed- therefore, insurer is to be held liable to indemnify the insured. Title: Radhi Devi and others Vs. Savitri and others Page-548

Motor Vehicles Act, 1988- Section 149- It was contended by insurer that vehicle bearing registration No. HR-38C-7858 was insured, and not the vehicle bearing registration No.HR-38D-7858- police record shows that FIR was registered against the driver of the truck bearing No.HR-38D-7858- no insurance policy of that vehicle was produced on record and the insurance policy of the vehicle bearing registration No. HR-38C-7858 was produced – hence, appeal allowed and right of recovery granted to the insurer. Title: Oriental Insurance Co. Ltd. Vs. Usha Rani and others Page-955

Motor Vehicles Act, 1988- Section 149- It was contended that deceased was negligent as he was not supposed to travel in the goods vehicles- held, that passenger cannot be said to be negligent until the act of the passenger had contributed towards the cause of the accident- owner had not pleaded in the reply that deceased was travelling with the goods- hence, he was a gratuitous passenger and the insurer was rightly absolved of the liability. Title: Pyar Chand Vs. Mangla Devi and others Page- 965

Motor Vehicles Act, 1988- Section 149- It was for the insurer to plead and prove that driver did not possess any valid and effective driving licence at the time of accident or owner-insured has committed willful breach or the petition was bad for non-joinder of necessary parties- no evidence was led by the insurer- hence, insurer has failed to discharge the onus- Tribunal had rightly saddled the insurer with liability- appeal dismissed. Title: Oriental Insurance Company Ltd. Vs. Anand Kumar & others Page-957

Motor Vehicles Act, 1988- Section 149- It was for the insurer to plead and prove that driver did not have valid and effective driving licence at the time of accident and the insurer had committed willful breach- insurer had failed to discharge the onus- appeal dismissed. Title: Oriental Insurance Company Ltd. Vs. Mohinder Singh & others Page-539

Motor Vehicles Act, 1988- Section 149- Mahindra Pick Up was involved in an accident which is a Light Motor Vehicle- driver of the vehicle was having effective and valid driving licence to drive light motor vehicle- it was for the insurer to plead and prove that owner had committed willful breach but insurer had failed to prove it- insurer was rightly saddled with liability- appeal dismissed. Title: Raj Kumar and others Vs. Jal Kishan and others Page-261

Motor Vehicles Act, 1988- Section 149- The driving licence shows that driver was competent to drive light motor vehicles- offending vehicle was Mahindra Pick-up jeep, which falls within the definition of 'light motor vehicle' -endorsement of PSV is not required and the driver had a valid driving licence – insurance was not disputed and the insurer was rightly saddled with liability. Title: Jagdish Kumar and another Vs. Parvati Kumari and others Page-1056

Motor Vehicles Act, 1988- Section 149- Tribunal held that owners had not obtained fitness certificate at the time of accident- photostat copies of registration certificate and fitness certificate filed which shows that owner had all the documents- insurer was rightly held liable to pay the compensation. Title: Sadhu Singh Vs. Chander Dev & others Page-970

Motor Vehicles Act, 1988- Section 149- Tribunal saddled the insurer with liability with a right of recovery- vehicle was duly insured- deceased was third party and insurer was bound to

indemnify the third party claim- - insurer has right to recover the amount from the owner in case of willful breach of the terms and conditions of the policy - appeal dismissed. Title: Mohan Lal and another Vs. Urmila Devi and others Page-244

Motor Vehicles Act, 1988- Section 157- It was contended that owner insured had sold the vehicle – the risk was not covered and there was breach of the terms and conditions of the policy- held, that mere transfer of a vehicle cannot absolve the insurer from third party liability and the insurer has to satisfy the award – in these circumstances, the insurance company was rightly saddled with liability. Title: Oriental Insurance Company Limited Vs. Jeewan Singh & others Page-1058

Motor Vehicles Act, 1988- Section 163-A - Income of the deceased was Rs. 6,000/- per month, i.e. Rs. 72,000/- per annum which is more than the upper limit of income of Rs. 40,000/- prescribed in the schedule- questions referred to larger bench; whether the claim petition in such situation is maintainable under Section 163-A and second whether claimants can abandon a part of their claim to bring the same within limit - held, that claim petition can be maintained under Section 163-A if the income of the victim is less than Rs. 40,000/- per annum- if the Tribunal comes to the conclusion that income of the victim is more than Rs. 40,000/- per annum- it is not supposed to dismiss the petition on this ground alone - if the petition is dismissed on this ground alone, it will be defeat the purpose of Act and will amount to succumbing to the technicalities- MACT can treat the claim petition under Section 166 and provide an opportunity to the claimants to prove rashness and negligence- claimants cannot be permitted to abandon a part of their claim and to bring it below the sum of Rs. 40,000/- per annum- monthly income of the deceased was alleged to be Rs. 6,000/- per month or Rs. 72,000/- per annum- claim petition was not maintainable - deceased was travelling on the roof which by itself is negligent act- claimants are entitled to compensation under Section 166 of the Act- appeal dismissed. Title: Oriental Insurance Company Ltd. Vs. Sihnu Ram and others (D.B.) Page-1000

Motor Vehicles Act, 1988- Section 163-A- Deceased had died in an accident, which was outcome of the use of motor vehicle and claim petition was, therefore, maintainable- deceased was earning Rs. 3300/- per month or say Rs. 39,600/- per annum, which is below the cap fixed and provided under Section 163-A of the Act- appeal dismissed. Title: National Insurance Co. Ltd. Vs. Bhawna Devi and others Page-534

Motor Vehicles Act, 1988- Section 163-A- Income of the deceased was Rs. 3,300/- per month- 1/3rd amount was rightly deducted towards personal expenses of the deceased- multiplier of 15 is applicable- claimant is entitled to Rs. 2200 x 12 x 15 = Rs. 3,96,000/- under the head 'loss of dependency'- interest should be awarded as per prevailing rate, therefore, rate of interest reduced from 12% to 7.5% per annum from the date of filing of the claim petition till realization- claimants are entitled to Rs. 3,96,000/- + Rs. 25,000/- + Rs. 50,000/-+ Rs. 50,000/- + Rs. 30,000/- = Rs. 5,51,000/- along with interest at the rate of 7.5% per annum from the date of filing of the claim petition. Title: Bajaj Allianz General Insurance Company Ltd. Vs. Veena Devi & others Page-931

Motor Vehicles Act, 1988- Section 166- Claimant had lost his right arm and is not in a position to work as a driver- the age of the claimant was 24 years at the time of the accident- multiplier of 16 is applicable- Tribunal had assessed the income of the claimant as Rs.4,000/- per month- the injury has permanently affected the earning capacity of the claimant- hence, claimant is entitled to Rs.4,000 x 12 x 16= Rs.7,68,000/- as loss of source of dependency- the claimant is entitled to Rs.1,50,000/- under the head 'pain and suffering' and Rs.1,50,000/- under the head 'loss of amenities of life' – Appellate Court has power to enhance the compensation and to award more amount than claimed- the rate of interest reduced to 7.5% per annum from 8%. Title: Oriental Insurance Company Vs. Parveen and another Page-1065

Motor Vehicles Act, 1988- Section 166- Claimant had suffered fracture of ankle and leg- he remained admitted in the hospital with effect from 24th September, 2001 till 11th October, 2001- he suffered permanent disability to the extent of 6%- income of the claimant was taken as Rs. 3,000/- per month- Rs. 9,000/- awarded under the head 'loss of income for the period he remained admitted' - 'attendant charges' of Rs. 5,000/- per month, i.e. Rs. 15,000/- for the period of three months were also awarded- considering disability to be 6%, loss of income taken to be Rs. 500/- per month- multiplier of 13 was to be applied and the claimant is entitled to Rs. 500 x 12 x 13= Rs. 7,800/- under the head loss of future income, in addition to this Rs. 50,000/- awarded under the head 'pain and suffering' - Rs. 50,000/- awarded under the head ' loss of amenities of life' and Rs. 10,000/- awarded under the head future medical expenses- claimant held entitled to total compensation of Rs. 2,12,000/- along with interest @ 7.5% per annum from the date of claim petition till realization. Title: Kehar Singh Vs. Shamsher Singh and others Page-230

Motor Vehicles Act, 1988- Section 166- Claimant had sustained 80% permanent disability- monthly income of the claimant was Rs. 10,500/-- he had suffered loss of earning of Rs. 8,000/- per month- age of the claimant was 33 years at the time of accident- multiplier of 15 was rightly applied and compensation of Rs. 8,000 x 12 x 15= Rs. 14,40,000/- was rightly awarded under the head 'loss of future income- claimant is entitled to Rs. 1,50,000/- under the head 'pain and sufferings', Rs. 1,50,000/- under the head 'loss of amenities of life'- compensation of Rs. 2 lac was rightly awarded under the head 'medical expenses'- Rs. 50,000/- awarded under the head 'expenses for future treatment'- thus, total compensation of Rs. 19,90,000/- awarded along with interest @ 7.5% per annum. Title: Ropesh Gupta Vs. Guljinder Kaur & others Page-267

Motor Vehicles Act, 1988- Section 166- claimant had sustained permanent disability to the extent of 80% - he had purchased medicines worth Rs. 3,07,077/- - claimant will not be in a position to perform his duty due to the disability- claimant was working as salesman and was stated to be earning Rs. 8,000/- per month- however, no proof of monthly income was filed- now a days, even a labourer does not earn less than Rs. 4,000/- per month- hence, income of the claimant can be taken as Rs. 4,500/- per month - age of the claimant was 45 years- Tribunal had applied multiplier of 13, whereas, multiplier of 12 was to be applied- thus, claimant is entitled to Rs. 4500 x 12 x 12= Rs. 6,48,000/- under the head 'loss of future income' – Tribunal had awarded Rs. 75,000/-, under the head 'pain and suffering', which is on the lower side- compensation enhanced to Rs. 1,50,000/- under the head 'pain and suffering'- claimant is also held entitled to Rs. 1,50,000/- under the head 'loss of amenities of life'- claimant remained admitted in the hospital- he was attended by a person for three months- hence, he is entitled to Rs. 5,000 x 3 = Rs. 15,000/- under the head 'attendant charges'- claimant would have spent at least Rs. 200/- per day i.e. Rs. 6,000/- per month under the head 'special diet' – claimant would have hired taxi for approaching the hospital- amount of Rs. 25,000/- awarded under the head 'transportation charges'- claimant may have to undergo medical check-ups/treatment and compensation of Rs. 50,000/- awarded under the head 'future medical treatment'- thus, total compensation of Rs. 13,63,077/- awarded along with interest @ 7.5% per annum from the date of passing of the order till deposit. Title: Rajinder Sharma Vs. Haryana Roadways and others Page-262

Motor Vehicles Act, 1988- Section 166- Deceased died in a motor vehicle accident- claim petition was filed by the parents, which was dismissed by the Tribunal- Tribunal held that claimants had failed to prove the rashness and negligence of the driver- held, in appeal that claimants have specifically pleaded that FIR was registered against the driver – charge-sheet was filed before the Court- prima facie case has to be established before MACT- version of the claimants that accident had taken place due to the negligence of the driver was proved- income of the deceased cannot be less than Rs. 4, 000/- per month by guess work- deceased was bachelor and 50% amount has to be deducted towards personal expenses- deceased was 19 years of age- multiplier of '15' is applicable, thus, compensation of Rs. 2,000 x 12x 15= Rs. 3,60,000/-

awarded under the head 'loss of dependency, in addition to this Rs. 10,000/- each awarded under the heads 'loss of love and affection', 'loss of estate' and 'funeral expenses'- thus, total compensation of Rs. 3,60,000 + Rs. 30,000= Rs. 3,90,000/- along with interest @ 7.5% per annum awarded. Title: Jubeda Bibi and another Vs. Hassan Ali and others Page-526

Motor Vehicles Act, 1988- Section 166- Deceased was 30 years of age at the time of accident- he was earning Rs. 7,000/- per month as driver and was also being paid Rs.100/- per day as pocket/diet money- 1/4th amount was to be deducted towards personal expenses- it was held that claimant had suffered loss of dependency of Rs. 36,000/- per annum, which is reasonable- however, multiplier of 14 was wrongly applied as multiplier of 16 was to be applied- thus, claimants are entitled to Rs.36,000 x 16= Rs.5,76,000/- under the head 'loss of income/dependency', in addition to this, Rs.10,000/- each under the heads 'loss of consortium', 'loss of estate', 'loss of love and affection' and 'funeral expenses' also awarded- claimants are entitled to total compensation of Rs. 6,16,000/- -interest was wrongly awarded @ 8% per annum, whereas it should have been 7.5% per annum. Title: Keblu Devi and others Vs. Lagan Dass and others Page-953

Motor Vehicles Act, 1988- Section 166- Deceased was 8 years of old at the time of accident- compensation of Rs. 2 lacs awarded by the Tribunal is just and appropriate- petition dismissed. Title: Oriental Insurance Company Vs. Satya & others Page-540

Motor Vehicles Act, 1988- Section 166- Deceased was aged 34 years at the time of accident – Tribunal applied multiplier of '17', whereas, multiplier of 16 was to be applied- income of the deceased was Rs. 8,000/- per month- 1/3rd was rightly deducted towards personal expenses- loss of income comes to Rs. 4,000/- per annum- claimants are entitled to compensation of Rs. 64,000 x 16 = Rs. 10,24,000/- under the head 'loss of income'- interest was awarded @ 12% per annum which is reduced to 7.5% per annum. Title: Oriental Insurance Company Limited Vs. Satya Devi and others Page-252

Motor Vehicles Act, 1988- Section 166- Deceased was earning Rs. 9,490/-, or roughly Rs. 9,000/- per month - 1/3rd was to be deducted towards his personal expenses - claimants have lost source of dependency of Rs. 6,000/- per month- deceased was aged 40 years at the time of accident- multiplier of '12' is applicable- thus, loss of dependency was Rs. 6,000 x 12 x 12= Rs. 8,64,000/-, in addition to this, Rs. 10,000/- each awarded under the heads 'loss of love and affection', 'loss of estate', 'loss of funeral expenses' and 'loss of consortium'- thus, claimants are entitled to total compensation of Rs. 9,04,000/- along with interest @ 7.5% per annum from the date of filing of the claim petition till realization. Title: Oriental Insurance Company Ltd Vs. Pushpa and others Page-254

Motor Vehicles Act, 1988- Section 166- Deceased was earning. Rs. 44,132/- per month- total income of the deceased comes to Rs. 5,29,584/- per annum- Rs. 25,999/- was deducted as tax- net income of the deceased comes to Rs. 5,03,585/- per annum- claimants specifically pleaded that age of the deceased was 53 years at the time of accident- multiplier of 11 was applied, whereas, multiplier of 9 was applicable- claimants are 5 in number- 1/4th amount was to be deducted towards personal expenses- after deducting 1/4th amount, claimants have lost source of dependency of Rs. 3,77,689/- or say Rs. 3,78,000/-- claimants are entitled to Rs. 3,78,000 x 9= Rs. 34,02,000/-, in addition to this, Rs. 10,000/- each awarded under the heads ' loss of love and affection' , 'loss of estate', 'funeral expenses' and 'loss of consortium'- total compensation of Rs. 34,02,000/- + Rs. 40,000= Rs. 34,42,000/- awarded along with interest @ 7.5% per annum. Title: National Insurance Co. Vs. Ajay Kumar and others Page-245

Motor Vehicles Act, 1988- Section 166- Deceased was riding a scooter, which was hit by HRTC bus- he sustained multiple injuries and succumbed to them- compensation of Rs. 23,69,736/- along with interest @ 6% per annum from the date of filing of the petition till realization was

awarded by the MACT - claimants have duly proved that accident had taken place due to the negligence of the driver of the bus - deceased was 62 years of age at the time of accident and was drawing monthly pension of Rs. 37,782/-- multiplier of 7 was correctly applied- sum of Rs.1 lac was also awarded towards 'love and affection' in accordance with law- a sum of Rs. 25,000/- awarded towards funeral expenses cannot be termed as excessive- a sum of Rs.1 lac awarded towards consortium is also justified- compensation is just and reasonable. Title: Himachal Road Transport Corporation Vs. Varinder Singh Negi & others Page-227

Motor Vehicles Act, 1988- Section 166- Deceased was travelling in the vehicle as owner of goods- he died when the vehicle met with an accident - his monthly salary was Rs. 14,676/- and he was stated to be earning Rs. 5,000/- from agriculture- petition was allowed by MACT- held, that claimants had led the evidence to prove the rashness and negligence of the driver- no evidence was led by the respondent to prove that accident had taken place due to mechanical defect or any other reason- it was duly established that vehicle was hired for carrying goods for marriage and therefore, deceased could not be said to be a gratuitous passenger - no cross objections were filed and enhancement cannot be granted in absence of the same- appeal dismissed. Title: Oriental Insurance Company Vs. Malti & others Page-709

Motor Vehicles Act, 1988- Section 166- In criminal cases proof beyond reasonable doubt is required while in motor accident cases prima facie proof is required- appeal dismissed. Title: Karam Chand Vs. Chanchla Devi and others Page-229

Motor Vehicles Act, 1988- Section 166- Income of the deceased cannot be less than Rs. 4,000/- per month- deceased was bachelor – 50 % was to be deducted towards his personal expenses- claimant has lost source of dependency of Rs. 2,000/- per month- age of the deceased was 42 years- he was bachelor at the time of accident- multiplier of 16 was applied by the Tribunal, whereas, multiplier of 14 was to be applied- claimant is entitled to Rs. 2,000 x, 12 x 14= Rs. 3,36,000/- under the head 'loss of dependency'- Rs. 40,000/- awarded under the head 'funeral expenses' and Rs. 30,000/- awarded under the head 'loss of love and affection'- interest was awarded @ 12% per annum, which is improper and is reduced to 7.5% per annum. Title: Oriental Insurance Company Limited Vs. Amar Singh and others Page-250

Motor Vehicles Act, 1988- Section 166- Income of the deceased was Rs. 4,200/- per month- claimants are four in numbers- 1/4th amount was to be deducted towards personal expenses- age of the deceased was 30 years at the time of accident- multiplier of 15 was rightly applied. Title: Pyar Chand Vs. Mangla Devi and others Page-965

Motor Vehicles Act, 1988- Section 166- Income of the deceased was Rs. 10,000/- per month- he was aged 32 years - 1/3rd is to be deducted towards personal expenses - claimants have lost source of income of Rs. 6,667/- per month, i.e. Rs. 80,000/- per annum- Tribunal had applied multiplier of 17, whereas, multiplier of 16 was to be applied- claimants are entitled to Rs. 80,000 x 16= Rs. 2,80,000/- under the head 'loss of income/dependency'- interest awarded @ 12% per annum, which is on the higher side and is reduced to 7.5% per annum. Title: Oriental Insurance Company Ltd. Vs. Sakeena Devi and others Page-259

Motor Vehicles Act, 1988- Section 166- **Insurance Act, 1938-** Section 64-VB- It is for the insurer to prove that insurer was intimated- if no intimation is given and the accident takes place in the meantime, Insurer is liable – appeal dismissed. Title: United India Insurance Company Ltd. Vs. Mansa Devi & others Page-571

Motor Vehicles Act, 1988- Section 166- It was admitted that claimant had sustained injuries in the motor accident- he was taken to zonal hospital, Bilaspur, where he remained admitted for 17 days- income of the claimant can be taken as Rs. 5,000/- per month – claimant is entitled to Rs. 2500/- under the head 'loss of income'- Doctor stated that claimant could not have worked for

about six months due to the injury sustained by him - he must have spent about Rs.1 lac on his treatment and medicines- he is also entitled to Rs. 50,000/- under the head 'pain and sufferings', Rs. 50,000/- under the head 'future pain and sufferings' and Rs. 50,000/- under the head of 'loss of amenities of life'- thus, total compensation of Rs. 2,62,500/- awarded along with interest @ 7.5% per annum from the date of the claim petition till its realization. Title: Mohinder Kumar Vs. Shakuntla Devi and others Page-530

Motor Vehicles Act, 1988- Section 166- The age of the deceased was 31 years at the time of the accident- multiplier of '15' was applicable – the claimants are entitled to the compensation of Rs.2500 x 12 x 1= Rs.4,50,000/- under the head 'loss of dependency'- claimants are also entitled to Rs.10,000/- each under the heads ' loss of love and affection', 'loss of consortium' , 'loss of estate' and 'funeral expenses' – claimants are thus entitled to Rs.4,50,000 +40,000= 4,90,000/- with interest. Title: Oriental Insurance Company Limited Vs. Jeewan Singh & others Page-1058

Motor Vehicles Act, 1988- Section 166- The claimant has undergone pain and suffering and will have to undergo the same throughout the life- he remained under treatment for about one year and suffered 10% permanent disability- thus, the claimant is entitled to Rs. 50,000/- under the head 'pain and suffering' – the Tribunal had awarded Rs. 20,000/- under the head 'loss of enjoyment of life', which is too meager – the amount enhanced to Rs. 50,000/- - claimant held entitled to Rs. 1,90,029/- along with interest @ 7.5% per annum from the date of filing of the claim petition till realization. Title: Oriental Insurance Company Limited Vs. Jeewan Singh & others Page-1058

Motor Vehicles Act, 1988- Section 166- Tribunal dismissed the claim petition after holding that accident had taken place due to the negligence of the deceased- respondent No. 1 had not driven the truck rashly and negligently at the relevant point of time- FIR was got registered against the deceased- a closure report was filed against him, which was accepted after hearing the complainant- claimants have to plead and prove that accident was outcome of the rash and negligent driving of the respondent No. 1, in which they failed, however, claimants are entitled to Rs. 50,000/- under no fault liability. Title: Bholi Devi and others Vs. Avtar Singh and others Page-500

Motor Vehicles Act, 1988- Section 166- Tribunal held that accident was caused by Scooterist himself- an FIR was lodged against him- even Criminal Court had recorded the findings to the effect that accident was outcome of rash and negligent driving of the scooterist- no interference is called for- appeal dismissed. Title: Atma Ram Vs. Veena Kumari and others Page- 221

Motor Vehicles Act, 1988- Section 166- Tribunal held that accident had not taken place due to any negligence but due to inept handling of the vehicle by the mechanic or some inherent manufacturing defect existing in the vehicle- findings recorded by the Tribunal are not proper – claimants had specifically pleaded that deceased was travelling in the vehicle as conductor- one tyre of the vehicle was being repaired when another tyre burst- its rim hit the deceased, who sustained injuries – owner/insured and the driver have not denied these facts- strict proof is not required in the motor accident case, discrepancies in the pleadings cannot be made ground to dismiss the claim petition- Tribunal has to follow the principles of justice, equity and good conscience – deceased had sustained injuries out of the use of the motor vehicle- income of the deceased was claimed to be Rs. 8,000/- per month - by guess work, it can be safely held that deceased was not earning less than Rs. 4,000/- per month- 1/4th amount was to be deducted towards his personal expenses- thus, it can be held that claimants have lost source of dependency of Rs. 3,000/- per month- deceased was 29 years of age- multiplier of 16 is just and appropriate- compensation of Rs. 3,000 x 12 x 16= Rs. 5,76,000/- awarded towards loss of dependency- claimants are also entitled to Rs. 10,000/- each under the head loss of 'love and affection', 'loss of estate' and 'funeral expenses'- insurance was admitted and insurer is liable to indemnify the insured - claimants are entitled to compensation of Rs. 6,06,000/- with interest @

7.5% per annum from the date of filing the claim petition till its realization. Title: Bimla Devi and others Vs. The Oriental Insurance Co. Ltd. and others Page-501

Motor Vehicles Act, 1988- Section 166- Tribunal held that there was no sufficient material on record to prove that motorcyclist had driven the vehicle rashly and negligently- held, that HHC Om Swaroop, who conducted the investigation specifically stated that FIR was lodged against the motorcyclist who was driving the vehicle rashly and negligently- standard of proof in criminal case is different from the standard of proof in claim petition - proof beyond reasonable doubt is required in a criminal case while a prima facie proof is required in a claim case- there is sufficient prima facie proof that motorcyclist had driven the vehicle rashly and negligently- insurer had examined RW-4 who deposed that driving licence of motorcyclist was not issued by Licensing Authority, Khandur Sahib, District Taran Taaran, Punjab but he admitted that register was not relating to the series of 9000- insurer has not proved breach of the terms and conditions of the insurance policy- claimant remained under treatment for two months and had suffered 5% permanent disability- claimant is entitled to Rs.1 lac under the head 'loss of amenities of life', Rs. 50,000/- under the head 'pain and suffering' and Rs. 50,000/- under the head 'medical expenses'- thus, claimant is entitled to Rs. 2 lacs along with interest @ 7.5% per annum till realization. Title: Palvi Vs. Rajneesh Kumar & others Page-542

Motor Vehicles Act, 1988- Section 171- Tribunal had awarded interest from the date of the claim petition, whereas, it was to be awarded from the date of the award- order modified and interest awarded from the date of the award till realization. Title: Himachal Road Transport Corporation and another Vs. Nand Lal and others Page-521

Motor Vehicles Act, 1988- Section 173- Appeal is outcome of vehicular accident which had given birth to a number of claim petitions, which were subject matter of a batch of FAOs, **FAO No. 255 of 2011,** titled as **Oriental Insurance Company Ltd. versus Kushal Kumar and others,** decided on 28th November, 2014- insurer was saddled with liability in view of the judgment- appeal dismissed. Title: Oriental Insurance Company Ltd. Vs. Suman Kumari and another Page-964

Motor Vehicles Act, 1988- Section 173- Insurance Company has filed an appeal challenging the quantum of compensation- held, that insurer has limited grounds available to it unless permission is obtained under Section 170 of the Act- Insurer had not obtained such permission, therefore, appeal challenging the award on quantum of compensation is not maintainable. Title: Oriental Insurance Company Ltd. Vs. Gurdeep Singh & another Page-959

Motor Vehicles Act, 1988- Section 173- Insurer cannot question the adequacy of compensation- it has limited ground available- it can contest claim petition on all the grounds after obtaining permission under Section 170- no such application for seeking permission was filed, which was dismissed by the Tribunal- thus, insurer is precluded from questioning the award on adequacy of compensation- however, rate of interest reduced from 9% to 7.5% per annum. Title: ICICI Lombard General Insurance Company Limited Vs. Gita Devi and others Page-942

Motor Vehicles Act, 1988- Section 173- Insurer has filed appeal on the ground of adequacy of compensation- held, that limited grounds are available to insurer- it can contest claim petition on all the grounds after obtaining permission under Section 170- no such application for seeking permission was filed - thus, insurer is precluded from questioning the award on adequacy of compensation- appeal dismissed. Title: Bajaj Allianz General Insurance Co. Ltd. Vs. Seema Devi and others Page-928

Motor Vehicles Act, 1988- Section 173- Insurer questioned the award on the ground that compensation amount is excessive- held, that insurer cannot question the award on the ground of adequacy of compensation, unless permission has been obtained under Section 170 of the Act-

no such permission was obtained- appeal dismissed. Title: The New India Assurance Company Vs. Indu Bala & others Page-282

Motor Vehicles Act, 1988- Section 173- Insurer was saddled with liability with the right of recovery from the owner- appeal was filed by him on the ground that he is not liable- held, that law had gone through sea change and the insurer had to satisfy the award with right of recovery- appeal dismissed. Title: The New India Assurance Co. Ltd. Vs. Neelam Kumari Mongra and others Page-571

Motor Vehicles Act, 1988- Section 173- Tribunal questioned the award only on the ground of adequacy of compensation - insurer contested the claim petition on the grounds available to him under Section 149 of the Act- if he has to contest the petition on other grounds, he has to seek permission under Section 170 of the Act - such permission was not sought- therefore, appeal is not maintainable at the instance of the insurer- appeal dismissed. Title: National Insurance Company Ltd. Vs. Reena Sharma and others Page-247

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N.D.P.S. Act, 1985- Section 15- A Bulker was signalled to stop- it was found to be containing 2.190 kg poppy straw- accused was tried and convicted by the trial Court- held, in appeal that statements of PW-4 and PW-5 were corroborated by PW-9 who deposed about the recovery of carry bag of poppy straw – defence version was not probable and testimony of DW-1 does not inspire confidence – case property was sent to FSL, Junga and reached there intact - contraband was found to be poppy straw on analysis - recovery was effected from the vehicle and no compliance of Section 50 was to be made- prosecution version was proved beyond reasonable doubt and the accused was rightly convicted by the trial Court- appeal dismissed. Title: Jai Shankar Vs. State of Himachal Pradesh Page-332

N.D.P.S. Act, 1985- Section 15- Accused was found transporting 100 Kgs. poppy husk/poppy straw in five plastic bags in dickey of the car- accused was tried and convicted by the trial Court- held, in appeal that merely because PW-1 had cordial relation with the police is no ground to doubt the prosecution version when the witness was available on the spot- there was no occasion to call the witnesses from the adjoining shops or barrier situated at some distance- minor omission or failure to recall the facts is no ground to doubt the prosecution version- case cannot be doubted due to failure to produce the seal- police had no prior information- police was on patrolling duty for detection of crime- accused was driving car with registration number of another vehicle- mere failure to take photograph from particular angle will not make the prosecution case doubtful- prosecution version was duly proved beyond reasonable doubt and the accused was rightly convicted by the trial Court- appeal dismissed. Title: Satish Kumar Vs. State of Himachal Pradesh (D.B.) Page-910

N.D.P.S. Act, 1985- Section 15- Two gunny bags and three plastic bags were recovered from the house of the accused, which were containing poppy husk and poppy straw- the accused was tried and acquitted by the trial Court- held, in appeal that the place of recovery was a newly constructed house having no doors and windows – the land is owned by various co-owners – no satisfactory evidence was led to prove that house belonged to accused and not to any other person- independent witnesses did not support the prosecution version- thus, two version are appearing on record- the benefit of which has to be given to the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Karnail Singh alias Kaila (D.B.) Page-487

N.D.P.S. Act, 1985- Section 17 and 20- Accused got perplexed on seeing the police and tried to run away- he was apprehended- his search was conducted during which 20 grams brown sugar and 60 grams charas were recovered from the accused- accused was tried and convicted by the trial Court- held, in appeal that efforts were made to associate independent witnesses- police

approached a lady but she refused to become the witness- official witnesses supported the prosecution version- their statements inspire confidence- there are no major contradictions in the their statements - contradiction regarding the number of belongings recovered is minor contradiction which can come with the passage of time- prosecution version was proved beyond reasonable doubt and the accused was rightly convicted by the trial Court- appeal dismissed. Title: Amar Chand Vs. State of Himachal Pradesh Page-626

N.D.P.S. Act, 1985- Section 18- Police party was present at Dogla Nullah- accused got down from the bus and tried to run away on seeing the police- he was apprehended and his search was conducted during which 800 grams opium was found from his possession - accused was tried and acquitted by the trial Court- held, in appeal that no efforts were made by the police to associate any independent witness- plea that there was no inhabitation in the vicinity was not established- testimonies of prosecution witnesses are contradictory and inconsistent- prosecution version was shrouded in suspicion – trial Court had rightly acquitted the accused in view of the contradictions - prosecution version was not proved beyond reasonable doubt- appeal dismissed. Title: State of Himachal Pradesh Vs. Ram Singh (D.B.) Page-277

N.D.P.S. Act, 1985- Section 20- Accused started running on seeing the police- he was apprehended - his search was conducted during which 1.5 kg. charas was recovered- accused was tried and acquitted by the trial Court- held, in appeal that no independent witness was associated during the search and seizure - all the members of the police party were not examined - testimonies of police officials were contradictory- NCB form was filled in the same ink and in the same hand- there are other discrepancies in the testimonies of official witnesses- prosecution version was not proved beyond reasonable doubt - the trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Hottam Ram (D.B.) Page-560

N.D.P.S. Act, 1985- Section 20- Accused was travelling in a bus- he was occupying seat No.23 and 24 and had kept one carry bag in between them- police party signaled the bus to stop- search of the bag was conducted during which 2.5 kgs. Charas was recovered from the bag- accused was tried and acquitted by the trial Court on the basis of Division Bench judgment of High Court **Sunil** Vs. **State of Himachal Pradesh**, **Latest HLJ 2010 (HP) 207** but the same has been overruled in **State of Himachal Pradesh** versus **Mehboob Khan 2013(3) Him.L.R. (FB) 1834** – therefore, judgment of trial Court is not sustainable- appeal allowed and case remanded to trial Court for a fresh disposal in accordance with the law. Title: State of Himachal Pradesh Vs. Satnam Singh & another Page-566

N.D.P.S. Act, 1985- Section 20 and 29- Accused tried to run away on seeing the police- they were apprehended- their search was conducted during which 1 kg. charas was recovered from possession of H- accused were tried and acquitted by the trial Court in view of the judgment delivered in ***Sunil Kumar*** versus ***State of Himachal Pradesh, latest HLJ, 2010 HP, 207-*** however, judgment of ***Sunil Kumar*** has been over ruled by Full Bench in ***State of Himachal Pradesh*** versus ***Mehboob Khan 2013(3) Him.L.R. (FB) 1834-*** hence, judgment of the trial Court set aside and the case remanded to the trial Court for fresh decision in the light of the latest law. Title: State of Himachal Pradesh Vs. Hukam Singh & Another (D.B.) Page-76

N.D.P.S. Act, 1985- Section 20 and 29- Vehicle was signaled to stop – driver stopped the vehicle and fled away- search of the vehicle was conducted during which 14.750 kg was recovered- it was found after investigation that accused was driving the vehicle - owner of the vehicle was also arrested by the police- accused was tried and acquitted by the trial Court- held, in appeal that prosecution version was duly supported by official witnesses- no independent witness could be associated as the place was lonely- passbook of the accused was found in the dashboard of the vehicle- back portion of the accused was seen by the police- name of the accused was specifically mentioned in the ruqqa and NCB form- there was no enmity between the accused and the police- accused had not given any explanation regarding presence of his passbook in the dashboard- it

was duly proved that accused was driving the vehicle from which charas was recovered- however, there is no evidence to connect the owner with the commission of offence- appeal partly allowed and driver convicted of the commission of offence punishable under Section 20 of N.D.P.S. Act. Title: State of H.P. Vs. Khekh Ram and another (D.B.) Page-733

N.D.P.S. Act, 1985- Section 20- Car was signaled to stop- 1 kg. charas was recovered- accused were tried and acquitted by the trial Court- according to prosecution, a bag was found in the back side of rear seat of the car covered by a seat cover having zip- however, no such bag was found in the car- front glass of the car was also found to be broken when it was produced in the Court- there are material contradictions and discrepancies in the statements of witnesses making the prosecution version doubtful- trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Suresh Kumar & others (D.B.) Page-370

N.D.P.S. Act, 1985- Section 20- Car was stopped and searched- 14.5 kg. charas was recovered- accused were tried and acquitted by the trial Court- held, in appeal that accused were travelling the car- charas was recovered from below the seat- all the codal formalities were completed on the spot- case property was produced before PW-3 who had resealed the same- mere fact that independent witnesses had not supported the prosecution version is not sufficient to doubt the prosecution version when they had admitted their signatures on the seizure memo - there are no major contradictions in the statements of official witnesses- statements of officials witnesses are inspiring confidence and are trustworthy - presumption that person acts honestly applies as much in favour of police personnel as in favour of any other persons- trial Court had erred in giving undue importance to the fact that no personal belongings of accused were found in the car- it was not necessary for the prosecution to prove that accused were travelling with their personal belongings- ownership of the car was also not proved- accused were travelling in the same car and they hail from the same District- possession of charas was duly proved and the trial Court had wrongly acquitted the accused- appeal allowed and accused convicted of the commission of offence punishable under Section 20 of N.D.P.S. Act. Title: State of Himachal Pradesh Vs. Jai Bhagwan and others (D.B.) Page-319

N.D.P.S. Act, 1985- Section 20- Police party noticed one boy standing on the bridge- he tried to run away on seeing the police- he was apprehended- his search was conducted during which 250 grams charas was recovered- accused was tried and acquitted by the trial Court- held, in appeal that there are contradictions in the testimonies of official witnesses- no independent witness was associated- explanation was given that place was isolated and no vehicle passed through the bridge- further, PW-1 admitted that he had taken lift in the private vehicle to police station, Banjar- this shows that road was busy- independent witness could have been associated at the time of search, seizure and sealing- prosecution version was not proved and the trial Court had rightly acquitted the accused- appeal dismissed. Title: State of H.P. Vs. Mohan Lal (D.B.) Page-737

N.D.P.S. Act, 1985- Section 20- Police party signaled a motor cycle to stop - jacket of accused A was slightly lifted– his search was conducted during which one packet containing 985 grams charas was recovered - accused were tried and acquitted by the trial Court- held, in appeal that provision of Section 50 of N.D.P.S. Act was not complied with- accused were not apprised of their legal right to be searched before a Magistrate or Gazetted Officer- recovery cannot be relied upon- Trial Court had rightly acquitted the accused- appeal dismissed. Title: State of H.P. Vs. Anil Kumar & another (D.B.) Page-109

N.D.P.S. Act, 1985- Section 20- Police party was on patrolling duty- accused got frightened on seeing the police party and went to the toilet- he was apprehended and his search was conducted - 1.2 kg. charas was recovered from his possession- accused was tried and acquitted by the trial Court- held in appeal, mere fact that investigation was conducted by the complainant is not sufficient to doubt the prosecution version- independent witnesses were associated but they did

not support the prosecution version- it was suggested that there was enmity between the I.O. and the accused, but this fact was not established- no prejudice was caused by non-production of the seal and malkhana register to show that case property was taken to the Court- however, testimonies of police officials were contradictory – Trial Court had rightly held that prosecution version was not proved beyond reasonable doubt- appeal dismissed. Title: State of Himachal Pradesh Vs. Kishori Lal (D.B.) Page-203

Negotiable Instruments Act, 1881- Section 138- Complaint was filed pleading that petitioner had taken loan from the bank and had issued a cheque, which was dishonored due to insufficient funds- trial Court convicted the accused and sentenced him to undergo simple imprisonment for 6 months and to pay compensation of Rs. 60,000/-- an appeal was preferred, which was dismissed in view of the statement made by the accused- held, that Appellate Court had dismissed the appeal for the simple reason that undertaking was given before the Court to deposit the money which amounted to confession of guilt- accused had disputed delivery of cheque and the receipt of notice- Appellate Court was supposed to adjudicate all these facts- it was not permissible to dispose of the appeal on the basis of undertaking- revision allowed and case remanded to Appellate Court for deciding the same afresh on merits. Title: S.K. Shant Vs. I.C.I.C.I. Bank Ltd. Page-607

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Protection of Children from Sexual Offences Act, 2012- Section 4- **Indian Penal Code, 1860-** Section 506- Prosecutrix aged 10 years was subjected to repeated sexual assault by the accused - accused threatened the prosecutrix not to disclose the incident to anyone – accused was tried and convicted by the trial Court- held, in appeal that date of birth of the prosecutrix was duly proved as 2.8.2004- she was studying in Class 6th- prosecutrix had supported the prosecution version- her testimony was duly corroborated by her mother and medical evidence- other prosecution witnesses also supported the prosecution version- defence version was not probablized – minor contradictions in the statements are not sufficient to doubt the prosecution version- prosecution version was duly proved beyond reasonable doubt and the trial Court had rightly convicted the accused- appeal dismissed. Title: Hem Raj Vs. State of Himachal Pradesh Page-937

Protection of Children from Sexual Offences Act, 2012- Section 5 (m) and 5 (n)- Charge was framed by Special Judge for the commission of offences punishable under Sections 5 (m) and 5 (n) of Protection of Children from Sexual Offences Act, 2012- it was contended that according to medical evidence charge should have been framed for attempting to commit offence and not for the commission of offence- held, that prosecutrix had specifically stated in her statement recorded under Section 161 Cr.P.C that she felt hard object and pain in her urinary organ- she cried on which her mother woke up and blood was also detected on vaginal slides, coronal, glans slides and pubic hair of victim- medical evidence clearly shows that there was penetration- prosecutrix was less than 12 years of age- slightest penetration is sufficient to bring the offence under the purview of committing 'penetrative sexual assault' – charge was rightly framed- revision dismissed. Title: Sanjay Kumar Vs. State of Himachal Pradesh and another Page-12

Protection of Woman from Domestic Diolence Act, 2005- Section 12- Application was filed by N pleading that she was being harassed by her husband and his relatives- a consent order directing the husband to pay Rs. 3,000/- per month to wife and Rs. 1500/- per month each to the children was passed- it was ordered that husband would meet the children but would not take them out of Kasauli- application for alteration of consent order was filed on the ground that wife had shifted to Delhi and permission was sought to bring the children from Delhi to Kasauli- Magistrate ordered that husband will not take the children to Kasauli- however, he could meet them at Delhi from 9 A.M. to 5 P.M. and the wife can bring the children to Kasauli at her desire - appeal was preferred, in which consent order was passed that husband would pay maintenance of Rs. 9,000/- per month to each of minor daughters and husband would be at liberty to take

them from Delhi to Kasauli- held, that maintenance was granted as per statement of the Advocate- husband cannot be permitted to resile from the statement - otherwise also, husband is under an obligation to maintain the children- petition dismissed. Title: Manish Ghai son of Sh Surinder Ghai Vs. Nancy Ghai wife of Sh Manish Ghai Page-640

Protection of women for Domestic Violence Act, 2005- Section 12- Marriage between parties was solemnized on 26.11.2007- a daughter was born on 17.11.2008- husband used to threaten to kill her unborn child and oust her from her matrimonial home- she was compelled to take shelter in her parent's home- she filed a petition seeking maintenance and rent for separate residence- respondent denied the factum of marriage- trial Court awarded the maintenance of Rs. 1200/- per month and Rs. 700/- per month as rent of the residence- an appeal was preferred, which was dismissed- held, in revision that petitioner had examination herself to prove her version- her version was corroborated by her witnesses- version of the respondent is self contradictory- plea of the petitioner that she was married to the respondent and had given birth to a daughter was duly proved- it was also proved that respondent had treated the petitioner with cruelty- maintenance and rent awarded by Court cannot be said to be excessive- petition dismissed. Title: Tej Ram Vs. Prem Lata Page-14

Protection of Women from Domestic Violence Act, 2005- Section 21- Marriage between the parties was solemnized as per Hindu Rites and Custom- a male child was born – wife filed an application against the husband- husband filed an application seeking permission to meet his minor son, which was allowed- wife filed an appeal, which was dismissed- held, that Court can grant temporary custody of any child or children to the aggrieved person, i.e. mother or the person making an application on her behalf- custody of child was already with mother- father had sought visitation right to see his son, which right was granted to him by the Magistrate- in case of denial of visitation right to father, child would be deprived of father's love and affection- father cannot be forced to seek remedy under Guardians and Wards Act or Hindu Minority and Guardianship Act, because it would lead to multiplicity of proceedings- the endeavour of the Court should be to cut-short the litigation- petition allowed- order passed by Sessions Judge quashed and order passed by Judicial Magistrate restored. Title: Sandeep Kumar Thakur Vs. Madhubala Page-273

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Specific Relief Act, 1963- Section 13- Plaintiffs filed a civil suit for restraining the defendants from interfering with the suit land- it was pleaded that plaintiffs had purchased the suit land from one D for a consideration of Rs. 24,300/- possession of whole land except one small field was delivered to the plaintiffs - defendants took the possession of the suit land forcibly- defendants denied the sale of the suit land in favour of the plaintiffs- it was asserted that D was not competent to sell the suit land as it was in excess of the permissible limits under the provisions of the H.P. Ceiling Act- defendants are in possession of 13-13 bighas of land as tenants since the time of their father- they have constructed four shops at the cost of Rs. 25,000/-- suit was partly dismissed by the trial Court- an appeal was preferred, which was partly allowed- held, in second appeal that plaintiffs have acquired title of the suit land by sale deed- Courts had held defendants to be in possession of 13-13 bighas of land – the Land Reforms Officer had also found that predecessor-in-interest of the defendants was holding the land as a tenant and the land was given to him in lieu of personal services - proprietary rights were conferred upon the predecessor in interest of the defendants – Civil Court does not have jurisdiction to go into question of conferment of proprietary rights- the appeal dismissed and the judgment and decree of Appellate Court confirmed. Title: Ramesh Rattan and another Vs. Jeet Singh (through LRs) and others Page-100

Specific Relief Act, 1963- Section 15- Plaintiff filed a suit for possession claiming that defendants had encroached upon the suit land- suit was opposed by the defendants by filing a

reply denying the contents of the plaint- suit was decreed by the trial Court- an appeal was filed, which was dismissed- held, in second appeal that defendants had purchased the land from the plaintiff- he had encroached upon the suit land, which fact was established by demarcation report- it was contended that Local Commissioner was not examined and no reliance could have been placed on the report- no evidence was led by the defendants in support of the objection- demarcation was conducted in accordance with law- appeal dismissed. Title: Kuldeep Chand Vs. Satya Devi and another Page-26

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for declaration pleading that they are owners in possession of the suit land- half share of the suit land was owned by predecessor-in-interest of the plaintiffs and remaining half share was owned by M- M mortgaged his share with the predecessor-in-interest of the plaintiffs- mutation was sanctioned to this effect- mortgage was never redeemed either by M or by his successors- the right of redemption was extinguished by efflux of time and the plaintiffs became owners of the suit land – the land has been wrongly shown in the ownership and possession of S – hence, the suit was filed for seeking the declaration- the defendant denied the averments of the plaint- the suit was decreed by the trial Court- an appeal was filed, which was allowed and the case was remanded to the trial Court- again the suit was decreed- an appeal was filed, which was dismissed – held, in second appeal that an issue regarding the lack of jurisdiction was framed by the trial Court which was not pressed, therefore, it is not permissible to raise the question of jurisdiction in the second appeal- further, the suit was filed regarding the declaration of the right of a person which falls exclusively within the jurisdiction of the Civil Court- the suit land was shown to be in the ownership and possession of M, who had mortgaged it with the predecessor-in-interest of the plaintiffs- plaintiffs are in continuous possession of the suit land since then M had not redeemed the mortgaged at any point of time- even successors of M had not filed an application for redemption, therefore, Courts had rightly decreed the suit- appeal dismissed. Title: State of H.P. Vs. Ramswaroop & Ors. Page-666

Specific Relief Act, 1963- Section 34 and 38- A civil suit was filed for declaration pleading that suit land was joint and ancestral of the plaintiff and defendant No. 1- plaintiff was coparcener, who had right by birth- defendant No. 1 had relinquished the suit property in favour of defendant No. 2 without legal necessity- suit was dismissed by the trial Court- an appeal was preferred, which was dismissed- it was contended in second appeal that DW-1 had admitted the nature of the suit land, however, he had only admitted that suit land was earlier owned by S and thereafter by N and S- no document was placed on record to show that suit land was ancestral and coparcenary qua the plaintiff- relinquishment deed was executed by defendant No. 1 in favour of defendant No. 2 as he and his family members were looking after the defendant No. 1 as well as his land- Courts had rightly held that plaintiff had failed to prove the ancestral and coparcenary nature of the property- appeal dismissed. Title: Raj Kumar Vs. Rumalo Devi and others Page-392

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit for declaration and injunction pleading that suit land was earlier recorded in the ownership of Sarkar Daulatmadar and in possession of Mahkma District Board- land was sold to J by His Highness by way of oral sale- J constructed a building on the suit land- land was sold by successor of J, M and, predecessor-in-interest of the plaintiffs No. 1 to 3- entry showing the State of Himachal Pradesh as owner of the suit land is illegal, inoperative and void- suit was partly decreed by the trial court- an appeal was preferred, which was dismissed- held, in second appeal that there is no material on record to show that suit land was purchased by J by way of oral sale- no recent entry was recorded regarding the ownership of J- adverse possession pleaded in the alternative also could not be proved- moreover, suit could not have been filed on the basis of adverse possession- appeal dismissed. Title: Amit Garg and others Vs. The State of Himachal Pradesh and others Page-450

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs filed a civil suit for declaration to the effect that exparte judgment and decree obtained by defendant was illegal, null and void and not binding upon the plaintiffs- it was pleaded that M, predecessor-in-interest of the plaintiffs had purchased the suit land from one J by registered sale deed- gate and boundary wall were constructed by M- exparte proceedings against M were illegal, since, he was not duly served and decree was obtained by mis-representation and suppression of material facts- suit was dismissed by the trial Court- an appeal was preferred, which was also dismissed- held, in second appeal that Collector Settlement had changed the nature of the suit land from Banjar Kadim to Gair Mumkin Sehan- defendant challenged this entry by filing a civil suit, which was decreed exparte- plaintiffs had not led any cogent evidence to prove that decree was obtained by playing fraud on the Court – predecessor in interest of the plaintiffs was served by way of publication- he did not appear to contest the suit- plaintiffs have taken a plea of adverse possession and the suit cannot be filed on the basis of adverse possession- Courts had rightly appreciated the evidence- appeal dismissed. Title: Lajya Devi and others Vs. The District Cooperative Union Ltd. Page-170

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs filed a civil suit for declaration and injunction pleading that P was joint owner in possession of the suit land- he died issueless- he had executed a Will in favour of the plaintiffs- defendant manipulated a forged Will in her favour- defendant claimed to be the widow of deceased- she stated that Will was executed in her favour- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that plaintiffs had successfully proved the Will- defendant was not able to dispel the suspicious circumstances- execution of the Will in favour of the defendant was not proved- Courts had decreed the suit on the basis of the Will of the plaintiff- there is no infirmity in the same- appeal dismissed. Title: Muni Vs. Jhanku & Another Page-48

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs filed a civil suit seeking declaration and permanent prohibitory injunction pleading that they are owners in possession on the basis of natural succession being legal heirs of S- mutation attested in favour of deceased husband of the defendant was wrong, null and void- defendant pleaded that her predecessor was sole owner in possession on the basis of Will- suit was dismissed by the trial court- an appeal was preferred, which was dismissed- held, in second appeal that legal heirs of S had given their no objection for attestation of mutation on the basis of Will- plaintiff again preferred an appeal before A.C. 2nd Grade and gave her no objection- Will always remained in the custody of plaintiff No. 1- it was not case of the plaintiff that Will was outcome of fraud and undue influence- appeal dismissed. Title: Brahmi Devi and others Vs. Bavita Devi Page-461

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit seeking declaration that suit land was owned and possessed by G, father of the plaintiff- defendant was adopted by N in accordance with the custom- he has no right over the land owned by G- suit land is in possession of the plaintiff and the defendant has abandoned his right over the same- defendant denied his adoption by one N- he claimed that he is owner in possession of half share of the land- suit was dismissed by the trial Court- an appeal was filed, which was allowed- held in second appeal that G had left behind three sons D, defendant and the plaintiff- mutation of inheritance was sanctioned in favour of all the sons- D remained unmarried and his estate was mutated in favour of the plaintiff and defendant on his death- a judgment was passed by District Judge, Hoshiarpur declaring that defendant was adopted by N – according to customary law, an adopted son does not succeed to his natural father- mutation of inheritance was wrongly sanctioned in favour of the defendant- Appellate Court had rightly allowed the appeal- appeal dismissed. Title: Bhagat Ram died (through LR) Vs. Soma Devi and others Page-80

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration, permanent prohibitory injunction and mandatory injunction pleading that his grandfather M had migrated from District Ambala- he started business which was carried by his son and thereafter by his grandson – partition had taken place between grandsons, in which suit land had fallen to the

share of S, father of the plaintiff- S disappeared in 1979 and was presumed to be dead- plaintiff became owner in possession of the suit land- suit land could not have been alienated except for legal necessity- defendants no. 1 and 2 started interfering with the suit land and it was found on inquiry that suit land was alienated to P through registered sale deed- suit was dismissed by the trial Court- an appeal was filed, which was also dismissed- held, in second appeal that particulars of fraud and misrepresentation have to be given specifically - it is not enough to allege fraud without stating particulars- pleadings of the plaintiff are deficient and the facts constituting fraud or misrepresentation were not pleaded- suit was filed after 25 years of the registration of the sale deed- mere mutation will not extend the period of limitation- partition had taken place and the suit land was allotted to the S - appeal dismissed. Title: Rameshwar Dass (deceased) through his LRs: Subhash Jain and others Vs. Dayawanti (deceased) through her LRs: Manoj Bansal and others Page-847

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit pleading that G, M, J and D were previous owners of the land- G mortgaged the suit land with the possession - mortgage was redeemed - plaintiffs and proforma defendants had purchased the land from G- land was mentioned as Shamlat Taraf Raja Khassa- consolidation authorities without any right to change or convert the ownership of the land- suit was opposed by the defendants pleading that land had vested in the State- Consolidation Authorities were competent to consolidate the holding and then to divide it amongst the owners- suit was dismissed by the trial Court- an appeal was filed, which was allowed- held, in second appeal that G and M etc. were recorded as owners of the suit land in the jamabandi for the year 1955-56- Khasra No. 514 was recorded in the ownership of Shamlat Taraf Raja Khassa but it was recorded in the possession of plaintiffs and proforma defendants- subsequently, land was recorded in the ownership of the State and the possession of Bartandarans- nature of land was also changed- there is an entry regarding redemption of mortgage- there was no reason to record the ownership of the State and possession of Bartandarans- entry was changed without hearing the plaintiffs and without any order a person can challenge the revenue entries when he feels aggrieved- Appellate Court had rightly allowed the appeal- appeal dismissed. Title: State of H.P. and anr. Vs. Govind Singh and ors. Page-129

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit pleading that he is owner in possession of the suit land being legal heir of deceased R – mutation attested on the basis of the Will stated to have been executed by R is wrong and illegal- deceased had left the village when he was aged 12 years- his whereabouts are not known to any person for 60 years, therefore, he was presumed to be dead- a false Will was propounded by the defendant- suit was opposed by filing a reply pleading that Will was executed by R- land was partitioned by the Settlement Authority- defendant is in possession of the suit land- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, that presumption regarding documents, which are thirty years old, does not apply to a Will and the Will has to be proved in terms of Succession Act and Evidence Act- Will was shrouded in suspicious circumstances- defendant was not able to dispel those circumstances- Will was rightly held to be not proved- appeal dismissed. Title: Hans Raj Vs. Ramesh Chand and others Page-582

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for declaration pleading that he along with proforma defendants are co-owners in possession of the suit land- mutation sanctioned in favour of the predecessor-in-interest of the defendants was illegal, null and void- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that H was owner in possession of the suit property – father of plaintiffs and father of defendants are sons of late H- no evidence was led to prove family settlement-no daily diary report was lodged with the patwari to prove that family settlement was given effect in the revenue record- limitation begins to run not from the date of the entry but from the date when a person feels aggrieved by the entry – thus, suit was within limitation. Title: Chaman Singh & ors. Vs. Prabhat Singh & anr. Page- 57

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for seeking declaration that they were in possession of the suit property as non-occupancy tenants and had become owners after the commencement of H.P. Tenancy and Land Reforms Act- defendant denied the tenancy of the plaintiff and claimed that he was the tenant- proprietary rights were rightly conferred upon the defendant- suit was dismissed by the trial Court- an appeal was filed, which was also dismissed- held, in appeal that dispute was between two tenants and the jurisdiction of the Civil Court was not barred- name of the father of the plaintiff was recorded as tenant in the year 1964-65 which continued till 23.4.1971- earlier suit land was shown in the ownership and possession of A- owners had not challenged the entry nor had they appeared before the trial Court to challenge the same- no order for recording defendant No. 1 as gair maurusi was placed on record- application to bring on record the proceedings of Revenue Court was rightly dismissed, as proceedings were initiated after filing the suit- appeal dismissed. Title: Prita Vs. Baldev Singh & ors Page-595

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for restraining the defendant from interfering with their possession and to remove construction over the parts of the land and to restore the possession pleading that plaintiff No. 1 is owner of the suit land and defendant was appointed as Manager- defendant failed to produce the register containing the inventory of the property qua income and expenditure - plaintiff No. 1 terminated the agency of the defendant and asked him to hand over the charge of the property- defendant had constructed structure without the consent of the plaintiffs - suit was partly decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that oral evidence does not prove that defendant was appointed as Manager – witnesses examined by the plaintiffs are either interested witness or they do not inspire confidence- appointment letter was not produced on record – PW-1 also admitted in cross-examination that his servant used to collect rent from the defendant- witnesses of the defendant also proved that defendant was tenant- it was also established on record that plaintiffs used to receive galla batai from the defendant- defendant was tenant who has become the owner after the commencement of H.P. Tenancy and Land Reforms Act – Appellate Court had given perverse findings and had misconstrued, misread and misinterpreted the pleadings of the parties as well as the evidence- appeal allowed - judgment and decree passed by the Appellate Court set aside and that of the trial Court affirmed. Title: Shiv Ram (since dead) through LRs. Vs. Partap Singh (since dead) through LRs & others Page-722

Specific Relief Act, 1963- Section 34- Plaintiffs filed a suit for declaration that they are owners of the property left behind by late H- they came to know that mutation was attested in favour of the defendants- defendants pleaded that deceased had made a specific statement that plaintiff no. 1 was not his son and he had no claim over him before the Court- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that H was married to M but he had disputed the paternity of plaintiff No. 1- however, there is irrebuttable presumption regarding the legitimacy of the child born during the continuance of a valid marriage- plaintiff No. 1 was not party to the matrimonial proceedings- decree of divorce was passed on the basis of statements of the parties but there was no proof of recognized custom of divorce - decree is contrary to law and will not operate as res judicata- plaintiffs came to know about the wrong revenue entries in the year 1994- suit was also filed in the year 1994 and is within limitation- appeal dismissed. Title: Lekh Ram deceased, through his LRs. & others Vs. Vidya Sagar and Another Page-835

Specific Relief Act, 1963- Section 34- The suit land was owned by N, the husband of the plaintiff- plaintiff inherited the same on his death- revenue entries are in the name of brother of the plaintiff- plaintiff made an application to Land Reforms Officer for correction of the entries – the application was partly allowed directing the correction of 2/3rd share and observing that plaintiff can file a suit for remaining 1/3rd share – the suit was opposed by the defendant- the suit was dismissed by the trial Court- an appeal was preferred, which was allowed- held, in second appeal that plaintiff had inherited the suit land from her previous husband L- she died during the pendency of the appeal- the children of second husband are not entitled to inherit the

suit land- plaintiff had lost her rights in the suit land on her re-marriage prior to commencement of Hindu Succession Act- the suit land was required to be recorded in the ownership and possession of her previous husband L or that of her father-in-law – therefore, neither the successors of the plaintiff nor the defendant is entitled to succeed to the land – direction issued to the Deputy Commissioner to mutate the land in favour of legal heirs of L and in the absence of the legal heirs to initiate the proceedings for escheat. Title: Ishwar Dass Vs. Neem Dassi deceased through her LRs Shesh Ram and others Page-946

Specific Relief Act, 1963- Section 34, 38 and 39- Plaintiff filed a civil suit for declaration, possession and injunction pleading that G was father of plaintiff No. 1, proforma defendant and one S- plaintiff No. 2 was sister of G- G, S and plaintiff No. 2 were owners in possession of the suit land- G had mortgaged his share to predecessor-in-interest of the defendants No. 1 to 4 - revenue petition was filed for redemption, which was dismissed on the death of G- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that mortgage was proved by Rojnamcha Vakyati - possession was delivered to predecessor-in-interest of the defendants- defendants had failed to prove their adverse possession- suit was filed within a period of 30 years and is within limitation- petition before revenue Authorities was summary in nature and will not bar the civil suit- appeal dismissed. Title: Sardar Singh and another Vs. Puran Chand and others Page-479

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for injunction pleading that suit land was jointly owned and possessed by the plaintiff and her son - defendant was threatening to raise construction on the suit land without any right to do so- suit was dismissed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that no tatima of the suit land was filed- suit land was not got demarcated before filing the suit- plaintiff was not even aware of the khasra number of the suit land- PW-2 admitted that latrine of the defendant was constructed within his property- plaintiff had alleged that construction was raised on her land – therefore, burden was upon her to prove this fact- a Local Commissioner cannot be appointed to collect the evidence, especially when Court was satisfied on the basis of material that no construction was raised- appeal dismissed. Title: Roshni Devi Vs. Man Chand Page-418

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for restraining the defendant from interfering with the suit land pleading that plaintiff had purchased the suit land to the extent of one biswa – defendant is interfering in the possession of the plaintiff without any right do so - suit was decreed by the trial Court-an appeal was preferred, which was allowed- held, in second appeal that defendant had categorically deposed that he had not encroached upon the land of the plaintiff- plaintiff stated that he had taken demarcation but no copy of the same was produced on record- plaintiff was required to prove the encroachment, which he had failed to do- Appellate Court had rightly appreciated the evidence- appeal dismissed. Title: Uma Dutt Vs. Goverdhan Dass Page-219

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for seeking permanent prohibitory injunction for restraining the defendant from interfering in the flow of water for irrigation purpose- it was pleaded that land of the plaintiff was being irrigated from the source named Jaral Bain- defendants threatened to tap the water of source forcibly and without consent of the plaintiff- suit was opposed by filing a reply pleading that water source is owned and possessed by State of Himachal Pradesh- Department was going to dig the well in Khasra No. 283 on the request of the public at large- plaintiff cannot restrain the owner from digging well in their land- suit was dismissed by the trial Court- an appeal was preferred, which was also dismissed- held, in second appeal that no prescriptive right can be acquired regarding the water flowing in underground channel- there was no evidence that by tapping the water, plaintiff would be deprived of the use of the water for irrigating his land- injunction was rightly refused in these circumstances- appeal dismissed. Title: Paras Ram Vs. State of Himachal Pradesh and others Page-30

Specific Relief Act, 1963- Section 38- Plaintiff filed a suit for permanent prohibitory injunction for restraining the defendants from interfering with the suit land- it was pleaded that suit land was allotted to the plaintiff in partition- defendants started interfering with the suit land without any right to do so- defendants pleaded that they had purchased 1/4th share of J and S and were put in possession- the suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that J and S had filed a civil suit claiming ownership and possession but the suit was dismissed- therefore, it was not permissible for them to put the defendants in possession – it was duly proved that joint land was partitioned and plaintiff was put in possession- the Courts had rightly appreciated the evidence- appeal dismissed. Title: Lekh Raj & ors. Vs. Inder Dev Page-93

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit seeking permanent prohibitory and mandatory injunction pleading that they are son and daughter of defendant No. 1- suit land is ancestral in nature- defendant No. 1 threatened to alienate the suit land and to raise construction on the same- defendants denied the claim of the plaintiffs – the suit was decreed by the trial Court- an appeal was preferred, which was dismissed- a second appeal was preferred, which was allowed and the case was remanded to the Appellate Court- the District Judge allowed the appeal- held, in second appeal that as per the record defendant No. 1 is recorded to be father of the plaintiffs- there is no evidence of divorce and the plaintiffs are to be presumed to be the legitimate children of defendant No. 1- the nature of the suit land was proved to be ancestral- injunction can be granted against the manager in case of waste or ouster – there is nothing on record to show that sale is to be made for legal necessity – defendant No. 1 has disowned the plaintiffs and will oust them from the ancestral land as well- the Appellate Court had wrongly allowed the appeal- appeal allowed judgment and decree passed by the Appellate Court set aside and that passed by trial Court restored. Title: Kuldeep Kumar & another Vs. Ishwari Parshad & others Page-988

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit seeking injunction pleading that they are owners in possession of the suit land and defendant started raising construction of Gharat forcibly without any right to do so- suit was dismissed by the trial Court- an appeal was preferred, which was allowed- held, in second appeal that PW-4 had found the encroachment of 0-0-9 Biswansis on the land of the plaintiffs - defendant could not explain on which khasra number gharat was constructed by him- DW-3 admitted that Gharat was constructed over the land of the plaintiffs- plaintiffs have proved the encroachment on the suit land- defendant could not prove the plea of adverse possession- Appellate Court had rightly appreciated the evidence- appeal dismissed. Title: Darsho Ram Vs. Nidhia and another Page-138

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for permanent prohibitory injunction pleading that they are owners in possession of the suit land- defendants started interfering with the same without any right to do so- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that plaintiffs and their witness had specifically stated that plaintiffs are owners in possession of suit land and defendants are interfering with the same without any right to do so- defendants relied upon the judgment but the judgment does not show that plaintiffs were restrained - version of the plaintiffs that they are owners in possession and defendants are stranger has to be accepted- Courts had rightly decreed the suit- appeal dismissed. Title: Majalsi & Others Vs. Zulmi Ram (since deceased) through his LRs Page-37

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for permanent prohibitory injunction pleading that their predecessor-in-interest, D was in possession of the suit land as tenant at will- his tenancy right was inherited by the plaintiffs- they became owners on the commencement of H.P. Tenancy and Land Reforms Act- defendants had filed a wrong application for correction of wrong entry pleading that predecessor-in-interest of the plaintiffs, D had surrendered/relinquished his tenancy rights- suit was opposed by filing a reply denying the

contents of the plaint and pleading that D had surrendered the tenancy in the year 1959- he was not the tenant thereafter- suit was dismissed by the trial Court- an appeal was filed, which was allowed- held, in second appeal that defendants had not given the date when they came into possession- application for bringing on record certain documents were filed but it was not shown that these documents could not be traced earlier despite exercise of due diligence- application was filed to fill up the lacuna and was rightly dismissed- it was for the Revenue Authorities to carry out necessary correction after the death of D- no evidence was led to prove that D had relinquished/surrendered his rights over the suit land- tenancy has devolved upon the plaintiffs - landlord-tenant relation never came to an end in the year 1959- plaintiffs became owners on the commencement of H.P. Tenancy and Land Reforms Act automatically- appeal dismissed. Title: Dile Ram (since deceased through LRs Tikam Devi & ors.) Vs. Sidhu Ram & ors. Page- 636

Specific Relief Act, 1963- Section 5- Plaintiff filed a civil suit for possession and mesne profit pleading that he had purchased the property by sale deed and defendants had illegally opened the lock of the suit property- a criminal complaint was filed against them- suit was decreed by the trial Court for possession and for the recovery of Rs. 15,200/- along with interest @ 9% per annum- two appeals were filed before the Appellate Court- Appellate Court decreed the suit for recovery of Rs. 51,200/-- held, in second appeal that plaintiff has been recorded in the ownership column of the suit property- names of the defendants have neither been recorded in the ownership column nor in the possession column- sale deed was duly proved- title of the defendants was not established- there was nothing on record to show that defendants are owners- Appellate Court had rightly decreed the suit- appeal dismissed. Title: Khem Chand son of late Sh. Prem Dutt and another Vs. Prem Lal Bhambra son of Gopal Dass Page-163

Specific Relief Act, 1963- Section 5- Plaintiff filed a civil suit for possession pleading that plaintiff had purchased the same for consideration of Rs. 70,000/-- one temporary Dhara was constructed on a portion of land, whereas rest of the land was vacant- predecessor-in-interest of the defendants entered into an agreement to purchase the suit land but he was not an agriculturist and was not competent to purchase the property- agreement was declared to be void in a civil suit- possession of the defendants was illegal, hence, suit was filed for possession along with mesne profits- suit was partly decreed by the trial Court- an appeal was preferred- cross objections were filed, which were allowed and the suit was decreed for recovery of Rs. 68,000/- along with future interest @ Rs. 50 per day till possession- held, in second appeal that agreement was held to be not enforceable in view of Section 118 of H.P. Tenancy and Land Reforms Act- possessors could not have been ejected except in accordance with the law- no appeal was filed against the judgment and decree- plaintiff being owner is entitled for possession of the land and mesne profit @ Rs. 50/- per day cannot said to be excessive – judgment passed by the Court below calls for no interference- appeal dismissed. Title: Krishna Devi and others Vs. Raj Kumari Page-140

Specific Relief Act, 1963- Section 5- Plaintiff filed a civil suit seeking possession of the suit land pleading that he is successor of P- defendant had taken illegal possession of the suit land on the basis of Will, stated to have been executed by P- no Will was executed by the deceased- suit was decreed by the trial Court- an appeal was filed, which was dismissed- it was held by the Courts that original Will was not proved at the time of examination of the witnesses- held, in second appeal that original Will was submitted to Sub Judge 1st Class but was not exhibited- application to lead additional evidence was filed, in which it was prayed that witnesses be recalled for proving the original Will, which was not exhibited and whose photocopy was exhibited – another application for leading additional evidence was filed, in which it was stated that Will could not be exhibited due to mistake of Lower Court, which is not correct- original Will was not exhibited at the time of examination of the witness and the findings recorded by the Court that original Will was not proved on record cannot be said to be perverse- appeal dismissed. Title: Kuldeep Chand and another Vs. Bhagi Rath Page-588

Specific Relief Act, 1963- Section 5- Plaintiffs filed a civil suit for seeking possession of the land pleading that they are owners and defendants are in possession without any right to do so- they were asked to deliver the possession but in vain- suit was opposed by filing a reply pleading that their predecessor was recorded in possession and defendants are in possession since then – earlier a suit was filed by the plaintiffs, which was dismissed- defendants have become owners on the commencement of H.P. Tenancy and Land Reforms Act- suit was dismissed by the trial Court- an appeal was preferred, which was allowed – held, in second appeal that Assistant Collector 2nd Grade had held the predecessor-in-interest of the defendants to be a tenant - he was not competent to decide the dispute under Section 104(4) and his order is nullity- defendants have not proved that any rent was paid to the landlord- tenancy is a bilateral act and will not come into existence without payment of rent - copy of the plaint in earlier suit was not filed- order made in favour of predecessor-in-interest of the defendant is nullity and without jurisdiction- Appellate Court had rightly allowed the appeal- appeal dismissed. Title: Padama @ Mathra Devi & ors. Vs. Bhagat Ram & ors. Page-389

Specific Relief Act, 1963- Section 6- Plaintiffs filed a civil suit for restoration of the possession and for permanent prohibitory injunction for restraining the defendants from using any portion of the cabin by making additions and alterations- it was pleaded that plaintiffs were put in possession – plaintiff No. 1 had gone out of station and when he returned, he found that locks were changed- suit was dismissed by the trial Court- held, that plaintiff had not disclosed the name of the employee who had told him about the possession- plaintiff No. 3 had left the country- FIR was registered after 6 days – trial Court had rightly come to the conclusion that plaintiff No. 3 had delivered the possession and it was not a case of forcible dispossession- petition dismissed. Title: M/S Bhai Karam Singh & Co. & ors. Vs. Raminder Pal Singh & ors. Page- 477

'W'

Workmen Compensation Act, 1923- Section 5- Deceased was working as labourer- he met with an accident during the course of his employment- claim petition was filed by his parents- petitioners claimed that wages of the deceased were Rs. 4,500/- per month, whereas, according to respondent No. 1, wages of deceased were Rs. 2,400/- per month- compensation of Rs. 5,52,366/- along with interest was awarded- aggrieved from the order, present appeal has been filed- held, that employer had not stepped into the witness box to prove that income of the deceased was Rs. 2,400/- per month- witnesses of the petitioner stated that income was Rs. 4,500/- per month- in these circumstances, Commissioner had correctly assessed the income as Rs. 4,500/- per month- insurer was directed to pay penalty, whereas, liability is that of the employer- appeal allowed and respondent No. 1 directed to pay the penalty. Title: The Oriental Insurance Company Vs. Deeno & ors. Page-158

TABLE OF CASES CITED

'A'

A. Shankar vs. State of Karnataka, (2011) 6 SCC 279

A.C.Jose Vs. Sivan Pillai and others (1984) 2 SCC 656

A.P.S.R.T.C. & another versus M. Ramadevi & others, 2008 AIR SCW 1213

Ajaib Singh versus Sirhind Cooperative Marketing-cum-Processing Service Society Limited and another (1999) 6 SCC 82

Ajay Kumar Pandey, Advocate, (1998) 7 SCC 248

Akhilesh Halam V. State of Bihar 1995 Suppl.(3) S.C.C. 357

Alamgir Versus State (NCT, Delhi), (2003) 1 Supreme Court Cases 21

All India Judges' Association & ors Vs. Union of India & ors, (2002) 4 SCC 247

Amar Singh v. Union of India and others (2011) 7 SCC 69

Amol Singh vs. State of Madhya Pradesh, (2008) 5 SCC 468

Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433

Amrit Bhanu Shali and others vs National Insurance Company Limited and others, (2012) 11 SCC 738

Aneeta Hada Vs. Godfather Travels and Tours Pvt. Ltd., AIR 2012 SC 2795

Appabhai and another vs. State of Gujarat, AIR 1988 SC 696

Arun Vyas and others vs. Anita Vyas, (1994)4 SCC 690

Arundhati Roy, IN RE (2002) 3 SCC 343)

Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085

Arvind vs. State of Bihar (2001)6 SCC 407

Arvinder Singh Bains vs. State of Punjab, (2006) 6 SCC 673

Asha & others versus Sh. Moti Ram & others, Latest HLJ 2014 (HP) 595

Asharam M.Jain Vs. A.t. Gupta, (1983) 4 SCC 125

Ashok Kumar Chatterjee vs. State of M.P., 1989 Supp. (1) SCC 560

Ashoka Smokeless Coal India (P) Ltd. vs. Union of India, (2007) 2 SCC 640

Atma Singh and others v. State of Haryana and another (2008) 2 SCC 568

'B'

B. Fathima versus S.M. Umarabba & ors., II (2007) ACC 613 (DB)

B.R. Singh Vs. Union of India (1989) 4 SCC 710

Babu Ram (deceased) through L.Rs. Smt. Sita Devi and others Vs. Pohlo Ram (deceased) through L.Rs. Smt. Vidya Devi and others 1991 (2) Sim. L.C. 211

Baldev Singh versus Jagdish Chand & another, I L R 2016 (II) HP 977

Baldev Singh Vs. Pushpa Ram, AIR 1970 P&H 515

Baleshwar Tewari (dead) by LRs. and others vs. Sheo Jatan Tiwary and others (1997) 5 SCC 112

Balraj Taneja Vs. Sunil Madan (1999)8 SCC 396

Balram Prasad vs. State of Bihar, (1977)9 SCC 338

Balwant Raj Saluja and Anr. Vs. Air India Limited and Ors. (2014) 9 Supreme Court Cases 407

Balwant Singh (Dead) versus Jagdish Singh and others AIR 2010 SC 3043

Balwinder Singh vs. State of Punjab, (1987) 1 SCC 1

Bhadragiri Venkata Ravi vs. Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, (2013) 14 SCC 145

Bhagwan Das & others vs. State of U.P. and others, 2010 AIR SCW 1629

Bhagwan Singh versus State of Rajasthan, AIR 1976 S.C. 985

Bhagwathula Samanna and others Versus Special Tahsildar and Land Acquisition Officer, Visakhapatnam Municipality, Visakhapatnam, (1991) 4 SCC 506.

Bhakra Beas Management Board versus Kirshan Kumar Vij & Anr., 2010 AIR(SC) 3342

Bharat Sanchar Nigam Limited vs. Ghanshyam Dass (2) & others, (2011) 4 SCC 374

Bharpur Singh and others vs. Shamsher Singh, (2009) 3 SCC 687

Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat, AIR 1983 SC 753

Bhaskar Ramappa Madar and others versus State of Karnataka (2009) 11 SCC 690

Bhule Ram Versus Union of India and another, (2014) 11 SCC 307

Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157

Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors., 2009 AIR SCW 4298

Bipin Kumar Mondal vs. State of West Bengal, AIR 2010 SCW 4470

Birbal Vs. Udhami and others 1992 (1) Sim.L.C. 153,

Bodhraj alias Bodha & others vs. State of Jammu and Kashmir, (2002) 8 SCC 45

Bogha Singh alias Kishan Singh and anr. vs. Harnarain Singh and ors., 1959 PLJ 136

Brij Lal vs. Prem Chand, AIR 1989 SC 1661

Brijesh Kumar and others versus State of Haryana and others 2014 AIR SCW 1831

'C'

C. Muniappan and others vs. State of Tamil Nadu, (2010)9 SCC 567

CCE v. Jayant Dalal (P) Ltd. (1997) 10 SCC 402

CCE v. Kores (India) Ltd. (1997) 10 SCC 338

CCE v. Usha Martin Industries (1997) 7 SCC 47

Cement Corpn. of India Ltd. Versus Purya and others, (2004) 8 SCC 270

Census Commissioner and Others vs. R.Krishnamurthy, (2015)2 SCC 796

Central Electricity Supply Utility of Odisha vs. Dhobei Sahoo and Others (2014)1 SCC 161

Centre for Public Interest Litigation and others Vs. Union of India and others (2012) 3 Supreme Court Cases 1

Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors., 2013 AIR SCW 2791

Chandra Deo Singh vs. Prokash Chandra Bose alias Chabi Bose and another, AIR 1963 SC 1430

Chandrana Brothers and others versus K.Venkata Rao and others (1976) 1 KLJ 245

Chatti Konati Rao and others Vs. Palle Venkata Subba Rao, (2010) 14 Supreme Court Cases 316

Chennai Metropolitan Water Supply and Sewerage Board and others vs. T.T. Murali Babu, (2014) 4 Supreme Court Cases 108

Chetak Construction Ltd. v. Om Prakash (1998) 4 SCC 577

Chief Engineer and others vs. Mst. Zeba, II (2005) ACC 705

Chuhniya Devi Vs. Jindu Ram 1991 (1) Shimla Law Cases 223

Commissioner of Customs versus Indian Oil Corporation Ltd. (2004) 3 SCC 488

Commissioner of Income-tax (Central) vs. B.N.Bhattacharjee and another (1979) 4 SCC 121

'D'

D.C. Saxena vs. Hon'ble the Chief Justice of India (1996) 5 SCC 216

D.K. Javer and others Vs. State,1985 Cri. L.J 1572

Dabur India Ltd. v. CCE (2004) 13 SCC 107

Dalpat Abasaheb Solunke Vs. Dr.B.S. Mahajan etc, AIR 1990 SC 434

Damodar Mukherjee & Others Vs. Bonwarilal Agarwalla, AIR 1960 Calcutta 469

Datiyalal Vs. Bai Kanta, AIR 1965 Gujarat 247

Dattu Ramrao Sakhare v. State of Maharashtra (1997 (5) SCC 341)

Daulat Ram and Others vs. Sodha and Others, (2005)1 SCC 40

David Methew vs. State of H.P, 2011(6) RCR (Cri.) 2194

Daya Singh and other Vs. Gurdev Singh (dead) by LRs and others 2010 2 SCC 194

Deddappa & Ors. versus The Branch Manager, National Insurance Co. Ltd., 2007 AIR SCW 7948

Deepak Gulati Versus State of Haryana, (2013) 7 Supreme Court Cases 675

Deepal Girishbhai Soni and others versus United India Insurance Co. Ltd., Baroda, (2004) 5 Supreme Court Cases 385

Delhi Administration and Others vs. Kaushilya Thakur and another, AIR 2012 SCC 2515

Delhi Administration vs. Gurdip Singh Uban & others, (1999) 7 SCC 44

Delhi Development Authority Vs. Reena Suri and Ors. JT 2016(5) SC 291

Devinder Singh V. State of H.P. 1990 (1) Shim.L.C. 82

Dhannalal versus D.P. Vijayvargiya and others, AIR 1996 Supreme Court 2155

Dharam Deo Yadav v. State of Uttar Pradesh, (2014) 5 SCC 509

Dilip Singh Moti Singh versus State of Gujarat, (2010) 15 SCC 622

Dr. Rini Johar and another versus State of M.P. and others AIR 2016 SC 2679

Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 Supreme Court Cases 646

Dwarka Prasad Satpathy vs. Bidyut Prava Dixit, AIR 1999 SC 3348

Dwarkaprasad v. Niranjan and another, (2003) 4 SCC 549

'E'

Earabhadrappa vs. State of Karnataka, (1983) 2 SCC 330

Eastern Coalfields Limited vs. Tetulia coke Plant Private Limited & others, (2011) 14 SCC 624

Ellerman Lines Ltd. v. CIT (1972) 4 SCC 474

Eradu vs. State of Hyderabad, AIR 1956 SC 316

Executive Engineer & Anr. vs. Dilla Ram {Latest HLJ 2008 HP 1007

'F'

Fakhruddin v. The State of Madhya Pradesh, AIR 1967 Supreme Court 1326

Fate Ram and others V. Smt. Parvati Latest HLJ 2015 (HP) 816

Fernades vs. Special Land Acquisition Officer 2007(9) SCC 447

Fritiz T.M. Clement vs. Sudhakaran, AIR 2002 SC 1148

'G'

G. Govindan versus New India Assurance Company Ltd. and others, AIR 1999 SC 1398

Gajanan Dassrath Kharate vs. State of Maharashtra, JT (2016)2 SC 459

Gananath Patnaik vs. State of Orissa (2002)2 SCC 619

Ganpat Ram Sharma and others v. Smt. Gayatri Devi, (1987) 3 SCC 576

Gian Singh vs. State of Punjab (2012)10 SCC 303

Godavari Sugar Mills Limited v. State of Maharashtra and others, (2011) 2 SCC 439

Godavarman Thirumulpad vs. Union of India & Ors, 1997 (2) SCC 267

Golla Yelugu Govindu vs. State of Andhra Pradesh (2008) 16 SCC 769

Gopal Das Sindhi and others vs. State of Assam and another, AIR 1961 SC 986

Gopal Dass Vs. State of Assam, AIR 1961 SC 986

Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal, AIR 1980 (SC) 2041

Gujarat Steel Tubes Ltd. and others Vs. Gujarat Steel Tubes Mazdoor Sabha and others (1980) 2 SCC 593

Gulabi and etc. Vs. State of H.P., AIR 1998 HP 9

Gulzar Ahmed Azmi and another Versus Union of India and others, (2012) 10 SCC 731

Gulzari Lal v. State of Haryana, AIR 2016 SC 795

Gurbachan Singh vs. Satpal Singh AIR 1990 SC 209

Gurcharan Singh (deceased) through his LRs Vs. State of Himachal Pradesh and others, ILR 2015 (VI) HP 938 (D.B.)

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

Gurdial Singh vs. Union of India and others (2001) 8 SCC 8

Gurdwara Sahib v. Gram Panchayat Village Sirthala, (2014)1 SCC 669

Gurdwara Sahib Vs. Gram Panchayat Village Sirthala and another, (2014) 1 Supreme Court Cases 669

Gurmeet Singh versus State of H.P. 2015 (2) Him.L.R 766

Gurnam Singh & ors Vs. Jagjit Singh Rosha, 1975 PLJ 505

Gurudwara Sahib Vs. Gram Panchayat Village Sirthala, (2014) 1 SCC 669

Gyanesh Rai and another versus State of UP and Ors 2015 (6) All LJ 499

'H'

H. Venkatachala Iyengar Vs. B.N. Thimmajamma, AIR 1959 SC 443

H.P. Housing oard vs. Ram Lal & Ors. 2003(3) Shim. L.C. 64

H.Venkatachala Iyengar vs. B.N. Thimmajamma and others, AIR 1959 SC 443

Hanumant Govind Nargundkar v. State of Madhya Pradesh, AIR 1952 SC 343

Harcharan vs. State of Haryana, AIR 1983 SC 43

Hari Singh versus Sukhbir Singh and others (1988) 4 SCC 551 and Tukaram Gundu Naik versus State (1994) 1 SCC 465

Haridwar Development Authority vs. Raghubir Singh & others, (2010) 11 SCC 581

Harivadan Babubhai Patel vs. State of Gujarat, (2013) 7 SCC 45

Hemaji Waghaji Jat vs. Bhikhabhai Khengarbhai Harijan and ors., (2009) 16 SCC 517

Het Singh and others vs. Anar singh and others AIR 1982 Allahabad 468

High Court of Judicature of Patna, through Registrar General Vs. Shyam Deo Singh & ors (2014) 4 SCC 773

Hindustan Petroleum Corporation Limited vs. Dilbahar Singh, (2014) 9 SCC 78

Hukam Singh vs. State of Rajasthan, (1977) 2 SCC 99

'I'

Inacio Martins Vs. Narayan Hari Naik and others, AIR 1993 S.C 1756

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

Indofil Chemical Company Vs. State of H.P., 2009 (1) Shim. L.C 284

Insurance Co. Ltd., through its Senior Divisional Manager, Jammu versus Smt. Nirmala Devi and others, 2009 (3) T.A.C. 684 (J&K)

Ishwar Singh vs. State of M.P. AIR 2008 SCW 7865

'J'

Jacob Mathew V. State of Punjab and Another (2005) 6 Supreme Court Cases 1

Jagdish Chand v. Ambika Devi and others, 2014(2) Shim.LC 774

Jagmal Singh Yadav Versus Aimaduddin Ahmed Khan, 1994 Supp (2) Supreme Court Cases 308

Jai Prakash versus National Insurance Company Limited and others, (2010) 2 Supreme Court Cases 607

Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252

Jaswant Kaur vs. Amrit Kaur (1977) 1 SCC 369

Jaswant Singh Vs. Virender Singh (1995 (supp.1) SCC 384

Jeeja Ghosh and another v. Union of India and others, (2016) 7 SCC 761

Jennison v. Baker [1972] 1 All E.R. 997, 1006, it was observed (QB p.66 H)

Jit Singh and others vs. Chanan Singh and anr., 1966 PLJ 246

Joginder Pal v. Naval Kishore Behal, (2002) 5 SCC 397

Joginder Singh @ Pamma versus Vikram @ Vickey and others, Latest HLJ 2014 (HP) Suppl. 292

Joint Collector Ranga Reddy District & Another Vs. D.Narsing Rao and others (2015) 3 SCC 695

Josphine James versus United India Insurance Co. Ltd. & Anr., 2013 AIR SCW 6633

'K'

K. Srinivas versus K. Sunita, (2014)16 SCC 34

K. Thimmappa & others vs. Chairman, Central Board of Directors, State Bank of India & another, (2001) 2 SCC 259

K. Venkateshwarlu Versus State of Andhra Pradesh, (2012) 8 Supreme Court Cases 73

K.P. Varghese v. ITO (1981) 4 SCC 173

K.S. Bhoopathy and others vs. Kokila and others, AIR 2000 SC 2132

K.V. Muthu Vs. Angamuthu Ammal (1997) 2 Supreme Court Cases 53

Kailash Chand and another v. Dharam Dass, (2005) 5 SCC 375

Kakhangai Kabui & Others Vs. Smt. Apanbi Kabuini and others, AIR 1968 Manipur 42

Kala Devi & others versus Bhagwan Dass Chauhan & others, 2014 ACJ 2626

Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982

Karamjit Singh vs. State (Delhi Administration), AIR 2003 SC 1311

Kashibai and another Vs. Parwatibai and others, 1996 (1) S.L.J. 315

Kavita versus Deepak and others, 2012 AIR SCW 4771

Kehar Singh and Ors. V. State (Delhi Administration), (1988) 2 SCC 609

Khuraijam Jugeswar Singh and another Vs. Smt. Chanabam Ongbi Tomu Devi and another, AIR 1968 Manipur 29

Kishore Singh Ravinder Dev etc. versus State of Rajasthan AIR 1981 SC 625

Kranti Associates Private Limited and another Vs. Masood Ahmed Khan and others, (2010) 9 Supreme Court Cases 496

Krishan vs. State of Haryana, (2013) 3 SCC 280

Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241

Kulwant Singh & Ors. versus Oriental Insurance Company Ltd., JT 2014 (12) SC 110

Kulwant Singh and others vs. Oriental Insurance Company Limited, (2015) 2 Supreme Court Cases 186

Kumar Majhi versus State 1981 Cr.LJ 1787

Kunha Yammed & others vs. State of Kerala & another, (2000) 6 SCC 359

Kuriya and another vs. State of Rajasthan, (2012)10 SCC 433

'L'

Lakhan vs. State of M.P. (2000)8 SCC 514

Lal Mandi v. State of W.B., (1995) 3 SCC 60

Lalita Kumari vs. Govt. of U.P. AIR 2014 SC 187

Land Acquisition Officer & Sub-Collector Gadwal Versus Shreelatha Bhoopal (Smt.) & another, (1997) 9 SCC 62

Land Acquisition Officer vs. Shivabai and others, AIR 1997 SCC 2642

Laxman Singh vs. Poonam Singh and others, (2004) 10 SCC 94

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

Liaquat Ali vs. Amir Mohammad & ors., Latest HLJ 2016 (HP) 831

Lonankutty Vs. Thomman and another, AIR 1976 SC 1645

'M'

M.B. Ramesh (dead) by LRs vs. K.M. Veeraje Urs (dead) by LRS and others (2013) 7 SCC 490

M.B. Sanghi Vs. High Court of Punjab & Haryana (91) 3 SCC 600

M.P. Steel Corporation vs. Commissioner of Central Excise (2015) 7 SCC 58

M.V. Thimmaiah and Others Vs. Union Public Service Commission and another (2008) 2 SCC 119

M/s M.Laxmi & Company vs. Dr.Anant R.Deshpande and another, AIR 1973 SC 171

M/s New Prem Bus Service versus Laxman Singh & another, Latest HLJ 2014 (HP) 579

M/s. Delux Enterprises versus H.P. State Electricity Board Ltd. & others, ILR 2014 (V) HP 970

M/s. Murudeshwara Ceramics Ltd. and another Vs. State of Karnataka and others AIR 2001 Supreme Court 3017

Madam Razak Vs. State of Bihar and others, AIR 2016 SC 122

Madan Gopal Kanodia versus Mamraj Maniram and others, (1977) 1 Supreme Court Cases 669

Madan Mohan Aggarwal v. Smt. Mansa Devi and others, 1985(2) PLR 206

Madan Razak vs. State of Bihar, AIR 2016 SCW 122

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

Madivallappa V. Marabad and others Vs. State of Karnataka, (2014) 12 Supreme Court Cases 448

Madras Institute of Development Studies and Another Vs. K. Sivasubramaniyan & ors, (2016) 1 SCC 454

Magan Bihari Lal v. The State of Punjab, 1977 Cri. L.J. 711

Mahangu Parsad Vs. Pravag Sah & Others, AIR 1975 Gauhati 40

Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Paritosh Bhupeshkumar Sheth and Others and Alpana V.Mehta vs. Maharashtra State Board of Secondary Education and Another, (1984)4 SCC 27

Mahender Singh Vs. Union of India (2010) 12 SCC 675

Mahesh Chaudhary Vs. State of Rajasthan, 2009 (4) SCC 443

Malati Sardar versus National Insurance Company Ltd. and others, AIR 2016 Supreme Court 247

Malik Mazhar Sultan and another Vs. Uttar Pradesh Public Service Commission & Others, 2008 (17) SCC 703

Mandal Revenue Officer vs. Goundla Venkaiah and another (2010)2 SCC 461

Maniven Devraj Shah versus Municipal Corporation of Brihan Mumbai 2012 AIR SCW 2412

Mannan Shaikh v. State of W.B. (2014)13 SCC 59

Mano Versus State of Tamil Nadu, (2007) 13 SCC 795

Manohar S/o Manikrao Anchule Vs. State of Maharashtra and another, (2012) 13 Supreme Court Cases 14

Manoharlal Vs. State of Madhya Pradesh, (2014) 15 Supreme Court Cases 587

Maqbool Hussain Vs. State of Bombay, AIR 1953 SC 325

Medicamen Biotech Ltd. and another Vs. Rubina Bose Drug inspector, 2008 (7) SCC 196

Megha Singh versus State of Haryana (1996) 11 SCC 709

Mehta Ravindrarai Ajitrai (Deceased) through his Heirs and LRs. and Others v. State of Gujarat (1989) 4 SCC 250

Mehta Ravindrarai Ajitrai (Deceased) through his Heirs and LRs. and Others v. State of Gujarat (1989) 4 SCC 250

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

Mohan Singh vs. State (FB) Rajasthan,1993 Cr.L.J. 3193

Mohd. Akbar Dar & Others Vs. State of J & K and others, AIR 1981 SC 1548

Mohd. Hussain vs. State of A.P. (2002)7 SCC 4141

Mohindar Singh versus State AIR 1960, Punjab 135 and Kanbi Nagji Kala versus State AIR 1956, Saurashtra 107

Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434

Mosiruddin Munshi vs. Md. Siraj and another, AIR 2014 SC 3352

Mst. Param Pal Singh through father versus M/s National Insurance Co. and another, 2013 AIR SCW 283

Mst. Rukhmabai vs. Lala Laxminarayan and others AIR (47) 1960 SC 335

Mt. Choti vs. State, AIR 1957 Rajasthan page 10

Mukehsbhai Gopalbhai Barot vs. State of Gujarat, (2010) 12 SCC 224

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

Munna Lal Jain & another versus Vipin Kumar Sharma & others, 2015 AIR SCW 3105

Munna Lal Jain and another vs. Vipin Kumar Sharma and others, JT 2015(5) SC 1

Munna Versus State of Madhya Pradesh, (2014) 10 Supreme Court Cases 254

Munnawar and others vs. State of U.P. (2010)5 SCC 451

'N'

N. Lokanadham Vs. Chairman, Telecom Commission & ors, (2008) 5 SCC 155

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

N.K.Wahi Vs. Shekhar Singh and others, 2007 (2) ACR 1346 (SC)

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

Nagawwa vs. Veeranna Shivalingappa, AIR 1976 SC 1947

Nanhar & others vs. State of Haryana, (2010) 11 SCC 423

Narender Kumar Vs. State (NCT of Delhi), (2012) 7 Supreme Court Cases 171

Narinder Singh v. State Punjab (2014) 6 SCC 466

Narsing Dass Tapadia Vs. Goverdhan Dass, AIR 2000 SC 2946

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

National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors., 2008 AIR SCW 906

National Insurance Company Ltd. versus Sinitha & Ors., 2012 AIR SCW 10

National Small Industries Corporation Ltd. vs. Harmeet Singh Paittal and another, (2010)3 SCC 330

Navnit Lal C. Javeri v. K.K.Sen AIR 1965 SC 1375

Nelson Fernandes & Ors. v. Special Land Acquisition Officer, South Goa & Ors. (2007) 9 SCC 447

New India Assurance Co. Ltd. versus C.M. Jaya and others, (2002) 2 Supreme Court Cases 278

New India Assurance Co. Ltd. versus Rula and others, AIR 2000 Supreme Court 1082

New India Assurance Co. Ltd. versus Shanti Bai (Smt) and others, (1995) 2 Supreme Court Cases 539

New India Assurance Company Ltd. versus Chanchal Devi & ors., Latest HLJ 2014 (HP) 250

New India Assurance Company versus Smt. Veena Devi & ors., Latest HLJ 2009 (HP) 770

Niamat Singh vs. Darbari Singh and others 1956 AIR (43) 1956 Punjab 231

Nichhalbhai Vallabhai and others vs. Jaswantlal Zinabhai and others, AIR 1966 SC 997

Nicholas V. Menezes Vs. Joseph M. Menezes and others (2009) 4 Supreme Court Cases 791

Nihal Singh versus state of Punjab, (2013) 14 SCC 65

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

Ningawwa vs. Byrappa Shiddappa Hireknrabar AIR 1968, SC 956

Niranjan Singh and others vs. The Financial Commissioner, Punjab (Revenue) and others 1979 PLJ 352

North East Karnataka Road Trans. Corpn. versus Vijayalaxmi and others, 2012 ACJ 1968

Nutan Arvind Vs. Union of India & ors (1996) 2 SCC 488

'O'

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

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

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

Oriental Insurance Company Ltd. versus Smt. Rikta alias Kritka & others, ILR 2014 (VI) HP 1263

Oriental Insurance Company versus Gulam Mohammad (since deceased) & others, Latest HLJ 2014 (HP) 244

Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (IV) HP 1149

Oriental Insurance Company versus Sudesh Kumari and others, 2014 (2) Shim. LC 918
Oryx Fisheries Private Limited Vs. Union of India and others, (2010) 13 Supreme Court Cases 427

'P'

P.A. Inamdar and others Vs. State of Maharashtra and others, 2005(6) SCC 517
Panchanand Mandal alias Pachan Mandal & others vs. State of Jharkhand, (2013) 9 SCC 800
Paniben vs. State of Gujarat, AIR 1992 SC 1817
Paper Products Ltd. v. CCE (1999) 7 SCC 84
Paras Yadav vs. State of Bihar, (1992)2 SCC 126
Parisons Agrotech Private Limited and Another vs. Union of India and Others, (2015)9 SCC 657
Pawan Kumar Aggarwal Vs. State of Punjab & Ors. JT 2016(4) SC178
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 SCC 217
Periyar and Pareekanni Rubbers Ltd. Versus State of Kerala, (1991) 4 SCC 195
Prabhjot Singh Mand & others vs. Bhagwant Singh & others, (2009) 9 SCC 435
Pradeep Kumar Rai And Others vs. Dinesh Kumar Pandey and others (2015) 11 SCC 493
Prandas v. The State, AIR 1954 SC 36
Prasanta Kumar Sarkar Vs. Ashish Chatterjee and another, 2010 (14) SCC 496
Prem Singh vs. Birbal (2006) 5 SCC 353
Prithu alias Prithi Chand and another vs. State of Himachal Pradesh, (2009)11 SCC 588
Pudhu Raja and another Versus State Represented by Inspector of Police, (2012) 11 SCC 196
Pulukuri Kottaya and others v. Emperor, AIR (34) 1947 Privy Council 67
Puttamma and others versus K.L. Narayana Reddy and another, 2014 AIR SCW 165

'R'

R & M Trust vs. Koramangala Residents Vigilance Group and others, (2005) 3 SCC 91
R. Hanumaiah and another vs. Secretary to Government of Karnataka, Revenue Department and others (2010) 5 SCC 203
R. Kalyani vs. Janak C. Mehta, (2009)1 SCC 516
R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Rabindra Nath Rao, 1995 Criminal Law Journal 1187
Radha Mohan Lal v. Rajasthan High Court (2003) 3 SCC 427
Radhu Vs. State of Madhya Pradesh, (2007) 12 Supreme Court Cases 57
Ragu Thilak D. John vs. S.Rayappan and others, AIR 2001 SC 699
Rajan versus John, 2009 (2) T.A.C. 260 (Ker.)
Rajaram Prasad Yadav v. State of Bihar (2013)14 SCC 461
Rajeevan & another vs. State of Kerala, (2003) 3 SCC 355
Rajendra Kumar Mohanty Vs. P.K.Das, 1998 Cri. L.J 3920
Rajendra Singh Verma Vs. Lieutenant Governor (NCT of Delhi) and others (2011) 10 SCC 1.
Rajmata Vijaya Raje Scindia Vs. State of M.P. and others, 2003 (12) SCC 429
Rakesh Kumar & Etc. v. United India Insurance Company Ltd. and others. Etc. Etc., JT 2016 (6) SC 504
Ram Kishan Vs. Tarun Bajaj and others 2014 AIR SCW 1218
Ram Nath Sao @ Sahu and others versus Govardhan Sao and others AIR 2002 SC 1201

Ram Parkash Sharma Vs. State of Haryana, AIR 1978 SC 1282

Ram Saran Lall and others Vs. Domini Kuer and others, AIR 1961 SC 1747

Ramanand Prasad Singh & another Vs. Union of India & others (1996) 4 SCC 64

Ramanbhai B.Patel and others Vs. S.R.Sharma and another, 1997 (99) BOMLR 438

Ramavati vs. State of Bihar, AIR 1983 SC 164

Ramchandra Shankar Deodhar vs. State of Maharashtra, (1974) 1 SCC 317

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

Ramesh Chander Kaushal vs. Mrs Veena Kaushal and others, AIR 1978 SC 1807

Rameshwar Vs. State of Rajasthan AIR 1952 SC 54

Rammi alias Rameshwar vs. State of Madhya Pradesh, AIR 1999 SC 3544

Ramrajsingh Vs. State of M.P., 2009 (2) ACR 1650 (SC)

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

Ranadey Micronutrients v. CCE (1996) 10 SCC 387

Ratansinh Dalsukhbhal Nayak Vs. State of Gujarat, AIR 2004 Supreme Court 23

Ravindra Kaur vs. Achant Swarup, AIR 1966 All 133 title

Registrar General, Patna High Court Vs. Pandey Gajendra Prasad and others, AIR 2012 SC 2319

Rekha Vs. State of Tamil Nadu, 2011 (2) ACR 1592 (SC)

Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

Rikhi Ram and another versus Smt. Sukhrania and others, AIR 2003 SC 1446

Rishi Pal Singh vs. State of U.P., AIR 2014 SC 2567

Rishipal Singh Vs. State of U.P., AIR 2014 SC 2567

Ritesh Tewari & Anr. v. State of Uttar Pradesh & Ors., (2010) 10 SCC 677

Rubyana alias Smita Sanjib Bali Vs. State of Maharashtra and others, 1996 Crl. L.J.148

Russell Vs. Russell (1924) AC 687

'S'

S. J. Coke Industries Private Limited & others vs. Central Coalfields Limited & others, (2015) 8 SCC 72

S. Jeevanantham versus Sate (2004) (5) SCC 230

S. Sethu rathinam vs. Barbara, 1971 (3) SCC 923

S.A. Venkataraman Vs. Union of India, AIR 1954 SC 375

S.D.O. Grid Corporation of Orissa Ltd. and ors. versus Timudu Oram, 2005 AIR(SCW) 3715

S.K.Sinha Chief Enforcement Officer Vs. M/s Videocon International Ltd., AIR 2008 SC 1213

S.K.Sundaram: IN RE (2001) 2 SCC 171

S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and another, 2005 (3) ACR 3082

S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla, 2005(8) SCC 89

S.N.D.P. Union v. Vamana Naik, 1994(1) RCR 157

S.R. Srinivasa and others Vs. S. Padmavathamma, (2010) 5 Supreme Court Cases 274

Sadhu Saran vs. State of U.P., AIR 2016 SCW 1160

Sangara Bonia Sreen Vs. State of Andhra Pradesh,1997 (5) Supreme Court Cases 348

Sangeetaben Mahendrabhai Patel Vs. State of Gujarat and another, 2012 (7) SCC 621

Sangili alias Sanganathan Vs. State of Tamil Nadu, (2014) 10 Supreme Court Cases 264

Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702 Apex Court DB 702
Sanjaysingh Ramrao Chavan Versus Dattatray Gulabrao Phalke and others, (2015) 3 SCC 123
Sankalchan Jaychandbhai Patel and others vs. Vithal Bhai Jaychandbhai Patel (1996) 6 SCC 433
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Saraswati Devi and others Vs. State of H.P. and others, Latest HLJ 2015 (HP) 1276
Sarla Verma and others versus Delhi Transport Corporation and another AIR 2009 SC 3104
Sat Pal v. Ram Kumar and others, 1992 PLJ 5
Satosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Satpal Singh Versus State of Haryana, (2010) 8 SCC 714
Satya Devi versus Bakshi Ram & ors., 2009 (2) Shim.LC 381
Satyadhyan Ghosal Vs.Deorajin Debi and another, AIR 1960 SC 941
Savita versus Bindar Singh & others, 2014 AIR SCW 2053
Savita versus Binder Singh & others, 2014 AIR SCW 2053
Sawarni (Smt.) vs. Inder Kaur (Smt.) and others, (1996) 6 SCC 223
Saya alias Sultan Begum vs. State of Maharashtra, (2007)12 SCC 562
Secretary, State of Karnataka and others versus Uma Devi (3) and others, (2006) Vol 4 SCC 1
Shakila Abdul Gafar Khan (Smt) versus Vasant Raghunath Dhoble and another, (2003) 7 SCC 749
Shakuntala and others Vs. Surindeer Chand and others, AIR 2006 Himachal Pradesh 108
Shakuntla Devi Vs. Kamla and others (2005) 5 SCC 390
Sham Shankar Kankaria Versus State of Maharashtra, (2006) 13 SCC 165
Shankarlal vs. State of Rajasthan, (2004) 10 SCC 632
Shanti Devi & anr. versus National Insurance Company & ors, 2008 (2) Shim.LC 125
Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116
Shashank Bhargava Vs. State of Punjab and another, 2005 (14) criminal 87
Shashi Gupta & Anr. Vs. State of Haryana & Ors. JT 2016(5) SC 196
Shashi Kumar and another versus State of H.P. Latest HLJ 2015 (HP) 596
Shashi Kumar Banerjee and Others vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and others, AIR 1964 SC 529
Sheela Devi and others vs. Lal Chand and another, (2006) 8 Supreme Court Cases 581
Sher Singh & another vs. State of Punjab, (2008) 4 SCC 265
Shiam Singh vs. Chaman Lal, 2011 (Suppl.) Him. L.R. 2065
Shivaji Dayanu Patil and another versus Vatschala Uttam More, 1991 ACJ 777
Shivaji Sahabrao Bobade and another Versus State of Maharashtra, (1973) 2 SCC 793
Shyam Sunder Lal Vs. Shagun Chand, AIR 1967 Allahabad 214
Shyamlal Vs. Takhatmal, AIR 1957 M.P. 98
Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and others, AIR 1976 SC 1947
Sohan Lal Passi versus P. Sesh Reddy and others, AIR 1996 Supreme Court 2627
Sohawa Singh vs. Kesar Singh and others, AIR 1932 Lahore 586
Sohrab and another vs. The State of Madhya Pradesh, AIR 1972 SC 2020
Soma Devi v. Guin Devi, AIR 2003 HP 158
Special Director and another versus Mohd. Ghulam Ghouse and another, 2004 AIR(SCW) 416
Special Land Acquisition Officer Versus Karigowda and others, (2010) 5 SCC 708

Sridevi and Others vs. Jayaraja Shetty and Others, (2005)2 SCC 784

Srinivasa Bhat (Dead) by L.Rs. & Ors. vs A. Sarvothama Kini (Dead) by L.Rs. & Ors., 2010 AIR(SC) 2106

Standard Chartered Bank Vs. Andhra Bank Financial Services Limited and others (2016) 1 Supreme Court Cases 207

State (NCT of Delhi) vs. Shiv Kumar Yadav and another (2016)2 SCC 402

State by Inspector of Drugs Chidambaram Vs. J.Mohamed Rafic, 2005 (2) GLR 1518 2012 Cri.L.J 4115

State of A. P. vs. Shaik Moin, (2004) 6 SCC 34

State of Bihar Vs. Ramesh Singh, AIR 1977 SC 2018

State of Bombay Vs. S.L. Apte, AIR 1961 SC 578

State of Delhi Vs. Gyan Devi & Others, AIR 2001 SC 40

State of Gujarat Versus Kishanbhai and others, (2014) 5 SCC 108

State of H.P. versus Shesh Ram 2015 (2) HLR (DB) 720

State of H.P. vs Kurban Khan 2015(1) Criminal Court Case 598, (2015) Criminal Law Journal 183 H.P.

State of H.P. Vs. Hanacho alias Stewert Latest HLJ 2004(HP) (DB) 642

State of H.P. vs. Lekh Raj and another, (2000)1 SCC 247

State of H.P. vs. Ram Sagar Yadav, AIR 1985 SC 416

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

State of Haryana and others Vs. Bhajan Lal and others, 1992 Supp (1) SCC 335

State of Haryana vs. Bhajan Lal, (1992) Supp 1 SCC 335

State of Haryana vs. Bhajan Lal, AIR 1992 SC 604

State of Haryana Vs. Brij Lal Mittal and others, AIR 1998 SC 2327

State of Haryana Vs. Unique Farmaid P.Ltd. ors., 1999 (2) ALD (Cr.) 908

State of Himachal Pradesh and another versus Sakshi Sharma etc. and others 2014 (Supp) Shim. LC 563

State of Himachal Pradesh and others vs. Ajay Vij and others, 2011(1) Shimla Law Case 452

State of Himachal Pradesh versus Mehboob Khan 2013(3) Him.L.R. (FB) 1834

State of Jammu & Kashmir versus R.K. Zalpuri and others, 2015 9 JT 214

State of Karnataka & another v. K.C. Subramanya & others, (2014) 13 SCC 468

State of Karnataka Vs. C.B.Sheelavanth, ILR 1991 Karnataka 2368

State of Karnataka vs. Laxuman, AIR 2006 Supreme Court 24

State of Karnataka vs. Rameshwara Rice Mills, AIR 1987 SC 1359

State of M.P. vs. Awadh Kishore Gupta. (2004)1 SCC 691

State of M.P. Vs. Johari & Others, AIR 2000 SC 665

State of M.P. vs. Surendra Kori, (2012)10 SCC 155

State of Madhya Pradesh versus Ramesh and Another, (2011) 4 Supreme Court Cases 786

State of Madhya Pradesh Vs. Shrikant Chapekar, JT 1992 (5) SC 638

State of Madhya Pradesh Vs. Surendra Kori, 2012 (10) SCC 155

State of Maharashtra and Ors. V. Som Nath Thapa and Ors. (1996) 4 SCC 659

State of Maharashtra and others Vs. Raghunath Gajanan Waingankar (2004) 6 SCC 584

State of Maharashtra Vs. Priya Sharan Maharaj & Others, AIR 1997 SC 2041

State of NCT of Delhi Vs. Sanjay, AIR 2015 SC 75
State of Orissa vs. Choudhuri Nayak (2010) 8 SCC 796
State of Orissa Vs. Debendra Nath Padhi, AIR 2005 SC 359
State of Punjab V. Shiv Ram and others (2005) 7 Supreme Court Cases 1
State of Punjab versus Bawa Singh, 2015(2) Criminal Court Cases 765 (SC)
State of Punjab Vs. Gurmit Singh and others, (1996) 2 Supreme Court Cases 384
State of Rajasthan Versus Roshan Khan and others, (2014) 2 SCC 476
State of Rajasthan vs. Bhanwar Singh, (2004) 13 SCC 147
State of Rajasthan vs. Om Parkash, AIR 2007 SC 2257
State of T.N. vs. Thirukkural Perumal, (1995)2 SCC 449
State of Tripura and others vs. Arabinda Chakraborty and others, (2014) 6 SCC 460
State of U.P. vs. M.K. Anthony, AIR 1985 SC 48
State of U.P. vs. Sukhbasi, 1985 Supp. SCC 79
State of Uttar Pradesh & others vs. Arvind Kumar Srivastava & others, (2015) 1 SCC 347
State of Uttar Pradesh Versus Manoj Kumar Pandey, (2009) 1 SCC 72
State of Uttar Pradesh vs. Santosh Kumar and others, (2009)9 SCC 626
State of Uttaranchal vs. Balwant Singh Chaufal and Others, (2010)3 SCC 402
State versus Anil Kumar 2015 Criminal Court Case 300 HP. DB.
State versus N.S. Gnaneswaran (2013) 3 Supreme Court Cases 594
State versus V. Jayapaul (2004) 5 SCC 223
Sudhir Mahajan versus United India Insurance Company Ltd. & anr., 2007 (2) Shim.LC 305
Sujit Biswas vs. State of Assam, (2013) 12 SCC 406
Sukhdei (Smt.) (dead) by LRs vs. Bairo (dead) and others (1999) 4 SCC 262
Sukhwant Kaur and others versus Sher Singh and another, 2008 (3) Shim.LC 93
Sunil Kumar and another vs. ram Parkash and others, AIR 1988 Supreme Court 576
Sunil Vs. State of Himachal Pradesh, Latest HLJ 2010 (HP) 207
Supdt. & Remembrancer of Legal Affairs Vs. Anil Kumar Bhunja, AIR 1980 SC 52
Suraj Deo Oza and others vs. State of Bihar, AIR 1979 SC 1505
Suraj Prakash Bhasin vs. Smt. Raj Rani, AIR 1981 SC 485
Suresh Chand vs. Siri Chand Jai, 2000 Law Suit (Del) 913
Suresh Kumar v. Town Improvement Trust, Bhopal [(1989) 2 SCC 329
Suresh Versus State of Haryana, (2009) 13 SCC 538
Surinder Kumar Arora and another vs. Dr. Manoj Bisla & Ors. 2012 AIR SCW 2241
Sushil Kumar vs. Union of India, (2005)6 SCC 281
Syad Akbar versus State of Karnataka, (1980) 1 Supreme Court Cases 30

'T'

Taramani Parakh vs. State of M.P. JT (2015)3 SC 185
Teja Singh Vs. Chhoto, 1981 Criminal Law Journal 1467
The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another, AIR 2003 Supreme Court 4172
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

The Working Friends Cooperative House Building Society Ltd. Vs. The State of Punjab & Ors. JT 2015(9) SC 357

The Workmen of Bhurkunda Colliery of M/s Central Coalfields Ltd. v. The Management of Bhurkunda Colliery of M/s Central Coalfields Ltd., (2006) 3 SCC 297

Tilak Raj Vs. State of Himachal Pradesh, AIR 2016 Supreme Court 406

Tribhuvanshankar vs. Amrutlal, (2014) 2 SCC 788

Trimukh Maroti Kiran versus State of Maharashtra, (2006) 10 SCC 681

Tukaram Kana Joshi and others vs. Maharashtra Industrial Development Corporation and others, (2013) 1 SCC 353

Tulsa Singh Vs. Agya Ram & ors,1994 (2) Sim.L.C. 434

'U'

U.P. Pollution Control Board & others vs. Kanoria Industrial Ltd. & another, (2001) 2 SCC 549

U.P.S.R.T.C. vs. Km. Mamta and others, AIR 2016 SC 948

Udham Singh Vs. Ram Singh and Another (2007) 15 SCC 529

Umesh Sharma Vs. S.G.Bhakta Drugs Inspector and others, 2003 Bom CR (Cri.) 1522

Union of India & Another vs. Lieutenant Colonel P.K. Choudhary and others (2016) 4 SCC 236

Union of India & Another Vs. S.K. Goel and others (2007) 14 SCC 641

Union of India & ors Vs. S.P. Nayyar, (2014) 14 SCC 370

Union of India and another Vs. Jai Kishun Singh (2014) 10 SCC 352

Union of India and another vs. Narendra Singh, (2008) 2, SCC 750

Union of India and Anr. vesus Kunisetty Satyanarayana, 2007 AIR (SCW) 607

Union of India and others versus Arviva Industries India Limited and others (2014) 3 SCC 159

Union of India v. Azadi Bachao Andolan (2004) 10 SCC 1

Union of India v. Ibrahim Uddin and another, (2012) 8 SCC 148

Union of India v. Pramod Gupta (Dead) by LRs. & Ors. [(2005) 12 SCC 1

Union of India vs. Harinder Pal Singh and others 2005(12) SCC 564

Union Public Service Commission Vs. Hiranyalal Dev and others AIR 1988 SC 1069

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281

United India Insurance Co. Ltd. versus Laxmamma & Ors., 2012 AIR SCW 2657

United India Insurance co. Ltd. Versus Shila Datta & Ors., 2011 AIR SCW 6541

United India Insurance Co. Ltd. versus Sunil Kumar and another 2013 AIR SCW 6694

United India Insurance Co. Ltd., Shimla versus Tilak Singh and others, (2006) 4 SCC 404

United India Insurance Company Limited versus Smt. Samitra Devi & others, Latest HLJ 2015 (HP) 85

United India Insurance Company Ltd. versus Smt. Kulwant Kaur, Latest HLJ 2014 (HP) 174

United India Insurance Company Ltd. Versus Smt. Sanjana Kumari & others, Latest HLJ 2014 (HP) 1140

United India Insurance Company Ltd. versus Sunil Kumar & Anr., 2013 AIR SCW 6694

United Phosphorus Ltd Vs. State of Maharashtra and others, 2009 (111) BOMLR 973

UPSC Vs. K.Rajaiah (2005) 10 SCC 15

UPSC Vs. L.P. Tiwari (2006) 12 SCC 317

'V'

Ved Prakash Garg versus Premi Devi and Others, (1997) 8 Supreme Court Cases 1,

Velamuri Venkata Sivaprasad (Dead) by LRs V. Kothuri Venkateshwarlu (Dead) by LRs and others (2000) 2 Supreme Court Cases 139

Velaxan Kumar Vs. Union of India and others (2015) 4 Supreme Court Cases 325

Venkaiah Chowdary Nannapaneni and others Vs. State of Maharashtra, 2003 AllMR (Cri) 758

Vijay Thakur Vs. State of Himachal Pradesh, (2014) 14 Supreme Court Cases 609

Vijay Kumar Gupta vs. State of Himachal Pradesh and Others, decided on 09.01.2015,

Vijay Pal vs. State (Government of NCT of Delhi), (2015) 5 SCC 749

Vimala (K) vs. Veeraswamy (K), 1991 (2) SCC 375

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

Vinod Kumar Vs. Gangadhar (2015) 1 Supreme Court Cases 391

Vishal Pharmaceuticals and another Vs. State of M.P, ILR (1999) MP 704

Vishram Singh Raghubanshi Vs. State of Uttar Pradesh (2011) 7 SCC 776

Vishwanath Sood vs. Union of India, AIR 1989 SC 952

'W'

Wardington Lyngdoh and others vs. The Collector, Mawkyrwat, AIR 1995 Supreme Court 2340

'Y'

Yamanaji H. Jadhav Vs. Nirmala (2002) 2 SCC 637

Yool Vs. Ewing (1904 1 L.R. 434)

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

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

Criminal Appeal No. 4072 of 2013
Reserved on : 24.06.2016
Date of Decision: 01.08.2016

Indian Penal Code, 1860- Section 306 and 498-A- Deceased was married to the accused for 17-18 years prior to the commission of suicide by her- relationship between the parties was cordial for 8-10 years but the accused started harassing and torturing the deceased by giving beating to her under the influence of liquor- deceased committed suicide- accused was tried and acquitted by the trial Court- held, in appeal that allegations levelled by the prosecution witnesses are general in nature, which are not sufficient to hold the accused guilty of cruelty - accused and deceased were living together for 17-18 years and they were blessed with one son and one daughter – matter was never reported to Police, Panchayat or any other Authority- a single instance of quarrel, 2-3 days prior to the commission of suicide will not amount to cruelty - words uttered in quarrel or anger cannot be termed as cruelty sufficient to drive a person to commit suicide- instigation to commit suicide was also not established- trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-4 to 23)

For the appellant : Mr. Neeraj Kumar Sharma, Deputy Advocate General.
For the respondent : None.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

Aggrieved by acquittal of respondent/accused vide judgment, dated 01.05.2013, passed by learned Additional Sessions Judge-II, Kangra at Dharamshala, District Kangra, H.P. in RBT Sessions Case No. 75-G/VII/2010/2009 in case FIR No. 168/2007 registered under Sections 498-A and 306 of Indian Penal Code, in P.S. Jawalamukhi, District Kangra, the State has preferred present appeal.

2. In present case, deceased Krishna Devi was married with respondent Vijay Kumar about 17-18 years prior to committing suicide by her. Couple was blessed with one son and a daughter out of their wedlock. As per prosecution story after marriage relation of husband and wife were cordial for 8-10 years. Thereafter respondent had started harassing and torturing deceased by giving beatings under influence of liquor and by not providing any maintenance to her. Due to harassment and maltreatment by respondent, deceased had committed suicide on 23.10.2008. Respondent had telephonically informed his father-in-law about death of deceased. On the basis of statement of father of deceased FIR under Sections 498-A and 306 IPC was registered. After completion of investigation challan was presented in the Court and respondent was charge sheeted under Sections 498-A and 306 IPC. On conclusion of trial respondent has been acquitted by trial Court.

3. We have heard learned counsel for parties and also have gone through record.

4. PW-1 Gian Chand father of deceased had deposed that his deceased daughter was married with Vijay Kumar about 17-18 years back and they were blessed with two children. After 8-10 years of marriage, respondent had left his job and had come to his house. He had stated that respondent was not paying any maintenance to his daughter and had started beating

her. On reporting matter to Panchayat, a compromise was effected between parties on intervention of Panchayat, but after few days, respondent had again started beating his daughter which was telephonically conveyed to him by his daughter. Thereafter, his wife (mother) of deceased had visited to advise respondent. He had further stated that about two years back at about 8.00 pm respondent informed about death of his daughter on telephone whereupon they informed the police and gone to house of respondent where they found that deceased had committed suicide by consuming poison. He has alleged that deceased had consumed poison because of torture of respondent.

5. PW-4 Rajender Kumar, real brother and PW-5 Ranjeet Singh cousin had stated that after marriage respondent used to beat and torture their sister and she used to tell them about this. They had not stated even a single instance of torture, beating or harassment and also not about any reason for beating deceased by respondent.

6. PW-6 Madan Lal (Jija) and PW-8 Pritam Chand Cousin had also deposed in the like manner except adding incident of quarrel between deceased and respondent at the time of marriage of Vinod son of PW-6 Madan Lal.

7. In cross-examination, PW-1 Gian Chand, PW-4 Rajinder Kumar and PW-8 Pritam Chand had admitted that after marriage, deceased and respondent had been visiting their houses on every function. PW-1 and PW-8 had admitted that at the time of death of deceased and thereafter her children were residing with respondent. PW-1 had also admitted that respondent had left his job on account of old age and sickness of his parents. He had also admitted that respondent used to drink on occasion of marriage function. He had stated that he had not made any written complaint before Pradhan and police and no Panchayat had ever called respondent. He had admitted that respondent deceased and their children had attended one marriage three-four days prior to death of his daughter. PW-8 had stated that respondent had made a telephonic call to PW-1 informing death of deceased by saying that he himself also was going to consume poison.

8. PW-3 Chander Kanta was Ward Panch of Gram Panchayat Pihari. She was declared hostile for resiling from her previous statement recorded by Police but in examination-in-Chief she had stated that PW-15 Roshni Devi mother of respondent had come to her and told that her daughter-in-law (Krishna deceased) and her son Vijay were saying to consume poison and both of them would die. Thereupon, she had tried to contact Pradhan and had visited house of respondent where Krishna was found lying dead in bed.

9. PW-9, Tarlok Chand, a Private RMP Practitioner, was called by PW-6 Madan Lal to house on 21.10.2008 at about 8.30. PM by telling that respondent had consumed 'Phenol' but on checking it was found that respondent had not consumed 'Phenol' but beer.

10. Allegations levelled by PW-1 PW-4, PW-5, PW-6 and PW-9 are general in nature which cannot be treated sufficient to hold respondent guilty for cruelty under Section 498-A and/or also to convict respondent under Section 306 of IPC.

11. Respondent and deceased were living together for 17-18 years and were blessed with one son and one daughter and there was not even a single instance when matter was reported to Police, Panchayat or any other Authority. Prosecution witnesses had also failed to point out any specific instance of quarrel, harassment or beating to deceased by respondent.

12. A single instance of quarrel amongst couple in the marriage of son of PW-6 that too 2-3 days prior to committing suicide by deceased cannot be treated as cruelty, harassment or torture so as to force deceased to commit suicide. Prosecution has to establish that instigation by respondent was so directly co-related and proximate with act of suicide that it could be safely inferred that deceased had committed suicide only on account of such instigation. General allegations of harassment and torture however strong may be do not made out any case of abetment to commit suicide.

13. To prove cruelty subjected to deceased by respondent, prosuection has relied upon statement of PW-1 Gian Chand father of deceased, PW-4 Rajender Kumar brother, PW-5 Ranjit Singh cousin PW-6 Madan Lal brother in law and PW-8 Pritam Chand cousin of deceased. Prosuection has also examined PW-2 Arjun Singh son, PW-7 Usha Devi daughter and PW-15 Roshni Devi mother in law of deceased. Besides this, PW-3 Chander Kanta Ward Panch of Pihari Panchayat has also been examined by prosuection.

14. PW-2 Arjun Singh, PW-7 Usha Devi and PW-15 Roshni Devi were declared hostile on resiling from their statements recorded by police under Section 161 Cr. P.C. These witnesses were subjected to cross examination by learned public prosecutor. These witnesses were present in the house on the day on which deceased had committed suicide and were also residing with deceased and respondent prior to day of incident. In their statements it had emerged that respondent Vijay Kumar, deceased PW-2 Arjun Singh and PW-7 Usha Devi had attended marriage of Vinod Kumar son of PW-6 Madan Lal brother in law of deceased (Jija) w.e.f. 18.10.2008 to 20.10.2008. On 21st October, 2008 some altercations had taken place between husband and wife and respondent had pretended that he had consumed poison where upon deceased had called PW-6 Madan Lal (her Jija), her sister Saroj and PW-9 Tarlok Chand, a private RMP Practitioner. However, on check up it was fond that respondent had not consumed poison but beer.

15. There is no specific incident on record indicating quarrel between husband and wife amounting cruelty for which respondent could be held liable for subjecting deceased to cruelty driving her to commit suicide. There is also no evidence of even general behaviour attracting provisions of Sections 498-A and/or 306 IPC.

16. PW-2 had also admitted suggestions of Public Prosecutor that when his mother started weeping, respondent had come there and said that if she would die then he would also die.

17. On the basis of evidence, available on record it can only be said that there was some quarrel between husband and wife on 21.10.2008 and both of them were expressing desire to commit suicide but at the same time both of them were also trying to save each other as on doubt of consumption of poison by respondent, deceased had called private RMP Practitioner and her sister and brother-in-law (Jija) to save life of respondent. Respondent had also expressed his desire to die in case of death of deceased.

18. The words uttered in quarrel or in spur of moment or in anger cannot be treated as a cruelty driving a person to commit suicide. As discussed above, there is no allegation of demand of dowry or any other valuable article of property nor there is any willful conduct of such a nature as was likely to derive deceased to commit suicide. Therefore, there is no evidence to convict respondent under Section 498-A IPC. Before parting with this case it is necessary to held that observations of learned trial Court that 'mere harassment by itself is not cruelty and it is only when harassment is shown to have been given for the propose of coercing a woman to meet the demand of dowry is cruelty' is contrary to provision of law and cruelty can be there even in absence of demand of dowry as provided in explanation (a) to Section 498-A. However, in present case, there is no evidence to bring case under ambit and scope of explanation (a) and (b) in proviso to Section 498-A IPC.

19. For convicting a person under Section 306 of IPC prosecution has to establish that instigation by a person was so direct, co-related and proximate with the act of suicide that it can be safely inferred that deceased had committed suicide only on account of such instigation. Mere harassment or every quarrel between husband and wife would not constitute the offence under Section 306 of Indian Penal Code. Mere fact that some quarrel had taken place between deceased and respondent with threatening to each other to commit suicide cannot be treated as abetment to commit suicide so as to attract conviction of respondent under Section 306 IPC.

20 In present case, prosecution evidence is lacking evidence so as to hold respondent guilty under Sections 498-A and 306 of Indian Penal Code.

21. Prosecution has failed to prove any omission or commission on the part of respondent beyond reasonable doubt so as to attract provision of Sections 498-A and Section 306 of Indian Penal Code.

22. Prosecution has failed to prove guilt of accused beyond all reasonable doubt and there is no merit in the appeal. There is no illegality or perversity in impugned judgment. Learned trial Court has appreciated evidence on record completely and correctly.

23. Allegations as made against respondent are not trustworthy, believable, convincing and therefore cannot be treated as cogent, reliable and convincing to convict the respondent under Sections 498-A and 306 of the Indian Penal Code.

24. The present appeal, devoid of any merit, is dismissed, so also the pending applications, if any. Bail bonds, if any, furnished by the accused are discharged. Records of the Court below be sent back forthwith.

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

The H.P. State Forest Development Corp. & Anr. .....Petitioners.

Versus

Rosin & Turpentine Factory Employees Union & Anr. .....Respondents.

CWP No. 7931 of 2010.
Date of Decision:05.08.2016.

Industrial Disputes Act, 1947- Section 25- Rosin & Turpentine Factory Employees Union had been demanding remote locality/special compensatory allowance at par with the Central Government employees serving at different areas- this demand was not accepted by H.P. Forest Corporation- a dispute arose, which was referred to Industrial Tribunal-cum-Labour Court, Shimla- claim was allowed and corporation was directed to grant special compensatory allowance- aggrieved from the order, present writ petition has been filed- held, that there are two types of establishments in factory namely ministerial establishment and industrial establishment- ministerial establishment is governed by the pay and allowances of the Himachal Pradesh Government and Industrial establishment is governed by central pattern of pay scales and other allowances- evidence of the Union proved that they are governed by the Central Government pay pattern and allowances and have been getting remote locality/compensatory allowances on Central Government pattern- earlier this allowance was not revised- plea that special compensatory allowance was being paid unauthorizedly is not acceptable- Tribunal had rightly passed the award on the basis of the evidence- finding of fact recorded by the Tribunal on the basis of appreciation of evidence cannot be questioned in writ proceedings- petition dismissed.

(Para-10 to 22)

Case referred:
Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157

For the petitioners: Mr. Prany Partap Singh,Advocate.
For the respondents: Mr. Nimish Gupta, Advocate, for respondent No. 1.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Petitioner being aggrieved with the award dated 27.07.2010 passed by Industrial Tribunal-cum-Labour Court, Shimla, camp at Nahan in Reference No. 213 of 2002, has

approached this Court by way of instant petition filed under Article 226 of Constitution of India, praying therein for following main relief:-

> "a) That the award of the learned H.P. Industrial Tribunal-cum-Labour Court, Shimla in Ref. No. 213 of 2002 in the reference titled The General Secretary, Mazdoor Union Sharmik Sanghthan Biroja Factory, Nahan, District Sirmaour, H.P. versus The General Manager, Rosin & Turpentine Factory, Nahan, District Sirmaur, H.P. be quashed and set aside.

2. Briefly stated facts as emerged from the record are that Rosin & Turpentine Factory Employees Union through its General Secretary, District Sirmaur (here-in-after to be referred as 'Respondent-Union') have been demanding remote locality/special compensatory allowance at par with the Central Government employees serving in/at different places in the State of Himachal Pradesh like the employees of the Telephone Department, MES and Nahan Foundry etc. Since H.P. Forest Corporation did not concede to the demand of the Respondent-Union, dispute arose between Respondent-Union as well as petitioner and ultimately reference was made to the Industrial Tribunal-cum-Labour Court, Shimla. Reference for adjudication sent by the appropriate Government to the Industrial Tribunal-cum-Labour Court is as under:-

> *"Whether the workmen of Rosin & Turpentine Factory, Nahan are entitled to the compensatory allowance w.e.f. 1.10.1985 as given by the Central Government to its employee? If yes, from which date such allowance is admissible to workmen of above Factory?"*
>
> *"If not, then whether the workmen of above factory are entitled to the compensatory allowance as given by the H.P. Government to its clerical staff? If so, from which date such allowance is admissible?"*
>
> *"If not, then what type of compensatory allowance the above workmen are entitled to and from which date?"*

3. Pursuant to aforesaid reference having been made to the Industrial Tribunal-cum-Labour Court, Shimla, Respondent-Union filed statement of claim stating therein that in Rosin & Turpentine Factory at Nahan (here-in-after to be referred as 'Factory) there are two types of establishments (1) Ministerial establishment governed by the pay and allowances of the Himachal Pradesh Government; (2) Industrial establishment comprising of the industrial workers in the manufacturing process and governed by the central pattern of pay scales and other allowances. Respondent-Union also stated in their claim petition that as far as members of the respondent-Union are concerned they fall in the second category i.e. industrial establishment. Respondent-Union also averred in their claim that the Government of India granted locality/special compensatory allowance to the Central Government Employees posted at Shimla and its suburbs @ Rs. 75/- per month (minimum) and Rs. 300/- (maximum) as per pay range of the employees w.e.f. 1.10.1985 and the said allowance was increased to Rs. 150/- per month (minimum) and Rs. 650/- maximum w.e.f. 1.1.1986 on the revision of the pay scales of the Central Government employees. It also emerges from the claim petition that Central Government employees posted at Kasuali had challenged the notification of the Central Government before Central Administrative Tribunal (hereinafter referred to as "CAT') on the ground that same was violative of Article 14 of the Constitution of India because the grant of such benefit only to the employees posted at Shimla is discriminatory and in violation of 14 of the Constitution of India. CAT allowed the aforesaid petition filed by Central Government Employees of Kasauli, as a result of which, Central Government Employees posted at various places in H.P. also claimed the said benefits and they were granted the benefits w.e.f. 1.10.1985. Respondent-Union also stated that employees posted at Nahan also claimed the said benefit and they were also allowed the same. Similarly, other employees posted in telephone department as well as civilians posted at the Army Headquarters were also granted these benefits.

4. It is also averred in the claim petition that even the Nahan Foundry employees, who were about 400 in number were also granted these benefits on having approached the

Administrative Tribunal. It is also averred that the Nahan Foundry employees were also governed by the same terms and conditions as employees of the Factory, at Nahan were also governed by the Central Government patterns of the pay scales and allowances before their services were taken over by the HPPWD & IPH Departments. Respondent-Union also claimed that ministerial establishment of the Factory has also got compensatory allowance at par with the H.P. Government employees w.e.f. 1967 but the same has been denied to the workers of factory establishment on the ground that they were governed by the Central Government pattern of pay scales & allowances. In the aforesaid background, respondent-Union claimed that aforesaid discrimination amounts to unfair labour practice and employees serving in the same establishment cannot be discriminated on the ground of different establishments. Respondent-Union claimed that when the special compensatory allowance was granted to the other Central Government Employees posted at Nahan, they also approached the management for the grant of the same but nothing was done and ultimately they approached Administrative Tribunal by way of filing an O.A., which was sent to Managing Director as a representation of the petitioner. But Managing Director failed to accept the request of the respondent-Union and as such Union was to approach learned Industrial Tribunal-cum-Labour Court by filing application under Section 33-C(2) of the Industrial Disputes Act, 1947, but the same was dismissed on the ground that matter could have been agitated by way of dispute. Accordingly, respondent-Union further claimed that since member of Union are also governed by Central pattern of pay scales and other allowances, they cannot be denied the said benefits but they are entitled to the benefits of special compensatory allowance at par with the Central Government employees posted at Nahan w.e.f. 1.10.1985. Petitioner also claimed that in the application filed under Section 33-C(2), General Manager had admitted that the Factory establishment is also governed by the central pattern of pay scales and other allowances at par with the other Central Government Employees. In the aforesaid background, respondent-Union requested the management to pay remote locality/special compensatory allowance to the members of the petitioner at par with other Central Government employees w.e.f. 1.10.1985 @ Rs.75/- to Rs.300/- per month upto 31.12.1985 as per their pay ranges and Rs. 150/- to Rs. 650/- w.e.f. 1.1.1996 with all consequential benefits.

5. Present petitioner by way of detailed reply refuted the claim of the respondent-Union on the ground of maintainability, cause of action and that the members of the Union are not workmen as per the Act. Similarly, on merits, respondent-department claimed that employees of the Factory are not at par with the Central Government employees because they are governed by the pay scale pattern, at par with the Ministry of Railways as per Clause 32 of the Standing Order. Respondent also averred that ministerial staff working in the factory is governed by the pay scale of the H.P. government and compensatory allowance, as given by the H.P. government, is also being given to them. Respondent further stated that since the Factory workers are on the pattern of Railway workshop for the purpose of pay/allowances, compensatory allowance cannot be given to them. Respondent further stated that as far as special compensatory allowance is concerned, the same is not admissible to the employees of workshop staff. As per respondent, Ministry of Finance, Department of Expenditure, Government of India had issued notification dated 31.5.1991 for the grant of special compensatory (remote locality) allowance to only the Central Government employees posted in H.P. within the various pay ranges and as such workers of factory are drawing remote locality allowance w.e.f. May, 1991 and revised rates from 1.8.1997. As per respondent, all the benefits in terms of notification are meant for Central Government Employees, whereas members of respondent-Union are employees of State Forest Corporation, drawing pay and allowances on the pattern of Railway Workshop and as such no allowance, as being claimed by them, can be granted to them. Industrial Tribunal-cum-Labour Court on the basis of pleadings framed following issues:-

> "1. Whether the workmen are entitled to the compensatory allowance as given by the Central Government to its employees or at par with State Government clerical staff or any other type of compensatory allowance? OPP
>
> 2. If yes, from which date and to what amount the workmen are entitled? OPP

3. Whether the claim of the petitioners is not maintainable in view of objections raised from para 1 to 4 of preliminary objections? OPP"

6. Learned Tribunal on the basis of oral as well as documentary evidence adduced on record, allowed the claim of the petitioner and directed the Corporation to grant special compensatory allowance to members of the union with its revision from time to time on the pattern of Central Government Employees, as per their respective pay scales w.e.f. 1.10.1985.

7. Feeling aggrieved and dis-satisfied with the award dated 27.7.2010 passed by Industrial Tribunal, present petitioner approached this Court by way of instant writ petition praying therein relief as has been reproduced here-in-above.

8. Shri Pranay Partap Singh, counsel representing the petitioner vehemently argued that the impugned award passed by Industrial Tribunal-cum-Labour Court, Shimla is not sustainable as the same is based upon the mis-appreciation of the evidence adduced on record completely ignoring the statements as well as documentary evidence placed on record by the Department. It is also contended on behalf of petitioner that members of Union had been getting special compensatory allowance at old rates previously because of bona-fide mistake on the part of the petitioners and as such they were paid un-authorisedly and learned Tribunal failed to acknowledge that it has come in evidence that earlier special compensatory allowance/remote locality allowance was paid due to bona-fide mistake.

9. With a view to substantiate his arguments that impugned award is not based upon the correct appreciation of the evidence adduced on record by the Department, Mr. Pranay Partap Singh, counsel representing the petitioner made this Court to travel through the statements of RW1 Swaran Singh, General Manager of Petitioner No. 2, wherein he categorically stated that special compensatory /remote locality allowance was paid to the respondent-Union by bona-fide mistake, un-authorisedly at local level. Mr. Pranay Partap Singh also contended that Industrial Tribunal has fallen in grave error in not acknowledging the fact that petitioner No. 2 is bound by Standing Order of the Factory. As far as service conditions are concerned, in Clause 32(a), it has been provided that pay and allowances of labour and supervisory staff would be as per orders of Ministry of Railway issued for their workshop staff from time to time. The aforesaid counsel also invited the attention of this Court to Ex. RB, wherein clarification was given by the Railway workshop Jagadhari wherein, it has been stated that no compensatory allowance was being paid to its employees. He also contended that nearest workshop Jagadhari does not pay any special compensatory allowance/remote locality allowance to its employees and this clarification was on record before the learned Tribunal in the shape of Ex. RB and in the aforesaid background, he prayed for quashing of impugned award.

10. It clearly emerges from the record that there are two types of establishments in factory i.e. Ministerial establishment and Industrial establishment. Ministerial establishment is governed by the pay and allowances of the Himachal Pradesh Government and Industrial establishment comprising of the industrial workers in the manufacturing process are governed by the central pattern of pay scales and other allowances. As per petitioner, they are governed by pay scale pattern at par with the Ministry of Railway. Petitioner has also stated that factory workers are governed by the pay scale pattern at par with the Ministry of Railway and as far as the grant of special compensatory allowance is concerned, factory workers are not entitled for the grant of special compensatory allowance. And as such members of respondent-Union cannot be granted special compensatory allowance as the same is not admissible as per the pay-scale pattern of Ministry of Railway. PW1 Shashi Kant Kalia specifically stated before the learned Tribunal that employees of factory were being paid remote allowances on the Central Government pattern @ Rs. 20/- per month (minimum) and Rs. 60 (maximum) as per the pay range of the employees but now they are claiming this allowance w.e.f. 1.10.1985 on the Central Government pattern as is being paid to the Central Government employees of the various departments such as MES, P&T, Army Station Headquarters etc. Aforesaid PW1 also placed on record Ex. PW1/A, Ex. PW1/B & Ex. PW-1/C, copies of notification issued by the Central Government as well as orders passed by Central Administrative Tribunal, in the case of Central Government employees posted at Nahan Foundry,

wherein their claim for allowance at par with the Central Government employees was allowed. PW1 also stated that in terms of order passed by Central Administrative Tribunal, Union made representation to the management, who asked them to produce documents whereby Central Government employees posted at Nahan were granted the revised rates of the said allowances. PW1 further stated that relevant documents were supplied but nothing was done by the management. He also placed on record representation Ex. PW1/D, wherein, it is stated that Nahan Foundry, the Jagadhri Railway workshop pattern was applicable and employees of said Foundry were also granted the said allowances w.e.f. 1.10.1985 at the revised rates. The Rules & Regulations in respect of Nahan Foundry Employees are the same as applicable to the members of the petitioner. PW1 also stated that Ministerial staff, serving in the same premises is getting compensatory allowance w.e.f. 1970 @ Rs.150/- per month (minimum) and maximum as per their pay range. PW1 also stated that in the earlier application filed under Section 33-C(2) of the Act, General Manager admitted that members of the petitioner are governed by the Central Government pay pattern and allowances. Similarly, PW2 Shri Saleem Ahmed, General Secretary of Nahan Foundry stated that they had claimed remote locality allowance/compensatory allowance w.e.f. 1.10.1985, on the ground that they are governed by Central Government pattern pay-scale and allowances and the same was paid to them @ Rs. 150/- per month (minimum) and Rs. 650/- (maximum) as per pay range. He also stated that in the matter of pay and allowances they had similarity with the employees of the Factory since both were governed by the Jagadhri workshop pattern/central pattern of pay and allowances.

11. PW3 Shri Mohinder Singh, a Central Government Employee stated that vide notification dated 31.05.1991, they were paid the remote locality/ compensatory allowance @ Rs.20/- to Rs.120/- per month as per their entitlement of pay. He has also stated that for getting the revised benefits, they filed an Original Application before Central Administrative Tribunal, titled Sumer Chand & others. vs. Union of India and vide Ex.PW1/C, CAT issued directions to the Department to revise the allowance at par with the Central Government Employees posted at Shimla and paid revised arrears of allowances w.e.f.1.10.1985.

12. PW4 Shri Balbir Singh, General Secretary of Mazdoor Union, Resin & Turpentine Factory, Nahan stated that members of Union were getting remote locality/compensatory allowance since. 1.1.1986 but till date same has not been revised. He also stated that Central Government Employees are getting revised rates w.e.f. 1.1.1986 @ Rs. 150/- to Rs. 650/- as per their pay-scale. Similarly, revised rates were being paid to the employees of MES, Post Office, Army station Headquarter, Telecom and also Nahan foundry Employees. In cross-examination, he denied that they are the employees of the State Government undertaking and as such they are not entitled to remote locality allowance @ Rs.20-40-60 but specifically vide notification dated 6.11.1985 they demanded the rates at par with the allowance paid to the employees posted at Shimla. PW4 further stated that since they were not given the revised rates of allowances, Union filed OA before the CAT and the same was allowed vide Ex.PW2/A and, since then, they are getting the allowance at par with the Shimla employees ranging between 150-650 per months w.e.f. 1.10.1986.

13. Conjoint reading of the aforesaid evidence led on record by respondent-Union clearly suggests that they have been able to prove on record by leading cogent and convincing evidence that they are governed by the Central Government pay pattern and allowances and have been getting remote locality/compensatory allowances on Central Government pattern @ Rs. 20/- (minimum) and Rs.60/- (maximum) as per pay range of the employees and they had been demanding the aforesaid allowances w.e.f. 1.10.1985 on Central Government patterns as being paid to the Central Government employees of the various departments in terms of notification Ex.PW1/A as well as various directions issued by CAT in this regard. All the aforesaid witnesses led on record by the respondent-Union have categorically stated that earlier they were being paid remote locality/compensatory allowance @ Rs.20/- to 120/- per month as per their entitlement but subsequently on the basis of notification issued by Government of India dated 3.5.1991 for grant of special compensatory allowance as well as the directions passed by CAT in the Original

Application filed by various Central Government Employees, they have been getting revised rates w.e.f. 1.1.1986 @ Rs.150 to Rs. 650/- as per their pay scale.

14. Careful perusal of the aforesaid statements as well as documents available on record clearly suggests that w.e.f 1.1.1986 revised rates are being paid to the employees of MES, Post Office, Army Station Head Quarter, Telecom and also Nahan Foundry employees. RW1 Shri Swaran Singh, General Manager of the Factory also stated that the workers of the Factory are governed by the pay-scale of Railway workshop staff and that the members of the Union were appointed as per conditions shown in Ex. RA & Ex. RB. As per aforesaid RW1 Shri Swaran Singh, benefits of remote locality allowance was not extended by the Railway to its workshop staff as per Ex. RB and as such members of the Union are also not entitled for the same since their service conditions are also governed in terms of Ex. RA and Ex.RB.

15. RW1 also stated that since there was no instruction to pay this allowance, to the members of petitioner, by any competent authority, earlier this allowance was being paid un-authorisedly at the local level. He also admitted in his cross examination that audit is conducted every year and report is furnished to the Headquarter. He also admitted that remote locality/special compensatory allowance is being paid to the employees serving in Himachal Pradesh.

16. It is undisputed as clearly emerge from the statements given by PWs that members of respondent-Union were getting compensatory allowance/remote locality allowance on old rates @ Rs. 20/- (minimum) and Rs. 60/- (maximum) per month as per their pay-scale and they have been claiming revised rate w.e.f. 1.1.1986 @ Rs.150/- to Rs.650/- as per their pay scale in terms of notification issued by Central Government as well as orders passed by CAT in the cases filed by the employees of MES, Post Office, Army Station Headquarters, Telecom and Nahan Foundry employees. Similarly, RW1 Also admitted that aforesaid allowance is being paid to the employees of the factory, however, he stated that same was being paid un-authorisedly at local level and, as such, steps were taken to stop the same. However, perusal of the statement given by RW1 clearly suggests that he was unable to offer plausible explanation that under what authority compensatory/ remote locality allowance was being paid to the employees of the factory un-authorisedly and when the same was pointed out to the authorities by the audit authorities. In his cross-examination, he admitted that audit is conducted every year and report is furnished to headquarter but in this regard, apart from the oral statement, nothing was placed on record by the RW1 to substantiate that on being pointed out by the audit authorities, steps were taken to correct the mistake, which was committed by the Department, by un-authorisedly paying allowance in question to the members of the respondent-Union. Whereas, respondent-Union has been successful in demonstrating that they are also entitled to enhancement in the allowance in terms of revision made by the Central Government. It also stands proved on record that as per revision made by Central Government employees posted at Nahan are getting revised compensatory allowance w.e.f. 1.10.1985 on the Central Government pay scale pattern. It has also come in the statement of PW3 that remote locality/compensatory allowance is being paid to the employees of Nahan Foundry w.e.f. 1.10.1985. It has also come in the statement of aforesaid witness that there is similarity between the employees of Nahan Foundry and that of the Rosin & Turpentine Factory Employees, who were also governed by Jagadhri workshop pattern / central pattern of pay allowances.

17. In this background, if the statement of RW1 is seen, who has categorically stated that workers of the factory are governed by the pay scale of Railway workshop staff and members of respondent-Union were appointed as per conditions shown in Ex.RA and Ex.RB, it clearly emerges that there is force in the contention put-forth on behalf of the members of the Union that they are also entitled to remote/compensatory allowance in terms of revised notification issued by Central Government, whereby all the Central Government Employees posted at Nahan are getting revised compensatory allowance w.e.f. 1.10.1985 on the Central Government pattern pay scale. Respondent-Union by leading cogent and convincing evidence has proved on record that employees of Nahan Foundry are being paid revised remote locality/compensatory allowance on

revised rates w.e.f. 1.10.1985, hence, members of respondent-Union are also entitled to remote locality/compensatory allowance at revised rates w.e.f. 1.10.1985 as is being paid to employees of Nahan Foundry, who are also governed by Jagadhri workshop pattern/central pattern of pay allowance. Similarly, PW2 also stated that employees of Nahan Foundry are also governed by Jagadhri workshop pattern and they are being paid remote locality/compensatory allowance w.e.f. 1.10.1985. Aforesaid statements of PW2 and PW3 have been further supported by the statement of Shri Shashi Kant Kalia, who has specifically stated that employees of Nahan Foundry are governed by Jagadhri workshop and are getting remote locality/compensatory allowance w.e.f. 1.10.1985 at the revised rates. Moreover as has been discussed above, RW1 Swaran Singh categorically stated that members of the respondent-Union are governed by Railway workshop staff in terms of Ex. RB and they are not entitled to remote locality/special compensatory allowance. But aforesaid contention put-forth on behalf of RW1 cannot be accepted solely for the reason that employees of Nahan Foundry who were governed by Jagadhri workshop pattern/central pattern as applied to the central establishment of factory are getting special compensatory allowance w.e.f. 1.10.1985 at the revised rate and as such there is no justification, if any, to deny the aforesaid benefit to the members of the respondent-Union, who were admittedly governed by the Railway workshop staff pattern. Moreover, learned Tribunal has rightly observed that since the ministerial staff working in the factory is paid compensatory allowance as per the pay scale of H.P. Government, members of respondent-Union cannot be denied the payment of such allowance on the ground that they were governed by Jagadhri workshop pattern. Hence, this Court sees no illegality and infirmity in the findings of the learned Tribunal that all the Central Government employees working at Nahan Foundry are being granted compensatory allowance on revised rate w.e.f. 1.10.1985 and as such members of respondent-Union cannot be discriminated as far as entitlement of revised special compensatory allowance as per Central Government pattern.

18. After careful perusal of the evidence led on record by the members of respondent-Union, this Court sees no illegality and infirmity in the impugned award passed by the learned Tribunal, which appears to be based upon the correct appreciation of the evidence on record. In the present case, respondent-Union has been successful to prove on record that they are entitled for payment of special compensatory allowance with revised rates w.e.f. 1.10.1985 as being paid to the Central Government employees as per Central Government pattern. Whereas, petitioner department has not been able to demonstrate that how members of respondent-Union are not entitled to special compensatory allowance w.e.f. 1.10.1985 on the revised rates when admittedly they are governed by the pay-scale of Railway workshop staff and the employees at Nahan Foundry who have been getting remote locality/ compensatory allowance on revised rates w.e.f. 1.10.1985. Hence, this Court sees no illegality and infirmity in the award passed by the learned Tribunal, which is based on correct appreciation of the document available on record.

19. Apart from above, findings of fact recorded by learned Tribunal below on the basis of appreciation of evidence cannot be questioned in writ proceedings and writ court cannot act as an appellate court. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in case titled ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157***. It is profitable to reproduce paras 16, 17 and 18 of the judgment herein:

> *"16. .....The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or tribunals: these are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the*

jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is no entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened for questioned in writ proceedings. nA error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the interference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

17. The judgments mentioned above can be read with the judgment of this Court in Harjinder Singh's case (supra), the relevant paragraph of which reads as under:

> *21. Before concluding, we consider it necessary to observe that while exercising jurisdiction under Articles 226 and / or 227 of the Constitution in matters like the present one, the High Courts are duty bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the Preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43-A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of the community to subserve the common good and also ensure that the workers get their dues. More than 41 years ago, Gajendragadkar, J. opined that:*
>
> *10.... The concept of social and economic justice is a living concept of revolutionary import; it gives sustenance to the rule of law and meaning and significance to the ideal of welfare State.*

18. A careful reading of the judgments reveals that the High Court can interfere with an order of the Tribunal only on the procedural level and in cases, where the decision of the lower Courts has been arrived at in gross violation of the legal principles. The High Court shall interfere with factual aspect placed before the Labour Courts only when it is convinced that the Labour Court has made patent mistakes in admitting evidence illegally or have made grave errors in law in coming to the conclusion on facts. The High Court granting contrary relief under Articles 226 and 227 of the Constitution amounts to exceeding its jurisdiction conferred upon it. Therefore, we accordingly answer the point No. 1 in favour of the appellant."[Emphasis added]

20. The Division Bench of this High Court while deciding batch of writ petition, CWP No. 4622 of 2013, titled as ***M/s Himachal Futuristic Communications Ltd. V. State of HP and another*** also held that question of fact determined by the Tribunal cannot be made subject matter of writ petition.

21. Reliance is also placed on judgment rendered by Hon'ble Apex Court titled ***Ishwarlal Mohanlal Tshakkar v. Paschim Gujarat Vij Company Ltd. And another***. It is profitable to reproduce para 9 of the judgment herein:

> "9. *We find the judgment and award of the Labour Court well reasoned and based on facts and evidence on record. The High Court has erred in its exercise of power under Article 227 of the Constitution of India to annul the findings of the Labour Court in its Award as it is well settled law that the High Court cannot exercise its power under Article 227 of the Constitution as an Appellate Court or reappreciate evidence and record its findings on the contentious points. Only if there is a serious error of law or the findings recorded suffer from error apparent on record, can the High Court quash the order of a lower Court. The Labour Court in the present case has satisfactorily exercised its original jurisdiction and properly appreciated the facts and legal evidence on record and given a well reasoned order and answered the points of dispute in favour of the appellant. The High Court had no reason to interfere with the same as the Award of the Labour Court was based on sound and cogent reasoning, which has served the ends of justice."*

22. Consequently, in view of detailed discussion as well as laws referred here-in-above, this Court sees no reason to interfere in well reasoned award passed by learned Industrial Tribunal-cum-Labour Court and as such present petition is dismissed being devoid of merit.

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BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR.

Sanjay Kumar ....Appellant

Versus

State of Himachal Pradesh and another ....Respondent

Criminal Revision No. 66 of 2016
Date of decision : 16.08.2016

Protection of Children from Sexual Offences Act, 2012- Section 5 (m) and 5 (n)- Charge was framed by Special Judge for the commission of offences punishable under Sections 5 (m) and 5 (n) of Protection of Children from Sexual Offences Act, 2012- it was contended that according to medical evidence charge should have been framed for attempting to commit offence and not for the commission of offence- held, that prosecutrix had specifically stated in her statement recorded under Section 161 Cr.P.C that she felt hard object and pain in her urinary organ- she cried on which her mother woke up and blood was also detected on vaginal slides, coronal, glans slides and pubic hair of victim- medical evidence clearly shows that there was penetration- prosecutrix was less than 12 years of age- slightest penetration is sufficient to bring the offence under the purview of committing 'penetrative sexual assault' – charge was rightly framed- revision dismissed. (Para- 7 to 15)

For the Petitioner : Mr. Suresh K. Advocate.
For the respondent No.1: Mr. Pankaj Negi, Deputy Advocate General.
For respondent No.2 : Ms. Ravinder Sandhu, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge(Oral)

Charge under Section 5 (m) and 5 (n) of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as **'the Act'**) has been framed by Special Judge,

Kangra at Dharamshala vide order dated 30.12.2015 against petitioner for committing sexual assault with his less than 12 years old daughter. Hence present petition.

2. I have heard learned counsel for parties and also gone through summoned record of trial Court. Learned counsel for petitioner submitted that without admitting guilt of petitioner even if it is considered that there was any material available on record to frame charge against petitioner, charge could have been framed only for attempt to commit alleged offence. He referred opinion of Doctor given in MLC of victim Ex. P-4 stated as under:-

"I am of opinion that there is a finding suggestive of possibility of attempt of forceful sexual intercourse cannot be ruled out."

3. Learned counsel for petitioner submitted that ocular evidence was to be considered at final stage of trial whereas medical evidence suggesting that there was attempt of forcible sexual intercourse was to be considered at present at the time of framing of charge and therefore framing charge only under Sections 5 (m) and (n) read with Section 6 of the Act is not sustainable and the charge under Section 18 of the Act for attempt to commit offence under Sections 5 (m) and 5 (n) read with Section 6 of the Act was required to be framed.

4. Learned counsel for petitioner also submitted that semen was not detected in vaginal swabs and vaginal slides of victim and also in underwear, coronal and glans swabs and pubic hair of petitioner and on the basis of chemical analysis and examination conducted by him, Doctor had opined possibility of attempt of forceful sexual intercourse.

5. Learned counsel for respondent No.2 argued that of semen was detected in Pajami and underwear of victim and human blood was also detected in clothes (frock, Pajami and underwear), vaginal swab and slides of victim, coronal and glan slides and pubic hair of petitioner, therefore charge has rightly been framed against petitioner and there is no illegality or perversity in impugned order passed by learned Special Judge.

6. Learned Deputy Advocate General submitted that Section 6 of the Act provides punishment for 'aggregative penetrative sexual assault' whereas opinion referred by learned counsel for petitioner is that 'attempt of forcible sexual intercourse cannot be ruled out' and complete sexual intercourse is not necessary for charging petitioner under Sections 5(m) and 5 (n) of the Act punishable under Section 6 of the Act as the offence of 'sexual assault' has been made punishable.

7. Section 2(f) of the Act provides that 'penetrative sexual assault' has the same meaning as assigned to it in Section 3 of the Act. Section 3 states that a person is said to commit 'penetrative sexual assault' if he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person. Section 5(m) states that 'penetrative sexual assault' on a child below twelve years of age will be 'aggravated penetrative sexual' assault. Further Section (n) provides that 'penetrative sexual assault' committed on a child by a relative of child being a guardian will be in the category of 'aggravated penetrative sexual assault'. Section 6 provides Punishment for 'aggravated penetrative sexual assault' committed on a child.

8. Victim in her statement recorded under Section 161 of the Code of Criminal Procedure placed before the learned Special Judge alongwith challan stated that in the intervening night between 19-20th March, 2015 during her sleep, she felt pain at her urinary organ and she cried. She felt hard object being inserted in her urinary organ and on her crying her mother woke up.

9. As per medical evidence blood group of victim was of Group 'A'. Blood of same Group was found on Pajami, underwear, vaginal swab of victim and underwear of petitioner. Blood was also detected on vaginal slides of victim, coronal, glans slides and pubic hair of petitioner.

10. On medical examination of victim observations of Doctor with regard to 'Vulva hymen, vagina, perineum and ervix in MLC of victim (Ex. P-4 to petitioner) were as under:-

Volva	:	Erythmatous tender.
Hymen	:	Erythmatous inflamed remarks seen.
Vagina	:	Inflamed Tenderness
Perineum		

11. At the time of consideration for farming charge, court has to consider entire material including ocular and medical evidence, placed before it. However, in my considered opinion, in present case even if medical and ocular evidence is ignored and only medical evidence considered then also there was sufficient material in MLC indicating that there was peniteration, may be to a small extent not amounting to complete sexual intercourse but definitely 'penetrative sexual assault' for purpose of the Act. As per Section 3 (a) peniteration to any extent is 'penetrative sexual assault'.

12. A certificate issued by Registrar Birth and Death Gram Panchayat Vindravan was also placed on record with challan. As per this certificate victim was daughter of petitioner and her date of birth was 14.11.2004 and thus her age was less than 12 years on day of incident. Therefore alleged offence fulfilled ingredients of Section 5 (m) and 5(n) of the Act. Section 18 of the Act is not attracted at all because there was sufficient ocular evidence corroborated by medical evidence that there was penetration.

13. Absence of semen in vaginal swabs and slides of victim and underwear, coronal glan slides and pubic hair of petitioner was not sufficient to negate evidence of 'penetrative sexual assault' by petitioner because offence under Sections 5(m) and 5 (n) was not to be treated as complete only on ejaculation in vagina. Slightest penetration for a shortest time was sufficient to bring the offence under the purview of committing 'penetrative sexual assault' on a child as defined in the Act.

14. In view of above discussion, I find no illegally, irregularity, perversity or infirmity in impugned order passed by learned Special Judge, Kangra at Dharamshala in framing charge against petitioner and as such no interference is warranted at this stage by this Court and petition is dismissed alongwith pending applications, if any.

15. Observations made in this judgment are for disposal of present petition and shall not be construed as expression of opinion on the merits of the case.

16. Records of the Court below alongwith copy of this Judgment be sent back immediately.

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

Tej Ram .....Petitioner.

Versus

Prem Lata .....Respondent.

Cr. Revision No. 25 of 2011.
Date of Decision: 16.08. 2016.

Protection of women for Domestic Violence Act, 2005- Section 12- Marriage between parties was solemnized on 26.11.2007- a daughter was born on 17.11.2008- husband used to threaten to kill her unborn child and oust her from her matrimonial home- she was compelled to take shelter in her parent's home- she filed a petition seeking maintenance and rent for separate residence- respondent denied the factum of marriage- trial Court awarded the maintenance of Rs. 1200/- per month and Rs. 700/- per month as rent of the residence- an appeal was preferred,

which was dismissed- held, in revision that petitioner had examination herself to prove her version- her version was corroborated by her witnesses- version of the respondent is self contradictory- plea of the petitioner that she was married to the respondent and had given birth to a daughter was duly proved- it was also proved that respondent had treated the petitioner with cruelty- maintenance and rent awarded by Court cannot be said to be excessive- petition dismissed. (Para-10 to 22)

Case referred:
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241

For the petitioner: Mr. Naveen K. Bhardwaj, Advocate.
For the respondent: Mr. Peeyush Verma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.*(Oral)*

The instant criminal revision petition filed under Sections 397 and 401 of Cr.P.C. is directed against judgment dated 30.11.2010, passed by learned Sessions Judge, Kullu, District Kullu in Criminal Appeal No. 8 of 2009, affirming the judgment dated 29.1.2009 passed by learned Judicial Magistrate 1st Class, Manali in Criminal Case No. 310-I/08, whereby learned Trial Court below while allowing the application preferred on behalf of petitioner - Smt. Prem Lata filed under Section 12 of the Protection of women for Domestic Violence Act, 2005 (here-in-after referred to as the 'Act'), awarded maintenance of Rs.1200/- per month and Rs.700/- per month as rent of the residence. For the sake of convenience, the parties as referred to in the judgment of the trial Court has been referred as such.

2. Briefly stated facts as emerged from the pleadings are that petitioner filed an application under Section 12 of the Act, stating therein that she is legally wedded wife of the respondent. Perusal of the contents contained in application under Section 12 of the Act suggests that marriage was solemnized on 26.11.2007 and thereafter both the parties lived under one roof as husband and wife at village Haripur, Tehsil Manali, District Kullu and out of their wedlock a daughter, namely, Kaushlaya was born on 17.11.2008. As per petitioner, during her pregnancy, the respondent used to threaten her to kill her unborn child and ousted her from the house after gave beatings to her. Due to aforesaid ill behavior of her husband, she was compelled to take shelter in her parents' house. In the aforesaid background she moved an application under Section 12 of the Act, praying therein for monthly maintenance as well as rent for separate residence. Respondent while filing reply to the petition stated that petitioner is not his legally wedded wife and there is no question of living together. He further stated that petitioner is married to one Joginder, r/o village Simsa, Tehsil Manali, District Kullu and the petitioner has filed the application in order to harass him.

3. Petitioner by way of rejoinder while denying allegation contained in reply asserted that she had moved an application before Pradhan, Gram Panchayat, Haripur and Gram Panchayat taking cognizance of the averments made in the application summoned both the parties with a view to explore the possibility of amicable settlement, if any, between the parties, however, Petitioner's husband remained adamant not to take her to house. Since, no amicable settlement could take place between the parties, Pradhan, Gram Panchayat referred the application to Police Post, Prini where both the parties were summoned and a compromise was effected between the parties on 14.9.2008. In the aforesaid background, petitioner filed an application, as referred to here-in-above, in the Court of Judicial Magistrate Ist Class, Manali, District Kullu, which was ultimately allowed vide order dated 29.01.2009, whereby, respondent was directed to pay an amount of Rs. 1200/- as maintenance and Rs.700/- per month as rent of the residence.

4. Being aggrieved and dis-satisfied with the order dated 29.1.2009 passed by Judicial Magistrate Ist Class, Manali, District Kullu, respondent filed an appeal in the Court of learned Sessions Judge, Kullu, District Kullu, which came to be registered as Criminal Appeal No. 8 of 2009, however, learned Sessions Judge, Kullu, District Kullu, on the basis of record available, dismissed the appeal and upheld the order passed by learned Judicial Magistrate Ist Class, Manali, District Kullu. Hence, present Criminal Revision Petition before this Court laying challenge to the impugned judgment passed by Sessions Judge, Kullu, H.P.

5. Shri Naveen Bhardwaj, counsel representing the petitioner herein, vehemently argued that order passed by both the Courts below granting maintenance and rent to the respondent herein is not sustainable as the same is not based on correct appreciation of law and the same deserves to be quashed and set aside. Mr. Bhardwaj further contended that bare perusal of the impugned orders passed by the Courts below suggests that same are based upon surmises and conjectures without there being any material on record. Mr. Bhardwaj forcefully contended that both the Courts below have not acknowledged the fact that petitioner-Tej Ram wife was married to another person, namely, Joginder and living with him and as such petition filed under Section 12 of the Act was not maintainable. During arguments having been made on behalf of the petitioner herein, Mr. Bhardwaj also made this Court to travel through the statements of the witnesses to demonstrate that Courts below have not read evidence in its right perspective and has wrongly held petitioner herein liable to grant maintenance as well as rent to the respondent herein. Mr. Bhardwaj invited the attention of this Court to the Statement of RW2, who stated that Prem Lata is married to one Joginder and not to the Tej Ram. Mr. Bhardwaj also stated that a bare perusal of the statement made by the petitioner herein suggest that there is no violence on his part, rather both the Courts have failed to take note of overwhelming evidence available on record clearly establishing that respondent herein was married to another person Joginder and had been living with her during filing of the application. While concluding his arguments, Mr. Bhardwaj forcefully contended that both the Courts below have fallen in grave error in not appreciating the fact that petitioner herein is a labourer and is not earning more than Rs.15,00/- per month and he won't be in a position to pay maintenance and rent of residence in terms of orders passed by both the Courts below. In the aforesaid background, Mr. Bhardwaj prayed for quashing of the impugned order passed by Courts below.

6. Mr. Peeyush Verma, counsel representing the respondent herein supported the judgments passed by both the Courts below and prayed for dismissal of the present revision petition being devoid of merit. Mr. Verma strenuously argued that bare perusal of the orders passed by both the Courts below suggests that same are based upon the correct appreciation of the evidence on record and no interference whatsoever of this Court is warranted in the facts and circumstances of the present case. Mr. Verma further contended that it stands duly proved that relationship between the parties as husband and wife and a child was born on 17.11.2008 out of their wedlock, whose name stands registered with the Registrar of Death and Birth Ex.PW5/A and as such arguments having been made by counsel representing the petitioner herein (Tej Ram) deserves out-rightly rejection. He also invited the attention of this Court to Ex.PW3/B, a certificate to demonstrate that name of husband of Prem Lata has been clearly mentioned as Tej Ram. Mr. Peeyush Verma also stated that this Court has very limited jurisdiction under Section 397 (1) to re-appreciate the evidence especially when the Courts below has recorded concurrent findings on the basis of evidence adduced on record by the respective parties. The reliance has also been placed on the following Hon'ble Apex Court judgments:-

State of A.P. versus Rajagopal Rao (2000) 10 SCC 338.

"4. The High Court in exercise of its revisional power has upset the concurrent findings of the courts below without in any way considering the evidence on the record and without indicating as to in what manner the courts below had erred in coming to the conclusion which they had arrived at. The judgment of the High Court contains no reasons whatsoever which would indicate as to why the revision filed by the respondent was allowed. In a sense, it is a non-speaking judgment."

State of Kerala versus Puttumana Illath Jathavedan (1999) 2 SCC 452

"Having examined the impugned Judgment of the High Court and bearing in mind the contentions raised by the learned counsel for the parties, we have no hesitation to come to the conclusion that in the case in hand, the High Court has exceeded its revisional jurisdiction. In Its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of Supervisory Jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an Appellate Court nor can it be treated even as a second Appellate Jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tentamount to gross miscarriage of justice. On scrutinizing the impugned Judgment of the High Court from the aforesaid stand point, we have no hesitation to come to the conclusion that the High Court exceeded its jurisdiction in interfering with the conviction of the respondent by re-appreciating the oral evidence. The High Court also committed further error in not examining several items of evidence relied upon by the Additional Sessions Judge, while confirming the conviction of the respondent. In this view of the matter the impugned Judgment of the High Court is wholly unsustainable in law and we, accordingly set aside the same. The conviction and sentence of the respondent as passed by the Magistrate and affirmed by the Additional Sessions Judge in appeal is confirmed. This appeal is allowed. Bail bonds furnished stand cancelled. The respondent must surrender to serve the sentence."

7. I have heard learned counsel for the parties as well carefully gone through the record of the case.

8. True, it is that this Court has very limited powers under Section 397 Cr.P.C. while exercising its revisionary jurisdiction but in the instant case, this Court solely with a view to ascertain that the judgments passed by learned Courts below are not perverse and same are based on correct appreciation of the evidence on record, undertook an exercise to examine the case.

9. As far as scope of power of this Court while exercising revisionary jurisdiction under Section 397 is concerned, the Hon'ble Apex Court in ***Krishnan and another*** *Versus* ***Krishnaveni and another,*** **(1997) 4 Supreme Court Case 241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality or 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."

10. Careful perusal of evidence led on record leaves no doubt that petitioner is the legally wedded wife of the respondent - Tej Ram. As per Petitioner, her marriage was solemnized on 26.11.2007 and thereafter they lived under one roof at village Haripur, Tehsil Manali, District

Kullu, H.P. and out of their wedlock she gave birth to a daughter on 17.11.2008. However, aforesaid factum of marriage as well as birth of daughter was specifically denied by the respondent. Petitioner in her application stated that during her pregnancy respondent gave beatings to her and threatened to kill her unborn baby and she was forcibly ousted from the house. Thereafter, she moved an application before Pradhan, Gram Panchayat, Haripur with a view to settle the matter amicably but the respondent did not agree to take the petitioner to house and, as such, Pradhan, Gram Panchayat referred the matter to the Police Post, Prini where both the parties entered into compromise dated 14.9.2008. Since respondent failed to take the petitioner to house, she was compelled to file an application Under Section 12 of the Act as referred here-in-above. Perusal of reply filed by the respondent clearly suggests that he denied that petitioner is legally wedded wife and as such there is no question of living together. Respondent also denied of extending threats to petitioner as claimed by the petitioner in the application under Section 12 of the Act.

11. Petitioner in order to prove her case examined herself as PW1, in which she stated that her marriage was solemnized on 26.11.2007 with the respondent and lived under one roof at VPO Haripur, Tehsil Manali, District Kullu. She also stated that during pregnancy her husband gave beating and threatened to kill her unborn baby. She also stated that she presented application before Pradhan, Gram Panchayat, Haripur but respondent refused to resolve the matter amicably. She further stated that Pradhan, Gram Panchyat referred the application to the Incharge, Police Post, Prini, where parties entered into a compromise on 14.9.2008 but despite compromise her husband neither took her to house nor provided any maintenance. She further stated that at present she resides with her mother. Bare perusal of cross-examination conducted on this witness clearly suggests that nothing contrary to what has been stated in examination-in-chief. It is safely concluded that respondent was unable to shatter the testimony of PW1. In her cross-examination, she specifically denied that she is not married to respondent and she is married to one Joginder, resident of village Simsa. She also denied the suggestion put to her that she never resided with the respondent, rather self stated that she resided with the respondent.

12. PW2 Rakesh Kumar also stated that he recognizes the aggrieved person and the respondent. He further stated that he is brother-in-law of the petitioner. It also came in his statement that aggrieved person and respondent are husband and wife in relation, who resided at Haripur. He specifically stated that he used to visit them and they used to visit him. He also stated that petitioner and respondent had quarrel and thereafter petitioner started residing with her mother. PW2 further stated that whenever he visited the house of respondent, he saw respondent was quarreling with aggrieved person. Perusal of cross-examination conducted on this aforesaid witness also suggests that respondent was unable to shatter the testimony of PW2, who has been very very consistent and candid in stating the facts. Careful perusal of the cross-examination conducted on this witness clearly suggests that he stuck to his statement made in examination-in-chief. PW2 in his cross-examination also asserted the factum of marriage of aggrieved person with the respondent, which was soleminised at place Dungri, where about ten people attended the marriage. He also identified the respondent being a resident of Siraj. Close scrutiny of the statement given by PW2 clearly suggests that he fully corroborated the version put-forth by PW1 in her application as well as statement made before the Courts below. It clearly emerges from the statements of PW1 and PW2 that before living separately, petitioner was residing with her husband Shri Tej Ram.

13. PW3 Smt. Bina, Anganwari Worker also stated that she recognized aggrieved person as well as respondent and they are husband and wife in relation. She further stated that during her pregnancy, the aggrieved person visited the Anganbari and she got herself registered there for nutrient food. PW3 also tendered into evidence the copy of attendance register of the aggrieved person as Ex.PW-3/A and stated that same are correct as per original. Copy of attendance register Ex.PW3/A clearly suggests that Prem Lata is recorded as wife of respondent (Tej Ram), which clearly corroborates the statements of PW1 and PW2.

14. PW4 Devia Ram, M.C., Police Post, Prini, Tehsil Manali, Distt. Kullu stated that Prem Lata had moved an application before the Pradhan, Gram Panchayat, Haripur qua ousting

of her from matrimonial house. He further stated that Pradhan, Gram Panchyat forwarded the application to Police Post, Prini, wherein aggrieved person Prem Lata and Tej Ram visited the Police Post, Prini alongwith other persons and compromise was effected on 14.09.2008 and thereafter no proceedings were carried by the police. Statement of PW4 corroborates the statement of PW1 in which she has stated that she had reported the matter to Pradhan, Gram Panchayat, who further forwarded the complaint to Police Post, Prini and ultimately compromise was effected on 14.09.2008.

15. PW 5 Narinder Kumar, Assistant Secretary, Panchayat Soyal, Tehsil Manali, District Kullu came present in Court alongwith requisitioned record i.e. certified copy of certificate Ex. PW5/A and stated that this birth certificate is correct as per original record. In his cross-examination, he stuck to his statement made in the examination-in-chief. Perusal of Ex.PW5/A suggest that Kaushalya Devi was born on 17.11.2008 at village Haripur and her father and mother names are recorded as Tej Ram and Prem Lata. Ex.PW5/A clearly corroborates the statement of PW1 in which she stated that she gave birth to a baby on 17.11.2008. The recording of the name of Tej Ram as father and Prem Lata as mother in the register establish that they are husband and wife in relation.

16. Careful perusal of the statements of aforesaid witnesses clearly suggests that petitioner is wife of respondent and after her marriage they resided as husband and wife under one roof at village Haripur. It also stands proved that she gave birth to a child on 17.11.2008 out of the aforesaid wedlock. Respondent while appearing as RW1 stated that he resides with his mother and his mother works as servant with Lovekishore Gupta. He also stated that he does not recognize aggrieved person personally and she has filed present case falsely against him. He stated that he works as labourer and Prem Lata is married to one Joginder, r/o Simsa and he never resided with the petitioner. In his cross-examination stated that he had not been called at Police Post, Prini and no compromise was effected.

17. Interestingly, careful reading of the aforesaid statement of RW1 clearly suggests that RW1 has not disclosed true facts to the Court, rather his statement is self contradictory and as such cannot be relied upon. In his examination-in-chief he stated that he does not recognize the aggrieved person Prem Lata but In his cross-examination he stated that he was not called at Police Post, Prini and no compromise was affected, whereas PW4 Devia Ram categorically stated that Prem Lata and Tej Ram were summoned to Police Post, Prini alongwith other persons on 14.9.2008, where they effected compromise. Statement of PW4 stands fully corroborated by statement of PW1 wherein she categorically stated that compromise could not be effected in Gram Panchayat, then Pradhan of the Gram Panchayat referred the matter to the Police Post, Prini and compromise was effected on 14.9.2008 at Police Post, Prini. This Court has no reason to disbelieve the testimony of PW4, who is an independent witness, rather this Court after perusing the statement of RW1 sees sufficient reasons to conclude that statement of RW1 is not trustworthy and confidence inspiring and as such same has been rightly not appreciated by the Courts below. RW2 Roop Chand also stated that he recognized Prem Lata and she resides with her mother. RW2 is maternal cousin of the petitioner. He stated that Prem Lata is married with one Joginder. RW2 further stated that Tej Ram resides with her mother and he is not married.

18. Careful perusal of statement made by RW2 clearly suggests that it will not be of any help to the RW1 since he did not utter a word with regard to the factum of residing of the petitioner with respondent as wife. RW2 only stated that Prem Lata is married to one Joginder but he did not utter a word with regard to residing of Prem Lata with RW1.

19. Conjoint reading of evidence led on record by aggrieved person Prem Lata clearly establish that she was married to respondent, namely, Tej Ram and she also gave birth to a baby daughter on 17.11.2008, whose name stands mentioned with the Registrar of Death & Birth i.e. Ex.PW5/A. Further perusal of Ex. PW5/A clearly establishes that name of the father and mother of child stands mentioned as Tej Ram and Prem Lata. All the witnesses adduced on record by petitioner corroborated version of the petitioner and have been candid and straightforward in making their depositions. Whereas, respondent has not been able to extract anything contrary in

their cross-examination. RW1 while deposing before Court below has not been able to prove that petitioner-Prem Lata was not his legally wedded wife and no marriage was solemnised on 26.11.2007. Though, RW1 in his statement, stated that no marriage was solemnized with the petitioner and he does not recognise her but he also stated in her statement that petitioner is married to one Joginder, resident of Simsa, which itself falsify the earlier part of the statement given by RW1, wherein he stated that he does not recognize the petitioner. Similarly, RW2 stated that petitioner is married to one Joginder but he nowhere stated that petitioner never used to reside with RW1 Tej Ram.

20. Close scrutiny of statement of PW1-Prem Lata clearly establish that she was married to RW1-Tej Ram on 26.11.2007 and she resided with him in the house of one Lovekishore Gupta of Haripur. She also proved that she was ousted from the house during her pregnancy and respondent used to give beatings to her. Aforesaid factum of beatings and mis-behaviour stands corroborated with the statement of PW2 Rakesh Kumar. He categorically stated that he used to visit the house of petitioner and respondent and respondent oftenly use to quarrel with the petitioner. Factum of giving birth to daughter on 17.11.2008 duly stand proved on record with the production of Ex.PW5/A i.e. Death & Birth Register, wherein, Kaushlaya Devi, a female child was born on 17.11.2008 at village Haripur is recorded as daughter of Tej Ram and Prem Lata. Similarly, PW1 has been able to prove that before filing the present application under Section 12 of the Act, she reported the matter to the Pradhan, Gram Panchayat, who summoned the parties for amicable settlement but respondent remained adamant in not taking her to house. Similarly, factum with regard to effecting of compromise dated 14.9.2008 stands duly proved on record with statement of PW4 M.C. Devia Ram, who categorically stated that petitioner had moved an application against her husband Tej Ram in the Gram Panchayat, Haripur and thereafter Pradhan referred the application to Police Post, Prini. He categorically stated that Tej Ram and Prem Lata alongwith other persons came present on 14.9.2008 and they effected the compromise.

21. Hence, it can be safely concluded that PW1-Prem Lata successfully proved that she was legally wedded wife of the respondent - Tej Ram, who threw her out of house after giving beatings. It also stands proved on record that out of their wedlock a baby child was born. Hence, this court has no hesitation to conclude that petitioner-Prem Lata was able to prove her case by leading cogent and convincing evidence that she was legally wedded wife of the respondent - Tej Ram and they lived under one roof at Haripur and out of their wedlock a child was born and she was subjected to domestic violence by her husband, as such she is entitled for maintenance and rent of residence. PW1 stated that respondent works as labourer and earns Rs. 12,000/- per month. Since, respondent has failed to refute the aforesaid statement of PW1 before the Courts below, it can be rightly presumed that respondent has sufficient source of income keeping in view the fact that he is able bodied person.

22. Consequently, in view of the aforesaid discussions, there is no illegality and infirmity in the orders passed by learned Courts below as such the same are upheld and the present petition is dismissed being devoid of merit.

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

Dayalu Devi and others ..Appellants/plaintiffs.

Versus

State of Himachal Pradesh and another ..Respondents/Defendants.

RSA No. 666 of 2005.
Reserved on: 09/08/2016
Date of decision: 20/08/2016

Limitation Act, 1963- Section 65- Proceedings were initiated against the predecessor-in-interest of the plaintiffs for encroaching upon abadi deh- ejectment was ordered, which was challenged unsuccessfully – a civil suit was filed claiming that plaintiffs had become owners by way of adverse possession- suit was opposed by the defendants, which was dismissed- held, in second appeal that plaintiffs had claimed that portion of the house and saw mill were standing on the disputed land- however, it was not established that predecessor-in-interest of the plaintiffs and thereafter plaintiffs remained in possession of the suit land- defendants proved that suit land had vested by escheat to them- defendants had a right to evict the plaintiffs - appeal dismissed.

(Para-7 to 9)

Cases referred:

A.C.Jose Vs. Sivan Pillai and others (1984) 2 SCC 656

Commissioner of Income-tax (Central) vs. B.N.Bhattacharjee and another (1979) 4 SCC 121

For the appellants: Mr. R.K.Bawa, Sr. Advocate with Mr. Ajay Kumar Sharma, Advocate.

For the respondents: Mr. Vivek Singh Attri, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

The instant appeal stands directed against the impugned judgement and decree of the learned District Judge, Solan, Himachal Pradesh, whereby he affirmed the rendition of the learned Civil Judge (Senior Division), Kandaghat. The plaintiffs standing aggrieved by the concurrently recorded renditions against them by both the learned Courts below concert through the instant appeal constituted before this Court, to reverse the judgements and decrees of both the Courts below.

2. The facts necessary for rendering a decision on the instant appeal are that plaintiffs claimed to be owner in possession of 2 biswas of land comprised in Khata/Khatauni No. 179 min 314, old khasra No. 1500/1186/2 and new Khasra No. 1053 situated in Mauja Sirinagar, Pargana Baguri-khurd, Tehsil Kandaghat being part of the land measuring 6 bighas 5 biswas recorded as Abadi Deh in the revenue record. The respondents/defendants who claimed to be owner of this land on account of having escheated to it as its owner Tara Chuhru Tailor had died issueless initiated ejectment proceedings under Section 163 of the H.P.Land Revenue Act alleging that predecessor in interest of the appellants/plaintiffs had encroached upon this land, the Collector Kandaghat who ordered the ejectment of the predecessor in interest of the appellants from this land. It was also alleged that he land was being auctioned and predecessor in interest of the plaintiffs had also made a bid in the year 1970 but his bid being lost was not accepted and it was leased out to Pritam Singh. The appeal by the predecessor in interest of the appellants against this order had been dismissed up to the level of Financial Commissioner, consequently a suit was filed by the present appellants who in the alternative claimed to be owner by adverse possession and that the suit land was not a Nazul land was coming in possession of the predecessor in interest of the plaintiffs since long and provisions of Section 163 of the H.P.Land Revenue Act are not applicable to the suit land being Abadi Deh and Financial Commissioner having no jurisdiction to declare the revenue entries being wrong. Consequently, the suit for declaration and injunction.

3. The suit of the plaintiffs was resisted by defendants whereby they have taken preliminary objections that the plaintiffs are estopped from filing the present suit due to their own act and conduct. On merits, the defendants have denied the averments made by the plaintiffs in their plaint and specifically pleaded that the defendants have every right to evict the unauthorized occupants from the Government land under Section 163 of the H.P.Land Revenue Act. It is averred that the plaintiffs or their predecessor in interest had never been in its possession and they have grabbed the possession of the suit land being the adjoining land owner in possession.

The State has every right to initiate the proceedings under Section 163 of the H.P.Land Revenue Act against the plaintiffs.

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

1. Whether the plaintiffs are owners in possession of the suit land, as claimed? OPP.

2. Whether the provisions of Section 163 of the Land Revenue Act are not applicable to the suit land and as such the plaintiffs are entitled for the declaration that the order passed by the Revenue Authorities is illegal and inoperative, as alleged? OPP.

3. Whether the plaintiffs are entitled for the relief of permanent prohibitory injunction, as alleged? OPP.

4. Whether the plaintiffs have are estopped from filing the present suit due to their own acts and deeds, as alleged? OPD.

5. Whether the plaintiffs have no cause of action, as alleged? OPD.

6. Whether late Shri Duni Chand has filed a suit in the year 1986 having suit No. 51 of 1986, if so, its effect? OPD.

7. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs besides the learned First Appellate Court dismissed the appeal preferred therefrom before it by the plaintiffs.

6. Now the plaintiffs have instituted the instant Regular Second Appeal before this Court, assailing the findings in its impugned judgment and decree recorded by the learned first Appellate Court. When the appeal came up for admission on 26.4.2006, this Court admitted the appeal on the hereinafter extracted substantial question of law:-

"Whether the first appellate Court has erred in dismissing the appeal when it has specifically been observed in para 11 of its judgement that the land in question is not shown to have belonged to Tara Chuhra, on whose death the respondent-defendant claimed that it escheated to the State and became Wazud Land?"

Substantial question of law.

7. The predecessor in interest of the plaintiffs/appellants had purchased the 'Abadi' of one Dharam Dutt. Tersely the lawful possession of the plaintiffs of the contentious portion of two biswas of land adjoining the 'Abadi land' of the plaintiffs as stood purchased by their predecessor in interest from one Dharam Dutt, is the nerve centre of the controversy engaging the parties at lis. Proven lawful possession of Abadi land by Abadi holder(s) vests in the latter an indefeasible right qua continuance of possession thereof also preempts any onslaught qua usurpation of its possession standing constituted either by the State or by any holder of Abadi land adjoining it. PW-1 had concerted to establish theirs provenly holding possession qua the contentious parcel of two biswas of land by testifying qua a portion of their residential house beside their saw mill standing installed thereon. However, the aforesaid assertion made by the plaintiffs qua theirs holding possession thereof per se stands ingrained with a vice of falsity, falsity whereof emanates from theirs in a previous suit in contradiction besides in variance with the afore referred manner of espousal by them qua theirs holding its lawful possession, theirs therein ventilating, of, the aforesaid contentious parcel of two biswas of land which adjoins their Abadi standing used by them as an orchard. The effect of the aforesaid loud contradiction is of an inference standing garnered qua the espousal by the plaintiffs qua theirs holding possession of the suit land standing whittled. Contrarily, the propagation of the defendants/respondents qua the suit land constituting the Abadi of one Tara who died issueless hence on his demise it standing escheated to them appears to hold vigour. Significantly, the plaintiffs have not even adduced any cogent evidence in display of their predecessor in interest while purchasing 'Abadi

land' from one Dharam Dutt his also purchasing from the latter the contentious tract of two biswas of land for hence theirs holding a leverage to espouse of theirs holding its lawful possession. However, the learned counsel appearing for the appellants has contended of the propagation aforesaid of the defendants of the suit land being construable to be Nazul land is unamenable to its holding any legally vigorous clout arousable from non existence any cogent evidence comprised in the Revenue Officer concerned on demise of Tara attesting mutation qua its standing vested by escheat in the defendants. The aforesaid submission holds legal worth only to a limited extent of the defendants not producing the relevant mutation attested qua the suit land by the Revenue Officer concerned with manifestations therein of on the demise of one Tara who purportedly held it as 'Abadi' it standing escheated to the defendants. However, the non adduction of the relevant mutation would not in its entirety disrobe the efficacy of the propagation of the defendants of given the plaintiffs provenly not ever holding its lawful possession theirs yet holding a right to stake a claim for ousting the defendants to seek their eviction therefrom. The reason for this Court proceeding to with invincible vigour conclude of dehors the defendants not adducing the relevant mutation attested on demise of Tara by the Revenue Officer concerned personificatory of the suit land hence standing escheated to them, theirs hence proving the aforesaid factum probandum stands harbored upon the acquiescence made by their predecessor in interest qua his not holding its lawful possession whereas with lawful possession of 'Abadi land' constituting the indispensable sine qua non for a 'Abadi' holder standing entitled to repulse the defendants from dislodging his possession thereto, acquiescence whereof contrarily belies the espousal of the plaintiffs qua theirs holding its lawful possession rendering open an inference of hence theirs not holding any right to restrain the defendants from seeking their eviction therefrom. The inference of acquiescence made by the predecessor in interest of the plaintiffs stands constituted in Ext.DW-1/A embodying a communication made to the authorities concerned by the predecessor in interest of the plaintiffs wherein an articulation exists qua the suit land standing located in vicinity to his 'Ara machine' qua whose allotment to him by way of lease he made a request therein to the authority concerned. Furthermore the defendants had put to auction the contentious parcel of two biswas of land. On conclusion of the relevant auction proceedings of the suit land as stood conducted by the authority concerned one Pritam Singh as manifested by Ext.DW-1/D stood declared to be the successful bidder whereupon it stood allotted to him on lease. An order for its allotment to him by lease was made by the authority concerned. Moreover in the aforesaid proceedings as divulged by Ext.DE comprising a copy of an order rendered by Sub Judge Ist Class, Kandaghat, in an application preferred therebefore by the predecessor in interest of the plaintiffs under Order 39 Rule 1 and 2 CPC, a communication occurs of the predecessor in interest of the plaintiffs participating in the auction held qua the suit land by the authority concerned, reiteratedly the effect of the aforesaid acquiescence is of (a) neither the predecessor in interest of the plaintiffs nor the plaintiffs ever holding lawful possession of the contentious suit land; (b) with evidently neither the predecessor in interest of the plaintiffs nor the plaintiffs holding lawful possession of the 'Abadi land' theirs acquiescing to the propagation of the defendants of on the demise of one Tara who hitherto held it, it given the aforesaid Tara dying issueless, it standing escheated in the State besides benumbs the effect if any of non adduction by the defendants of the relevant attestation of mutation qua it by the revenue officer concerned on demise of Tara (c) the defendants proving the factum of the suit land on demise of Tara vesting by escheat vis-à-vis them; (d) defendants holding a right to evict the plaintiffs therefrom. The learned counsel appearing of the plaintiffs has contended that the vigour of the aforesaid acquiescence neither estopps the plaintiffs to stake a claim qua their entitlement to the suit land nor relieves the defendants from adducing the relevant mutation pronouncing the factum of its standing escheated to them. In making the aforesaid submissions he relies upon a judgement of the Apex Court reported in **A.C.Jose Vs. Sivan Pillai and others *(1984) 2 SCC 656*** , parapgraph 38 whereof stands extracted hereinafter:

> "38. Lastly, it was argued by the counsel for the respondents that the appellant would be estopped from challenging the mechanical process because he did not oppose the introduction of this process although he was present in the meeting personally or though his agent. This arguments is wholly untenable because

when we are considering a constitutional or statutory provision there can be no estoppel against a statute and where or not the appellant agreed or participated in the meeting which was held before introduction of the voting machines, if such a process is not permissible or authorized by law he cannot be estopped from challenging the same."

He also places reliance upon a judgement of the Hon'ble Apex Court reported in **Commissioner of Income-tax (Central) vs. B.N.Bhattacharjee and another *(1979) 4 SCC 121,*** relevant paragraphs No. 56 to 59 whereof stand extracted hereinafter:

"56. Now we came to the meat of the matter - the plea of estoppel or its variants. The C. I. T's objection to the jurisdiction of the Commission to proceed with the matter has been shot down by the artillery of estoppel. The order under appeal proceeds to hold that a conspectus of the circumstances of the case compels the conclusion that an understanding had been reached between the assessee and the C. I. T., evidenced by mutual withdrawal of their respective appeals before the I. T. A. T., that the Commission would be permitted to explore a settlement; and so, the statutory veto available to the C. I. T. to interdict the enquiry by the Commission could not be exercised because he was estopped from so doing, resiling from his earlier stand. The argument has an attractive veneer or cosmetic charm but law is more than skin-deep and courts peep beneath to see the principle of equity and justice thereby promoted.

57. What, in essence, is estoppel? Estopeel is a rule of equity which for bids truth being pleaded or representation, on which faith, another has acted to his detriment, being retracted. Even extending the rule into the newfangled empire of promissory estoppel, it cannot go beyond the limits of the Law Revision Committee in England which Lord Denning allowed to blossom in the High Trees case, 1947 (1) KB 130 - also see "Discipline of Law by Lord Denning" p. 202.

"We therefore recommend that a promise which the promisor knows, or reasonably should know, will be relied upon by the promisee, shall be enforceable if the promisee has altered his position to his detriment in reliance on the promise."

58. The soul of estoppel is equity, not facility for inequity. Nor is estoppel against statute permissible because public policy animating a statutory provision may then become the casualty. Halsbury has noted this sensible nicety.

"Where a statute, enacted for the benefit of a section of the public, imposes a duty of positive kind, the person charged with the performance of the duty, cannot by estoppel be prevented from exercising his statutory powers."

[Maritime Elec. Co. Ltd. v. General Diaries Ltd. 1937 AC 610 and Halsburys Laws of England para 1515.]

"A petitioner in a divorce suit cannot obtain relief simply because the respondent is estopped from denying the charges, as the court has a statutory duty to inquiry into the truth of a petition." [Hudson v. Hudson (1948) P. 292 and Halsburys Laws of England Para 1515].

The luminous footnote cites rulings and states that

"This rule probably also applies where the statute bestows a discretion rather than imposing a duty." [Halsbury, 4th Edn. pp. 1019.]

To sum up, where public duties cast by statute are involved, private parties cannot prevent performance by invoking estoppel. We do not discuss further since the facts here exclude estoppel.

59. In the present statutory situation Section 245D by the 2nd Proviso, casts a public duty on the Commissioner of Income-tax to consider, in the light of the case made out in the assessee's application, whether "concealment of particulars of income on the part of the applicant or perpetration of fraud by him for evading any tax or

other sum chargeable or imposable under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act, has been established or is likely to be established by any Income-tax authority, in relation to the case", and exercise his veto power to prevent escape of macro-criminals prima facie guilty of grave economic crimes. He cannot bargain over this interdict in advance or barter away a legal mandate in anticipation. He may permit or even assist the filing of a conciliation motion by the assessee but when the Commission intimates him under S. 245D (1) he shall, with statutory seriousness, exercise his discretion. He cannot enter into a 'deal' over this power without betraying the statutory trust. We cannot, therefore, accept the plea that the Commissioner of Income-tax, by conduct and 'under-standings' has 'irredeemably, mortgaged' his statutory duty to object if the case deserves such objection. Estoppel then is both odious and ominous and discretion the door to corruption."

8. However, the reliance placed by the learned counsel for the plaintiffs/appellants herein upon the aforereferred verdicts, relevant portions whereof stands extracted hereinabove, do not confer any legal leverage upon him to contend of the aforesaid acquiescence if any not estopping the plaintiffs/appellants to claim possession qua the suit land nor relieving the defendants from adducing the relevant mutation magnifying the factum of its on demise of Tara standing escheated to them. The reason for forming the aforesaid conclusion stands founded upon the factum of acquiescences made by a litigant operating as an estoppel against him unless acquiescences are qua a fact or a procedure, adoption/ acquiescence whereof is impermissible or barred by law. Also any representation made by the predecessor in interest of the plaintiffs to the authority concerned qua the suit land would not operate as an estoppel vis-à-vis the plaintiffs for hence barring them to stake a right of retaining possession of the suit land unless they provenly by vigorous evidence establish the trite factum of theirs holding its lawful possession evidence whereof stood comprised in the factum of their predecessor in interest while acquiring the 'Abadi land' of one Dharam Dutt his also acquiring the contentious tract of two biswas of land. Since the relevant best evidence stands unadduced, the plaintiffs cannot claim the benefit of the renditions aforesaid nor obviously can contend of their acquiescences of their predecessor in interest not estopping them to claim possession of the suit land. Furthermore any acquiescence by a litigant in derogation of his inherent rights would also not estop him to subsequently stake a claim for their bestowment upon him. However, none of the aforesaid legal expostulations for excepting the plaintiffs from any attraction qua them the principle of estoppel awakened by the acquiescences made by their predecessor in interest occurring in the aforereferred exhibits is available to them, rendering hence inapt any reliance by the learned counsel for the appellants upon the citations aforesaid. The reason for this Court concluding of the counsel for the plaintiff making an inapt reliance upon the judicial verdicts aforesaid rest upon the trite factum of the suit land standing nomenclatured as 'Abadi' for continuance of possession whereof they stood enjoined to prove by forthright evidence qua theirs continuously since their predecessor in interest besides uptill now holding its lawful possession. However, the aforesaid trite factum for theirs thereupon concomitantly standing vested with a right to forestall the defendants in usurping their possession if any thereupon hence stands unestablished besides unproven by them, as a corollary when proof of the aforesaid factum probandum is imperative it remaining unsubstantiated, cannot bestow in them any right to contend of the acquiescences aforesaid qua the suit land made by their predecessor in interest not estopping them to oust the defendants to stake their eviction therefrom.

9. The result of the above discussion is that the appeal preferred by the appellants/plaintiffs is dismissed and the substantial question of law is answered against them. The judgements and decrees rendered by the both the Courts below are maintained and affirmed. Decree sheet be prepared accordingly. The parties are left to bear their own costs. All pending applications also stand disposed of accordingly. Records be sent back forthwith.

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

Kuldeep Chand ..Appellant/defendant.
Versus
Satya Devi and another ..Respondents/plaintiffs.

RSA No.545 of 2002
Reserved on : 09.08.2016
Date of decision: 20/08/2016

Specific Relief Act, 1963- Section 15- Plaintiff filed a suit for possession claiming that defendants had encroached upon the suit land- suit was opposed by the defendants by filing a reply denying the contents of the plaint- suit was decreed by the trial Court- an appeal was filed, which was dismissed- held, in second appeal that defendants had purchased the land from the plaintiff- he had encroached upon the suit land, which fact was established by demarcation report- it was contended that Local Commissioner was not examined and no reliance could have been placed on the report- no evidence was led by the defendants in support of the objection- demarcation was conducted in accordance with law- appeal dismissed. (Para-7 to 11)

For the appellant: Mr. Anand Sharma, Advocate.
For the respondents: Mr. Ajay Sharma, Advocate for respondent No.1.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

The instant appeal stands directed against the impugned judgement and decree of the learned District Judge, Una, H.P., whereby he affirmed the rendition of the learned Sub Judge 1st Class, Court No.II, Amb, District Una. The defendant standing aggrieved by the concurrently recorded renditions of both the learned Courts below against him concerts through the instant appeal constituted before this Court, to reverse the judgements and decrees of both the Courts below.

2. The facts necessary for rendering a decision on the instant appeal are that plaintiff was the owner in possession of land measuring 10 Kanals 7 marlas comprising of Khasra No. 1980 as per copy of the jamabandi for the year 1980-81 situate in village Amb, Tehsil Amb. Out of the above said land, the plaintiff is said to have sold the land measuring 10 karams x 18 karams shown by khasra No. 1980/1 in favour of the defendants. The defendants were alleged to have constructed their house on the aforesaid land. However, at the time of raising construction of their house, the defendants are said to have encroached upon 98 sq.mtrs. the land of the plaintiff. The defendants are said to have raised wall between points ABCD and have also installed a gate at points A and B on the eastern side of their house. The defendants are further shown to have encroached upon some other land of the plaintiff on the western side of their house as shown by letters FGHI. The possession of the defendants over the disputed land was stated to be that of trespassers and the plaintiff claimed the possession of the disputed land against the defendants on the allegation that the defendants have refused to vacate this land despite being asked to do so.

3. The suit of the plaintiff was resisted by defendants who have filed written statement in the case. The defendants have denied that they have encroached upon any land of the plaintiff. It was averred that the land purchased by the defendants from the plaintiff was demarcated and shown to the defendants in presence of the plaintiff and the defendants have raised the construction of their house on this very land and they have not encroached upon any further land of the plaintiff.

4. On the pleadings of the parties, the trial Court struck following issues inter-se the parties in contest on 10.01.1994:-

1. Whether plaintiff is entitled to the possession of suit land marked as ABCED and FGHI in the site plan attached with the plaint? OPP.

1A. Whether defendants have encroached upon an area 98 Sq.mtrs. marked by letters ABCDE and FGHI in the site plan? OPP.

1B. Whether the possession of defendants over portion marked ABCDE and FGHI is that of trespasser? OPP.

2. Whether plaintiff has no locus-standi to file the present suit? OPD.

3. Whether suit is bad for non-joinder of necessary parties? OPD.

4. Whether plaintiff is estopped by her act and conduct as alleged to file the present suit? OPD.

6. Relief.

On 19.2.1996 the learned trial Court framed another issue:

"Whether the report of the Local Commissioner is liable to be set-aside."

5 On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff besides the learned First Appellate Court dismissed the appeal preferred therefrom before it by the defendants.

6. Now defendant Kuldeep Chand has instituted the instant Regular Second Appeal before this Court, assailing the findings recorded by the learned first Appellate Court in its impugned judgment and decree. When the appeal came up for admission on 25.08.2004, this Court admitted the appeal on the hereinafter extracted substantial question of law:-

"Whether the relief granted to the plaintiff by the Courts below was beyond the scope of the pleadings."

Substantial question of law.

7. Uncontrovertedly, the appellant purchased an area measuring 1 kanal from the plaintiff. He raised construction beyond the area sold to him by the plaintiff sequelling his hence encroaching upon the land of the plaintiff. The factum of the defendant encroaching upon the land of the plaintiff stands vividly pronounced by the Revenue Officer concerned in his demarcation report comprised in Ext.PW-3/D. The learned counsel appearing for the defendant/appellant has made a vigorous attempt before this Court to scuttle the efficacy of demarcation report comprised in Ext.PW-3/D on the anvil of the Local Commissioner concerned not stepping into the witness box for proving the trite factum of his holding demarcation of the relevant site in consonance with the relevant procedure encapsulated in the H.P.Land Code Manual. Furthermore, the learned counsel for the defendant has made a vehement espousal herebefore of the non rendition of a verdict by both the Courts below upon the objections reared by the defendant against the tenacity of the findings recorded by the local commissioner in his report comprised in Ext.PW-3/D renders his relevant report when construed in coagulation with the purported infirmity aforereferred to hence stand gripped with an aggravated vice of invalidation. He also contends of the findings pronounced by both the Courts below bereft of theirs pronouncing a verdict upon their objections qua it hence stains them with a vice of theirs standing pronounced in a summary besides in a post haste manner also obviously bespeaks of non application of their judicial mind qua the tenacity of Ext.PW-3/D rendering them it to be wanting in any legal vigour. Furthermore, the learned counsel appearing for the defendant has made loud echoings hereinbefore qua the emanation upsurging from the depositions of the plaintiffs' witnesses marking their stark acquiescence qua the construction raised by him upon the suit land especially with communications occurring therein of the defendant raising construction within the precincts of the area earmarked by the plaintiff at the time of his purchasing it from the latter estops the plaintiff to inordinately proclaim hereinbefore of the

defendant in his subjecting the suit land to construction his proceeding to do so without her consent. Initially the foremost onslaught constituted by the defendant to the report of the demarcating officer constituted in Ext.PW-3/D warrants its standing rested by this Court. Even though in Ext.PW-3/D the demarcating officer has recorded of his at the stage preceding his subjecting the suit land to demarcation his not holding the Tatima pertaining to the inter se contiguous lands of the parties at lis hereat, non holding whereof at the apposite stage ensuing from its unavailability thereat. Nonetheless his proceeding to from the relevant Tatima available on the relevant mutations besides from the relevant field books, hence gauge their respective Karukans besides their respective areas. Furthermore, with the aforesaid manner of the demarcating officer making a determination of the configuration besides of the areas borne by the relevant contiguous lands of the parties at lis standing evidently concurred by both the plaintiff and the defendant under their respective statements recorded before him which stand respectively borne on Mark-A and Mark-B especially when signatures of the defendant occurring thereon stand not contested by him also with the apposite revelations manifested therein qua the displaying of satisfaction by the defendant qua the demarcation conducted by the demarcating officer of the relevant contiguous lands of the parties at lis, foments a conclusion of with the procedure adopted by the demarcating officer in gauging on the anvil of Ext.PW-3/G and Ext.PW-3/H the area besides the dimensions of the contiguous lands of the parties at lis, gauging whereof stood meted concurrence by the defendant as displayed by his statement comprised in Mark-B also with his in Mark-A displaying his concurrence with the measurements of the relevant contiguous lands of the parties at lis hence his standing estopped him from contending qua the gauging by the demarcating officer, the dimensions/areas of the relevant contiguous lands of the parties at lis while standing anvilled not upon the relevant Tatima being impermissible or hence his holding demarcation of the relevant contiguous lands of the parties at contest in purported stark departure of the procedure contemplated in the H.P.Land Manual also forestalls him from contending of the conclusions arrived by the demarcating officer in his report comprised in Ext.PW-3/D wanting in legal worth. Although it was preemptory for the demarcating officer to before his proceeding to demarcate the contiguous land of the parties at lis to hold the copy of the relevant Tatima yet with his assigning a good reason qua its unavailaibility also with his preceding thereto recording the consensus ad idem of the parties at lis qua the fixed points wherefrom he hence demarcated the contiguous lands of the parties at contest renders inconsequential the effect of unavailability of the relevant Tatima.

8. Be that as it may, with the defendant concurring with the determination by the demarcating officer of the relevant fixed points with the aid of Musabi available on the relevant mutations besides from the relevant field books renders inconsequential the effect of the demarcating officer not tendering by stepping into the witness box his report comprised in Ext.PW-3/D. Moreover, the effect if any of the learned Courts below not pronouncing upon the objections reared therebefore by the defendant qua the efficacy of the demarcation report embodied in Ext.PW-3/D is for the reasons ascribed hereinafter legally unworthwhile.

9. Although it was imperative for the demarcating officer to by stepping into the witness box tender his report comprised in Ext.PW-3/D for hence his proving it. However, the dire legal necessity qua his thereupon proving it would acquire a paramount effect for hence rendering his report comprised in Ext.PW-3/D to hold no efficacy in law only when on the apposite issue framed by the learned trial Court on 19.2.1996 qua hence his report being liable to be quashed and set-aside, the defendant had adduced therebefore sustainable evidence for sustaining besides succoring the aforesaid espousal. However, though an apposite issue struck by the learned trial Court qua the objections raised by the defendant vis-à-vis the report of the demarcating officer comprised in Ext.PW-3/D yet as openly echoed by an order of the learned trial Court recorded on 9.10.1996 of the counsel for the defendant waiving his right to lead evidence for sustaining his objections qua the report of the Local Commissioner, warrants a deduction standing derived by this Court, of the defendant not pressing his objections qua the report of the local commissioner nor also his holding any evidence in support of the objections reared by him qua the report of the local commissioner. Contrarily, an inference stands

awakened from the concurrence emanating from the defendant embodied in his statement comprised in Mark-B recorded by the demarcating officer prior to his holding demarcation of the relevant site besides also from his making concurrence to the demarcation of the relevant site held by the demarcating Officer, concurrence whereof stands bespoken in his statement comprised in Mark-B signatures whereon of the defendant remain uncontested by him of hence the counsel for the defendant standing constrained to waive the apposite opportunity to lead evidence for succoring his objections to the report of the local commissioner. Also the aforesaid apposite concurrences begetting the sequel of the demarcation report comprised in Ext.PW-3/D holding legal sinew. The sequel of the aforesaid discussion is of the acquiescence if any of the plaintiff upsurging from communications occurring in the plaintiffs' evidence of the defendant holding his construction within the precincts of the area disclosed to him by the plaintiff at the time he purchased an area of 1 Kanal from the plaintiff, getting belittled. The reason for holding so, sprouts from the factum of the defendant conceding to his purchasing an area measuring 1 kanal from the plaintiff wherewithin alone he held a right to raise construction. Even if the area which stood disclosed to him by the plaintiff prior to his proceeding to raise construction fell in excess of the area alienated to him by the plaintiff yet it was enjoined upon him to get ascertained from the competent revenue officer the relevant dimensions of the land alienated to him. He omitted to do so. Contrarily for his omission he cannot merely on a surmisal assessment by the plaintiff of the area wherewithin the dimensions of 1 kanal of land occurred, forestall her from canvassing her vested rights to usurp his possession therefrom predominantly when the concert of the plaintiff to usurp his possession therefrom stands squarely anchored upon a valid demarcation report.

10. The learned counsel for the defendant has made a vociferous address before this Court qua the omission of the plaintiff to step into the witness box for corroborating the averments constituted in the plaint whereas the averments constituted in the plaint standing testified by her power of attorney who in his cross-examination makes communications of his holding an estate located at a distance of 20 km from the suit land also his showing ignorance qua the dimensions of the suit land rendered him while hence his unveiling the factum of his holding no personal knowledge qua the entire gamut of the controversy engaging the parties at lis also his unveiling his ignorance qua the averments testified by him in proof of the averments constituted in the plaint whereas in case he held personal knowledge qua the relevant facets embedded in the plaint would facilitate him to prove them dehors the plaintiff not stepping into the witness box for proving the averments, contrarily his unveiling his ignorance qua the entire gamut of the controversy besetting the parties at lis renders proof if any adduced by him qua the averments constituted in the plaint to hold no legal worth. He contends of the averments constituted in the plaint standing unsubstantiated. He also contends qua the omission of the plaintiff to step into witness box for proving the averments constituted in the plaint constraining a conclusion from this Court of theirs remaining unsubstantiated whereupon he contends of the suit of the plaintiff warranting dismissal. To succor his submission he relies upon judgements reported in 2002(3) SLC-285, 1999(3) SCC 576, 2000(2) SLJ-1736, 2002(3) SLC-478 and 2001(1) SLJ 463. The effect of the aforesaid submissions stand effaced in the light of this Court pronouncing with formidability of the demarcation report comprised in Ext.PW-3/D standing not bereft of any validity. With the entire gravamen of the lis engaging the parties at lis standing hinged upon the encroachment made by the defendant upon the land of the plaintiff factum whereof enjoined adduction of best evidence comprised in the report of the demarcating officer concerned, imperatively when the relevant best evidence stands adduced also when it for reasons aforestated holds sinew besides when the attorney of the plaintiff did not hold the relevant demarcation nor was hence required to prove it hence his ignorance if any qua the entire gamut of the controversy embodied in the plaint also hence the effect of his testimony being discardable gets subsumed in the trite factum of the fulcrum of the controversy warranting its standing clinched by best evidence comprised in the report of the local commissioner, report whereof when holds validity also vigorously clinches the apt controversy it would be legally insagacious to on the plaintiff omitting to step into the witness box, draw any adverse inference qua her from her omission to step into the witness box, also it would be legally inapt to from ignorance if any of the

power of attorney qua the entire gamut of the controversy embodied in the plaint, conclude of hence the averments constituted in the plaint remaining unproved nor it would be apt to conclude of the suit of the plaintiff warranting dismissal prominently when the factum probandum or the fulcrum of the controversy hinged upon the demarcation report Ext.PW-3/D stands thereupon clinched.

11. The result of the above discussion is that the appeal preferred by the defendant/appellant herein is dismissed and the substantial question of law is answered against him. The judgements and decrees rendered by the both the Courts below are maintained and affirmed. Decree sheet be prepared accordingly. The parties are left to bear their own costs. All pending applications also stand disposed of accordingly. Records be sent back forthwith.

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

Paras Ram ..Appellant/plaintiff.
Versus
State of Himachal Pradesh and others ...Respondents/Defendants.

RSA No. 437 of 2004.
Reserved on: 10/08/2016
Date of decision: 20/08/2016

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for seeking permanent prohibitory injunction for restraining the defendant from interfering in the flow of water for irrigation purpose- it was pleaded that land of the plaintiff was being irrigated from the source named Jaral Bain- defendants threatened to tap the water of source forcibly and without consent of the plaintiff- suit was opposed by filing a reply pleading that water source is owned and possessed by State of Himachal Pradesh- Department was going to dig the well in Khasra No. 283 on the request of the public at large- plaintiff cannot restrain the owner from digging well in their land- suit was dismissed by the trial Court- an appeal was preferred, which was also dismissed- held, in second appeal that no prescriptive right can be acquired regarding the water flowing in underground channel- there was no evidence that by tapping the water, plaintiff would be deprived of the use of the water for irrigating his land- injunction was rightly refused in these circumstances- appeal dismissed. (Para-7 and 9)

Case referred:
Het Singh and others vs. Anar singh and others AIR 1982 Allahabad 468

For the appellant: Mr. Ankush Dass Sood, Sr. Advocate Ms. Shweta Julka, Advocate.
For the respondents: Mr. Vivek Singh Attri, Dy. A.G. for respondents No. 1 and 2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

The instant appeal stands directed against the impugned judgement and decree of the learned District Judge, Bilaspur, Himachal Pradesh, whereby he affirmed the rendition of the learned Senior Sub Judge, Bilaspur. The plaintiff standing aggrieved by the concurrently recorded renditions against him by both the learned Courts below concert through the instant appeal constituted before this Court, to reverse the judgements and decrees of both the Courts below.

2. The facts necessary for rendering a decision on the instant appeal are that plaintiffs filed a suit for permanent injunction as against the respondents restraining them from

interfering in the flow of water for irrigation purpose from a source named Jaral Bain. It was alleged by the plaintiffs that they were owner in possession of the irrigated land comprised in Khasra No. 130, 142, 258, 169, 287, 144, 141, 170, 145, 278, 82 and 155. It was alleged that this land was being irrigated from the water of the source named as Jaral and Bain Bawari situated in village Sayar. It was alleged that there is a water source situated in Khasra No. 283 from where the water for irrigation flows to the land of the plaintiffs who used to irrigate their land by the said water and that the lands of the plaintiffs situated downward from the said water source. It was alleged that the defendants had started threatening the plaintiffs to tap the water of the said source forcibly and without the consent of the plaintiffs and to take it to other villages for drinking purposes and have started digging a well near the source. It was alleged that in case the water is tapped in this manner, the plaintiffs would be put to a great loss hence the suit for injunction.

3. The suit of the plaintiffs was resisted by defendants whereby they have taken preliminary objections that of maintainability, cause of action and locus standi. On merits, they pleaded that there is water source situated in Khasra No. 276 owned and possessed by State of H.P. which was described in the revenue record as Gair Mumkin Bowli as Rafaiam i.e. for the benefit of the public at large. In regard to Khasra No. 283 it was pleaded by the defendants that this Khasra number is owned and possessed by Sant Ram alongwith Devku and the department was going to dig the well in this land on the request of the public at large. It was pleaded that the plaintiffs cannot restrain other owners from digging wells in their respective land and defendants were exercising their legal rights with consent of owners of Khasra No. 283. Thus, it was pleaded that the suit is liable to be dismissed.

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

1. Whether the suit in the present form is not maintainable, as alleged? OPD.
2. Whether the plaint does not disclose any cause of action and if so its effect? OPD.
3. Whether the plaintiffs have been in the user of the water of the of the source known as Jaral and Bain Bowri for irrigation of their land and exclusively as of right? OPP.
4. If issue No.1 is proved in affirmative whether by tapping the water source by the defendants for bringing water supply to the inhabitants in Khasra No. 283 caused interference in this user of the water by the plaintiffs for irrigation by diminishing the flow of the water? OPP.
5. Whether the plaintiffs are entitled for the relief of permanent injunction? OPP.
6. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs besides the learned First Appellate Court dismissed the appeal preferred therefrom before it by the plaintiff.

6. Now the plaintiff has instituted the instant Regular Second Appeal before this Court, assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 30.11.2004 this Court admitted the appeal on the hereinafter extracted substantial question of law:-

> "Whether the findings of the learned trial Court as affirmed by the learned First Appellate Court are dehors the evidence on record?"

Substantial question of law.

7. Water tapped, in, Jaral and Bain Bowri, stands contended by the plaintiffs to be the source for irrigating their fields. The aforesaid source of water occurs in Khasra No. 276, khasra number whereof stands not owned by the plaintiffs. The defendants by theirs tapping the water of Jaral and Bain Bowri stand espoused by the plaintiffs to cause deprivation of water to them though meant for irrigating their fields which occur below khasra No. 276. They claims a

relief for injuncting the defendants from tapping the water of Jaral and Bain Bowri on the anvil of theirs since time immemorial using its water for irrigating their fields. Obviously they contend qua even when its location occurs on Khasra No. 276, khasra number whereof stands not owned and possessed by them it yet constituting a servient heritage for facilitating the user of its water by them for irrigating their fields occurring below it given its relevant user holding continuity for 20 years hitherto, whereupon they statutorily stand vested with a prescriptive right qua its user for irrigating their fields, fields whereof constitute the dominant heritage. However, for pronouncing upon the sinew of the aforesaid contention an allusion to the provisions of Section 17 of the Indian Easements Act, 1882, which stand extracted hereinafter, is imperative.

> "17. Rights which cannot be acquired by prescription – Easements acquired under Section 15 are said to be acquired by prescription and are called prescriptive rights.
>
> None of the following rights can be so acquired:-
>
> (a) a right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were made, liability would be imposed;
>
> (b) a right to the free passage of light or air to an open space of ground:
>
> (c) a right to surface water not flowing in a stream and not permanently collected in a pool, tank or otherwise;
>
> (d) a right to underground water not passing in a defined channel."

A perusal of the aforesaid provisions portray of clause (d) thereof standing constituted therein to be one of the prescriptive rights being not amenable for acquisition by way of prescription, prescriptive right whereof is qua right to user of underground water not passing in a defined channel. However for determining whether hence the prescriptive right of easement staked by the plaintiffs qua user by them of the water held in Jaral and Bain Bowri for irrigating their fields falls within the ambit besides within the precincts of the domain of clause (d) of Section 17 whereupon hence they would stand baulked to claim any relief against the defendants, standing forestalled by an injunctive decree from tapping its water for providing drinking water to co-villagers an allusion qua the factum probandum of the water source standing nomenclatured as Jaral and Bain Bowri is a vivid besides visible pronouncement of the Bowri aforesaid obviously therewithin holding underground water also is a loud bespeaking of hence it standing held therewithin in a defined channel. Consequently, given the occurrence of underground water in a defined channel forestalls the plaintiffs to stake any prescriptive right qua its user by them for irrigating their fields which occur below it. Reiteratedly, hence when water if held not in a defined channel would empower the plaintiffs to stake a prescriptive right qua its user by them for irrigating their fields contrarily when it is held in a defined channel emasculates the concert of the plaintiffs to stake any prescriptive right qua its user by them for irrigating their fields which occur below it.

8. Be that as it may, the water which flows to the fields of the plaintiffs from Jaral and Bain Bowri, Bowri whereof apparently holds therewithin underground water in a defined channel rendering its flow therefrom onto the fields of the plaintiffs to be a subterranean flow whereupon also the plaintiffs would hold a right to injunct the defendants from tapping its water for providing drinking facilities to co-villagers only on upsurgings of cogent evidence personificatory of the defendants in tapping the underground water of Jaral and Bain Bowri theirs making an excessive drawal of water therefrom sequelling the subterranean flow of water therefrom onto the fields of the plaintiffs to stand diminished besides reduced with a concomitant effect of reducing the crop yielding capacity of their fields which occur below it. In coming to the aforesaid conclusion this Court finds succor from a judgement of the Allahabad High Court reported in **Het Singh and others vs. Anar singh and others *AIR 1982 Allahabad 468,*** paragraph 3 whereof stands extracted hereinafter:-

> "Without going into the merits of the that finding and accepting it as a fact that the plaintiffs had been irrigating their fields by taking water from the well in dispute for

more than 20 years, the question that arises in this Second Appeal is whether a right to do so by way of easement could be acquired by prescription in view of the provisions contained in Section 17 of the Easement Act which is to the effect that a right to underground water not passing in a defined channel cannot be acquired as an easementary right by prescription under Section 15 of the Act. A right to draw water from a well is surely a right to underground water and it is not the case that the plaintiffs right to enjoy water from their well was interrupted by something done by the defendants to the source of water in the well which was through a defined channel, by doing something, such as drawing an excessive supply of water from their own well from the same underground source."

9. Apposite evidence in personification of the aforesaid principle of law stood constituted in the report of the hydrologist wherein he made loud echoings in consonance with the aforesaid principles encapsulated hereinabove. Though PW-2 stepped into the witness box wherein he has made a pronouncement of his measuring the discharge of water from Jaral and Bain Bowri in sequel whereto he prepared Ext.PW-2/A, exhibit whereof holds pronouncements of the tapping of the relevant underground water by the defendants begetting the consequence of dwindling the subterranean flow of underground water onto the fields of the plaintiff rendering them hence to stand deprived of water in plentiful for facilitating theirs irrigating their fields, fields whereof stand depicted in the revenue records to be irrigated land. However, the aforesaid pronouncements do not hold any vigour given his making echoings in his cross-examination qua his at the time of his visiting the 'Jaral and Bain Bowri' his not holding any equipments to measure the depth of water occurring therein. Also his voicing in his cross-examination of his making measurements of surplus water at the relevant site and not of ground water besides his acquiescing to the suggestion put to him by the learned defence counsel while holding him to cross-examination of wells as, is, Jaral and Bain Bowri holding underground water, constrains a conclusion of his not measuring either the depth of the under groundwater occurring therein nor his determining by applying scientific methods the trite factum qua the consequence of the defendants in tapping its water for supplying it to co-villagers entailing a diminution of its subterranean supply to the fields of the plaintiffs. In sequel, with the plaintiffs not proving the factum qua the subterranean supply of its water onto their fields standing diminished, in sequel to the defendants tapping it therefrom also with the plaintiffs not cogently proving by adducing best evidence in display of on the defendants tapping its water the crop yielding capacity of the relevant fields facing diminution, fosters a conclusion of act of the defendants in tapping the water of Jaral and Bain Bowri not begetting the consequence of its subterranean flow therefrom onto the fields of the plaintiffs either reducing or diminishing. As a corollary the injunction as claimed by the plaintiffs against the defendants from restraining them for tapping its water warrants its standing refused dehors the factum of theirs holding a right to claim its subterranean flow therefrom onto their fields. The substantial question of law is answered against them. The judgements and decrees rendered by the both the Courts below are maintained and affirmed. Decree sheet be prepared accordingly. The parties are left to bear their own costs. All pending applications also stand disposed of accordingly. Records be sent back forthwith.

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

Bholu Ram .....Appellant.

Versus

State of H.P .....Respondent.

Cr. Appeal No. 189 of 2016
Reserved on : 4.8.2016
Decided on : 22-08-2016

Indian Penal Code, 1860- Section 376- Prosecutrix was residing with her children in her home – accused came to the room of the prosecutrix and raped her- incident was narrated by prosecutrix to her father- accused was tried and convicted by the trial Court- held, in appeal that prosecutrix had supported the prosecution version- there are no significant contradictions in her testimony- her version was duly supported by her father- medical evidence also corroborated the version of the prosecutrix- delay was properly explained- prosecution version was proved beyond reasonable doubt- trial Court had rightly convicted the accused- appeal dismissed. (Para-9 to 13)

For the Appellant: Mr. Lovneeesh Kanwar, Advocate.
For the Respondent: Mr. P.M Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed against the impugned judgment of 24.12.2015 rendered by the learned Additional Sessions Judge, Ghumarwin District Bilaspur, Himachal Pradesh (Camp at Bilaspur) in Sessions trial No. 4/7 of 2015, whereby the learned trial Court convicted the appellant (hereinafter referred to as "accused") for his committing an offence punishable under Sections 376 of the Indian Penal Code also sentenced him as under:-

> "*.....he is sentenced to undergo rigorous imprisonment for a period of ten years and fine of Rs.10,000/- (Rupees Ten Thousand Only) for the commission of offence punishable under Section 376 of the Indian Penal Code. In default of payment of fine he shall further suffer rigorous imprisonment for a period of six months.....*"

2. Brief facts of the case are that the prosecutrix is the wife of Amit Chand (PW-7) and was residing in village Khungan. Her husband is a driver by profession and he seldom visits home. Accused alongwith the prosecutrix and her three daughters and one son had been residing together. On the intervening night of 9/10.9.2014 at about 12.30 a.m. accused came to the room of the prosecutrix and forcibly committed sexual intercourse upon her. The prosecutrix had communicated qua the aforesaid act of the accused to her father by her mobile phone. In the company of her father (PW-5) she had gone to the police station for lodging a report. The accused for the past 15-16 days had regularly been teasing the prosecutrix. Earlier also on 3-4 occasions the accused had forcibly made physical relations with the prosecutrix. On 8.9.2014 during the night time the accused by entering in her room had made physical relation with her forcibly. The accused on each and every occasion holding out threats to the prosecutrix to kill her if she made a disclosure to anyone. Out of fear, except for her husband, the prosecutrix had not disclosed anything to anyone. Her husband had been abusing her. Owing to the threatening meted by the accused the prosecutrix had not reported the matter to the police earlier. On the matter being reported to the police, FIR Ex.PW-10/A came to be registered. Medical examination of the prosecutrix was conducted on an application. Dr. Shilpa (PW-9) conducted her medical examination and observed that the possibility of sexual intercourse and rape could not be ruled out. The accused was also medically examined and on his examination it stands found that there was nothing to suggest that the accused was not capable of performing sexual acts. Site plan Ex. PW-12/A was prepared. Vaginal swabs, pubic hair and slides of the prosecutrix were preserved by the medical officer and handed over to the police. The underwear, sample of blood, pubic hair and semen of the accused were also taken and sealed. Further the case of the prosecution is that the prosecutrix had handed over to the police her shirt (Ex.P-2) and salwar (Ex.P-3), which were sealed in a parcel and seized vide seizure memo Ex.PW-2/A. A khandolu (Mattress) (Ex.P-5) was also produced by the prosecutrix which was seized under memo Ex.PW-2/B. Mobile phone alongwith sim card was also taken into possession by the police vide seizure memo Ex.PW-3/A. The case property was handed over to the MHC, who sent the same to the Regional Forensic Science Laboratory, Mandi. On receipt of RFSL report comprised in Ex. PW-

8/C and completion of all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. The accused stood charged by the learned trial Court for his committing offences punishable under Sections 376 and 506 of IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 13 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded in which he pleaded innocence and claimed false implication. However he did not choose to lead evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of conviction against the accused for his committing an offence punishable under Section 376 of the IPC.

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

7. The learned Deputy Advocate General has with considerable force and vigour contended qua the findings of conviction recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference rather 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. An FIR stood lodged with the police station concerned qua the ill-fated incident which occurred in the intervening night of 9/10.9.2014 at 12.30 a.m. wherein a narrative is held of the prosecutrix standing subjected to forcible sexual intercourse by the accused/her father-in-law. The sole deposition qua the ill-fated occurrence of the prosecutrix when bereft of any vice of any visible inter-se contradiction vis-à-vis her respective examination-in-chief with her cross-examination would ipso facto constitute sinewed evidence of probative worth for constraining this Court to return findings of conviction against the accused. For disinterring the factum aforesaid an incisive reading of her deposition is imperative. She has in her deposition made both loud and vivid underscorings therein qua on the relevant date hers standing subjected to forcible sexual intercourse by the accused. She with utmost promptitude made a revelation qua the occurrence to PW-5, her father. PW-1 (Ashwani Kumar) has deposed a version corroborative to the version qua the occurrence spelt out by the prosecutrix in her testification. PW-1 who alongwith PW-5 on the latter receiving a cellular communication from the prosecutrix proceeded to the matrimonial home of the latter has recorded a vivid pronouncement in his testification qua theirs thereat noticing the prosecutrix sitting in the courtyard of her house alongwith her three daughters whereas the accused stands testified by them to be noticed by them to be hurling abuses from the room of the upper storey of his house. The aforesaid pronouncement occurring in the testification of the PWs aforesaid holds the effect of theirs countervailing the concert of the defence to herebefore espouse of with the prosecutrix not raising outcries for inviting the presence of the inhabitants of the homesteads located in close vicinity to the relevant site of occurrence apparently unveiling of hers holding consent to the accused for his subjecting her to sexual intercourse. Even otherwise reiteratedly the factum of hers purveying with utmost promptitude a communication qua the occurrence to her father by holding a communication with him over a cell phone, factum whereof stands vigorously corroborated by call detail reports Ex.PC and PE**,** unfolds the imminent factum of hers not contriving the implication of her father-in- law/ the accused nor also it can be concluded of hers by omitting to raise outbursts not rendering herself amenable to an inference standing foisted qua hers consensually succumbing to the sexual misdemeanors of the accused given hers holding a perception qua her

reputation standing stigmatized by hers, during the ordeal of hers standing subjected to forcible sexual intercourse by the accused, raising outcries inviting thereat the presence of the neighbors, hence hers deeming it fit to on its conclusion make an intimation thereof to her father. Also the perpetration of sexual intercourse upon her person by the accused for it to be not amenable to a construction of its standing committed by hers purveying consent to the accused did not entail upon her to during its course or during the ordeal which beset her to raise outcries especially when as manifested by hers on consummation of the occurrence making a prompt cellular communication to her father rather tellingly bespeaks of hers not meteing consent to the sexual misdemeanors of the accused moreso when the aforesaid concert would stand unresorted to by her given its distracting her married life, as a corollary, dehors hers not during the ordeal which beset her, hers not raising outbursts for inviting the presence thereat of the neighbours holding residences in proximity thereof, is, consequential, given the prevalence hereat of singularly peculiar facts nor it can hence be concluded of hers by omitting to raise shrieks held consent to the accused qua his subjecting her to sexual intercourse.

10. The defence has assayed qua the implication of the accused by the prosecutrix holding an aura of falsity it standing reared by the accused holding a desire to alienate a part of his land to his sister whereas the prosecutrix and her father insisting upon the accused qua his transferring his land in their names, resistance whereof of the accused evoking an altercation inter-se the accused and the father of the prosecutrix wherefrom the latter nursed a vendetta vis-à-vis the accused, vendetta whereof found its outlet in his in collusion with her father falsely implicating the accused. However the aforesaid defence gets stifled by the factum of the prosecutrix acquiescing to the suggestion put to her by the learned defence counsel while holding her to cross-examination qua her husband not expending any money on her maintenance besides on the maintenance of her children rather her acquiescing to the apposite suggestion put to her by the learned defence counsel when holding her to cross-examination of the accused maintaining her besides her children. The effect of the aforesaid acquiescences is of there being no estrangement in the relationship inter-se the accused and the prosecutrix rather both living harmoniously together thereat the accused during the absence from home of the husband of the prosecutrix given the latter standing engaged as a driver callings whereof of his profession entailing his not staying regularly at his house. Also the aforesaid acquiescence blunts the factum of both holding animosity, with a concomitant effect of the defence making an engineered espousal on anvil aforesaid of the prosecutrix in connivance with her father falsely implicating the accused. Apart therefrom the effect of the prosecutrix leveling grave allegations upon her father-in-law begetting the ill-sequel of her image standing tarnished, protection whereof is the cherished aspiration of any married lady, she hence cannot at all be inferred to hold false allegations against the accused unless the latter had sexually exploited her.

11. The medical evidence on record held in Ex.PW-9/B holding manifestations of the prosecutrix standing subjected to sexual intercourse being not overrule able also the report of the FSL concerned holding unveilings of the vaginal slides of the prosecutrix sent therebefore holding semen, lends succor to the deposition of the prosecutrix. Even though the husband of the prosecutrix while appearing as PW-7 has deposed of his on the relevant date holding coitus with the prosecutrix hence concerts to repel the prosecutrix version yet his testimony is unworthwhile to oust the credible testimony of both PW-1 and PW-5 the brother and father respectively of the prosecutrix both of whom in prompt sequel to the latter making a cellular communication to them qua the occurrence proceeded to her matrimonial home whereat they testify qua theirs not noticing PW-7. The un-shattered testimony of both PW-1 and PW-5 qua theirs on theirs visiting the matrimonial home of the prosecutrix not noticing thereat the husband of the prosecutrix is amplifying display of the endeavor of the defence to thereupon repel the participation of the accused in the forcible coitus to which she stood held by the accused being both feeble besides fragile. Consequently, also with the opinion of the FSL concerned qua the vaginal slides of the prosecutrix as sent to it for examination holding semen is to be concluded to be connecting the accused in as much as the relevant vaginal slides holding the semen of the accused.

12. The effect of delay, if any, of the prosecutrix reporting the occurrence to the police station concerned stands effaced given its standing explicated in the factum of the police station Ghumarwin standing located at a distance of 28 kms from the relevant site of occurrence wheretoat she in the company of PW-5 in the morning of 10.9.2014 made a visit. Consequently when the alleged incident occurred in the intervening night of 9/10.9.2014 also when in prompt sequel thereto she made a cellular communication to her father who visited her matrimonial home rather renders hers holding a prompt communication qua the occurrence to her father also the factum aforesaid entwined with the evident factum of the relevant police station standing located at a distance of 28 kms from the site of the occurrence wheretoat given the darkness of the relevant time besides unavailability of means of transport she could not be expected to in prompt sequel to the occurrence visit it renders the delay, if any, to be inconsequential.

13. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned trial Court does not suffer from any perversity and absurdity nor it can be said that the learned trial Court in recording findings of conviction has committed any legal misdemeanor, in as much, as, its mis-appreciating the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of conviction recorded by the learned trial Court merit interference.

14. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment of the learned trial Court is maintained and affirmed. Record of the learned trial Court be sent back forthwith.

****

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

Majalsi & Others .....Appellants-Defendants

Versus

Zulmi Ram (since deceased) through his LRs .....Respondents-Plaintiffs

Regular Second Appeal No.178 of 2006.
Judgment Reserved on: 02.08.2016.
Date of decision: 22.08.2016

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for permanent prohibitory injunction pleading that they are owners in possession of the suit land- defendants started interfering with the same without any right to do so- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that plaintiffs and their witness had specifically stated that plaintiffs are owners in possession of suit land and defendants are interfering with the same without any right to do so- defendants relied upon the judgment but the judgment does not show that plaintiffs were restrained - version of the plaintiffs that they are owners in possession and defendants are stranger has to be accepted- Courts had rightly decreed the suit- appeal dismissed. (Para-14 to 25)

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

For the Appellants: Mr. Ajay Sharma, Advocate.
For Respondent No.1(a): Mr. Sanjay Kumar Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

This appeal has been filed by the appellants-defendants *(hereinafter referred to as the `defendants')* against the judgment and decree dated 10.2.2006, passed by learned District

Judge, Hamirpur, H.P., affirming the judgment and decree dated 29.1.2004, passed by learned Civil Judge(Junior Division), Court No.1, Hamirpur, H.P., whereby the suit filed by the Respondent-plaintiff *(hereinafter referred to as the `plaintiff)* has been decreed.

2. The facts necessary, as emerged from the record, necessary for adjudication of the case are that the plaintiff filed a suit for permanent prohibitory injunction against the defendants on the allegation that he had been owner in possession of land comprised in Khata No.51, Khatauni No.127, Khasra Nos.901, 903, 909, 911, 916, 917, 918, 932, 933, 934, 935, 937, 941, 942, kitta 14, measuring 10 Kanals 9 Marlas, as per Jamabandi for the year 1990-91, situated in village Rathwani, Mauza Mehlta, Tehsil Bhoranj, District Hamirpur, H.P. *(hereinafter referred to as the `suit land').* It is averred that the suit land had been allotted to the plaintiff by the State of Himachal Pradesh on which the defendants had started interfering with the ownership and possession of the plaintiff over the suit land w.e.f. Ist week of May, 2000. They had been requested not to do so, but without any result. The defendants are sought to be restrained from interfering in the ownership and possession of the plaintiff over the suit land by issuance of a decree of permanent injunction.

3. Defendants, by way of filing written statement, raised preliminary objections on the grounds of maintainability, estoppel, non-joinder, limitation, want of cause of action, principles of resjudicata and valuation in preliminary objections. On merits, the defendants had admitted the allotment of the suit land in favour of the plaintiff by the State of Himachal Pradesh. It is alleged that the possession of the suit land had not been delivered to the plaintiff and the defendants and other estate right holders had been in possession of the suit land. It is further alleged that the defendants had instituted a Civil Suit regarding the suit land against the plaintiff and the State of Himachal Pradesh, which was dismissed by both the Courts below and against the said judgments and decrees, the defendants had instituted Regular Second Appeal bearing RSA No.488 of 1990 against the plaintiff and State of Himachal Pradesh before this Court. It is further alleged that the said RSA No.488 of 1990 was allowed by this Court vide judgment and decree dated 22.07.1999 (mark `A'), in which this Court had observed that *"the plaintiffs-appellants (defendants herein) shall not be dispossessed from the suit land, unless already dispossessed, except, in due course of law"*. It is further alleged by the defendants that this Court had directed the Collector to dispose of the proceedings under the H.P. Village Common Land (Vesting & Utilisation) Act, 1974, *(hereinafter called the `Act').* As such, the plaintiff was not entitled to any relief much less to the discretionary relief of permanent prohibitory injunction and the defendants were entitled to special costs under Section 35-A of the Code of Civil Procedure from the plaintiff.

4. The learned trial Court, on the basis of pleadings, settled inasmuch as 9 issues and except Issue No.1, which is partly decided in favour of the plaintiffs, decided all the issues in favour of the plaintiffs and accordingly decreed the suit of the plaintiffs. An appeal preferred before the learned Appellate Court was dismissed.

5. This second appeal was admitted on the following substantial questions of law:

> *"(1) Whether the finding of the two Courts below that the respondent-plaintiff is in possession is not sustainable, in view of the statement of PW-1 Julmi Ram and PW-2 Lakhu Ram in which it is stated that the suit is for recovery of possession?*

6. As emerged from the record, plaintiff filed a suit for permanent prohibitory injunction against the defendants specifically stating that he is owner in possession of the suit land, as described above, which was allotted to him by the State of Himachal Pradesh. It is averred that the defendants started interfering in the ownership and possession of the plaintiff over the suit land w.e.f. Ist week of May, 2000 and as such they have filed suit praying for permanent prohibitory injunction against the defendants from interfering in the ownership and possession of the plaintiff over the suit land by way of decree of permanent injunction.

7. Defendants by way of written statement resisted the claim of the plaintiff. Though they admitted the allotment of the suit land in favour of plaintiff by State of Himachal Pradesh but denied his possession over the same and stated that defendants and other estate right holders had been in possession of the suit land. Defendants specifically denied that the plaintiff is in possession of the suit land, rather they set up a case that they had instituted a suit against the plaintiff and the State, which was dismissed. However, in Regular Second Appeal, this Court observed that the defendants cannot be dispossessed, except, in accordance with law, and a direction was issued to the Collector to dispose of the proceedings under the H.P. Village Common Land (Vesting & Utilization) Act, 1974.

8. Being aggrieved with the concurrent findings returned by both the Courts below, present appellants-defendants filed instant appeal on various grounds. However, main contention, which emerges from the grounds of the appeal as well as arguments having been made by learned counsel for the plaintiffs, is that no suit for permanent prohibitory injunction could be entertained or allowed by the Courts below filed by the true owner without being in possession of the suit land. As per defendants, plaintiff and his witnesses unequivocally admitted that the plaintiff had filed suit for possession, meaning thereby that the plaintiff is not in possession, as such, both the Courts below have erred in passing decree for permanent prohibitory injunction.

9. Apart from above, defendants have also placed reliance on mark `A', judgment passed by this Court in RSA No.488 of 1990, wherein directions were issued that appellants-defendants herein be not dispossessed from the suit land, unless already dispossessed, except in accordance with law. As per defendants-appellants, in the present case, bare perusal of plaint nowhere suggests that the plaintiff pleaded that the defendants stand dispossessed by the earlier judgment of this Court and as such they are estopped from filing the present suit and this aspect has not been looked into by the learned Courts below while rendering the judgments. Appellants-defendants also contended that bare perusal of the averments made in the written statement, which have not been denied by filing replication, would suggest that defendants are in possession of the suit land and as such no suit, if any, for permanent prohibitory injunction could be filed by true owner without being possession of the suit land and prayed that the judgments and decrees passed by both the Courts below be quashed and set aside.

10. Mr.Ajay Sharma, learned counsel appearing for the appellants-defendants, invited the attention of this Court to the statement made by the plaintiff's witnesses wherein, in cross-examination they admitted that they have filed suit for possession, meaning thereby that at the time of filing of the suit, plaintiff was not in possession and the suit is not maintainable. Mr.Sharma contended that as per provisions of Order 8 Rule 5 of the Code of Civil Procedure, when there is no specific denial to a fact pleaded, the same is taken to be admitted and, as such, no further evidence was required but despite that courts below having rendered contrary decision to the well settled principle of law and have violated the provisions of Order 8 Rule 5 CPC.

11. Mr.Sharma also stated that both the Courts below have fallen in error while relying upon the Jamabandies for the years 1985-86 (Ex.P-1), 1990-91 (Ex.P-2) and even in Khasra Girdawari (Ex.P-3), while holding plaintiff to be in possession of the suit land because plaintiff himself as well as witnesses adduced by him specifically stated on record that the plaintiff filed suit for possession, whereas evidence led on record by appellants-defendants clearly proves that they are in possession of the suit land and as such both the Courts below have erred in holding the plaintiff to be in possession of the suit land.

12. Mr.Sanjay Kumar Sharma, learned Counsel appearing for the respondents-plaintiffs, supported the judgments passed by both the Courts below and vehemently argued that no interference, whatsoever, is warranted in the present facts and circumstances of the case, especially in view of the fact that both the Courts below have very meticulously dealt with each and every aspect of the matter. He also urged that scope of interference by this Court is very limited especially when two Courts have recorded concurrent findings on the facts as well as law.

In this regard, to substantiate the aforesaid plea, he placed reliance upon the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264.**

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

14. Plaintiff, with a view to prove his case, examined two witnesses. PW-1 Zulmi Ram, plaintiff himself, categorically stated in his examination-in-chief that he is owner in possession of the suit land and defendants have no right, title or interest over the same. He also stated that defendants want to take forcible possession of the suit land will not allow the plaintiff to become owner of the suit land. Plaintiff also tendered in evidence Jamabandies for the year 1985-86 and 1990-91, wherein he has been recorded owner in possession of the suit land. Moreover, entries of these Jamabandies have been repeated in Khasra Girdawari w.e.f. 30.10.1998 to 13.3.2000.

15. PW-2 Shri Lakhu Ram also supported the statement given by PW-1 Zulmi Ram by stating that plaintiff is owner in possession of the suit land and defendants have no right, title or interest in the suit land. He also stated that defendants want to take forcible possession of the suit land. However, both the plaintiff witnesses in their cross-examination, while answering to the suggestions that they have filed suit for possession, admitted that they have filed suit for possession of the land. Otherwise also, careful perusal of the cross-examination of these PWs nowhere suggests that the defendants have been able to discard the testimony of these witnesses who have been very specific and candid in stating that PW-1 is owner in possession of the suit land. PW-1 in his cross-examination stated that he has filed suit for taking possession but if his statement is read in its entirety, it can be safely concluded that he was candid enough in stating that he is owner in possession of the suit land and as such statement/admission, if any, made in cross-examination cannot be read in isolation. Whereas PW-2, in his cross-examination, stated that he has also filed suit for taking possession, meaning thereby, that while making statement he was referring to the suit which he filed for taking possession. Conjoint reading of aforesaid deposition made by the plaintiff witnesses, if read with Jamabandies for the years 1985-86 and 1990-91, which are duly proved on record, clearly demonstrate that they are owners in possession of the suit land.

16. DW-1 Meena Kumari, Patwari, who had come with the record of the proceedings under the Act, categorically stated that a case under Section 3(5) of the H.P. Village Common Land (Vesting and Utilization) Act is pending for inquiry before Revenue Department in terms of the order of the High Court of Himachal Pradesh. She also stated that report of Tehsildar has not been received as yet. However, in her cross-examination, she stated that inquiry is not going on regarding the land of Shri Zulmi, meaning thereby that, at the time of filing of the suit for permanent prohibitory injunction by the plaintiff, no proceedings, if any, qua the suit land were pending in the SDM Court under Section 3(5) of the Act.

17. DW-2 Milkhi Ram stated that he and villagers are possessing the suit land and that the plaintiff never possessed the suit land. He also stated that he had filed the suit when the suit land was allotted to the plaintiff, but the same was dismissed. He also stated that they had filed an appeal before the learned District Judge which was also dismissed. It has also come in his statement that the Hon'ble High Court of Himachal Pradesh allowed his second appeal being RSA No.488 of 1990, wherein SDM was directed to conduct an inquiry in the matter which is still pending. In his cross-examination, he has shown his ignorance whether the mutation of the suit land has been entered in the name of the plaintiff.

18. DW-3 Chaudhary Ram also deposed that the plaintiff is not in possession of the suit land and that the villagers are possessing the suit land. He also stated that they had filed a suit against the plaintiff. It has also come in his statement that after the decision of Hamirpur Courts, the Hon'ble High Court of Himachal Pradesh sent the file to the SDM with the direction to

conduct an inquiry and that at present the matter is pending before the SDM. He showed his ignorance whether the mutation has been entered in the name of the plaintiff qua the suit land.

19. DW-4 Gurcharan Singh also stated that the defendants are possessing the suit land and cases are going on between the parties regarding the suit land and that the Hon'ble High Court of Himachal Pradesh sent the case to SDM for inquiry. Defendants also tendered in evidence copy of order passed by this Court mark `A'.

20. Careful perusal of aforesaid statements made by defendants' witnesses suggests that defendants made an attempt to set up a case that the plaintiff was never in possession of the suit land at the time of filing of the suit for permanent prohibitory injunction but conjoint reading of the depositions made by defendants' witnesses nowhere proves that the plaintiff was not in possession at the time of filing of the suit for permanent prohibitory injunction because all the defendants witnesses stated nothing with regard to dispossession, if any, of the plaintiff from the suit land. Rather, they all stated that defendants as well as villagers are in possession of the suit land, but interestingly none of the defendants' witnesses was able to state something with regard to entry of the name of the plaintiff in the mutation i.e. Jamabandies for the years 1980-85 and 1990-91. Apart from this, defendants led no documentary evidence suggestive of the fact that their names have been recorded as owners qua the suit land, though defendant by way of placing the judgment passed by this Court mark `A' tried to persuade the Courts below that he could not be dispossessed, save and except, in accordance with law. But this Court, while examining the record, could lay its hand to the judgment mark `A' which nowhere suggests that suit, if any, was filed by the defendants against the plaintiff and as such it cannot be accepted that by way of aforesaid judgment being relied upon by the defendants, plaintiff was estopped from dispossessing the defendants from the suit land. Apart from above, bare perusal of order passed by this Court in mark `A' suggests that appeal preferred by present defendants was dismissed with the direction to the State not to dispossess the plaintiff from the suit land, unless already dispossessed, except in due course of law. Rather perusal of the aforesaid judgment mark `A' clearly suggests that defendants filed suit for permanent prohibitory injunction in representative capacity on the pleadings that suit land was shown in the Jamabandi for the year 1973-74 as *"Shamlat Tikka'* and had thus vested in the Gram Panchayat under the Punjab Village Common Lands Act and thereafter in the State of Himachal Pradesh on coming into force of H.P. Village Common Lands (Vesting & Utilization) Act, 1974. The defendants, alongwith other right-holders of their village, approached this Court by way of filing a Civil Writ Petition bearing CWP No.297 of 1975 challenging the vires of the said statues as well as the vesting of the land in the State of Himachal Pradesh on the ground that the suit land had been in individual cultivating possession of the villagers, including the defendants, since before January, 1950. However, fact remains that this Court dismissed the writ petition vide order dated 21.4.1978 with a direction to the Collector concerned to enquire into the claim of the defendants under Rule 9 of the Rules framed under the Act, referred to above. Record further reveals that the Collector concerned neither complied with the directions given by this Court nor he conducted any inquiry, as envisaged under Rule 9 ibid. Record further suggests that Collector never gave any decision regarding the vesting of the suit land or otherwise, in the State of Himachal Pradesh.

21. After perusing the aforesaid judgment, mark `A', relied upon by the defendants, it nowhere emerges that plaintiff was restrained at any point of time by this Court to dispossess the defendants from land owned and possessed by them and as such this Court sees no illegality and infirmity in the judgments passed by both the Courts below.

22. While exploring the answer to the substantial question of law framed at the time of admission, this Court had an occasion to peruse the entire evidence led on record by respective parties and this Court sees no force in the contention put forth on behalf of appellant that Courts below mis-appreciated the statement of PW-1 and PW-2.

23. At the cost of repetition, it is once again stated that PW-1 plaintiff Zulmi Ram and PW-2 Lakhu Ram in their examination-in-chief categorically stated that they are owners in

possession of the suit land and they have filed suit for permanent prohibitory injunction restraining the defendants from causing interference. PW-1 admittedly in cross-examination, while answering the suggestion put forth to him, admitted that he has filed suit for possession but, as has been discussed above, the aforesaid admission, if any, cannot be read in isolation by defendants ignoring the documentary evidence i.e. Jamabandies for the years 1985-86 (Ex.P-1), 1990-91 (Ex.P-2) and Khasra Girdawari (Ex.P-3), which clearly suggests that plaintiff Zulmi Ram is the exclusive owner in possession of the suit land. This Court had also an occasion to go to through the statement of PW-2 Lakhu Ram, who unequivocally stated that PW-1 Zulmi Ram is owner in possession of the suit land. However, in his cross-examination, he stated that he has also filed suit for possession of his land against the defendants. Whereas, defendants have not been able to lead sufficient evidence, be it ocular or documentary, to rebut the entries as contained in Jamabandies Ex.P-1 and P-2. Hence, this Court, after close scrutiny of the documentary evidence, is fully convinced that the plaintiff has been able to establish on record that he has been recorded owner in possession of the suit land and defendants are strangers to the suit land and as such this Court sees no illegality and infirmity in the judgments and decrees passed by both the Courts below. Admittedly, in the present case, defendants though claimed to be in possession of the suit land, but did not lead any cogent, convincing evidence suggestive of the fact that they are in possession of the suit land and as such both the Courts below have rightly held that defendants interfered in the suit land which belongs to the plaintiff.

24. Consequently, in view of detailed discussion made hereinabove, this Court has no hesitation to conclude that judgments passed by both the Courts below are based upon the correct appreciation of record/evidence available on record. To answer the substantial question, reproduced hereinabove, this Court traveled through entire evidence led on record by the parties to the lis and it can be safely concluded that both the Courts below have rightly returned the concurrent findings of facts as well as law after dealing with the evidence on record meticulously. Hence this Court is of the view that this is not a fit case wherein exercise of powers/jurisdiction under Section 100 CPC concurrent findings returned by both the Courts below cannot be upset, especially when the defendants have failed to prove that judgments are perverse. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in ***Laxmidevamma's*** case supra, wherein the Court has held as under:

> *"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)*

25. Hence, in view of the aforesaid discussion, this Court is persuaded to conclude that the impugned judgments passed by both the Courts below are based on proper appreciation of the evidence, be it ocular or documentary on the record and, as such, substantial question of law, framed above, is answered accordingly. Hence, present appeal fails and the same is, accordingly dismissed.

26. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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

CWP No. 3274 of 2010 a/w
CWP No. 3278 of 2010
Reserved on : 5.8.2016
Decided on : 22.8.2016

CWP No. 3274 of 2010
Shailendra Kishore .....Petitioner.
Versus
Central Administrative Tribunal & others. .....Respondents.
CWP No. 3278 of 2010
Naresh Jaswal .....Petitioner.
Versus
Central Administrative Tribunal & others. .....Respondents.

Constitution of India, 1950- Article 226- Petitioners successfully cleared the competitive examination and undertook training at Jaipur- they were appointed on contract basis- however, a subsequent advertisement was issued for filling up posts on permanent basis- they filed an original application before Administrative Tribunal for seeking appointment on permanent basis, which was dismissed- held, that where the contractual appointment was made in accordance with procedure and there is a need for continuation of the post, petitioners have right to claim regularization- petition allowed and respondent directed not to terminate the services of the petitioners and to consider them for regularization. (Para-2 to 8)

Cases referred:
Secretary, State of Karnataka and others versus Uma Devi (3) and others, (2006) Vol 4 SCC 1
Nihal Singh versus state of Punjab, (2013) 14 SCC 65

For the petitioners: Mr. Yudhvir Singh Thakur, Advocate vice counsel.
For the Respondents: Mr. Ashok Sharma, Assistant Solicitor General of India with Mr. Angrej Kapoor, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

In sequel to the petitioners successfully clearing a competitive examination conducted on a all India basis for filling up the relevant advertised vacancies also in consequence to theirs successfully clearing the viva-voce they stood selected against the relevant vacancies in sequel whereto they undertook training at Jaipur. Further more their contractual appointments against the relevant vacancies stood preceded by their character standing affirmatively verified by the agency concerned also on theirs standing subjected to medical examination. The respondent concerned issued advertisement/notice comprised in Ex. P-18 for filling up the post of Investigator(s) on a permanent basis. The petitioners herein claim a direction being rendered upon the respondents by this Court to offer appointments to them against the post of investigator(s) as stands advertised by them to be filled up on a permanent basis.

2. The rendition of the Central Administrative Tribunal comprised in Annexure P-20 palpably ousts the claim reared by the petitioners. The aforesaid rendition of the Central Administrative Tribunal while ousting the claim generated therebefore by the petitioners wherein they sought a mandate being issued upon the respondents to on eruption of apposite vacancies in the cadre of investigator(s) regularize their hitherto contractual appointments had in the relevant

paragraphs which stands extracted hereinafter concluded of the judgment of Orissa High Court, Cuttack, which stood affirmed by the Hon'ble Apex Court holding a view qua on eruption of apposite contractual vacancies contractual appointees holding a status at par with a retrenched employee whereupon they hold an entitlement to stake a claim for their appointment against contractual vacancies, whereas with the respondents issuing advertisement for filling up the relevant post on a permanent basis rendered the petitioners claim for theirs being offered appointment against a regular vacancy suffering the ill fate of it standing ousted, yet a right stands reserved qua the petitioners qua their standing entitled on eruption of contractual vacancy(s) for theirs being considered for appointment thereto.

> "*In view of the above mentioned statutory provisions which have been made applicable in the case of contractual appointments and since the opposite parties of the instant review petition were already working on contract basis and again the post are going to be filled up on contract basis, the opposite parties can be termed as retrenched person and the review petitioners may very well consider the relaxing in age for that category of persons.*
>
> *8. Having heard learned counsel representing the applicant and examining the record of the case with his assistance, we are of the considered view that the applicant is not entitled to regular appointment. At the most he is a retrenched employee and he would e entitled to re-employment, if vacancy may arise with the respondents, on the same terms and conditions on which he was earlier appointed."*

3. The legal vigor of the aforesaid pronouncement of the Central Administrative Tribunal comprised in Annexure P-20 is to be tested on the anvil of a conjoint reading of the trite factum of the petitioners after undergoing the rigor of successfully facing a competitive examination also theirs successfully facing a viva-voce besides theirs undergoing training, on completion whereof they stood appointed against the relevant posts on a contractual basis preceding whereof the relevant agency after holding the apposite verifications proclaiming them to hold not a stained character also given theirs preceding to theirs standing appointed theirs standing declared medically fit vis-à-vis the availability of apposite post(s) on a permanent basis with the respondents, availability whereof bespeaks of hence the respondents holding a perception qua continued necessity of engagement of investigator(s) whereupon the renditions of the Hon'ble Apex Court occurring in (2006) Vol 4 SCC 1 and in (2013) 14 SCC 65 warrants their respective application hereat.

4. Initially the principle constituted in a verdict of the Hon'ble Apex Court reported in (2006) Vol 4 SCC 1 ***Secretary, State of Karnataka and others*** versus ***Uma Devi (3) and others***, ousting the right of a temporary employee or an employee appointed against the relevant vacancy on a purely contractual basis to on eruption of a permanent vacancy vis-à-vis the hitherto post stake any indefeasible entitlement for his regularization thereto unless his hitherto appointment either on a contractual basis or a temporary basis stands preceded by the employer meteing reverence to the relevant rules also the apposite appointment standing preceded by a competitive examination. Relevant portion of the judgment supra is extracted as under-

> " 43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it

is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of court, which we have described as 'litigious employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates."

5. Similarly in a verdict of the Hon'ble Apex Court occurring in (2013) 14 SCC 65 ***Nihal Singh*** *versus* ***state of Punjab,*** wherein the Hon'ble Apex Court has held of where an employee holds a post excepting on a regular basis he would thereupon not perse stand debarred to on occurrence of a permanent vacancy claim a right for his regularization thereto unless his initial appointment on a temporary basis was arbitrary also his initial selection besides appointment occurred in ouster of participation of all eligible candidates. The relevant paragraphs of the judgment supra stands extracted hereinafter.

> **"[29]** The abovementioned process clearly indicates it is not a case where persons like the appellants were arbitrarily chosen to the exclusion of other eligible candidates. It required all able bodied persons to be considered by the SSP who was charged with the responsibility of selecting suitable candidates.
>
> **[30]** Such a process of selection is sanctioned by law under section 17 of the Act. Viewed in the context of the situation prevailing at that point of time in the State of Punjab, such a process cannot be said to be irrational. The need was to obtain the services of persons who had some experience and training in handling an extraordinary situation of dealing with armed miscreants.
>
> **[31]** It can also be noticed from the written statement of the Assistant Inspector General of Police (Welfare & Litigation) that preference was given to persons who are in possession of licensed weapons. The recruitment of the appellants and other similarly situated persons was made in the background of terrorism prevailing in the State of Punjab at that time as acknowledged in the order dated 23.4.2002 of the SSP. The procedure which is followed during the normal times of making recruitment by inviting applications and scrutinising the same to identify the suitable candidates would itself take considerable time. Even after such a selection the selected candidates are required to be provided with necessary arms and also be trained in the use of such arms. All this process is certainly time consuming. The requirement of the State was to take swift action in an extra-ordinary situation.

> **[32]** Therefore, we are of the opinion that the process of selection adopted in identifying the appellants herein cannot be said to be unreasonable or arbitrary in the sense that it was devised to eliminate other eligible candidates. It may be worthwhile to note that in Umadevi's case, this Court was dealing with appointments made without following any rational procedure in the lower rungs of various services of the Union and the States."

6. A gauging of the factual matrix thereat unveils of the appointees therein standing appointed after compliance by the employer with the relevant procedure besides upsurgings occurring therein qua the dire necessity of continuance of their employment whereupon the Hon'ble Apex Court formed a conclusion akin to the one formed in the judgment reported in (2006) Vol 4 SCC 44 qua a candidate/aspirant standing debarred on occurrence of a permanent vacancy to stake any entitlement for his regularization thereto if his initial appointment is bereft of scrupulous adherence by the employer with the statuary procedure also is bereft of his employer prior thereto eliciting the participation of all eligible candidates. However it stands mandated therein of when the relevant appointment(s) of an aspirant stand preceded by his standing declared successful in a competitive examination he stands bestowed with a right to on occurrence of a permanent vacancy stake a claim for his regularization thereon. Preponderantly it has also been mandated therein qua the continued necessity of engagement of appointees being a relevant factor for entitling the appointees against the relevant post to claim regularization thereon.

7. Be that as it may having culled out the relevant legal postulations from the aforesaid renditions of the Hon'ble Apex Court enjoins this Court to apply them qua the factual scenario existing thereat. Uncontrovertedly as aforestated the petitioners had secured appointments against the relevant advertised contractual posts after theirs clearing all the statutory rigors. Consequently, their initial appointment emanated on a scrupulous compliance by their employer with the apposite relevant rules, the petitioners hereupto continue to render service under the employer other than on a regular basis, however extant occurrence of a permanent vacancy(s) holds loud bespeakings of the respondents holding a contemplation qua the dire necessity of continuous engagements of qualified appointees against the relevant posts whereagainst the petitioners stood appointed on a contractual basis hence whereupon the petitioners befittingly stand empowered to hold a right to stake a claim for theirs standing regularized thereon preponderantly when there was no ouster of participation of all eligible candidates at the stage contemporaneous to their standing appointed on a contractual basis. Further more given their long standing experience which is both an asset and an qualification vis-à-vis new entrants amplifyingly gives a vigorous force to their claim as stands reared hereat.

8. In view of the above, the petitions are allowed and the respondents are directed not to terminate the services of the petitioners rather they are directed to consider them for regularization against available vacancy(s) or to consider them for appointment against contractual post(s), if available with them.

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

Vinay Kumar .....Petitioner

Versus

Sangeeta Cheetu & another .....Respondents.

CMPMO No. 326 of 2014
Date of Decision: 22.8.2016

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a civil suit for seeking specific performance of the contract- application for interim relief was filed, in which order of status quo was granted by the trial Court- an appeal was preferred and Appellate Court reversed

the findings of the trial Court- Appellate Court observed that defendant No. 1 was not holding the title of the property and was not competent to execute the agreement- held, that this fact was to be proved during the course of the trial – defendant No. 1 was an ostensible owner- petition allowed, order of the Appellate Court set aside and the parties directed to maintain status quo qua the nature. (Para-2 to 4)

For the petitioner: Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K Vashishta, Advocate.
For the Respondents: Mr. Y.P Sood, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

Alongwith the suit for specific performance instituted by the petitioner herein (for short "the plaintiff") against the respondents herein (for short "the defendants"), the former instituted an application under Order 39 Rule 1 & 2 CPC before the learned trial Court. Thereupon the learned trial Court directed the contesting parties to maintain status quo qua the nature, possession, construction and alienation over the suit land. However the aggrieved defendant instituted an appeal therefrom before the learned District Judge, Una who reversed the findings recorded by the learned trial Court. The plaintiff on standing aggrieved by the order of the learned District Judge has preferred the instant petition before this Court.

2. The learned District Judge while interfering with the order recorded by the learned trial Court on an application preferred therebefore under Order 39 Rule 1 and 2 of the Code of Civil Procedure had dwelt upon the factum of inefficacious recording of an agreement to sell qua the suit property by the plaintiff with the defendant concerned. The anvil qua the assigning by the learned District Judge of legal inefficacy embodying the agreement to sell stood underscored by it to spur from the trite factum of the contesting defendant No.1 not holding title to the suit property also it stood hinged upon the factum of hers not prima-facie holding any authorisation from its owner to either enter into any agreement to sell with the plaintiff qua the suit property detailed therein nor any suit for specific performance was hence institutable by the plaintiff besides no decree for specific performance was renderable against the defendant No. 1 Sangeeta Cheetu. Even though the aforesaid factum does bring forth qua the essential rubric for affording of relief in the application at hand may be hence not standing satiated yet certain facts surrounding it palpably the one of Sangeeta Cheetu subsequent thereto obtaining title qua the suit property from its owner was also enjoined to be revered. However, the learned District Judge slighted the aforesaid factum probandum whereas on the suit progressing to the stage of adduction of evidence whereat the plaintiff may succeed in establishing by resorting to the apposite procedure embodied in the CPC, of, Sangeeta Cheetu holding a Power of Attorney from the title holder of the suit property whereupon he may also establish the factum of hers standing entitled to execute with him an agreement to sell qua the suit property. However, the learned District Judge in a pedantic fashion has paid reverence merely to the factum of Sangeeta Cheetu not prima-facie holding title to the suit property whereupon it concluded of no decree of specific performance being renderable upon her whereas the aforesaid attendant circumstance also the afore-referred factum of the plaintiff concerting to during the course of trial of the suit establish qua hers holding authorization from the true owner for hers hence holding empowerment to with the plaintiff record an agreement to sell was also enjoined to be revered. The aforesaid omission of the learned District Judge has stifled the endeavor of the plaintiff to during the course of trial of the suit establish the factum probandum aforesaid. Consequently, the learned District Judge in a pedantic besides cursory and mechanical manner precluded the plaintiff from succeeding in his suit for specific performance.

3. Further more with the plaintiff impleading the subsequent alienees of the suit property also portrays underlinings qua the subsequent alienations thereof not prima-facie

holding legal validation. At this stage prima-facie the subsequent alienees when may contest qua the validity of the sale deeds recorded in their favour by defendant No.1 Sangeeta Cheetu by relying upon the factum of theirs being ostensible owners, in concert whereof by the alienees, to validate theirs acquiring title to the suit property upsurgings of the relevant evidence would occur for enabling the learned trial Court to conclude qua the alienation of the suit property initially qua Sangeeta Cheetu by its true owner and subsequently by her to the subsequent alienees standing or not clouded with a vice of complicity occurring inter-se the contesting defendant with the title holder of the suit property whereupon the learned trial Court may or may not conclude of Sangeeta Cheetu by legal maneuvering baulking the plaintiff to obtain a decree for specific performance qua the suit property constituted by hers contemporaneous to the drawing of the contentious agreement to sell, hers making a contrived guise therein of hers holding an authorization to record it with the plaintiff, pretence whereof of the contesting defendant when may stand either falsified or may acquire a virtue of truth yet with the aforesaid endeavor obviously standing thwarted by the learned District Judge rather his under the impugned rendition making a pronouncement analogous to non-suiting the plaintiff has hence committed a patent illegality besides gross impropriety**.** Preeminently the rendition of the learned trial Court qua the contesting parties maintaining status quo qua the suit property was both just besides expedient given its forestalling the impleadment thereafter of successive alienees of Sangeeta Cheetu also given its thwarting the occurrence thereafter of its alienations. However the impugned rendition has given latitude to the aforesaid obviable occurrence rather has begotten the obviable consequence of the plaintiff standing compelled to implead the subsequent alienees of the suit property whereupon the contest would be rendered both complex besides cumbersome, necessarily it warrants interference.

4. Be that as it may the decree of specific performance as claimed in the suit by the plaintiff enjoined the contesting parties if rendered to execute a deed of conveyance qua it, however subject to the learned trial Court also pronouncing qua the invalidity of its subsequent alienations. However the aforesaid initial right of the plaintiff to obtain a decree of specific performance also stands stifled by the learned District Judge by his holding of the plaintiff standing entitled to, in case a decree of specific performance is un-renderable to the alternative relief of damages from the contesting defendant, conclusion whereof is a visible display of a dichotomy standing underscored by the learned District Judge constituted in the factum of with his holding qua the purported agreement to sell holding no legal formadibility his yet pronouncing qua the aggrieved plaintiff if establishing the factum of the contesting defendant standing authorized to execute it with him his standing entitled to the relief for damages. In view of the above, the present petition stands allowed and the impugned order is quashed and set aside. The parties are directed to maintain status quo qua the suit land described in the agreement specifically qua plot No. 34 and 92.

5. Parties are directed to appear before the learned trial Court on 21.9.2016.

6. 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.

Smt.Muni ....Appellant-Defendant

Versus

Sh.Jhanku & Another ....Respondents-Plaintiffs

Regular Second Appeal No.506 of 2007.
Judgment Reserved on: 15.07.2016.
Date of decision: 23.08.2016

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs filed a civil suit for declaration and injunction pleading that P was joint owner in possession of the suit land- he died issueless- he had executed a Will in favour of the plaintiffs- defendant manipulated a forged Will in her favour- defendant claimed to be the widow of deceased- she stated that Will was executed in her favour- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that plaintiffs had successfully proved the Will- defendant was not able to dispel the suspicious circumstances- execution of the Will in favour of the defendant was not proved- Courts had decreed the suit on the basis of the Will of the plaintiff- there is no infirmity in the same- appeal dismissed. (Para-21 to 39)

Cases referred:

H.Venkatachala Iyengar vs. B.N. Thimmajamma and others, AIR 1959 SC 443
Shashi Kumar Banerjee and Others vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and others, AIR 1964 SC 529
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264
Daulat Ram and Others vs. Sodha and Others, (2005)1 SCC 40
Sridevi and Others vs. Jayaraja Shetty and Others, (2005)2 SCC 784

For the Appellant: Mr.Ajay Kumar, Senior Advocate with Mr.Dheeraj Vashisht, Advocate.
For Respondents: Mr.G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

This appeal has been filed by the appellant-defendant *(hereinafter referred to as the `defendant')* against the judgment and decree dated 13.7.2007, passed by learned Additional District Judge, Mandi, Camp at Karsog, H.P., affirming the judgment and decree dated 21.6.2004, passed by learned Civil Judge(Junior Division), Karsog, District Mandi, H.P., whereby the suit filed by the Respondents-plaintiffs *(hereinafter referred to as the `plaintiffs')* has been decreed.

2. The brief facts of the case are that the plaintiffs filed a suit for declaration and injunction against the defendant. It is averred that Paras Ram alias Parsu was joint owner in possession of 6/32 share of land comprised in Khata/Khatauni No.57/114 to 117, measuring 51-19-17 bighas, situated in village Kahleni, Tehsil Karsog, 3/16 share of land comprised in Khata/Khatauni No.181/361 to 363, measuring 3-4-18 bighas situated in village Lower Karsog, and 3/16 share of Khata/Khatauni No.40/91-92, measuring 16-13-5 bighas. It is alleged by the plaintiffs that they are the nephews of late Shri Paras Ram, who died issueless on 9.1.1999. It is further averred that said Parsu was looked after and maintained by the plaintiffs during his old age and in lieu of the services rendered by them, said Parsu had executed a Will dated 22.12.1980 (Ex.PW-2/A) in their favour. Thus, on the death of Parsu his estate was inherited by the plaintiffs and as such they are owners in possession of the share of deceased Parsu in the suit land. It is further alleged that the defendant is widow of one Juhru and not the widow of deceased Parsu. It is alleged that the defendant manipulated a forged will dated 11.9.1987 (Ex.DW-6/A) of deceased Parsu in her favour, whereas said Parsu never executed any will in favour of the defendant and the said will is result of fraud and undue influence. It is further alleged that the plaintiffs have become owners in possession of the suit land and prayed that they be declared owners in possession of the suit land on the basis of valid will dated 22.12.1980 (Ex.PW-2/A) executed by deceased Parsu and that the will dated 11.9.1987 (Ex.DW-6/A), as claimed by the defendant, be declared null and void and that the defendant be restrained from interfering with their possession over the suit land.

3. Defendant, by way of filing written statement, raised preliminary objections on the grounds that the suit is bad for non-joinder of necessary parties and the same is not in

proper form. On merits, the defendant has admitted the ownership and possession of late Shri Parsu alongwith other co-sharers. It is averred by the defendant that she is legally wedded wife of late Shri Parsu, who was looked after and maintained by her during his old age. It is also alleged by the defendant that she performed all religious obsequies on the death of her husband Parsu. It is alleged by the defendant that said Parsu had executed a valid will dated 11.8.1987 in her favour, which was also registered. The defendant refuted the case of the plaintiffs that Parsu had executed a will dated 22.12.1980 in their favour and prayed for dismissal of the suit.

4. By way of replication the plaintiffs, while denying the allegations made in the written statement, reaffirmed the averments made in the plaint.

5. The learned trial Court, on the basis of pleadings, settled inasmuch as 6 issues and decided all the issues in favour of the plaintiffs and accordingly decreed the suit of the plaintiffs. An appeal preferred before the learned Appellate Court was dismissed.

6. This second appeal was admitted on the following substantial questions of law:

> *"(1) Whether once the execution of Will had been admitted unequivocally by the plaintiffs/respondents, whether the onus with regard to alleged fraud and alleged undue influence in the execution of the Will was not on the plaintiffs.*
>
> *(2) Whether the Will Ext.DA/Ex.DW6/A has wrongly been ignored by the learned court below, though legally proved on record?*
>
> *(3) Whether the Courts below correctly recorded the finding that the appellant was legally wedded wife of late Shri Parasia as established by Ex.DA, Ex.DB, Ex.DC and Ex.DW7/A?*

7. Needless to say that law regarding nature and onus of the proof of the will is by way of propounder and in that regard the manner in which the evidence is required to be appreciated has been duly prescribed in the judgment passed by the Hon'ble Apex Court in ***H.Venkatachala Iyengar vs. B.N. Thimmajamma and others, AIR 1959 SC 443***.

8. Guidelines framed in ***H.Venkatachala Iyengar*** case (*supra*) were further reiterated by Constitutional Bench of Hon'ble Apex Court in ***Shashi Kumar Banerjee and Others vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and others, AIR 1964 SC 529.*** The Court held:

> *"4. The principles which govern the proving of a will are well settled; (see H. Venkatachala Iyengar v. B. N. Thimmajamma, 1959 (S1) SCR 426 : 1959 AIR(SC) 443) and Rani Purniama Devi v. Khagendra Narayan Dev, 1962 (3) SCR 195 : 1962 AIR(SC) 567). The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by S. 63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no. such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be as to genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indication in the will to show that the testator's mind was not free. In such a case the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator.*

> *If the propounder himself takes part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the Court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. It is in the light of these settled principles that we have to consider whether the appellants have succeeded in establishing that the will was duly executed and attested. (Page-531)*

9. Mr.Ajay Kumar, learned Senior Counsel representing the appellant-defendant, submitted that the judgment and decree passed by both the Courts below deserves to be quashed and set aside being contrary to law and facts. Learned Senior counsel, vehemently argued that the inference and conclusions as drawn by both the Courts below are neither supported by material on record nor by provisions of law. He contended that both the learned Courts below have misread, mis-construed and mis-interpreted the evidence led on record which has resulted in returning of erroneous findings. Mr.Ajay Kumar further contended that the Courts below failed to consider the fact and the settled proposition of law that once execution and registration of Will dated 11.9.1987 in favour of present appellant had been admitted by the plaintiffs-respondents, as such, the onus of proof to the effect that the said will was a result of fraud, undue influence etc. was on plaintiffs-respondents. During arguments having been made, Mr.Ajay Kumar made this Court to travel through the statement adduced on record by the plaintiffs witnesses to demonstrate that not even a single word had been stated by the plaintiffs witnesses that will dated 11.9.1987 is a result of fraud, undue influence and as such both the Courts below have fallen in grave error while discarding duly registered will dated 11.9.1987. It is also contended on behalf of the appellant that finding of the Courts below that execution of will in favour of appellant-defendant has not been proved is contrary to law because defendant by way of leading cogent and convincing evidence duly established on record that will dated 11.9.1987 Ex.DW-6/A was duly executed by late Shri Parsu in favour of defendant Smt.Muni.

10. Mr.Ajay Kumar strenuously argued that both the Courts below have failed to take note of provisions of Section 70 of the Indian Successions Act while returning the findings qua the genuineness of will Ex.DW-6/A. As per Mr.Ajay Kumar, if the provision of Section 70 of the Indian Successions Act is read, bare perusal of the same would suggest that if second will has been executed by any person, in that eventuality, the first will shall be deemed to be revoked/cancelled automatically. Hence, findings of both the Courts below that there is no mention of earlier will executed by late Shri Parsu in will dated 11.9.1987 Ex.DW-6/A and as such same cannot be relied upon, rather the same is erroneous and illegal. Mr.Ajay Kumar further contended that Courts below failed to frame proper issue, keeping in view the controversy at hand and as such grave injustice has been caused to the appellant-defendant also. As per Mr.Ajay Kumar, learned Senior counsel, Courts below ought to have framed following issue:

> *"Whether the Will executed and registered by late Parsu dated 11.9.1987 is result of fraud, undue influence etc.?*

11. While concluding his arguments, Mr.Ajay Kumar invited the attention of this Court to the findings returned qua issue No.3 to demonstrate that findings returned qua the aforesaid issue deserve to be quashed and set aside being contrary to law applicable to the facts of the present case. Mr.Ajay Kumar vehemently argued that both the Courts below have not appreciated the fact that the allegations of fraud and undue influence etc. were levelled against the petition writer and Sub Registrar, Karsog, who allegedly registered the will dated 11.9.1987 and as such all these persons were required to be impleaded as party in the present suit and no suit was competent and maintainable in the present form without there being any impleadment of aforesaid persons.

12. Mr.Ajay Kumar, while adverting to the evidence adduced on record by the plaintiffs, forcefully contended that both the Courts below have wrongly placed reliance upon the aforesaid witnesses because bare perusal of deposition made by them clearly suggests that they

are miserably failed to prove the case of the plaintiffs and as such judgment and decree passed by both the Courts below deserves to be quashed and set aside being totally perverse.

13. Mr.G.R. Palsra, learned Counsel appearing for the respondents-plaintiffs, supported the judgments passed by both the Courts below and vehemently argued that no interference, whatsoever, is warranted in the present facts and circumstances of the case, especially in view of the fact that both the Courts below have very meticulously dealt with each and every aspect of the matter. He also urged that scope of interference by this Court is very limited especially when two Courts have recorded concurrent findings on the facts as well as law. In this regard, to substantiate the aforesaid plea, he placed reliance upon the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264.**

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

Question Nos.1 to 3.

15. With a view to answer substantial questions, referred hereinabove, this Court now would be adverting to the evidence led on record by the respective parties to substantiate their claims made in the pleadings. Plaintiffs in the present case, with a view to prove that will dated 22.12.1980 was duly executed by late Shri Parsu in their favour, examined six witnesses.

16. Plaintiff Janku, while appearing as PW-1, categorically stated that Parsu was brother of their father and Smt.Prakarmu was his wife, who had passed away during his life time. He specifically stated that during old age of Parsu, he and his brother looked after him and in lieu of services rendered by them, said Parsu executed a valid will (Ex.PW-2/A) in their favour in the year 1980. It has also come in his statement that will propounded by defendant is a forged will and she is not a wife of Parsu, rather she is wife of one Juhru. In his cross-examination he further reiterated that the will in favour of defendant is a forged will.

17. PW-2 Asha Ram also deposed that the will Ex.PW-2/A was scribed by one Harish at the instance of Parsu in favour of the plaintiffs, on which he and another witness Khyali Ram Pradhan had appended their signatures.

18. Similarly, PW-3 Khyali Ram, Pradhan, who was attesting witness of the will Ex.PW-2/A, stated that the plaintiffs are the nephew of Parsu, who had bequeathed his estate in favour of the plaintiffs. He categorically stated that Parsu executed will Ex.PW-2/A in favour of the plaintiffs. It has specifically come in his statement that he and Asha Ram were attesting witnesses of the will and they had signed the will Ex.PW-2/A, which was signed by the testator Shri Parsu.

19. PW-4 Daru Ram stated that plaintiffs are nephews of Parsu, who lived with them till his death. He categorically stated that Parsu was looked after by the plaintiffs and after his death all his rites were performed by them. He specifically stated that the plaintiffs are in possession of land of deceased Parsu.

20. PW-6, Harish Sharma, document writer, categorically stated before the trial Court that will Ex.PW-2/A was scribed by him on 22.12.1980 on the instruction of late Parsu in favour of the plaintiffs in the presence of attesting witnesses; namely; Asha Ram and Khyali Ram. He also stated that the witnesses had signed the will in his presence.

21. Conjoint reading of aforesaid evidence, led on record by the plaintiffs in shape of PW-1 to PW-6, leaves no doubt that the plaintiffs were successful in proving that will Ex.PW-2/A was duly executed by late Shri Parsu in their favour. All the plaintiff witnesses have specifically stated that late Shri Parsu was looked after during his old age by the plaintiffs and as such he executed will Ex.PW-2/A in their favour in the year 1980. Since plaintiffs led cogent and convincing evidence in the shape of PW-2 and PW-3, who were attesting witnesses to the will Ex.PW-2/A, have discharged their onus by proving that will was duly executed by late Shri Parsu in their favour. Rather, PW-4 Daru Ram, specifically stated that plaintiffs are in possession of

the land of late Shri Parsu. Similarly, if statement of PW-6, Harish, document writer, who scribed the will Ex.PW-2/A, is seen in its totality, he has specifically stated that he scribed the will on the instructions of late Shri Parsu in favour of the plaintiffs that too in the presence of attesting witnesses; namely Asha Ram and Khyali Ram.

22. Whereas, careful perusal of cross-examination conducted on these witnesses nowhere suggests that the defendant has been able to shatter the testimony of aforesaid plaintiffs witnesses, who have been very-very candid, specific and straight forward, while stating that late Parsu executed a will Ex.PW-2/A on 22.12.1980 in favour of the plaintiffs.

23. Interestingly, learned counsel for the defendant put a suggestion to PW-1 that Parsu had executed a will in favour of Munni Devi in the year 1987, but PW-1 by self stating termed the same as forged one. Interestingly, cross-examination conducted on these plaintiffs witnesses nowhere suggests that any suggestion worth the name with regard to genuineness and correctness of Ex.PW-2/A, whereby Parsu executed a will in favour of plaintiffs, was ever put to them. Moreover, there is no whisper, if any, in the cross-examination with regard to execution, of will Ex.PW-2/A by Parsu in favour of the plaintiffs. Rather, defendant instead of putting suggestion with regard to Ex.PW-2/A asked the plaintiffs' witnesses with regard to will allegedly made by Parsu in the year 1987 in favour of defendant Munni.

24. Conjoint reading of aforesaid witnesses brought on record by the plaintiffs clearly suggests that plaintiff was successful in proving that will Ex.PW-2/A was validly executed by late Shri Parsu in their favour in accordance with law. Since plaintiffs specifically brought on record attesting witnesses in shape of PW-2 and PW-3, who have categorically proved that will Ex.PW-2/A was signed by late Parsu in their presence and they had also signed the same as marginal witnesses, this Court is of the view that both the Courts below rightly came to the conclusion that plaintiffs were successful in proving that will Ex.PW-2/A was validly executed in their favour by the testator late Shri Parsu. Whereas, apart from perusing the statements of plaintiffs witnesses, this Court had also an occasion to peruse will Ex.PW-2/A which itself suggests that late Parsu had no issue and wife and was residing with the plaintiffs, who used to look after and maintain him during his old age. Plaintiffs also proved on record that will Ex.PW-2/A was registered with Sub Registrar, Kasauli and as such this Court has all the reasons to accept that will Ex.PW-2/A was validly executed by late Parsu in favour of the plaintiffs.

25. Now, question which remains to be decided is, "Whether Parsu had executed a will Ex.DW-6/A in favour of the defendant or not?

26. In the present case, defendant, with a view to prove that Parsu had executed a will Ex.DW-6/A in her favour, examined as many as 9 witnesses

27. DW-1 defendant herself stated that she was married with Parsu about 22 years back and since then had been living with him till his death. She further stated that Parsu had executed a valid will in her favour about 11 years back in the presence of one Sangat Ram and Dagi.

28. Sangat Ram DW-3, with a view to prove execution of the will, stated that Parsu had executed will in favour of Smt.Muni Devi which was scribed by Diwakar on the instruction of Parsu in his and Dagi's presence. DW-3 specifically stated that mark `X' is photocopy of will executed by Parsu but interestingly in the present case DW-3, who was again made to depose as DW-6 in order to prove the execution of will Ex.DW-6/A, stated that will Ex.DW-6/A bears his signature. He also stated that he signed the said will in presence of the Tehsildar. Interestingly, second attesting witness Dagi Ram was not examined by the defendant for the reasons best known to her. Defendant, with a view to prove will Ex.DW-6/A, examined herself as well as Sangat Ram, who allegedly signed the will in presence of the Tehsildar. But interestingly when this Sangat Ram appeared as DW-3, he stated that he was the attesting witness to the will Ex.DW-6/A, but when appeared as DW-6 he admitted his signatures on photocopy of will mark `X'. This Court had an occasion to peruse the documents mark `X' and Ex.DW-6/A, which clearly show that mark `X' is not true copy of Ex.DW-6/A. Though perusal of both i.e. mark `X' and

Ex.DW-6/A, suggests that same were executed and registered on 11.9.1987 with Sub Registrar, Kasauli on same date, but interestingly if the contents of both these documents are read, juxtaposing each other, it clearly emerge that document mark `X' is not true copy of Ex.DW-6/A. It has been mentioned in document mark `X' that defendant Munni Devi is wife of Juhru and she was residing as a keep of Parsu, whereas Ex.DW-6/A shows that defendant was legally wedded wife of Parsu, hence both the Courts below have rightly concluded that perusal of mark `X' as well as DW-6/A clearly suggest that the same are highly doubtful and suspicious. Moreover, original of mark `X' was never produced in Court and as such Courts below rightly recorded the findings that since mark `X' has not been proved at all, it cannot be concluded that late Parsu had executed mark `X' in favour of defendant. Similarly, execution of will Ex.DW-6/A has also not been proved at all because DW-3 Sangat Ram, who lateron appeared as DW-6 stated that Ex.DW-6/A was signed by him. But careful perusal of his statement either as DW-3 or DW-6 clearly suggests that at no point of time he stated that Ex.DW-6/A was scribed on the instruction of Parsu in presence of Sangat Ram and Dagi and that Parsu signed Ex.DW-6/A in their presence. He also not stated that they also signed Ex.DW-6/A in presence of Parsu. Careful perusal of statement, made by Sangat Ram as DW-3 and DW-6, nowhere suggests that Diwakar, scribed the will on the instructions of Parsu, and he alongwith Dagi signed the same in presence of Parsu. Rather, perusal of both the documents mark `X' and Ex.DW-6/A certainly indicates towards suspicious circumstance because at first instance defendant, with a view to prove that Parsu had executed will Ex.DW-6/A in her favour, produced will mark `X' , but lateron original copy of will allegedly executed by Parsu was also produced which was exhibited as Ex.DW-6/A. But, as has been observed above, if both the documents mark `X' and Ex.DW-6/A are seen juxtaposing each other, it clearly emerge that recital made in the same is not similar, meaning thereby that mark `X' cannot be termed to be a photocopy of Ex.DW-6/A at this stage. It is not understood if will Ex.DW-6/A was executed by Parsu in favour of DW-1 Muni Devi, why she did not produce the same at first instance before the Court to prove her claim that Parsu bequeathed his share in suit land by way of will Ex.DW-6/A. Interestingly in the present case, PW-3 attesting witness at first instance stated that he signed Mark `X' but when he appeared as DW-6 he only contended that Ex.DW-6/A was signed by him but has not stated at all that Ex.DW-6/A was scribed on the instructions of Parsu in presence of Sangat Ram and Dagi and that Parsu signed Ex.DW-6/A in their presence and they also signed the testament in presence of Parsu. The aforesaid statements of defendants witnesses compelled this Court to accept the findings returned by both the Courts below whereby Ex.DW-6/A as well as mark `X' have been termed to be shrouded by suspicious circumstance.

29. It clearly emerges from the evidence led on record by the defendant that two different wills were written on the same day but defendant has miserably failed to prove that which will was actually executed by deceased Parsu in her favour before his death bequeathing his share of property in her favour.

30. Apart from above, another attesting witness Dagi was never produced and in his absence statements made by Sangat Ram, who appeared as DW-3 and DW-6, cannot be accepted on its face value, especially when he admitted his signatures on both the documents i.e. Mark `X' and Ex.DW-6/A. Otherwise also Sangat Ram nowhere stated that Parsu signed Ex.DW-6/A in his presence.

31. Though normally onus to prove the execution and validity of the will lies upon the propounder but in case when it is alleged by the opposite party that will is not genuine document, onus shifts on the person who alleges the will as being forged, to prove the same.

32. In ***Daulat Ram and Others vs. Sodha and Others,*** (***2005)1 SCC 40,*** the Hon'ble Apex Court held:

> *"10. Will being a document has to be proved by primary evidence except where the Court permits a document to be proved by leading secondary evidence. Since it is required to be attested, as provided in Section 68 of the Indian Evidence Act, 1872, it cannot be used as evidence until one of the attesting witnesses at least has been*

called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. In addition, it has to satisfy the requirements of Section 63 of the Indian Succession Act, 1925. In order to assess as to whether the Will has been validly executed and is a genuine document, the propounder has to show that the Will was signed by the testator and that he had put his signatures to the testament of his own free will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and that the testator had signed it in the presence of two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But where there are suspicious circumstances, the onus is on the propounder to remove the suspicion by leading appropriate evidence. The burden to prove that the will was forged or that it was obtained under undue influence or coercion or by playing a fraud is on the person who alleges it to be so." (Page 43)

33. Definitely onus to explain suspicious circumstances, if any, lies on propounder but onus shifts to a person who alleges/level allegations of undue influence, fraud or coercion on the propounder of the will.

34. In ***Sridevi and Others vs. Jayaraja Shetty and Others, (2005)2 SCC 784***, the Hon'ble Apex Court held:

"11. It is well settled proposition of law that mode of proving the will does not differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act, 1925. The onus to prove the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and proof of the signature of the testator, as required by law, need be sufficient to discharge the onus. Where there are suspicious circumstances, the onus would again be on the propounder to explain them to the satisfaction of the court before the will can be accepted as genuine. Proof in either case cannot be mathematically precise and certain and should be one of satisfaction of a prudent mind in such matters. In case the person contesting the will alleges undue influence, fraud or coercion, the onus will be on him to prove the same. As to what are suspicious circumstances have to be judged in the facts and circumstances of each particular case. {For this see H. Venkatachala Iyengar v. B.N. Thimmajamma & Ors. (1959) Supp.1 SCR 426 and the subsequent judgments Ramachandra Rambux v. Champabai & Ors.(1964) 6 SCR 814; Surendra Pal & Ors. v. Dr. (Mrs.) Saraswati Arora & Anr. (1974) 2 SCC 600]; Smt. Jaswant Kaur v. Smt. Amrit Kaur & Ors.(1977) 1 SCC 369; and Meenakshiammal (Dead) thr. LRs. & Ors. v. Chandrasekaran & Anr. [(2005) 1 SCC 280]" (Page-789)

35. Consequently, in view of the detailed discussion made hereinabove, this Court has no hesitation to conclude that the plaintiffs' discharged their onus to prove that will Ex.PW-2/A was duly executed by late Parsu in their favour by leading cogent and convincing evidence. Plaintiffs specifically brought on record attesting witnesses PW-2 and PW-3, who categorically stated that Parsu got the will scribed by one Harish in favour of the plaintiffs and he signed the same in their presence. Similarly, scribe Harish also stated that he scribed the will on 22.12.1980 at the instance of Parsu in favour of the plaintiffs in presence of attesting witnesses Asha Ram and Sangat Ram, as such, this Court sees no force in the contention put forth on behalf of the defendant that will Ex.PW-2/A is a result of fraud. Whereas, defendant has miserably failed to prove that will Ex.DW-6/A was allegedly executed by Parsu in favour of defendant, because none of the witnesses prodeuced by the defendant was able to prove that Ex.DW-6/A was executed by late Parsu in their presence. None of the defendant witnesses stated that Parsu got the will scribed by Diwakar in favour of defendant. Similarly, none of the

defendant witnesses stated that Parsu signed in their presence on the will Ex.DW-6/A. Hence, both the Courts below have not committed any illegality and irregularity while holding that defendant has failed to prove that Ex.DW-6/A was legally executed in her favour, rather, this Court, after perusing the documents mark `X' and Ex.DW-6/A, is compelled to draw adverse inference against the conduct of the defendant, where defendant, with a view to prove due execution of will, produced two documents terming one i.e. mark `X' to be photocopy of Ex.DW-6/A, which lateron was not found to be the photocopy of Ex.DW-6/A.

36. In view of above, this Court sees no illegality, whatsoever, in the judgments passed by the Courts below, whereby both the Courts have decreed the suit of the plaintiffs on the strength of will Ex.PW-2/A, ignoring the will Ex.DW-6/A set up by the defendant. Apart from above, perusal of the evidence led on record nowhere suggests that at any point of time plaintiffs admitted the claim of the defendant that will Ex.DW-6/A and mark `X' were executed by Parsu in her favour. Whereas, documents as well as evidence available on record by the plaintiffs clearly suggests that they refuted the claim of the defendant that she was legally wedded wife which stands duly proved and corroborated in pursuance to production of document mark `X' wherein it has been specifically stated that defendant was wife of Juhru. Hence this Court sees no illegality and infirmity in the judgment passed by both the Courts below which appears to be based upon correct appreciation of the evidence on record. All the questions are answered accordingly.

37. This Court is fully satisfied that both the courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference, whatsoever, in the present matter. Since both the Courts below have returned concurrent findings, which otherwise appear to be based upon proper appreciation of evidence, this Court has very limited jurisdiction/scope to interfere in the matter. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in ***Laxmidevamma's*** case supra, wherein the Court has held as under:

> *"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)*

38. In the facts and circumstances discussed above, this Court is of the view that findings returned by the trial Court below which was further upheld by the first appellate Court do not warrant any interference of this Court as findings given on the issues framed by the trial Court below as well as specifically taken up by this Court to reach the root of the controversy appears to be based on correct appreciation of oral as well as documentary evidence. Moreover, as has been discussed in detail above, appellant-defendant has not been able to make out a case to persuade this Court that Ex.PW-2/A is a fake and forged document, got executed by the plaintiffs forcibly using undue influence. Defendant also failed to indicate any circumstance which could compel this Court to return the finding that Ex.Pw-2/A was shrouded by suspicion. Hence, present appeal fails and is dismissed, accordingly.

39. Interim order, if any, is vacated. All the miscellaneous applications are disposed of.

****

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

Chaman Singh & ors. .....Appellants.

Versus

Prabhat Singh & anr. .....Respondents.

RSA No. 464 of 2015.
Reserved on: 23.08.2016.
Decided on: 24.08.2016.

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for declaration pleading that he along with proforma defendants are co-owners in possession of the suit land- mutation sanctioned in favour of the predecessor-in-interest of the defendants was illegal, null and void- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that H was owner in possession of the suit property – father of plaintiffs and father of defendants are sons of late H- no evidence was led to prove family settlement-no daily diary report was lodged with the patwari to prove that family settlement was given effect in the revenue record- limitation begins to run not from the date of the entry but from the date when a person feels aggrieved by the entry – thus, suit was within limitation. (Para-12 to 16)

Case referred:
Shiam Singh and others vs. Chaman Lal and others, 2011(Suppl.) Him. L.R. 2065

For the appellant(s): Mr. Ramakant Sharma, Sr. Advocate with Ms. Soma Thakur, Advocate.
For the respondents: Mr. Bhupender Pathania, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Chamba, H.P., dated 22.4.2015, passed in Civil Appeal No. 3/2015.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the respondent-plaintiff (hereinafter referred to as the plaintiff), has instituted a suit for declaration to the effect that he along with proforma defendant, namely, Sardar Singh, is co-owner in possession over the land as detailed in the plaint to the extent of half share and mutation No. 388 dated 26.03.1978 sanctioned and attested in favour of Chando Ram, predecessor-in-interest of defendants was illegal, null and void and not binding upon the rights of the plaintiff and proforma defendant. The plaintiff has also filed suit for permanent prohibitory injunction restraining the defendants from changing the nature, alienating or dispossessing the plaintiff from the suit land on the basis of wrong and illegal revenue entries. According to the averments made in the plaint, late Hira Singh son of Nihala was recorded as owner-in-possession over the suit land. After the death of Hira Singh, his entire estate was inherited by late Sh. Prithi Singh, predecessor-in-interest of plaintiff, proforma defendant and Chando Ram, predecessor-in-interest of defendants. One Sh. Chand son of Suchetu cultivated the suit land for some time as tenant but abandoned the land in the year 1966 and thereafter, late Sh. Prithi Chand and Chando Ram, both sons of late Sh. Hira Singh came in the possession of the suit land and started cultivating the same. Both late Sh. Prithi Chand and Chando Ram were in peaceful possession over the suit land in equal shares and were cultivating the suit land without any interruption, however, the entries continued to be in favour of Chand son of Suchetu as tenant. On the basis of revenue entries, mutation No. 314 dated 22.2.1976 was entered and attested in favour of Chand son of Suchetu under the Himachal Pradesh Land Reforms Act. Thereafter, Chando Ram, predecessor-in-interest of defendants filed an appeal before the learned Sub

Divisional Officer (Civil), Dalhousie against the mutation No. 314 dated 22.2.1976 attested in favour of Chand son of Suchetu wherein late Sh. Prithi Singh, predecessor-in-interest of plaintiff was also arrayed as respondent No. 2. However, he was not summoned or called. During the pendency of the appeal, Chand son of Suchetu who was brother-in-law of late Sh. Chando Ram son of Hira Singh entered into an agreement in connivance with each other on 21.6.1977 and presented the same before the SDO(C) Dalhousie, on the basis of which, the appeal of Chando Ram son of Hira Singh was allowed and the case was remanded to the learned Assistant Collector, IInd Grade, Bhattiyat on 21.6.1977. The learned Assistant Collector, IInd Grade, Bhattiyat attested the mutation No. 388 dated 26.03.1978 in favour of Chando Ram, predecessor-in-interest of defendants without the knowledge and behind the back of late Sh. Prithi Singh, predecessor-in-interest of plaintiff. Accordingly, Chando son of Hira Singh alone was recorded as owner of the suit land. Sh. Prithi Singh died on 12.1.2003. He remained in continuous possession over the suit land till his death. After his death, plaintiff and proforma defendant are in continuous possession over the suit land being sons of late Sh. Prithi Singh. The cause of action accrued to the plaintiff in the month of March, 2010 when defendants started threatening the plaintiff to alienate the suit land and to dispossess him.

3. The suit was contested by the defendants by filing written statement. The defendants admitted that earlier late Sh. Hira Singh son of Sh. Nihala was owner-in-possession over the suit land. The relationship of the parties shown in the pedigree table in the plaint was also admitted, however, it was denied that after the death of late Sh. Hira Singh, his entire estate was inherited by late Sh. Prithi Singh and late Sh. Chando Ram. According to them, suit land was given to Chando Ram, predecessor-in-interest of defendants in a family settlement. Sh. Chando Ram and after his death the contesting defendants are in peaceful cultivatory possession over the suit land. It is also admitted by the defendants in the written statement that Chand son of Suchetu cultivated the suit land and abandoned the same in the year 1966. According to the defendants, late Sh. Prithi Singh or plaintiff and proforma defendant never cultivated the suit land. Though, it is admitted by defendants that an appeal was filed before SDO (C), Dalhousie by Chando Ram, predecessor-in-interest of defendants, however, it is denied that late Sh. Prithi Singh was never summoned or called in those proceedings. In fact, according to the defendants, late Sh. Prithi Singh gave his consent for correction of revenue entries in favour of late Chando Ram, predecessor-in-interest of defendants as the same was settled in family settlement. Late Sh. Prithi Singh never challenged the order of SDO (C), Dalhousie nor mutation No. 388 dated 26.03.1978.

4. Replication was filed and the learned Civil Judge (Jr. Divn.), Dalhousie, framed the issues on 27.8.2012. The suit was decreed to the effect that plaintiff along with proforma defendant was co-owner in possession over the suit land to the extent of half share along with defendants and mutation No. 388 dated 26.03.1978 sanctioned and attested in favour of Sh. Chando Ram, predecessor-in-interest of defendants was illegal, null and void and not binding upon the rights of plaintiff along with relief of permanent prohibitory injunction restraining the defendants from changing the nature, alienating or dispossessing the plaintiff and proforma defendant from the suit land on the basis of wrong and illegal revenue entreis in their favour. The defendants, feeling aggrieved, preferred an appeal before the learned District Judge, Chamba. He dismissed the same on 22.4.2015. Hence, this regular second appeal.

5. The regular second appeal was admitted on 15.12.2015 on the following substantial questions of law:

> "1. Whether the impugned judgments and decrees are the result of complete mis-reading, misinterpretation as well as mis-appreciation of Ext. PA missal haquiat bandobast, Ext. PB Jamabandi for the year 1956-57 and Ext. PC Jamabandi for the year 1970-71 and order dated 21st June, 1977 Ext. D-1 and Ext. D-8, copy of Jamabandi for year 1975-76, and Ext. PA to Ext. PL?
>
> 2. Whether the learned Courts below are right in not dismissing the suit filed by the respondent-plaintiff being barred by time in view of the provisions of

Section 3 of the Limitation Act as well as the law laid down by the Hon'ble Apex Court?

3. Whether the impugned judgments and decrees are liable to be quashed and set aside being result of non-consideration of principle of estoppels inasmuch as the respondent-plaintiff having filed the suit against the mutation dated 26th March, 1978 after a lapse of 33 years especially when his predecessor-in-interest was alive till 2003 and did not assail the said mutation?"

6. Mr. Ramakant Sharma Sr. Advocate, appearing on behalf of the appellant, on the basis of the substantial questions of law, has vehemently argued that both the Courts below have misread the documentary evidence and the suit was barred by limitation. He also argued that though the mutation was attested on 26.3.1978, however, the suit was filed after 33 years. On the other hand, Mr. Bhupender Pathania, Advocate, has supported the judgments and decrees passed by both the Courts below.

7. Since all the substantial questions of law are inter-connected, hence are taken up together for to avoid repetition of discussion of evidence.

8. I have heard learned counsel for both the sides and have also gone through the judgments and records of the case carefully.

9. The plaintiff has appeared as PW-1. He has led his evidence by filing affidavit Ext. PW-1/A. He has supported the averments made in the plaint. According to him, Sh. Chand son of Suchetu was recorded as tenant over the suit land. He has abandoned his tenancy in the year 1966, however, revenue entries continued in his name and later on he was recorded as owner of the suit land by virtue of provisions of H.P. Tenancy and Land Reforms Act. The appeal was filed by Chando Ram son of Hira Singh before learned Sub Divisional Officer (Civil), Dalhousie. It was allowed on the basis of compromise entered in between Chand son of Suchetu and Sh. Chando Ram son of Hira Singh without the knowledge and behind the back of late Sh. Prithi Singh, predecessor-in-interest of plaintiff and proforma defendant. The cause of action arose in the month of March, 2010 when defendants started threatening the plaintiff to alienate the suit land and dispossess the plaintiff and proforma defendant from the suit land.

10. DW-1 Joginder Singh has also led his evidence by filing affidavit Ext. DW-1/A. According to him, the suit land came to the share of his father Sh.Chando Ram in family settlement and after his death, defendants were in possession over the suit land. It was testified by Joginder Singh that an appeal was decided by SDO (C), Dalhousie in favour of Chando Ram son of Sh. Hira Singh predecessor-in-interest of defendants with the conent of the parties.

11. DW-2 Rajneesh Singh has also led his evidence by filing affidavit Ext. DW-2/A. According to him, the defendants were in cultivatory possession of the suit land.

12. It is admitted fact that late Hira Singh son of Nihala Singh was owner-in-possession of the suit property. Plaintiff's father Sh. Prithi Singh and defendants' father Sh. Chando Ram are sons of late Sh. Hira Singh. As per copy of missal Hakiyat Ext. PA, Sh. Hira Singh son of Nihala was recorded as absolute owner-in-possession over the suit land. As per the remarks column of copy of jamabandi for the year 1970-71, Chand son of Suchetu was recorded as owner-in-possession over the suit land. As per remarks column of copy of jamabandi for the year 1975-76 Ext. PD, the suit land was again recorded under the ownership and possession of Chando Ram son of Sh. Hira Singh predecessor-in-interest of defendants.

13. The case of the defendants is that the suit land was partitioned by way of family settlement. However, no tangible evidence has been placed on record to prove the settlement. There is no entry of the settlement in the revenue record. The suit land was earlier entered in the name of Chand son of Suchetu vide mutation No. 314 dated 22.2.1976. This mutation was challenged by Chando Ram by filing an appeal before learned Sub Divisional Officer (Civil), Dalhousie. Sh. Prithi Singh was arrayed as respondent No. 2, however, Sh. Prithi Singh was not summoned while remanding the matter by learned Sub Divisional Officer (Civil), Dalhousie.

Chand and Chando Ram had entered into an agreement in connivance with each other on 21.6.1977 vide Ext. PJ. According to Ext. PJ also, the plaintiff's father was not present.

14. The matter was remanded by learned Sub Divisional Officer (Civil), Dalhousie on 21.6.1977. The learned Assistant Collector, IInd Grade, Bhattiyat attested mutation No. 388 dated 26.03.1978 in favour of Chando Ram. The plaintiff's father Prithi Singh ought to have been heard at the time of passing of the order on 21.6.1977 and at the time of attestation of mutation on 26.3.1978. The compromise arrived at between Chand and Chando Ram was not binding upon Prithi Singh. Thus, the entries made on the basis of mutation No. 388 dated 26.03.1978 were illegal. The name of Chando Ram could not be entered as sole owner-in-possession of the suit land. There is neither any family settlement deed nor any document in the shape of daily diary report lodged with the patwari, to prove that family settlement was given effect to in the revenue records. The learned Courts below have correctly appreciated the oral as well as documentary evidence on record.

15. The learned Single Judge of this Court in the case of ***Shiam Singh and others vs. Chaman Lal and others,*** reported in ***2011(Suppl.) Him. L.R. 2065,*** has held that limitation begins to run not from the date of the entry affecting the right of the person concerned, but from the date when he feels aggrieved by the entry and it is the satisfaction of such person as to when does he feel aggrieved. It has been held as under:

> "It is well settled that for a suit for declaration, referred to in Section 46, limitation begins to run not from the date of the entry affecting the right of the person concerned, but from the date when he feels aggrieved by the entry and it is the satisfaction of such person as to when does he feel aggrieved. Defendant cannot be heard to say that he (the plaintiff) felt aggrieved by the entry at some earlier point of time or when the entry was actually made".

16. In the instant case, the suit was thus within limitation. The Courts below have correctly appreciated the oral as well as documentary evidence. The substantial questions of law are answered accordingly.

17. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

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

LPA Nos.73 & 74 of 2016
Judgment Reserved on: 27.07.2016
Date of decision: 24.08.2016

1. LPA No.73 of 2016

Monika ....Appellant

Versus

State of H.P. & Ors. ....Respondents

2. LPA No.74 of 2016

Pritam Singh ....Appellant

Versus

State of H.P. & Ors. ....Respondents

Constitution of India, 1950- Article 226- Petitioner was appointed as peon and was promoted to the post of process server in the year 2000- respondents No. 3 and 4 were directly appointed as Process Servers in the year 2005- applications were invited for two posts of clerk – respondents No. 3 and 4 were promoted as clerks- petitioner pleaded that he was senior to respondent No. 3 and 4 and should have been promoted - writ petition was allowed and the appointment was quashed- held, in appeal that petitioner was initially appointed as Peon and was promoted as

Process Server against 50% quota- respondents No. 3 and 4 were directly appointed as Process Servers- since, respondents No. 3 and 4 were earlier appointed as Process Servers, therefore, they were senior to the petitioner- petitioner had not challenged seniority list- appointment could not have been made on the basis of first appointment as cadres of Process Server, Daftri, Orderly, Peon, Chowkidar, Chowkidar-cum-Sweeper, Safai Karamchari and Mali were different - their responsibilities were different and their pay was different- there is no rule that seniority is common- writ was wrongly allowed by the Learned Single Judge- appeal allowed and writ petition dismissed. (Para-21 to 31)

For the Appellants:	Mr.Ashwani Pathak, Senior Advocate with Mr.Sandeep K.Sharma, Advocate.
For Respondent No.1:	Mr.Shrawan Dogra, Advocate General with Mr.Anup Rattan, Additional Advocate General and Mr.J.K. Verma & Mr.Kush Sharma, Deputy Advocate Generals.
For Respondent No.2:	Ms.Sunita Sharma, Advocate.
For Respondent No.3:	Ms.Archana Dutt, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.:

Both the above captioned appeals are being taken up together for disposal with the consent of parties, since, by both the appeals, judgment dated 25.04.2016 passed by the learned Single Judge of this Court in CWP No.206 of 2014 has been assailed, *(for short 'impugned judgment').*

2. Briefly stated facts, as emerged from record, necessary for adjudication of the case are that the present appellants (hereinafter referred to as `respondents No.3 and 4') being aggrieved by the impugned judgment, whereby learned Single Judge, while allowing the writ petition preferred on behalf of respondent-petitioner (hereinafter referred to as the `petitioner') quashed the promotion of writ respondents No.3 and 4 as Clerks with the direction to writ respondent No.2 to consider the petitioner as well as respondents No.3 and 4 alongwith other applicants afresh in the light of observations made in the judgment within a period of two months.

3. In nutshell, petitioner, by way of filing CWP No.206 of 2014, invoked extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India and prayed for following reliefs:-

> *"(i) That impugned annexure P-3 may very kindly be quashed and set aside with the direction to the respondent to consider the petitioner for promotion to the post of Clerk.*
>
> *(ii) That records of the case may be summoned for the kind perusal of this Hon'ble Court."*

4. Perusal of averments contained in the writ petition suggests that the petitioner was appointed as a Peon in the Court of Civil Judge (Junior Division), Ghumarwin in the year 2004 and was further promoted to the post of Process Server on 26.6.2010. Actually he was promoted as Process Server on 26.6.2010. Writ respondent No.2, while filing reply, clarified that in promotion order there was a clerical mistake and infact petitioner was promoted as Process Server on 26.6.2010 instead of 26.6.2006 from the post of Peon which is a feeder cadre post. Pleadings on the record further reveal that respondent Nos.3 and 4 were directly appointed as Process Servers on 16.7.2005 and 21.12.2005 respectively.

5. In the year 2013, learned District & Sessions Judge, Bilaspur *(for short `D&SJ, Bilaspur')* vide Annexure P-1 invited applications through proper channel for two posts of Clerks to be filled in by selection/promotion from amongst the Class-IV officials working in Civil &

Sessions Division, Bilaspur having minimum 3 years of service as on 1.6.2013 and having passed atleast 10+2 examination.

6. Perusal of Annexure P-1 suggests that the applications were to reach in the office of learned D&SJ, Bilaspur on or before 12th June, 2013 in the prescribed format. It was also contained in the advertisement notice that the applicant/candidate had to undergo the screening test.

7. Pursuant to aforesaid advertisement, petitioner as well as respondents No.3 and 4 applied for the aforesaid posts of Clerks and on the basis of their applications they were called for screening test by the office of learned D&SJ, Bilaspur. Thereafter, office of D&SJ vide office order dated 26.9.2013 issued transfer and postings of Class-III officials of Civil & Sessions Division, Bilaspur, wherein present appellants (respondents No.3 and 4) were also shown to be promoted as Clerks vide Sr.Nos.8 & 9 and posted as Civil Ahlmad in the office of Civil Judge(Sr.Division)-cum-CJM, Bilaspur and Criminal Ahlmad in the office of Civil Judge (Jr.Division)-cum-JMIC, Court No.II, Ghumarwin, respectively against vacant posts.

8. Petitioner, being aggrieved with the promotion of respondents No.3 and 4, preferred writ petition bearing CWP No.206 of 2014 before this Court praying therein the reliefs, as reproduced above. Petitioner claimed that respondents No.3 and 4 were promoted to the posts of Clerks, pursuant to advertisement Annexure P-1, who were otherwise junior to him and as such order dated 26.9.2013 (Annexure P-3) promoting them as a Clerks is not sustainable and same deserves to be quashed and set aside. He further submitted that he was senior to the aforesaid respondents No.3 and 4 since he had joined service as Peon in the Court of Civil Judge(Jr.Division)-cum-JMIC, Court No.2, Ghumarwin in the year 2004 and thereafter he was promoted as Process Server on 26.6.2010. Petitioner contended that he was to be considered senior to respondents No.3 and 4, as he was promoted to the post of Process Server on 26.6.2010 from the post of Peon which is feeder post for the purpose of promotion to the post of Process Server. Petitioner also averred that bare perusal of advertisement issued by the office of learned D&SJ, Bilaspur, clearly suggests that employees of Class-IV categories including Peons, Chowkidars and Process Servers, who form a common cadre, were eligible for applying to the post of Clerk and they were to be offered appointment on the basis of seniority. Petitioner further claimed that for the purpose of promotion to the post of Clerk, entire service in Class-IV cadre, whether as Peon or as Process Server, was to be taken into consideration by the competent authority, while deciding seniority under the Recruitment and Promotion Rules in vogue and as such writ respondent No.2 had fallen in grave error, while ignoring the service rendered by him against the post of Peon. However, record nowhere suggests that petitioner disputed the fact that writ respondents No.3 and 4 were directly appointed as Process Servers on 16.7.2005 and 21.12.2005 respectively.

9. Writ respondent No.2 i.e. contesting party filed a detailed reply and refuted the averments contained in the petition specifically stating therein that petitioner was promoted as Process Server on 26.6.2010 and not on 26.6.2006, as is depicted in promotion order in the pay band of Rs.4900-10680+1400 (Grade Pay) against 50% quota prescribed for the promotion to the post of Process Servers from amongst the Class-IV employees of the Court as per Rule 11 of the Himachal Pradesh Subordinate Courts' Staff (Recruitment, Promotion and Conditions of Service), Rules, 1997 *(for short `R&P Rules, 1997').*

10. Respondent No.2 further contended that on the promotion of the petitioner as Process Server, he was junior in this category because the seniority lists of the Process Servers and Peons were prepared separately by treating them separate Unit in the cadre. Respondent No.2 further submitted that for the promotion to the post of Clerk from amongst the Class-IV employees against 25% quota, the petitioner was not liable to be treated as senior most Class-IV official. Respondent No.2 also claimed that as per seniority list of Class-III and Class-IV officials of the Civil and Sessions Division prepared on 1.6.2013, the petitioner has been shown at Sr.No.79 in the seniority list and in the category of Process Server he is junior to 21 Process Servers including writ respondents No.3 and 4 as such he was rightly denied promotion to the

post of Clerk. Respondent No.2 also averred that petitioner despite being fully aware of the seniority above, never laid any challenge to the seniority list, wherein he was admittedly placed junior to the aforesaid respondents. It is contended on behalf of the writ respondents that the petitioner was the junior most candidate in the category of Process Server, who appeared in the screening test held for the post of Clerk in terms of the advertisement issued in this regard. Respondent No.2 further averred that though the Peons, Chowkidars and Process Servers are all Class-IV categories but their identity and unit are separate, as per Rule 4 of the Himachal Pradesh Subordinate Courts' Staff (Recruitment, Promotion and Conditions of Service) Rules, 2012 *(for short `R&P Rules, 2012')*, wherein word `Cadre' has been defined by stating that *"the total strength of posts sanctioned as a separate unit as shown in schedule-I attached to these Rules"*. As per writ respondent No.2, bare perusal of Sr.Nos.29 to 36 of Schedule-I, which pertain to Class-IV category, clearly suggests that the categories of Peons and Process Servers form separate unit and have different grade pay and as such there is no force in the contention of the petitioner that he was to be treated senior while giving promotion to the post of Clerk from Class-IV category. Respondent No.2 has also stated that on promotion as Process Server from category of Peon, the nature of duties of Process Server altogether gets changed because the post of Process Server carries higher responsibilities than the post of Peon. Apart from above, grade pay of the post of Process Server is more than that of the post of Peon.

11. Respondent No.2 with a view to substantiate the aforesaid contention also cited example, wherein it has been stated that Process Server has an opportunity/eligibility to become a Bailiff in the hierarchy of Process Servers, whereas Peon is not eligible for promotion to the post of Bailiff.

12. Respondent No.2, with a prayer to reject the claim of the petitioner, submitted that the categories of Peons, Process Servers and Chowkidars do not form a common cadre as they are having separate unit and form separate identity and as such seniority of the petitioner could not be counted from the date of his first appointment because he had already been promoted as Process Server from the post of Peon against 50% quota reserved for the same.

13. Learned Single Judge, on the basis of aforesaid contentions and record made available to him by both the parties, came to the conclusion that authority concerned has fallen in error while ignoring the claim of the petitioner for promotion to the post of Clerk in terms of advertisement issued in this regard and has quashed the promotion of respondents No.3 and 4 as Clerks.

14. Relevant portions of Schedule-I and Schedule-II annexed with the R&P Rules, 2012 are reproduced here-in-below:

Schedule-I

Sr.No.	***Name of Post(s)***	***Classification***	***Pay Scale***	***Grade Pay***	***No.of Posts***
29.	*Process Server*	*Class-IV*	*Rs.4900-10680/-*	*Rs.1400/-*	*378*
30.	*Daftri*	*Class-IV*	*Rs.4900-10680/-*	*Rs.1400/-*	*12*
31.	*Orderly*	*Class-IV*	*Rs.4900-10680/-*	*Rs.1300/-*	*90*
32.	*Peons*	*Class-IV*	*Rs.4900-10680/-*	*Rs.1300/*	*116*
33.	*Chowkidars*	*Class-IV*	*Rs.4900-10680/-*	*Rs.1300/*	*69*
34.	*Chokidars-cum-Sweeper*	*Class-IV*	*Rs.4900-10680/-*	*Rs.1300/*	*6*
35.	*Safai Karamchari*	*Class-IV*	*Rs.4900-10680/-*	*Rs.1300/*	*49*

36.	*Malis*	*Class-IV*	*Rs.4900-10680/-*	*Rs.1300/*	*11*

Schedule-II

SN	***Name of Post(s)***	***Class of the Post***	***Scale of post (in Rs.)***	***Qualification for the post/grade from which the promotion is to be made.***
8.	*Clerks (which expression shall include all the employees except Steno-Typist and Bailiffs.*	*Class-III Non-Gazetted*	*i) Rs.5910-20200 + grade pay Rs.1900 with initial start of Rs.7810/-.* *ii) Rs.10300-34800 + grade pay Rs.3200 w.e.f. 1.10.2012. This pay band and Grade Pay will be given after two years of regular service.*	*a) 75% of the posts in cadre by direct recruitment, on the basis of a competitive examination (as per Part-I Annexure A) from amongst candidates, who are graduate from a recognized University Candidate have to qualify a Typing Test in English on computer at the speed of 50 W.P.M.* *(b) 25% of the available vacancies on the basis of Seniority-cum-Merit amongst the 10+2 Class-IV Court Officials on the basis of test as per Part-II of annexure-A and by considering ACRs of three years. The promotee candidates shall have to qualify Typing Test at the speed of 50 W.P.M. on computers with one year. ….”*
12.	*Process Servers*	*Class-IV*	*Rs.4900-10680 + grade pay Rs.1400*	*(a) 50% by promotion through selection from amongst the Class-IV Court Officials serving in the Division, having minimum three years service and who have passed 10+2 examination, as such, on the basis of seniority subject to the rejection of unfit.*

				(b) 50% by direct recruitment from the candidates, having passed 10+2 examination, as per Part-IV of Annexure-A.
14.	*Peon/Orderly/ Chowkidar/ Safai Karamchari*	*Class-IV*	*Rs.4900-10680 + Grade Pay Rs.1300 with initial start of Rs.6200* *W.e.f. 1.10.2012 Grade Pay Rs.1650. This Grade Pay will be given after two years of regular service.*	*By direct recruitment on the basis of viva-voce to be conducted by the concerned District and Sessions Judge. A candidate should have passed atleast matriculation examination."*

15. Careful perusal of the impugned judgment suggests that learned Single Judge, while quashing the promotions of respondents No.3 and 4, concluded that in view of R&P Rules, 2012, especially classification provided in Schedule-I and eligibility criteria for promotion as Clerk from amongst Class-IV officials provided at Sr.No.8 of Schedule-II of R&P Rules, 2012, petitioner was to be treated ahead of respondents No.3 and 4 in the seniority. It was further observed that maintaining of separate seniority list for Process Servers and Peons has no effect on the merits of the contention raised by the petitioner and an incumbent, irrespective of the fact whether he served as Peon or as Process Server or holding any other post in Class-IV cadre, his entire continuous service has to be taken into consideration for determining seniority as Class-IV official.

16. Mr.Ashwani Pathak, Senior Advocate, vehemently argued that the judgment passed by the learned Single Judge is not sustainable and same deserves to be quashed and set aside as the same is not based upon correct appreciation of the R&P Rules, 2012. Mr.Pathak also contended that learned Single Judge, while passing the impugned judgment, has fallen in grave error inasmuch as not interpreting the R&P Rules, 2012 correctly and has ignored the very vital factor with regard to maintaining of separate seniority list of the cadre of Process Servers and Peons.

17. During arguments, Mr.Pathak made this Court to go through the relevant relief clause of CWP No.206 of 2014 to demonstrate that no prayer, whatsoever, was made on behalf of the petitioner with regard to seniority list admittedly issued by the competent authority showing petitioner at Sr.No.79, whereas in the category of Process Servers, petitioner has been shown junior to 21 Process Servers including respondents No.3 and 4. Mr.Pathak strenuously argued that seniority list was prepared by the Civil & Sessions Division, Bilaspur on 1.6.2013 showing petitioner junior to respondent No.3 but no challenge, whatsoever, was ever laid to the seniority list by the petitioner. As such at this stage, he cannot be allowed to state that he ought to be treated above respondents No.3 and 4 in the seniority list.

18. Mr.Pathak also made this Court to travel through the R&P Rules, 2012 annexed with the petition to substantiate his plea that writ petitioner could not have claimed promotion alone on the strength of length of service in Class-IV category because bare perusal of the advertisement suggests that the promotion to the post of Clerk was to be made on the basis of selection/promotion from amongst Class-IV Officials, working in the Civil & Sessions Division, Bilaspur, having minimum of three years service as on 1.6.2013. It is forcefully contended on behalf of respondents No.3 and 4 that the learned Single Judge has fallen in to grave error while

ignoring the fact that respondents No.3 and 4 were appointed as Process Servers directly in the year 2005, whereas petitioner was promoted as Process Server on 26.10.2010 and as such he was rightly placed below respondents No.3 and 4 in the seniority list drawn on 1.6.2013 by the Civil & Sessions Division, Bilaspur. While concluding his arguments, Mr.Pathak also invited the attention of this Court to the Notification dated 12.3.2003, wherein word `Cadre' has been defined, bare reading of which clearly suggests that though the post of Process Servers/Peons/Chowkidars/Safai Karamcharies/Malies have been prescribed as Class-IV, but the categories of Process Servers and Peons are having separate unit and different grade pay and as such it cannot be prayed that the seniority is to be reckoned on the basis of initial appointment as a Peon.

19. Mrs.Archana Dutt, learned counsel for the writ petitioner, vehemently contended that there is no illegality and infirmity in the impugned judgment as the same is based upon correct appreciation of material placed on record and calls for no interference of this Court. It is contended on behalf of the petitioner that petitioner was senior to respondents No.3 and 4, since he was appointed as Peon in the year 2004, whereas the present appellants-respondents No.3 and 4 were appointed as Process Servers directly in the year 2005 and as such by no stretch of imagination they could be termed as senior to the petitioner. Subsequently the petitioner was promoted to the post of Process Server on 26.6.2010 from the post of Peon which was the feeder cadre for the purpose of promotion to the post of Process Server. She further contended that Process Servers, Peons and Chowkidars, who form a common cadre, were to be considered for promotion to the post of Clerk by taking into account the services rendered by them from their initial appointment and as such action of respondent No.2 in promoting respondents No.3 and 4 has been rightly quashed and set aside by the learned Single Judge. Mrs.Dutt also contended that as per R&P Rules, for the post of Clerk, 75% posts were to be filled in by way of direct recruitment and 25% by way of promotion from amongst the 10+2 Class-IV Court officials on the basis of type test and since petitioner had qualified the type test and further being senior most person that too in the feeder category was required to be promoted to the post of Clerk and as such learned Single Judge has rightly quashed the impugned order whereby respondents No.3 and 4 were promoted to the post of Clerk.

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

21. Close scrutiny of the pleadings available on record suggests that petitioner was appointed as Peon (Class-IV) in the year 2004 and was further promoted as Process Server in the pay band of Rs.4900-10680+1400 (Grade Pay) against 50% quota prescribed for promotion to the post of Process Servers from amongst the Class-IV employees in terms of Rule 11 of the R&P Rules, 1997. Similarly, it is undisputed that present appellants-respondents No.3 and 4 were appointed directly as Process Servers on 16.7.2005 and 21.12.2005 respectively, meaning thereby that the petitioner, who was promoted to the post of Process Server on 26.6.2010, was junior to the present appellants-respondents No.3 and 4 in the category of Process Servers. It is also undisputed before us that respondent No.2 issued seniority list of Class-III and Class-IV officials of Civil and Sessions Division, Bilaspur, prepared on 1.6.2013, wherein the petitioner had been shown at Sr.No.79 and in the category of Process Server he has been shown junior to 21 Process Servers including the present appellants-respondents No.3 and 4.

22. Before adverting to the impugned judgment, this Court is of the view that since petitioner never laid any challenge to the seniority list dated 1.6.2013, showing him at Sr.No.79 in the said seniority list and junior to the present appellants-respondents No.3 and 4, his plea with regard to his being senior to respondents No.3 and 4 cannot be accepted at all and deserves outright rejection. Otherwise also this Court sees no merit in the contention of the petitioner that since he was appointed as Peon (Class-IV) in 2004 and was promoted to the post of Process Server from the post of Peon, which was a feeder category for promotion to the post of Process Server, he was required to be treated as senior to respondents No.3 and 4, who were, admittedly, directly recruited against the post of Process Server in the year 2005. This Court is unable to

accept the contention put forth on behalf of the petitioner that categories of Peons, Chowkidars and Process Servers, being Class-IV categories, form a common feeder cadre and their seniority was to be taken on the basis of their first appointment because bare perusal of Rule-4 of R&P Rules, 2012, wherein `Cadre' has been defined by stating that *"the total strength of posts sanctioned as a separate unit as shown in Schedule I attached to these rules"*, suggests that separate cadre of all these Class-IV categories containing therein posts of Process Server, Daftri, Orderly, Peon, Chowkidar, Chowkidar-cum-Sweeper, Safai Karamchari and Mali, has been carved out.

23. It appears that learned Single Judge has failed to appreciate that though as per aforesaid R&P Rules, 2012 posts of Peons, Chowkidars and Process Servers have been shown as Class-IV categories, but further perusal of their pay band, grade pay and duties/responsibilities clearly suggests that their identity and unit are separate. It is apt to reproduce paragraph 16 of the impugned judgment hereunder:

> *"16. So far as the contention raised by the counsel for the respondent No.2 with regard to maintaining separate seniority list of Process Servers and Peons are concerned, it is evident from perusal of R&P Rules that the same is maintained for the reason that there are certain posts for which all Class-IV officials are not eligible to be considered and one of such example is the post of Bailiff mentioned at Sr.No.11 of Schedule-II for which recruitment by promotion on the basis of seniority from amongst only the Process Servers serving in the Division has been provided".*

24. Bare perusal of categories mentioned hereinabove in Schedule-I clearly suggests that they are having separate unit and different Grade Pay and as such nowhere it can be concluded that they form common cadre. Otherwise also for the post of Bailiff, which is a Class-III post, only Process Servers, amongst the aforesaid Class-IV employees, are eligible to be promoted in terms of Schedule-II annexed with the R&P Rules, 2012, which fact clearly suggests that posts mentioned in Schedule-I nowhere forms the common cadre but they have been only declared to be Class-IV posts by way of Rules mentioned hereinabove.

25. Learned Single Judge, while extending relief to the petitioner, failed to take note of the specific reply in this regard filed by respondent No.2, wherein it was categorically stated that though Peons, Chokidars and Process Servers are Class-IV category but their identity and unit are separate.

26. The learned Single Judge took note of the specific reply filed by respondent No.2, wherein it was categorically mentioned that Peons, Chowkidars and Process Servers fall under Class-IV category but their identity and unit are separate and as such they could not be considered at par. The learned Single Judge has failed to take note of the fact that nature of duties of Process Server carries higher responsibilities than the post of Peon and as such it could not be concluded that posts of Peon and Process Server form a common cadre.

27. Apart from above, learned Single Judge failed to take note of the fact that petitioner was promoted to the post of Process Server from the post of Peon in terms of aforesaid Rules and as such has fallen in to an error while concluding that posts of Peons and Process Servers form a common cadre.

28. After perusing the R&P Rules, 2012, this Court is of the view that categories of Peons, Process Servers, and Chokidars do not form a common cadre as they are having separate unit and identity. Moreover, there is no Rule, which provides that seniority of the petitioner could be counted from the date of his initial appointment as Peon in the year 2004 against category of Process Server to which he was admittedly promoted in the year 2010 against 50% quota reserved for in-service candidates. Since petitioner had already got promotion as Process Server for the post of Peon, taking advantage of 50% quota reserved for the category of Peon and he being junior most in the category of Process Server could not claim promotion to the post of Clerk on the basis of his seniority, to be counted from the date of his first appointment as Peon. On the top of it, when the petitioner after his promotion to the post of Process Server joined the separate cadre of

Process Servers, he cannot claim seniority over and above respondents No.3 and 4, who were admittedly, appointed directly against the post of Process Server much ahead of him. Learned Single Judge, while granting the relief to the petitioner, failed to appreciate that at the first instance, petitioner got promotion as Process Server from the post of Peon against 50% quota reserved for the category of Peons and is junior most in the category of Process Server, and in case the petitioner is promoted again to the post of Clerk by counting the seniority from the date of his initial appointment as Peon, he would avail the benefit of double promotion at once i.e. for promotion to the post of Process Server and also to the post of Clerk.

29. Learned Single Judge has also failed to appreciate that candidature of the petitioner as well as respondent Nos.3 and 4 was considered by Screening Committee on the basis of seniority-cum-merit, where length of service, if any, was not the sole criterion for promotion to the post of Clerk.

30. Having glance to the above discussion, impugned judgment is illegal, bad in law and merits to be set aside. Accordingly, the same is set aside and appeals are allowed. Writ petition is dismissed.

31. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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

Satluj Jal Vidyut Nigam Contract Workers Union ...Petitioner.

Versus

Satluj Jal Vidyut Nigam Limited & others ...Respondents.

CWP No. 987 of 2016
Reserved on: 11.08.2016
Date of decision: 24th August, 2016

Constitution of India, 1950- Article 226- Petitioner is a Union registered with the Labour Department- petitioner claimed that respondent had sufficient accommodation- members of the petitioner-union had awarded accommodation as sufficient vacant accommodation is available with the respondents- respondents stated that members of the petitioner are engaged by the Contractor and there is an agreement executed between contractor and respondents- there is no provision for providing accommodation to the workers engaged by the contractor- held, that members of Union are not employee of the respondents and they had been engaged by the Contractor – Allotment Rules clearly provided that accommodation can be allotted to the employees who had been appointed against the regular post- agreement between respondent and contractor does not stipulate that accommodation will be provided to the workers- availability of vacant accommodation will not confer the right to claim the accommodation- contractor is under obligation to provide and maintain rest-room or other suitable accommodation to the contract labour- petitioner had not arrayed contractors as respondents- no resolution authorizing General Secretary to file the present writ petition placed on record- petition dismissed. (Para-8 to 31)

For the petitioner: Sanjeev Bhushan, Senior Advocate with Ms. Abhilash Kaundal, Advocate, for the petitioner.

For the respondents: Ramakant Sharma, Senior Advocate, with Ms. Devyani Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

By way of present writ petition, petitioner-Union has prayed for the following main relief:-

> *"(i) That the respondents may kindly be directed to allot residential quarters / accommodation to the petitioner's members to live on the principle of parity as the respondents have allotted accommodation to various other agencies and persons such as; Pujari, Contractors, Photographers, private Companies, Army, Security, Societies, private School (DPS) and ITI certificate holder apprentices etc., but the petitioner's members who are working since long for various types of maintenance works of the respondents despite their various requests are being discriminated."*

2. Briefly stated, facts of the case are that the petitioner is a Union registered with the Himachal Pradesh Government Labour Department, under the Trade Unions Act, 1926, (for short, the Act), having its Registration No. 1255, in the name and style "Satluj Jal Vidyut Nigam Contract Workers Union" (for short 'Union'). Copy of registration certificate has been placed on record as Annexure P-1.

3. Present petition has been filed on behalf of the petitioner-Union through Narender Singh, son of Shri Shiv Ram, who claimed himself to be the General Secretary of the Petitioner-Union. It is averred that respondents have sufficient number of buildings, out of which some have been put to use for the offices and in some of the buildings, accommodation has been allotted to various agencies/persons, such as, Pujari, Contractors, Photographers, private Companies, Army, Security, Societies, private School (DPS) etc., and since the members of the petitioner-Union are also working for the respondents, they may also be provided residential accommodation in the buildings which are lying vacant. Petitioner-Union specifically stated that its members belong to different parts of the country, have been working in various capacities with the respondents and at present are facing number of problems including non-availability of residences. Accordingly, the petitioner-Union submitted a Demand Charter dated 12.02.2015 to the respondents (Annexure P-2), whereby, respondents were informed with regard to genuine demand of the members of the Union, but of no avail. Petitioner has procured information under Right to Information Act, 2005 (for short 'RTI Act'), (Annexure P-3), suggestive of the fact that respondents were having sufficient vacant accommodation available. Perusal of aforesaid information further reveals that respondents have allotted residential/commercial accommodation to various persons/agencies, which have no direct concern with the respondents. Petitioner-Union has also placed on record Quarter Allotment Order, dated 1.4.2016, to demonstrate that respondents have also provided accommodation to number of ITI Certificate holders who came only for a period of one year.

4. In nutshell, the case of the petitioner-Union is that since its members are working hard on meager wages for the benefit of respondents through the contractors, it is the primary duty of the respondents to provide accommodation to the poor members of the petitioner-Union. It has also been stated that due to non-availability of shelter, the members of the petitioner-Union are facing a lot of problems and respondents, despite having sufficient vacant accommodation, are not providing the same to them.

5. As noted above, since no action whatsoever was taken on the Demand Charter submitted by petitioner-Union, it was compelled to pass a Resolution dated 02.04.2016, to the following effect:

> *"Unanimously resolved that about 200 residential quarters are lying vacant with the respondents, but despite having knowledge that the petitioner's members are facing problems for their shelter, the same are not being allotted to petitioner's members, hence, the petitioner's members knocked the door of Hon'ble High Court of Himachal Pradesh."*

6. Since, the respondents failed to provide residential accommodation to the members of the petitioner-Union, hence the present writ petition.

7. Respondents, by way of detailed reply, refuted the claim of the petitioner-Union by stating that there is no privity of contract between the replying respondents and the petitioner-Union, inasmuch as the members of the petitioner-Union are engaged by the contractors, to whom the contract is awarded by the replying respondents for a specific period and it is the responsibility of the contractor and not of the respondents to provide accommodation to the workers employed by the contractors. With a view to substantiate aforesaid assertion, replying respondents also placed on record Annexure-RA i.e. agreement entered into between the Contractor and the respondents, which suggests that the respondents are not at all obligated to allot any kind of accommodation to the workers of the contractor and it is the responsibility of the contractor. Respondents have also stated that as per Rules framed by replying respondents called as "*SJVNL Allotment of Residential Accommodation Rules" (for short, the Allotment Rules),* (Annexure-RB), there is no provision for providing accommodation to the workers engaged by the contractor.

8. Respondents also sought dismissal of the petition on the ground that the petitioner-Union has already invoked the provisions of Industrial Disputes Act, 1947, therefore, the present writ petition is not maintainable. It has also been stated that pursuant to demand notice dated 26.4.2016, the Assistant Labour Commissioner, Chandigarh issued a notice to the replying respondents to appear for conciliation on 08.06.2016. It has also been stated by respondents that members of the petitioner-Union being workers of the contractor do not have any right, whatsoever, to claim accommodation from respondents because all the contracts are for specific period for just one or maximum two years based on open e-tender basis and replying respondents being principal employer has to ensure that the contractors are not violating the provisions of any labour law. Apart from above, respondents sought dismissal of the present writ petition on the ground that all the contractors to whom the contract is awarded by the replying respondents are already paying HRA @ 10% of the minimum wages to all the workers, as such, any plea of providing accommodation is not sustainable and same deserves to be dismissed.

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

10. Bare perusal of the documents made available on record by the respective parties, clearly suggests that members of the petitioner-Union are not employees of the respondents in any manner and they have been engaged by the contractors, who have been awarded contract by the respondents for execution of various works under Satluj Jal Vidyut Nigam Limited (for short, SJVNL). It also emerges from the record that respondents have constructed sufficient accommodation for its employees as well as for other agencies, who are rendering essential services to the respondents.

11. In the aforesaid background, this Court needs to ascertain whether members of the petitioner-Union are entitled to accommodation owned by the respondents, especially, when it stands proved on record that they have been engaged by the contractor and not by the respondents. It is an admitted case of the parties that members of the petitioner-Union have been engaged for execution of work by contractors and not by the respondents. Otherwise also, perusal of averments contained in writ petition, nowhere suggests that petitioner-Union has raised any legal grounds, which could make them entitled for allotment, if any, of the accommodation as has been referred to above. Rather plain reading of averments itself suggests that accommodation is being claimed on the basis of parity by the petitioner-Union for its members.

12. Here we may make a reference to Clause 3.0 of the Allotment Rules (Annexure-RB), which reads as under:-

***"3.0 Eligibility for Allotment of Accommodation**:*

3.1 All employees, except the local employees, will be eligible for allotment of residential accommodation in the township provided that if an employee is under suspension pending enquiry, he will not be eligible for allotment of any accommodation during the period of suspension.

3.2 If husband and wife are both employees of the Company and working at the same place, only one of them whosoever gets first allotment will be eligible for allotment.

3.3 If one of the spouse is employed by another government / Semi-Government Organization / Autonomous Bodies or Public Sector Undertaking and has been allotted residential accommodation from his/her employer in the same place, he/she shall not be eligible for allotment of accommodation by the Company.

3.4 If father or mother and unmarried son and/or daughter are both employed by the Company and are working at the same station, then only one of them will be eligible for allotment.

3.5 Normally bachelors will be allotted shared accommodation.

3.6 An employee who is permitted to the retention of his family accommodation in a place other than the place of posting as per separate rules will be allotted bachelor/shared accommodation only subject to the terms and conditions in force from time to time."

13. From the above Clause of the Allotment Rules, it is clear that accommodation, if any, can be allotted to the employees of SJVNL. Word 'Employee' has been defined in Clause 2.0 of the Allotment Rules, which reads as under:-

"2.0 Definition:

c) 'Employee' means a person appointed against a regular post and includes probationers and deputationists, but excludes Trainees, Apprentices, temporary, casual, Muster Roll, workcharged employees."

14. Careful perusal of Clause 2.0 of the Allotment Rules referred to above suggests that under the Allotment Rules, 'Employee' means a person appointed against regular post and includes probationers and deputationists, but excludes Trainees, Apprentices, temporary, casual, Muster Roll, workcharged employee, meaning thereby, person appointed against regular post, on probation and deputationists would be deemed as an employee for the purpose of aforesaid Rules. Bare perusal of aforesaid criteria as has been prescribed in the Rules, nowhere suggests for allotment of accommodation in favour of the workers engaged by contractors to whom work is awarded by the respondents in open tender.

15. Hence, in view of the aforesaid Allotment Rules, members of the petitioner-Union are not entitled for allotment of any residential accommodation by the respondents and, as such, this Court has no hesitation to conclude that the respondents are not under any obligation to provide accommodation to the members of the petitioner-Union.

16. Apart from the above, this Court also perused the agreement entered into between the respondents and the contractor, namely M/s Hem Power Corporation, which nowhere suggests that the respondents are under obligation to provide accommodation, if any, to the workers engaged by the contractors for the construction of project.

17. This Court is of the view that availability of vacant accommodation, if any, with the respondents cannot be a sole ground for providing accommodation to the members of the petitioner-Union, who are admittedly not the employees of the respondents in terms of the Allotment Rules and, as such, no illegality can be found with the action of the respondents in denying accommodation to the members of the petitioner-Union. Since, members of petitioner-Union have no locus and right to claim accommodation from the respondents, any plea of discrimination made on behalf of petitioner-Union deserves to be rejected outrightly. However, perusal of paragraph 4 of the reply filed by respondents clearly suggests that security agencies

like CISF, HIMPESCO and Himachal Pradesh Police deployed at the site are very vital agencies for the safety and security of the project and accordingly their employees have been provided accommodation in terms of the contract entered into between the respondents and the Agencies, referred to here-in-above.

18. Similarly, employees of DPS school, which has been set-up for the wards of the employees of the respondents, have been rightly provided accommodation in terms of agreement entered into between the respondents and the Management of School.

19. After perusing various agreements having been placed on record by the respondents, this Court has no reason to conclude that the respondents have discriminated the members of the petitioner-Union viz. a viz. various agencies in not allotting residential accommodation. It would be appropriate to reproduce para 4 of the reply filed by the respondents hereunder:

> *"4.That the averments made in this para of the petition so far they pertain to record, those are not disputed and the averments which are contrary to the record, those are specifically repudiated. It is submitted on behalf of the replying respondent that project of the replying respondent is fetching revenue to the State and Central Government and is a pride of the Nation. The security agencies like CISF, HIMPESCO and Himachal Pradesh Police deployed at the site are very vital agencies for the safety and security of prime project and employees working therein. As per terms and conditions of the contract with these agencies, the replying respondents are responsible and liable to provide accommodation to the employees of these agencies deployed for the safety and security of the projects. A copy of the agreement with the CISF is annexed as Annexure RD for the perusal of the Hon'ble Court. Similarly, the setting up of DPS school has proved a boon not only to the wards of the employees of the replying respondents but also to the public at large of the area. Therefore, as per terms and conditions of the agreement with the management of the DPS school, the replying respondents are responsible and liable to provide accommodation to the school staff at the project site. A copy of the Agreement with the School is annexed as Annexure RE. It is a fact that some residential accommodation has been provided to the army authorities at Jhakri as per the Rules of SJVNL. It is admitted that zero Type single room set have been provided to one contractor namely M/s Wang Gaar Infrastructure Pvt. Ltd. for office purpose only. Similarly, one zero type single room set has been provided to contractor M/s Jagdeep Aneja Paschim Vihar, New Delhi taking into consideration the specialized services being provided by the contractor for the smooth running of the project and the specialized services are not available at project site. It is also admitted that zero type accommodation has been allotted to contractor M/s Kingson Studio (photographer) as per terms and conditions of the contract between the parties, copy whereof is annexed herewith as Annexure RF. It is further admitted that residential accommodation has been allotted to the Pujaris deployed in the temples of the project vicinity keeping in view the demand of majority of the employees and the local residents of the area. Therefore, keeping in view the fact there is no justification on the part of the members of the petitioner to claim allotment of residential accommodation, more particularly, when the terms and conditions of the contract agreement with the contractor do not envisage such situation whereby the members of the petitioner can claim any such allotment of residential accommodation. It is submitted that keeping in view the above stated facts and circumstances, the demand of residential accommodation raised by the petitioner being against the terms and conditions of the contract agreement with the contractor, was rightly not considered by the replying respondents."*

20. As far as, another contention put-forth by the counsel representing the petitioner-Union with regard to violation of provisions of the Contract Labour (Regulation and

Abolition) Act, 1970 (for short, Act of 1970) is concerned, it would be apt to reproduce here-in-below Section 17 of the said Act:-

> *"17. Rest-rooms. - (1) In every place wherein contract labour is required to halt at night in connection with the work of an establishment -*
>
> *(a) to which this Act applies, and*
>
> *(b) in which work requiring employment of contract labour is likely to continue for such period as may be prescribed,*
>
> *there shall be provided and maintained by the contractor for the use of the contract labour such number of rest-rooms or such other suitable alternative accommodation within such time as may be prescribed.*
>
> *(2) The rest-rooms or the alternative accommodation to be provided under sub-section (1) shall be sufficiently lighted and ventilated and shall be maintained in a clean and comfortable condition.*

21. Perusal of aforesaid provisions clearly shows that contractor is required to provide and maintain rest-rooms in every place, where labour is required to halt at night in connection with work of establishment. The aforesaid provisions of the Act of 1970 relied upon by petitioner-Union, nowhere binds the respondents to provide accommodation to the members of petitioner-Union, who were admittedly engaged by the contractor.

22. Rule 41 of the Contract Labour (Regulation and Abolition) Central Rules, 1971 (for short, Rules of 1971) is also reproduced here-in-below:-

> *"41.Rest Rooms.-(1) In every place wherein contract labour is required to halt at night in connection with the working of the establishment to which the Act applies and in which employment of contract labour is likely to continue for 3 months or more, the contractor shall provide and maintain rest rooms or other suitable alternative accommodation within fifteen days of the coming into force of the rules in the case of existing establishments, and within fifteen days of the commencement of the employment of contract labour in new establishments.*
>
> *(2) If the amenity referred to in sub-rule (1) is not provided by the contractor within the period prescribed the principal employer shall provide the same within a period of fifteen days of the expiry of the period laid down in the said sub-rule.*
>
> *(3) Separate rooms shall be provided for women employees.*
>
> *(4) Effective and suitable provision shall be made in every room for securing and maintaining adequate ventilation by the circulation of fresh air and there shall also be provided and maintained sufficient and suitable natural or artificial lighting.*
>
> *(5) The rest-room or rooms or other suitable alternative accommodation shall be of such dimensions so as to provide at least a floor area 1.1 sq. metre for each person making use of the rest room.*
>
> *(6) The rest-room or rooms or other suitable alternative accommodation shall be so constructed as to afford adequate protection against heat, wind, rain and shall have smooth, hard and impervious floor surface.*
>
> *(7) The rest-room or other suitable alternative accommodation shall be at a convenient distance from the establishment and shall have adequate supply of wholesome drinking water."*

23. Perusal of aforesaid provisions also suggests that contractor shall provide and maintain rest-room or other suitable alternative accommodation to the contract labour where the labour is required to halt at night in connection with the work of establishment to which Act of 1970 applies. Sub-clause 2 of Rule 41 of the Rules of 1971 though suggests that, in case, contractor fails to provide amenity in terms of sub-rule 1, principal employer shall provide the same within fifteen days of the expiry of the period laid down in the said Rules. But in the present

case, as has been discussed in detail, there is no privity of contract between the replying respondents and petitioner-Union. Moreover, members of petitioner-Union have been engaged by contractor to whom the contract is awarded by the replying respondents for a specific period and agreement entered into between the respondents and contractor, nowhere suggests that respondents are under obligation to provide accommodation, if any, to the members of the petitioner-Union. Moreover, as has been discussed in detail, the Allotment Rules nowhere entitle the members of the petitioner-Union to claim accommodation, which otherwise is available to the employees of the respondents.

24. Otherwise also, there is no document on record suggestive of the fact that at any point of time members of the petitioner-Union raised their claim for accommodation, if any, with the contractor, who engaged them. Even for the sake of argument, it is presumed that the respondents being principal employer is under obligation to provide accommodation to the employees engaged by the contractor, the petitioner-Union ought to have placed on record communication, if any, made by petitioner-Union or its members with the contractor, asking him to provide accommodation in terms of provisions of the aforesaid Act of 1970 and the Rules of 1971. But in the present case, we are unable to find any document which could persuade us to infer that at first instance members of the petitioner-Union raised their claim for accommodation, if any, with the contractor and as such no benefit can be claimed by the members of petitioner-Union in terms of aforesaid Act of 1970 and the Rules framed thereunder, from the respondents.

25. Even if it is presumed that the respondents being principal employer are under obligation to provide accommodation to the workers engaged by the contractor in terms of the Rule 41 of the Rules of 1971, referred to here-in-above, there is no document available on record suggestive of the fact that petitioner represented to the contractor who engaged them, for making available accommodation in terms of provisions/rules of the aforesaid Act. In terms of Section 17 of the aforesaid Act as well as Rule 40 of Rules referred here-in-above, principal employer is only bound to provide accommodation, if at the first instance contractor fails to provide the same to its workers. Interestingly, in the present case, petitioner-Union has neither represented to contractor who engaged its members for construction work nor placed on record any document suggestive of the fact that its request for providing accommodation was not acceded to by the contractor and as such the petitioner-Union was compelled to make representation to the respondents, praying therein for providing accommodation. Hence, we are unable to accept the aforesaid contention put-forth on behalf of petitioner-Union that the respondents being principal employer are under obligation to provide accommodation to the employees engaged by the contractor.

26. Sections 22, 24 & 25 of the Act of 1970 provide for punishment for contravention of any of the provisions of the Act which are reproduced below:-

> ***"22. Obstructions*** *(1) Whoever obstructs an inspector in the discharge of his duties under this Act or refuses or willfully neglects to afford the inspector any reasonable facility for making any inspection, examination, inquiry or investigation authorized by or under this Act in relation to an establishment to which, or a contractor to whom, this Act applies, shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both. (2) Whoever willfully refuses to produce on the demand of an inspector any register or other document kept in pursuance of this Act or prevents or attempts to prevent or does anything which he has reason to believe is likely to prevent any person from appearing before or being examined by an inspector acting in pursuance of his duties under this Act, shall be punishable with imprisonment for a term which may extend to three months, or with a fine which may extend to five hundred rupees, or with both.*
>
> ***24. Other offences***
>
> *If any person contravenes any of the provisions of this Act or of any rules made thereunder for which no other penalty is elsewhere provided, he shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both.*

25. Offences by companies

(1) If the person committing an offence under this Act is a company, the company as well as every person in charge of, and responsible to, the company for the conduct of its business at the time of commission of the offence shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

PROVIDED *that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.*

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or that the commission of the offence is attributable to any neglect on the part of any director, manager, managing agent or any other officer of the company, such director, manager, managing agent or such other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation : *For the purpose of this section-*

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

27. Sections 26 & 27 of the Act of 1970 also provide that no court shall take cognizance of any offence except on a complaint made by, or with the previous sanction and no court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence punishable under the said Act. Sections 26 & 27 of the Act of 1970 read thus:-

"26. Cognizance of offences

No court shall take cognizance of any offence under this Act except on a complaint made by, or with the previous sanction in writing of, the inspector and no court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence punishable under this Act.

27. Limitation of prosecutions

No court shall take cognizance of an offence punishable under this Act unless the complaint thereof is made within three months from the date on which the alleged commission of the offence came to the knowledge of an inspector:

PROVIDED *that where the offence consists of disobeying a written order made by an inspector, complaint, thereof may be made within six months of the date on which the offence is alleged to have been committed."*

28. In the present case, as has been observed above, petitioner-Union has not been able to demonstrate that at any point of time prior to filing of their claim before the respondents, it had raised the issue of accommodation with contractor.

29. In view of the specific provisions contained in the Act of 1970, as referred to here-in-above, the present petition is not maintainable.

30. Interestingly, in the present case, petitioner-Union has not arrayed respective contractors as party respondents, who are otherwise under obligation to make accommodation available to their workers in terms of the aforesaid Act of 1970 and the Rules of 1971. Bare perusal of averments contained in the writ petition itself suggests that present petition is sheer abuse of the process of law because at no point of time, petitioner has been able to prove its locus as well as right to claim accommodation, if any, from the respondents.

31. Apart from the above, petitioner-Union has miserably failed to prove its locus as far as filing of the present petition is concerned because as has been discussed in the earlier part

of this judgment, no resolution whatsoever, authorising Mr. Narender Singh, General Secretary of the petitioner-Union, has been placed on record to file the present writ petition and as such the present petition is liable to be dismissed solely on the ground of maintainability.

32. We were inclined to dismiss this petition with cost, however, in the given facts and circumstances of the case, we refrain from doing so.

33. Having glance of the above discussion, we are of the considered view that the writ petition deserves to be dismissed and the same is dismissed accordingly alongwith pending CMPs, if any.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh .....Appellant.

Versus

Hukam Singh & Another .....Respondents.

Cr. Appeal No. 443 of 2010.
Decided on: 26th August, 2016

N.D.P.S. Act, 1985- Section 20 and 29- Accused tried to run away on seeing the police- they were apprehended- their search was conducted during which 1 kg. charas was recovered from possession of H- accused were tried and acquitted by the trial Court in view of the judgment delivered in ***Sunil Kumar*** versus ***State of Himachal Pradesh, latest HLJ, 2010 HP, 207-*** however, judgment of ***Sunil Kumar*** has been over ruled by Full Bench in ***State of Himachal Pradesh*** versus ***Mehboob Khan 2013(3) Him.L.R. (FB) 1834-*** hence, judgment of the trial Court set aside and the case remanded to the trial Court for fresh decision in the light of the latest law.

(Para-9 to 11)

Cases referred:

Sunil Kumar versus State of Himachal Pradesh, latest HLJ, 2010 HP, 207
State of Himachal Pradesh versus Mehboob Khan 2013(3) Him.L.R. (FB) 1834

For the appellant : Mr. D.S. Nainta, Addl. A.G.
For the Respondents : Mr. Suneel Mohan Goel, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

State of Himachal Pradesh is in appeal before this Court. The complaint is that learned Special Judge (Presiding Officer, Fast Track Court), Kullu has erroneously acquitted the respondents, hereinafter referred to as 'the accused', from charge under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, hereinafter referred to as 'the NDPS Act' in short, vide judgment dated 01.06.2010 passed in Sessions Trial No.32of 2007. The impugned judgment has thus been sought to be quashed and set aside with further prayer that both accused be convicted and sentenced for the commission of offences punishable under Sections 20 and 29 of the NDPS Act.

2. The facts in a nut-shell are that on 30.11.2006 in the midnight i.e. 1.30 a.m., a police party of Police Station, Bhunter, District Kullu, headed by ASI Bhagat Ram PW-10 intercepted both accused while on its way to Sujehni from Kalehli. Both accused were talking to each other. One was holding a torch in his hand whereas the other walking ahead of him. When both accused reached at the place where the police party had reached on its way to Sujehni, on

seeing them, both accused got scared and tried to flee away. They were chased by PW-10 with the help of the other police personnel accompanying him and one of the accused was apprehended by ASI Bhagat Ram at a distance of 50 meters. The said accused disclosed his name as Hukam Singh. The other accused namely Daulat Ram, however, ran away taking advantage of darkness. Accused Hukam Singh has disclosed the particulars of accused Daulat Ram also. Being dead hours of night no one was available for being associated as independent witness. Therefore, PW-10 has associated Constable Harbans Kumar PW-8 and Constable Vikram Singh as independent witnesses. Accused Hukam Singh was apprised that the police has suspicion of his carrying some narcotic drug or psychotropic substance with him and that his search is required. He was apprised about his right of his being searched either before a nearest gazetted officer or Magistrate. He vide memo Ex. PP, however, opted for his search by the police present there. After obtaining the search of the said accused, PW-10 had offered his own search first to him in the presence of witnesses. No incriminating substance was recovered from the possession of PW-10. Memo Ex.PQ was prepared in this behalf.

3. It is thereafter the search of accused Hukam Singh was conducted in the presence of witnesses. He was holding a light sky blue coloured polythene bag in his right hand. The bag was opened and it was found to be containing charas in the shape of sticks duly wrapped in polythene. When weighed, it was found one kilogram. Two samples weighing 25 grams each were separated for the purpose of chemical analysis and wrapped in two separate parcels of cloths. The remaining charas was put in the same polythene bag from which it was recovered and wrapped in a separate parcel of cloth. Each parcel was sealed with three seals having impression 'H'. The sample of seal Ex.PR was drawn separately. NCB-I form Ex.PM/PG was filled-in in triplicate on the spot. The seal was handed over to Constable Vikram Singh for safe custody after its use. The case property was taken into possession vide seizure memo Ex.PS in the presence of both witnesses. A copy thereof was supplied to accused Hukam Singh. His signature was obtained on the seizure memo in token of supply of the copy thereof to him. The accused thereafter was apprised about the commission of the offence he committed and the provision of sentence under the NDPS Act, therefore, vide memo Ex.PT, he was arrested. Rukka Ex.P-2 was prepared and handed over to Constable Umesh Kumar with a direction to take the same to Police Station, Kullu for registration of FIR. Constable Umesh Kumar handed over the rukka to SHO Mahender Singh, who registered the FIR Ex.PK and handed over the case file to the said Constable for being taken to the Investigating Officer on the spot. The Investigating Officer prepared the site plan Ex.PZ1 and recorded the statements of the witnesses as per their version.

4. Accused Hukam Singh was produced before Mahender Singh PW-6, SHO Police Station, Kullu and he was interrogated by him. He re-sealed each parcel containing the case property with three seals having impression 'T'. He also filled-in column No.9 to 11 of NCB-I forms Ex.PM. Sample of seal 'T' was taken separately on a piece of cloth, which is Ex.PN. The SHO thereafter deposited all the three parcels with Roop Singh, the then Moherer Malkhana. The MHC made entries qua receipt of the case property in the Malkhana register, the extract whereof is Ex.PE. The sample parcels along with the seals impressions 'H' and 'T', NCB-I form in triplicate, photocopy of FIR, seizure memo and other documents were handed over by PW-4 to Constable Diwan Chand PW-1 with a direction to carry the same to CFSL, Chandigarh vide RC No.339/06, dated 30.11.2006, EX.PF. The same, however, were not accepted in the laboratory and as such brought back by PW-1 to the Police Station and handed over there to additional MHC Manoj Kumari. The sample parcels were again sent to CFSL Chandigarh vide RC No.343/06, dated 3.12.2006, Ex.PJ, through HHC Jai Kishan along with NCB-I form in triplicate, sample of seals etc. On this occasion, the parcels along with other articles were deposited in the laboratory and PW-5 on return to Police Station has handed over the receipt to MHC Manoj Kumari.

5. The special report Ex.PB was prepared. It was handed over by PW-10 to Ahmad Sayed, Dy. S.P., Kullu on 30.11.2006. The same was perused by the Dy.S.P., Kullu and made the endorsement Ex.PA thereon. The same was proved by his reader Kasmi Ram PW-2, who has further stated that the entries qua special report were made by him in the register Ex.PC.

6. Accused Daulat Ram was also arrested and his search was conduced in the presence of S/Shri Sher Singh and Suresh Kumar. At his instance torch was recovered and taken into possession vide seizure memo Ex.PW. On receipt of the reports of chemical examiner Ex.PO and PZ2, challan against both accused was prepared and presented in the Court.

7. Learned Special Judge has charge-sheeted accused Hukam Singh for the commission of offence punishable under Section 20 of the NDPS Act, whereas his co-accused Daulat Ram for the commission of offence punishable under Section 20 read with Section 29 of the NDPS Act. They both pleaded not guilty and claimed trial. Therefore, the prosecution has produced evidence in order to sustain the charge against them.

8. After recording the prosecution evidence, the statements of both accused were also recorded under Section 313 Cr.P.C.

9. On the completion of record and hearing learned Public Prosecutor as well as learned defence counsel, learned special Judge, while placing reliance on the Division Bench Judgment of this Court in ***Sunil Kumar*** versus ***State of Himachal Pradesh, latest HLJ, 2010 HP, 207,*** has arrived at a conclusion that the stuff recovered from the possession of the accused Hukam Singh has not been proved to be Charas and treating the judgment in ***Sunil's*** case supra as a binding precedent, acquitted both the accused of the charge framed against each of them with the following observations:

> "….. Therefore in view of this binding precedent when the report does not show that the sample was containing resin and its percentage, the report does not prove that stuff was charas and in absence of any such evidence, it cannot be concluded that accused was found in possession of any Charas. Thus, the case of the prosecution would not be established on the basis of the report of analysis Ex.PO.
>
> xxxx
>
> xxxx
>
> 15 Once it is held that, the stuff recovered from the possession of accused Hukam Singh has not been proved to be charas accused Daulat Ram cannot be held to be a party to criminal conspiracy to transport the said Charas. Moreover, there is no evidence to show that Daulat Ram accompanied Hukam Ram on the relevant day. No eye witness identified him. He was implicated on the basis of the statement made by Hukam Ram at the spot. This statement was not reduced into writing and would not be admissible. Recovery of torch would not implicate him as the torch is an innocuous article which is commonly available. Hence, the case against the accused Daulat Ram is also not proved."

10. It is worth mentioning that a Larger Bench of this Court in ***State of Himachal Pradesh*** versus ***Mehboob Khan 2013(3) Him.L.R. (FB) 1834*** has reconsidered the law laid down by the Division in ***Sunil's*** case supra and concluded as under:-

> ***a.*** After taking into consideration Section 293 of the Code of Criminal Procedure, Sections 45 and 46 of the Indian Evidence Act and the Law laid down by the apex Court as well as various High Courts discussed in detail hereinabove, we conclude that on account of non-consideration of the same by the Division Bench, which has rendered the judgment in ***Sunil's*** case, correct law on the expert opinion and the reports assigned by the scientific expert after analyzing the exhibit has not been laid down.
>
> b. We further conclude that on account of non-consideration of various reports of the United Nations Office on Drugs and Crime including Single Convention on Narcotic Drugs, 1961 and to the contrary placing reliance on the text books, which basically are on medical jurisprudence, the Division Bench in ***Sunil's*** case failed to assign correct meaning to 'charas' and 'cannabis resin', the

necessary constituents of an offence punishable under Section 20 of the NDPS Act.

c. In view of the detailed discussion hereinabove, the Division Bench while deciding ***Sunil's*** case supra has definitely erred in taking note of the percentage of tetrahydrocannabinol in three forms of cannabis i.e. Bhang, Ganja and Charas and hence, concluded erroneously that without there being no reference of the resin contents in the reports assigned by the Chemical Examiners in those cases, the contraband recovered is not proved to be Charas, as in our opinion, the Charas is a resinous mass and the presence of resin in the stuff analyzed without there being any evidence qua the nature of the neutral substance, the entire mass has to be taken as Charas.

d. There is no legal requirement of the presence of particular percentage of resin to be there in the sample and the presence of the resin in purified or crude form is sufficient to hold that the sample is that of Charas. The law laid down by the Division Bench in Sunil's case that 'for want of percentage of tetrahydrocannabinol or resin contents in the samples analyzed, the possibility of the stuff recovered from the accused persons being only Bhang i.e. the dried leaves of cannabis plant, possession of which is not an offence, cannot be ruled out', is not a good law nor any such interpretation is legally possible. The percentage of resin contents in the stuff analyzed is not a determinative factor of small quantity, above smaller quantity and lesser than commercial quantity and the commercial quantity. Rather if in the entire stuff recovered from the accused, resin of cannabis is found present on analysis, whole of the stuff is to be taken to determine the quantity i.e. smaller, above smaller but lesser than commercial and commercial, in terms of the notification below Section 2 (vii-a) and (xxiii-a) of the Act.

e. We have discussed the Single Convention on Narcotic Drugs, 1961 in detail hereinabove and noted that resin becomes cannabis resin only when it is separated from the plant. The separated resin is cannabis resin not only when it is in 'purified' form, but also when in 'crude' form or still mixed with other parts of the plant. Therefore, the resin mixed with other parts of the plant i.e. in 'crude' form is also charas within the meaning of the Convention and the Legislature in its wisdom has never intended to exclude the weight of the mixture i.e. other parts of the plant in the resin unless or until such mixture proves to be some other neutral substance and not that of other parts of the cannabis plant. Once the expert expressed the opinion that after conducting the required tests, he found the resin present in the stuff and as charas is a resinous mass and after conducting tests if in the opinion of the expert, the entire mass is a sample of charas, no fault can be found with the opinion so expressed by the expert nor would it be appropriate to embark upon the admissibility of the report on any ground, including non-mentioning of the percentage of tetrahydrocannabinol or resin contents in the sample.

f. We are also not in agreement with the findings recorded by the Division Bench in ***Sunil's*** case that "mere presence of tetrahydrocannabinol and cystolithic hair without there being any mention of the percentage of tetrahydrocannabinol in a sample of charas is not an indicator of the entire stuff analyzed to be charas" for the reason that the statute does not insist for the presence of percentage in the stuff of charas and mere presence of tetrahydrocannabinol along with cystolithic hair in a sample stuff is an indicator of the same being the resin of cannabis plant because the cystolithic hair are present only in the cannabis plant. When after observing the presence of tetrahydrocannabinol and cystolithic hair, the expert arrives at a conclusion that the sample contains the resin contents, it is more than sufficient to hold that the

sample is of charas and the view so expressed by the expert normally should be honoured and not called into question. Of course, neutral material which is not obtained from cannabis plant cannot be treated as resin of the cannabis plants. The resin rather must have been obtained from the cannabis plants may be in 'crude' form or 'purified' form. In common parlance charas is a hand made drug made from extract of cannabis plant. Therefore, any mixture with or without any neutral material of any of the forms of cannabis is to be considered as a contraband article. No concentration and percentage of resin is prescribed for 'charas' under the Act."

11. A Larger Bench, therefore, has held that the judgment in ***Sunil's*** case supra does not lay down the correct legal position as to what is Charas and what shall be its constituents in legal parlance and as such not to be followed. Therefore, in view of the Larger Bench judgment in ***Mehboob Khan***'s case supra, the impugned judgment can not be said to be legally and factually sustainable and the same as such is quashed and set aside. The case, however, is remanded to learned trial Court for fresh disposal in accordance with law. The parties through learned counsel representing them are directed to appear before the trial Court on ***19th September, 2016***. Record be sent back so as to reach in the trial Court well before the date fixed.

12. The appeal is accordingly allowed and stands disposed of.

****

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

Bhagat Ram died (through LRs) ..Appellant/defendant.

Versus

Soma Devi and others ..Respondents/plaintiffs.

RSA No. 19 of 2007
Reserved on : 16.08.2016
Date of decision: 29/08/2016

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit seeking declaration that suit land was owned and possessed by G, father of the plaintiff- defendant was adopted by N in accordance with the custom- he has no right over the land owned by G- suit land is in possession of the plaintiff and the defendant has abandoned his right over the same- defendant denied his adoption by one N- he claimed that he is owner in possession of half share of the land- suit was dismissed by the trial Court- an appeal was filed, which was allowed- held in second appeal that G had left behind three sons D, defendant and the plaintiff- mutation of inheritance was sanctioned in favour of all the sons- D remained unmarried and his estate was mutated in favour of the plaintiff and defendant on his death- a judgment was passed by District Judge, Hoshiarpur declaring that defendant was adopted by N – according to customary law, an adopted son does not succeed to his natural father- mutation of inheritance was wrongly sanctioned in favour of the defendant- Appellate Court had rightly allowed the appeal- appeal dismissed. (Para-8 to 10)

Cases referred:

Shakuntala and others Vs. Surindeer Chand and others, AIR 2006 Himachal Pradesh 108
Niamat Singh vs. Darbari Singh and others 1956 AIR (43) 1956 Punjab 231
Mst. Rukhmabai vs. Lala Laxminarayan and others AIR (47) 1960 SC 335
Daya Singh and other Vs. Gurdev Singh (dead) by LRs and others 2010 2 SCC 194

For the appellant: Mr. K.D.Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate.
For the respondents: Mr. Bhupender Gupta, Sr. Advocate with Mr. Janesh Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

This appeal stands directed against the impugned judgement of the learned District Judge, Hamirpur, Himachal Pradesh, whereby it allowed the appeal preferred before it by the plaintiff who stood aggrieved by the judgement and decree of the learned trial Court whereunder the latter dismissed his suit.

2. The facts necessary for rendering a decision on the instant appeal are that the suit by virtue of amended plaint, plaintiff had claimed a decree for declaration qua the suit land on the ground that the suit land was owned and possessed by Shri Govind, father of the plaintiff. The defendant when was of 13 days old was adopted as son by one Nihala in accordance with the agricultural custom of Tappa Dhatwal, District Hamirpur, and as such the defendant was brought up by his adoptive father Nihala being adopted son and had no legal right whatsoever over the suit land which was owned and possessed by Shri Govind, natural father of defendant and father of plaintiff. It was further pleaded that after the death of Govind, plaintiff is in cultivating possession of the suit land and defendant had virtually abandoned his right in the suit land on account of property got by him from his adoptive father but inadvertently the name of defendant was also incorporated alongwith plaintiff in the revenue record showing him as co-owner of the suit land and as such the entries in favour of defendant in the revenue records are wrong.

3. The defendant filed written statement and thereby resisted and contested the suit of the plaintiff by taking preliminary objection qua maintainability, limitation, estoppel and suppression of material facts. On merits, the defendant termed the averments made in the plaint as wrong and incorrect and pleaded that the revenue entries incorporated in his favour regarding the suit land were correct. It was claimed that he is owner in possession of the land situated in Tika Ghulera, Mouza Dhatwal to the extent of ½ share. It was pleaded that the revenue entries in favour of the defendant were in the knowledge of the plaintiff. The defendant was never adopted by Shri Nihala nor any mutation of inheritance was attested of the land by Nihala in his favour. On the strength of said averments, the defendant claimed dismissal of the suit.

4. Replication to the written statement filed wherein the averments made in the written statement were controverted and those made in the plaint were re-asserted.

5. On the pleadings of the parties, the trial Court on 5.5.2000 struck following issues inter-se the parties at contest:-

1. Whether the plaintiff is the exclusive owner in possession of the suit land as alleged? OPP.

2. Whether revenue entries are wrong and illegal, as alleged? OPP.

3. Whether the defendant was adopted by Shri Nihala, as alleged. If so, its effect? OPP.

4. Whether the plaintiff is entitled to the injunction prayed for? OPP.

5. Whether the plaintiff is entitled to a decree for possession in the alterative as claimed? OPP.

6. Whether the suit is not maintainable in the present form? OPD.

7. Whether the suit is time barred? OPD.

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

9. Whether the plaintiff has not come to the Court with clean hands as alleged. If so, its effect? OPD.

10. Whether the defendant got the property of Shri Nihala by way of gift, as alleged, if so, its effect?OPD.

11. Whether the suit has not been properly valued for the purposes of Court fees and jurisdiction? OPD.

12. Whether the defendant is entitled to special costs under Section 35-A CPC, as alleged. If so, their quantum? OPD.

13. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff. However, the learned First Appellate Court allowed the appeal preferred therefrom before it by the plaintiff.

7. Now the defendant has instituted the instant Regular Second Appeal before this Court, assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 5.10.2007, this Court admitted the appeal on the hereinafter extracted substantial questions of law:-

"1. Whether the findings of the Court below are perverse, based on misreading of oral and documentary evidence as also the Kangra Customary Law which has vitiated the findings?

2. Whether the suit of the plaintiff was within limitation and the plaintiff was entitled to challenge the mutation of inheritance of Govinda which was attested on 8.2.1917 in the year 1966 when the property was in possession of the defendant and had been separted in Consolidation proceedings in 1962?

3. Whether the findings of the Court below are not sustainable in view of the fact that neither custom was pleaded nor proved and in any case on the proper construction of question No. 77 and the Kangra Customary Law, Rathis of Hamirpur were entitled to inherit the estate of both adopted father as also the natural father?

4. Whether the suit of the plaintiff was maintainable and the plaintiff was entitled to decree for injunction when admittedly appellant was separated possession of the property and the suit was not within limitation?

5. Whether the Court below has misconstrued the judgement Ext.P-16 of the District Judge, Hoshiarpur in holding that there was valid adoption of Bhagat Ram by Nihala when the same was not inter party and no reliance could be placed on the said evidence to prove the adoption of the appellant by Nihala?

Substantial questions of law.

8. One Govind the predecessor in interest of the parties at lis died on 5.12.1916. He left behind three sons, Dhian Singh, Bhagat Ram (defendant) and Inder Singh (plaintiff). On his demise mutations qua his estate comprised in Ext.D-4, Ext.D-5, Ext.D-6 stood attested on 8.2.1917 qua all his sons. Dhian Singh remained unmarried throughout his life also he died issueless on 27.3.1933. On his demise his estate stood on 24.12.1933 mutated as unveiled by Ext.D-1, Ext.D-2 and Ext.D-3 vis-à-vis plaintiff and the defendant. In the year 1962-63 on occurrence of consolidation proceedings in the area whereat the suit land stands located sequelled the consequence of the hitherto undevided Khatas of the parties standing separated. Conspicuously, the plaintiff had concerted to both erode besides disrobe the efficacy of mutation No. 23 Ext.D-4, mutation No. 20 Ext.D-5 and mutation No. 10 Ext.D-6, mutations whereof stood attested on demise of their predecessor in interest namely one Govind on 8.2.1917, in sequel whereof the estate of their predecessor in interest stood mutated respectively in favour of Dhian Singh, Bhagat Ram and Inder Singh. Also a strenuous assay was embarked upon the plaintiff to erode the effect of mutation No. 90 comprised in Ext.D-1, mutation No. 94 comprised in Ext.D-2, and mutation No. 99 comprised in Ext.D-3 mutation whereof stood attested on occurrence of demise of Dhian Singh whereby his estate given his leaving behind no surviving heir stood mutated in favour of the plaintiff and the defendant. Obviously also on occurrence of partition of the suit land during the course of holding of consolidation proceedings in the year 1962-63 in

villages Ghulera, Sunani and Mundwin whereat the suit land stands located whereupon obviously the hitherto undivided Khatas of the litigating parties stood dismembered also stands concerted to hold no legal worth. Moreover an onslaught stands mounted qua the efficacy of revenue entries borne in the relevant revenue records qua the suit land conspicuously when their occurrence therein holds consonance with the aforesaid mutations. The anchor of the legal onslaught mounted by the plaintiff qua the inefficacy of the aforesaid mutations besides qua the inefficacy of the revenue entries borne on the relevant records qua the suit land rests upon the defendant Bhagat Ram while his evidently as portrayed by a conclusive rendition of the learned District Judge, Hoshiarpur comprised in Ext.P-16 standing pronounced therein to when aged 13 days old standing adopted by one Nehala concomitantly rendering him unbefitting to hold any vestige of right to claim inheritance qua the estate of his natural or putative father one Govind, estate whereof subsequently opened for succession on occurrence of his demise on 5.12.2016. The finality of the judicial verdict qua the facet aforesaid embodied in Ext.P-16 conspicuously mutes the controversy qua the trite factum of defendant Bhagat Ram standing adopted by one Nehala. The singular factum of the decision recorded in Ext.P-16 holding pronouncements therein of Bhagat Ram standing adopted by Nehala not being a rendition inter se the litigating parties hereat is inconsequential nor would not erode its finality unless the prima donna factum probandum pronounced therein stood reversed by a Court higher than the one which pronounced Ext.P-16. However, when no evidence stands adduced herebefore qua the judicial verdict comprised in Ext.P-16 standing reversed by the High Court concerned renders it to acquire conclusivity also for reiteration benumbs the espousal of the defendant of it being not inter parties vis-à-vis the litigating parties hereat its holding no efficacy. However, with the aforesaid prima donna factum standing silenced would not ipso facto countervail the submission of the counsel for the defendant Bhagat Ram qua his merely thereupon not holding any vestige of right to inherit the estate of his natural and putative father one Govind. For silencing the aforesaid facet of the controversy an allusion is enjoined to be made qua the prevalence of customary laws of inheritance in the area whereat the suit land stands located also its holding clout besides governing the inheritance by an adopted son qua the estate of his deceased putative father, customary right whereof stands proclaimed in Question No. 77 and in the apposite answer meted thereto also finds explicit expression in an apposite illustration thereof as held besides encapsulated in the Customary Law of the Kangra District (excluding Kullu) compiled by L.Middleton, Esquire, I.C.S. Settlement Officer, Kangra District, which stands extracted hereinafter:-

> "Question No. 77 – Is an adopted son entitled to succeed to his natural father in case of the latter having no other lineal issue?
>
> Answer- Except the Gosains of Kangra and the Gaddis and Kanets of Palampur Tehsil all the tribes say the adopted son is not entitled to succeed to his natural father."
>
> Under illustration regarding Tehsil Hamirpur in relation to Mauza Dhatwal, to which the parties to the suit belong, it is illustrated as under:
>
> "Mauza Dhatwal – Lachhman, adopted son of Attar Singh, Rajput, did not succeed to his natural father, who had no other lineal issues."

An incisive reading thereof when unravels qua the relevant apt portions embodied therein holding upsurgings qua an adopted son not standing entitled to stake a right to succeed to the estate of his natural father concomitantly does not bestow any right in the defendant to given his standing adopted by one Nehala to succeed to the estate of his natural father one Govind whereupon the relevant mutations besides the revenue entries qua the suit land embodied in the relevant revenue record when find their occurrence therewithin in consonance therewith garner invalidation. Moreover, the aforesaid submission addressed by the counsel for the defendant Bhagat Ram holding no legal sinew stands mobilized with heightened momentum from the unfoldments occurring in the hereinabove extracted apt illustration thereto, illustration whereof is aptly applicable with precision qua the location of the suit land also qua the caste whereto the parties belong hence with its conspicuously bespeaking of Mauja Datwal whereat the suit land

stands located qua thereat an adopted son not holding any right to succeed to the estate of his natural father when the latter leaves behind lineal issues, concomitantly its vividly pronouncing the factum of a bar standing constituted under the relevant customary laws holding sway at the time contemporaneous to the opening for succession the estate of one Govind against an adopted son inheriting the estate of his natural father when the latter besides him leaves behind other lineal issues. In other words, when the natural putative father of an adoptive son besides his adoptive son leaves behind other lineal issues, the relevant customary law governing the right of inheritance of an adopted son qua the estate of his natural father extinguishes also emaciates the right of an adopted son to stake any claim to inherit the estate of his deceased natural father. Given the holding of the aforesaid principle in the relevant illustration, principle whereof pertains with specificity qua the suit land also its with specificity governing the rights of inheritance of an adopted son qua the estate of his natural father given theirs belonging to the Rajput clan conspicuously when it articulates qua an adoptive son holding no right to claim inheritance to the estate of his natural father when the latter leaves behind plurality of lineal issues, articulation whereof is befittingly applicable vis-à-vis the factual scenario hereat tritely when wherewithin on occurrence of demise of one Govind the natural father of the parties at contest he left behind three sons imperatively when besides defendant Bhagat Ram he stood succeeded by his other sons or other lineal issues, as a corollary with the aforesaid bar constituted in the relevant illustration holding applicability with aplomb qua the area whereat the suit land is located besides its holding clout qua the manner besides the right of inheritance of an adopted son vis-à-vis the estate of his natural father specifically when they belong to the apt Rajput clan hence also concomitantly renders the claim for inheritance of defendant Bhagat, adoptive son of one Nehala qua the estate of his natural father Govind to suffer effacement. However, the learned counsel for the defendant has made an unstoppable unpunctuated attempt to on anvil of a judgement of this Court reported in Sita Ram and others Vs. Bugga Ram and others *1994(2) Sim.L.C. 455*, relevant paragraph 9 whereof stands extracted hereinafter:

> "9. On the other hand, Shri Gupta referring to judgment in Gainda and Anr. v. Mt. Jai Devi and Anr., 1944 AIR(Lah) 90; Inder represented by Arjan and Anr. v. Makhtar minor s\o Rai Singh and Ors., 1945 AIR(Lah) 17; Mukhtar Singh v. Nathal and Anr., 1946 AIR(Lah) 305 and Gumam Singh v. Smt. Ass Kaur and Ors., 1977 AIR(P&H) 103, has pointed out that adoption under the Punjab Customary Law is different than the adoption under Hindu Law, as under Punjab Customary Law only a personal relationship is established between the appointed heir and appointer, and there is no question of transplantation of adopted son into the family of his adopted father and the adopted son does not lose his right to inherit property of his natural father.
>
> The proposition of law laid down in these judgments cannot be disputed. However, in the present case it has never been the case of the Appellants-Defendants that since the adoption of Mast Ram was under the Punjab Customary Law he was only appointed heir by Jangi of his property and he did not lose his right to inherit the property of his natural father. In the written statement no custom has been pleaded and the clear stand is that, "adoption deed was executed by Jangi in favour of Mastu but the said adoption was cancelled by the then Raja Sahib of Nalagarh State and was not acted upon...and the ties of Mast Ram alias Mastu were not severed from the family of Dooru to the family of Jangi as alleged in this para." In other words, had the adoption deed not cancelled or acted upon, Mast Ram would have been transplanted in the family of adopted father. Since this Court has already held that the adoption deed was neither cancelled nor could be cancelled in law, it is held that Mast Ram stood transplanted in the family of adopted father. Therefore, this plea cannot be permitted to be advanced in this second appeal in the absence of any pleading as well as evidence on record. The adoption had taken place as far back as in the year 1920 A.D. and the parties being Hindu, the only conclusion is that they were governed by Hindu Law in the matter of adoption."

to contend of the aforesaid illustration held in the compilation made by L.Middleton, Esquire, I.C.S. Settlement Officer, Kangra District, holding no sway. The vigour of the aforesaid contention tritely stands rested qua when it stands mandated therein of under the Punjab customary law holding application in the area whereat the suit land stands located besides holding sway at the relevant time precisely at the time contemporaneous to the demise of Govind qua adoption thereunder being contradistinct vis-à-vis adoption under the statutory law, contradistinctivity inter se adoption under the Punjab Customary Law vis-à-vis adoption under the statutory law standing constituted by the factum of the Punjab Customary Law within its gamut holding a contemplation qua occurrence of transplantation of an adopted son vis-à-vis the family of his adoptive father whereupon the right of inheritance of an adopted son qua his deceased natural father's estate remains un-obliterated whereupon hence rights stand preserved in the adoptive son to inherit the estate of his natural father. He hence contends qua the rights of the defendant to succeed to the estate of his natural father one Govind neither standing effaced nor obliterated. However, the counsel for the defendant while planking his submission thereupon, has read it in segregation of the apt illustration alluded to hereinabove, illustration whereof holds therewithin with precision also with vigour the relevant custom governing the rights of inheritance of an adopted son qua the estate of his natural father. Had he read both in coagulation he would omit to make the aforesaid submission. Also the reliance as placed by him upon a judgement of this Court reported in 1994(2) Sim.L.C. 455 relevant paragraph whereof stands extracted hereinabove is wholly inapplicable hereat given its obviously standing rendered per incuriam vis-à-vis the apt applicable hereat illustration which stands extracted hereinabove wherewithin an apparent mandate ensues qua under the apposite customary rights of inheritance of an adopted son vis-à-vis the estate of his deceased putative father given his deceased putative father standing succeeded by lineal descendants his relevant right of succession to the estate of his deceased natural father hence standing scuttled. As an apt sequitur the postulation occurring in paragraph 9 of the rendition of this Court relied upon by the leaned counsel for the defendant does not hold any sway nor constitutes the relevant ratio decidendi for setting at rest the controversy qua the entitlement of defendant Bhaghat Ram, adoptive son of one Nehala to succeed to the estate of his natural father one Govind. Moreso, with the apt illustration holding sway whereat the suit land stands located besides also when it holds legal prominence at the time contemporaneous to the occurrence of demise of Govind whereat the relevant mutations stood attested stridently wanes his right, to, given deceased Govind standing succeeded by the plaintiff besides by the defendant and one Dhian Singh to hence succeed to the estate of his aforesaid natural father. The counsel appearing for the defendant appellant has contended with vigour on the anvil of a judgement of this Court reported in Smt. Shakuntala and others Vs. Surindeer Chand and others, *AIR 2006 Himachal Pradesh 108* mandating therewithin a principle anvilled in concurrence with the prescription of a period of three years embodied in Article 113 of the IInd Schedule of Limitation Act, 1963 for institution by the aggrieved, a suit for declaration whereas the plaintiff, since, three years from 1917 when the relevant mutations stood attested qua his estate vis-à-vis him besides his other lineal descendants on occurrence of demise of Govind the natural father of the defendant, not, instituting an apposite suit for declaration, also his within three years since 1933 whereat on demise of Dhian Singh the brother of the parties at contest mutations qua his estate, his leaving behind no surviving heir stood attested qua the parties at lis, not, instituting a suit also with the plaintiff not instituting a suit for declaration within three years from 1962-63 whereat during the course of holding of consolidation proceedings in the relevant area their respective hitherto joint Khatas stood segregated, whereat at all the phases/eras aforesaid, a, right to sue accrued or occurred or more conspicuously when the right to sue accrued to the plaintiff on attestation of the relevant mutations renders the institution of a declaratory suit by the plaintiff after a prolonged inordinate delay of more than three years from the relevant phases aforesaid to stand barred by limitation whereupon he contends of the plaintiff standing non-suited. The aforesaid submission made herebefore by the learned counsel for the defendant stands simplistically made, his standing unmindful to the factum of an uncontested display qua the plaintiff standing aged 3 months old at the time of attestation of mutations qua the estate of Govind obviously his being a minor thereat deterred him to acquire knowledge qua

attestation of mutations comprised in Ext.D-4 and Ext.D-5 qua the estate of Govind vis-à-vis him besides his brothers one of whom defendant Bhagat Ram stood thereat adopted by one Nehala. Also given his continuing to be a minor he hence stood precluded to thereat or beyond three years thereafter institute a suit for declaration for setting aside the mutations aforesaid. Also on demise of Dhian Singh which occurred in the year 1933 he deposes qua his thereat serving in the army at the frontiers besides he testifies qua his from 1939-47 during the out break of world war-2 remaining in jail in Japan. The aforesaid testifications remain unrebutted rather acquiesced by the defendant wherefrom a sequel stands derived of their holding tenacity. Since no worthwhile best evidence connoted by the plaintiff recording his presence before the Consolidation Authorities concerned at the stage whereat they in the year 1962-63 subjected the suit land to consolidation whereupon their hitherto undivided holdings stood dismembered, stands adduced nor any evidence stands adduced holding manifestations of the plaintiff earlier than 1995 applying for copies of the relevant records from the revenue agencies concerned whereas adduction of the aforesaid evidence would dispel the contention of the plaintiff qua his not prior to 1995 acquiring knowledge qua theirs holding therein the name of defendant Bhagat Ram as a co-owner alongwith him qua the suit land, conspicuously hence theirs standing unadduced would facilitate this Court to erect an inference of the plaintiff not prior to 1995 when defendant Bhagat Ram provenly started interfering with his possession qua the suit land acquiring knowledge qua the existence vis-à-vis the defendant of erroneous entries in the relevant revenue records. Also the prima donna factum of the defendant not adducing best evidence displaying the factum of the plaintiff on his acquiring majority, his holding knowledge qua the inefficacy of the relevant mutations besides the inefficacy of the revenue entries recorded in consequence therewith, is a significant pointer of the defendant holding concurrence with the plaintiff qua his not acquiring the apposite knowledge earlier than 1995 whereat the cause of action besides the apposite right to sue accrued to the plaintiff constituted by the defendant invading his rights qua the suit land. The aforestated inference erected by this Court yet entails an obligation upon this Court to scuttle the effect of the principle of law held in the judgement relied upon by the Counsel for the defendant wherein the principle of accrual of right to sue occurring on attestation of relevant mutations stands encapsulated. The principle of law aforesaid held therewithin cannot stand omnibusly applied. If it stands applied blindfoldedly it would perpetuate gross injustice. Also a rigid application of the principle held therewithin would foist rights in the defendant to stake a right qua the estate of his deceased natural father even when he at the inception or the stage of the recording of the relevant mutations he stood barred for reasons aforesaid to alongwith his brothers succeed to his estate. Concomitantly, also a mantle of legal validation would stand foisted thereupon even when they stood barred to stand attested qua the defendant. Needless to hold of the reflections in all the apt revenue records holding no validity theirs spurring from mutations, in contemporaneity qua recording whereof no vestige of right inhered in the defendant. In sequel when at the inception of the attestation of the relevant mutations they stood rendered nonest besides void, any untenable warranting qua theirs standing impeached within the period of limitation constituted in the relevant article of the Limitation Act would sequel theirs thereupon acquiring the paramount virtue of validation in law, imputation thereto of validation would strike a discordance also dichotomy vis-à-vis their initial occurrence starkly being non-est besides void. Naturally hence void besides tainted mutations also revenue entries made in consonance therewith qua the suit land when hence bereft of any legal sinew to invest qua the suit land rights in the defendant warrants theirs being set-aside and quashed, for as a corollary on anvil thereof belittling the justifications of the defendant for legitimizing his holding any tract of the suit land. For a void entry being undone significantly for disrobing the defendant to perpetuate his untenably holding any tract of the suit land it can stand impeached from the date of acquisition of knowledge by the plaintiff qua its existence in the relevant records, also when the relevant acquisition of knowledge by the plaintiff ensues from his rights upon the suit land standing threatened besides invaded, concomitantly thereupon alone the 'right to sue' accrues to the plaintiff whereafter he within three years thereafter stands entitled to institute a suit for declaration. Any leanings by this Court to take a view contrary to the one aforesaid would efface the working of justice vis-à-vis the plaintiff contrarily it would

permit the defendant to perpetuate his unlawful claim qua any tract of the suit land, for undoing the occurrence of any mishap to justice also to mitigate any unwarranted prolonged efficacy standing enjoyed by void entries it is deemed fit to conclude of 'right to sue' within the ambit of the relevant article of Limitation Act, accruing to the plaintiff not from occurrence of adverse entries qua his rights qua the suit land rather conspicuously the 'right to sue' to the plaintiff emerging besides also its sprouting on the defendant making a loud, open unequivocal threat to infringe his indefeasible right qua the suit land. With this Court forming the aforesaid conclusion qua a 'right to sue' accruing to the plaintiff on his rights qua the suit land standing openly proclaimed to be infringed and invaded by the defendant, invasion whereof when stands unflinchingly proven to occur in 1995 renders the year 1995 to constitute the relevant year wherefrom the period of three years warrants its computation for hence rendering his suit to be maintainable whereas his instituting his suit within three years thereafter renders his suit to be within limitation. The effect of the aforesaid conclusion also holds coagulation with the non adduction of the relevant best evidence aforesaid in portrayal of the plaintiff earlier thereto holding knowledge qua the occurrence of erroneous reflections in the revenue records. In trite the parlance borne by the phrase 'right to sue' occurring in the relevant article of the Limitation Act is of it standing read for undoing the efficacy of void entries also its precluding a party to on *stricto senso* anvil thereof perpetuate his unlawful rights qua the suit land. Moreso, when the undoing of their inefficacy would rid injustice also when knowledge qua their existence in the relevant records emanates only on rights of the plaintiff standing visibly infringed by an overt act of the defendant contrarily when hence the parlance borne by the coinage aforesaid does not bear any signification of its mandating the plaintiff to pedantically, without his holding knowledge of the void entries yet preemptorily institute a suit within three years of occurrence of void entries.

9. This Court while building the aforesaid legal postulation finds succor from the decisions of the Punjab and Haryana High Court reported in Niamat Singh vs. Darbari Singh and others *1956* ***AIR (43) 1956 Punjab 231,*** Mst. Rukhmabai vs. Lala Laxminarayan and others ***AIR (47) 1960 SC 335*** and also from Daya Singh and other Vs. Gurdev Singh (dead) by LRs and others ***2010 2 SCC 194.***

10. The summum bonum of the above discussion is of the declaratory suit of the plaintiff standing not barred by limitation rather it being within limitation. In aftermath, the judgement and decree of the learned First Appellate Court as stands assailed hereat does not suffer from any infirmity, hence it is maintained and affirmed. The substantial questions of law are answered accordingly. In sequel the appeal is dismissed. Decree sheet be prepared accordingly. The parties are left to bear their own costs. All pending applications also stand disposed of accordingly. Records be sent back forthwith.

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

Dr. Amarjeet Singh .....Appellant/Petitioner.

Versus

Smt. Vijay Laxmi .....Respondent.

FAO No. 236 of 2010.
Reserved on : 23.08.2016.
Decided on : 29th August, 2016.

Hindu Marriage Act, 1955- Section 13- Marriage between the parties was solemnized according to Hindu Rites and Custom – husband filed a petition for divorce pleading that he was treated with cruelty by filing a complaint leveling false allegation of beating and keeping some concubine – she deserted husband for more than three years- wife filed a reply pleading that husband started picking up quarrel with her under the influence of liquor- he had sold her ornaments to satisfy his lust for liquor and to meet the expenses of his concubine- she had filed a true

complaint - she would join the company of the husband, if she is treated with respect and dignity- petition was dismissed- held, in appeal that wife had not given any specific instance when she was treated with cruelty- name of the concubine was also not mentioned – filing of the complaint amounts to cruelty- further, relationship had broken down irretrievably- thus, severance of marital ties would be just and expedient- appeal allowed and marriage ordered to be dissolved. (Para-8 to 12)

Case referred:
K. Srinivas versus K. Sunita, (2014)16 SCC 34

For the Appellant: Mr. P. P. Chauhan, Advocate.
For the Respondent : Mr. Dibender Ghosh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the judgment rendered by the learned District Judge, Kinnaur Civil Division at Rampur Bushahr, Himachal Pradesh, on 31.05.2010 in H.M.A. Petition No. 16 of 2007, whereby it refused the according qua the petitioner a decree for dissolution of his marital ties with the respondent.

2. The petitioner/appellant herein standing aggrieved by the rendition of the learned District Judge hence concerts to reverse it by preferring an appeal therefrom before this Court.

3. The brief facts of the case are that the petitioner claimed the respondent to be his legally wedded wife. Out of their wedlock one female child has born and the child is living with the respondent. The petitioner has further pleaded and claimed that the relations between the parties remained cordial till September, 2004 and when on 19.8.2006 to 24.8.2006 the petitioner remained on official tour and returned to his residence in District Kinnaur then he came to know that the respondent has filed some proceedings with the police by leveling false allegations of her beatings and keeping some mistress. The petitioner further claimed that he was summoned by the Superintendent of Police, Kinnaur at Reckong Peo where he filed written reply and the respondent withdrew her complaint by showing her intention not to live with the petitioner and thereby the respondent has treated the petitioner with cruelty as she did not join his company for the last more than three years and thereby the parties are living separately. Hence, he sought decree for divorce for dissolution of his marital ties with the respondent.

4. The respondent contested the petition and filed reply. In the reply, the respondent has admitted the relationship between the parties including the off spring as pleaded in the petition, however, the respondent has further pleaded and claimed that the relations remain cordial till August,2006 and thereafter the petitioner started picking up quarrel with the respondent under the influence of liquor and even the petitioner had removed the ornaments of the respondent including her Mangal Sutar and thereby sold the same to satisfy his lust for liquor and to meet out the expenses of his concubine and thereby she lodged true and correct report against the petitioner and when the petitioner assured the respondent to maintain her properly thereby she withdrew her complaint. The respondent has denied of hers making false allegations against the petitioner as pleaded in the petition and has further claimed that she is ready to join the company of the petitioner in case of his undertaking not to pick up quarrel and to maltreat her and thereby to provide all the bare necessities of the life. The respondent has denied treatment of the petitioner with cruelty as alleged in the petition and prayed for dismissal of 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 respondent teated the petitioner with cruelty? OPP
2. Whether the respondent has deserted the petitioner, as alleged? OPP
3. Relief.

6. On an appraisal of evidence, adduced before the learned District Judge, he dismissed the petition of the petitioner/appellant herein.

7. Now the petitioner/appellant herein has instituted the instant appeal before this Court wherein he has assailed the findings recorded in its impugned judgment and decree by the learned District Judge.

8. In the apposite petition for divorce, the petitioner had made trite specific averments qua his psyche standing beset with mental cruelty arising from the respondent leveling false/frivolous allegations against him qua his maintaining concubine/mistress. He with specificity averred therein of the allegations aforesaid constituted against him by the respondent standing embedded in a complaint preferred by the respondent before the Superintendent of Police, Kinnaur at Recokng Peo, whereupon he stood summoned therebefore. He had contended of hence accentuated cruelty standing perpetrated upon him by the respondent. The petitioner had before the learned District Judge led evidence in support of the averments constituted in the petition, apart therefrom supplemental to his oral testimony, he therebefore adduced Ex.PB and Ex.PC holding corroborative proclamations of the respondent leveling allegations against him qua his maintaining a concubine also his belabouring her besides as averred by him, his thereupon standing constrained to furnish a reply thereto.

9. Even though, before the learned District Judge, the respondent had contested by filing a reply, the truth of the averments aforesaid cast by the petitioner in his petition. However, her reply in repudiation to the averments reared by the petitioner in his petition is both vague besides nebulous holding no specificity with precision besides is bereft of exactitude in timings whereon she stood subjected to belabourings by the petitioner also it does not hold therewithin the name of the concubine with whom the petitioner is alleged by her to maintain adulterous relations. Even otherwise, the reply furnished by the respondent to the petition for divorce instituted by the petitioner, exaggerates upon the manifestations occurring in Ex.PB. Likewise when her testimony besides the testimonies of RWs hold therewithin digressions vis-a-vis her reply to the apposite petition hence rendering them to be discardable.

10. However, the learned District Judge has in a rough shod, mechanical manner dehors his meteing reverence to exhibits aforesaid holding visible display of the psyche of the petitioner standing encumbered with immense mental turmoil dehors the factum of the depictions held therewithin holding any iota or truth whereupon hence the petitioner had categorically displayed qua his standing entitled to on the ground of cruelty to a decree for divorce, its standing refused to be accorded to him under the impugned rendition per se ingrains it with a vice of his not attending to the relevant besides germane evidence rather his untenably discarding its probative worth.

11. The factum of the respondent under Ex. PC casting aspersions qua the character of the petitioner also hers therein alleging qua his holding adulterous relations with concubines whereupon he suffered the ordeal of his standing summoned by the Superintendent of Police, Kinnaur at Reckong Peo, foments an obvious inference of the respondent subjecting him to mental cruelty hence foisting in him an entitlement to obtain a decree for dissolution of his marital ties with her. The inference aforesaid as stands drawn by this Court stands lent succor from a decision of the Hon'ble Apex Court reported in ***K. Srinivas versus K. Sunita, (2014)16 SCC 34,*** the relevant paragraph No.5 whereof stands extracted hereinafter:-

> "5. The respondent wife has admitted in her cross-examination that she did not mention all the incidents on which her complaint is predicated in her statement under Section 161 CrPC. It is not her case that she had actually narrated all these facts to the investigating officer, but that he had neglected to mention them. This,

it seems to us, is clearly indicative of the fact that the criminal complaint was a contrived afterthought. We affirm the view of the High Court that th criminal complaint was "ill advised". Adding thereto is the factor that the High Court had been informed of the acquittal of the appellant husband and members of his family. In these circumstances, the High Court ought to have concluded that the respondent wife knowingly and intentionally filed a false complaint, calculated to embarrass the incarcerate the appellant and seven members of his family and that such conduct unquestionably constitutes cruelty as postulated in Section 13(1)(i-a) of the Hindu Marriage Act."

12. Furthermore with communications occurring in Ex.PB of her marriage with the petitioner standing irretrievably broken down wherefrom it is apt to clinchingly conclude of with her marital ties with the petitioner standing irretrievably broken down irretrievably hence, the rendition of a decree of severance of their marital ties would be both just and expedient.

13. For the reasons recorded hereinabove, the instant appeal is allowed. Accordingly, the marriage inter se the petitioner/appellant and the respondent herein is ordered to be dissolved under Section 13(1) (i)(i-a) (i-b) of the Hindu Marriage Act. In sequel, the judgment and decree impugned before this Court is quashed and set aside. All pending applications also stand disposed of. No order as to costs.

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

Inder Singh .....Appellant.
Versus
State of H.P .....Respondent.

Cr. Appeal No. 192 of 2016
Reserved on : 5.8.2016
Decided on : 29.8.2016

Indian Penal Code, 1860- Section 376, 506(B), 34 - **Protection of Children from Sexual Offences Act, 2012-** Section 8 and 12- Accused raped the prosecutrix aged 15 years and threatened to kill her- accused was tried and convicted by the trial Court- held, in appeal that prosecutrix had supported the prosecution version- there are no major contradictions in her testimony – she was minor and could not have consented to the act- medical evidence supported the prosecution version- DNA profile taken from Salwar of the prosecutrix matched DNA profile of the accused- prosecution version was proved beyond reasonable doubt and the accused was rightly convicted by the trial Court- appeal dismissed. (Para-9 to 13)

For the Appellant: Mr. Lakshay Thakur, Advocate.
For the Respondent: Mr. M.A Khan, Additional Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed against the impugned judgment of 13.12.2013 rendered by the learned Sessions Judge, Shimla-cum-Special Judge under Protection of Children from Sexual Offences Act, 2012 in Sessions trial No. 22-S/7 of 2013, whereby the learned trial Court convicted the appellant (hereinafter referred to as "accused") for his committing offences punishable under Sections 376, 506(B), 342 of the Indian Penal Code and

Sections 8 and 12 of Protection of Children from Sexual offences Act, 2012 also sentenced him as under:-

> "*1. 376 IPC Rigorous imprisonment for life and fine to the tune of Rs. 25,000/- (Twenty Five thousands). In default of payment of fine convicted Inder Singh shall further undergo rigorous imprisonment for two years*
>
> *2. 506 B IPC Rigorous imprisonment for seven years and fine to the tune of Rs.15,000/-(Fifteen thousands). In default of payment of fine convicted Inder Singh shall furnisher undergo rigorous imprisonment for one year.*
>
> *3. 342 IPC Rigorous imprisonment for one year and fine to the tune of Rs.10,000/- (Ten thousands). In default of payment of fine convicted Inder Singh shall further undergo rigorous imprisonment for two months.*
>
> *4. Section 8 of Protection of Children from sexual offences Act, 2012*
> *Rigorous imprisonment for five years and fine to the tune of Rs.25,000/- (Twenty Five thousands). In default of payment of fine convicted Inder Singh shall further undergo rigorous imprisonment for one year.*
>
> *5. Section 12 of Protection of children from sexual offences Act, 2012*
> *Rigorous imprisonment for three years and fine to tune of Rs.25,000/- (Twenty five thousands). In default of payment of fine convicted Inder Singh shall further undergo rigorous imprisonment for six months*."

2. Brief facts of the case are that on 26.11.2012 at about 7.00 a.m. at place Galchu P.O Jagtan Tehsil and Police Station, Jubbal District Shimla inside kitchen and again at 9.00 a.m. inside room accused had committed forcible sexual intercourse upon the minor prosecutrix/his daughter aged fifteen years. It is further alleged that continuously since one year prior to the incident of 26.11.2012 the accused had committed forcible sexual intercourse upon the minor prosecutrix. It is further alleged that on the aforesaid date, time and place accused threatened the minor prosecutrix to do away with her life. The accused also threatened her that in case she narrated the incident to anybody he will kill her. It is further alleged that accused on the same date time and place wrongfully confined the minor prosecutrix in order to commit forcible sexual assault upon the minor prosecutrix. On completion of all codal formalities and on conclusion of the investigation into the offences, allegedly committed by the accused challan was prepared and filed in the Court.

3. The accused stood charged by the learned trial Court for his committing offences punishable under Sections 376, 506(B), 342 of I.P.C and Sections 8 and 12 of Protection of Children from Sexual Offences Act, 2012, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 22 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded in which he pleaded innocence and claimed false implication. However he did not choose to lead evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of conviction against the accused for his committing offences punishable under Sections 376, 506(B), 342 of the Indian Penal Code and Sections 8 and 12 of Protection of Children from Sexual offences Act, 2012.

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

7. The learned Additional Advocate General has with considerable force and vigour contended qua the findings of conviction recorded by the Court below standing based on a

mature and balanced appreciation of evidence on record and theirs not necessitating interference rather 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. An FIR stood lodged with the police station concerned qua the ill-fated incident wherein a narrative is held of the minor prosecutrix standing subjected to forcible sexual intercourse by the accused/her father. The sole deposition of the prosecutrix qua the ill-fated occurrence when bereft of any vice of any visible inter-se contradiction vis-à-vis her examination-in-chief with her cross-examination would ipso facto constitute sinewed evidence of probative worth for constraining this Court to return findings of conviction against the accused. For disinterring the factum aforesaid an incisive reading of her deposition is imperative. An incisive reading of her testification qua the ill-fated occurrence embodied in her examination-in-chief besides also in her cross-examination upsurges unfoldments of hers consistently therein making both loud and vivid underscorings qua on the relevant date hers standing subjected to forcible sexual intercourse by the accused bereft of any inter-se contradictions whereupon this Court is coaxed to impute sanctity to her version. Also when the testification qua the ill-fated occurrence rendered by PW-11 (Rahul @ Rinku), her brother is also un-stained with any vice of its holding any contradiction with the testimony of the prosecutrix, is a forceful communication of the accused provenly perpetrating sexual intercourse upon the prosecutrix, his daughter.

10. Moreover, the factum of consent, if any, of the prosecutrix to the accused subjecting her to sexual intercourse stands benumbed by the factum of PW-4 (Rakesh Kumar) pronouncing in his deposition qua the prosecutrix standing born on 7.1.2002 hence with hers being a minor at the stage contemporaneous to the occurrence rendered her disempowered to mete consent to the accused for his subjecting her to sexual intercourse also renders the effect of consent, if any, purveyed by the prosecutrix to the accused in his subjecting her to sexual intercourse to be in consequential.

11. The deposition of the prosecutrix whereto corroborative succor stands lent by PW-11 attains corroboration from MLC (Ex. PW-3/C) wherein a pronouncement is made qua hymen of the minor prosecutrix standing torn. Obviously the tearing of the hymen of the minor prosecutrix fillips an inference of its tearing standing begotten by the accused subjecting her to forcible sexual intercourse. Even the deposition of PW-3 (Dr. Seema Atri) holding underscorings qua the DNA profile existing on the salwar of the prosecutrix on its standing subjected to DNA profiling with the blood sample of the accused begetting the sequel of hence compatibility occurring inter-se them, cogently connects the accused in the commission of the offences alleged.

12. The summom bonum of the above discussion is of the inculpation of accused by the minor prosecutrix, his daughter holding a paramount virtue of veracity. The minor prosecutrix would not have embarked upon hers inculpating her father in a heinous offence given the concomitant besetting upon her the hazardous consequence of hers standing deprived of her means of livelihood contrarily with the accused abusing his fiduciary capacity vis-à-vis his minor daughter renders him amenable to face an order of conviction from this Court.

13. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned trial Court does not suffer from any perversity and absurdity nor it can be said that the learned trial Court in recording findings of conviction has committed any legal misdemeanor, in as much, as, its mis-appreciating the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of conviction recorded by the learned trial Court merit interference.

14. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment of the learned trial Court is maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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

Lekh Raj & ors. ..... Appellants.
Versus
Inder Dev .... Respondent.

RSA No.161 of 2007
Date of Decision: 29.08.2016

Specific Relief Act, 1963- Section 38- Plaintiff filed a suit for permanent prohibitory injunction for restraining the defendants from interfering with the suit land- it was pleaded that suit land was allotted to the plaintiff in partition- defendants started interfering with the suit land without any right to do so- defendants pleaded that they had purchased 1/4th share of J and S and were put in possession- the suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that J and S had filed a civil suit claiming ownership and possession but the suit was dismissed- therefore, it was not permissible for them to put the defendants in possession – it was duly proved that joint land was partitioned and plaintiff was put in possession- the Courts had rightly appreciated the evidence- appeal dismissed.

(Para- 14 to 21)

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

For the Appellants: Mr. Sunil Mohan Goel, Advocate.
For the Respondent: Mr. V.S. Chauhan, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

Instant Regular Second Appeal filed under Section 100 of the Code of Civil procedure is directed against the judgment and decree dated 4.1.2007, passed by learned Additional District Judge (Fast Track), Kullu, District Kullu, H.P. in Civil Appeal No. 38/05, RBT. C. Appeal No. 06/05, affirming judgment and decree dated 17.5.2005 passed by learned Civil Judge (Jr. Division), Manali, Camp at Kullu, District Kullu in Civil Suit No. 72/04/162/04, whereby suit filed by the respondent/Plaintiff (hereinafter referred to as 'Plaintiff'), for permanent prohibitory injunction restraining the defendants (hereinafter referred to as 'Appellants') was decreed and defendants were restrained from interfering in any manner over the suit land.

2. Briefly stated facts of the case as emerged from the record are that plaintiff filed suit for permanent injunction restraining the defendants from interfering over the land measuring 4-15-0 Bigha bearing Khasra No. 5818/1, Khata Khatauni No. 1510/2126 and land measuring 1-6-0 bigha bearing khasra No. 7312/5817/2, khata khatauni No. 1509/2125 as depicted in the jamabandi for the year 1998-99 situated at Phati Shilihar, Kothi Kotkandi, Tehsil & District Kullu, H.P. Plaintiff averred in the plaint that earlier land comprising Khasra No. 7312/5817 and Khasra No. 5818 was jointly owned and possessed by the parties and later on the same was partitioned and after partition, land measuring 4-15-0 bigha bearing khasra No. 5818/1 and land measuring 1-6-0 bigha bearing Khasra No. 7312/5817/2 was allotted to the plaintiff, who became exclusive owner in possession of the suit land. Plaintiff further averred that defendants became owner in possession of land comprising Khasra No. 7312/5817/3 (1-6-0 bigha) and land comprising Khasra No. 5818/2 (1-11-0 bigha). Plaintiff further claimed that after partition mutation was effected in the revenue record. Plaintiff further contended that defendants, who are quarrelsome persons, started interfering over the suit land in the first week of July, 2004, as a result of which, he was compelled to file a suit for permanent prohibitory injunction.

3. Defendants by way of detailed written statement refuted the claim put-forth on behalf of petitioner by taking preliminary objections of locus standi, maintainability, estoppel, valuation and suppression of facts. On merits, defendants also denied the case of the plaintiff by stating that vide sale deed dated 23.01.1998, the defendants purchased 1/4th share of Shri Jagdish Chand alias Raj Kumar and Smt. Soma Devi in the land comprising Khasra No. 7312/5817 and Khasra No. 5818 and at the time of the sale of the aforesaid land, Shri Jagdish Chand alias Raj Kumar and Smt. Soma Devi put the defendants into specific possession of land measuring 4-3-0 bighas of Khasra No. 5818, as such, they became exclusive owner in possession of land measuring 4-3-0 bighas of Khasra No. 5818. Defendants claimed that they made improvements and raised the plum orchard by spending more than Rs. 3 lacs and entries in the revenue record are wrong, illegal and void. Defendants further alleged that aforesaid land was never partitioned, rather the defendants are in peaceful, open and continuous exclusive ownership and possession of land measuring 4-3-0 bighas of Khasra No. 5818 at the spot and the possession of the defendants is without any interruption and even up till today defendants have not been dispossessed from the suit land by any authority. In the aforesaid background, defendants prayed for dismissal of the suit filed by the plaintiff.

4. Learned trial Court on the basis of pleadings framed following issues:-

"1. Whether the plaintiff is the exclusive owner in possession of the suit land as alleged? …OPP

2. Whether the plaintiff is entitled to the prohibitory injunction as prayed for? …OPP

3. Whether the plaintiff has a cause of action? ….OPP

4. Whether the plaintiff has the locus standi to sue? …OPP

5. Whether the defendants have become owners of the suit property by way of adverse possession as claimed? …OPD

6. Whether the suit is not maintainable in the present form? …OPD

7. Whether the plaintiff is estopped from filing the suit by his act and conduct? …OPD

8. Whether the suit has not been properly valued for the purposes of court fee and jurisdiction? …OPD

9. Whether this court has got no jurisdiction to hear and decide the instant suit? …OPD

10. Relief."

Vide judgment dated 17.5.2005 learned Trial Court decreed the suit of the plaintiff, restraining the defendants from interfering in the suit land, description whereof is given hereinabove.

5. Being aggrieved and dis-satisfied with the impugned judgment passed by the learned Trial Court, present appellants/defendants filed an appeal under Section 96 of the Code of Civil Procedure read with Section 21 of the H.P. Courts Act before learned Additional District Judge (Fast Track), Kullu, H.P., who vide judgment dated 4.1.2007, dismissed the appeal and upheld the judgment and decree passed by the learned Civil Judge (Jr. Division), camp at Kullu. Hence, this Regular Second Appeal before this Court.

6. This Court on 6.11.2007 admitted the appeal on following substantial question of law Nos. 3 & 4:-

"Q.No.3 Whether partition proceedings entered into between plaintiff and Raj Kumar and Soma Devi vide instrument of partition dated 8.3.1999 and order dated 16.3.1999 are non est as Raj Kumar and Soma Devi were not co-owners of the land subject matter of partition on the above mentioned dates?

Q.No. 4. Whether both the learned Courts below have totally mis-read the instruments of partition and subsequent orders made by AC Ist Grade in this regard."

7. Shri Sunil Mohan Goel, counsel representing the appellants vehemently argued that impugned judgment and decree passed by both the Courts below are bad in law and not based upon the correct appreciation of evidence adduced on record and as such deserves to be quashed and set aside. Mr. Goel strenuously argued that Courts below miserably failed to appreciate the fact that it was specifically proved on record that defendants are in exclusive possession of the land measuring 4-3-0 bighas of Khasra No. 5818 out of the suit land and is an absolute owner since 23.1.1998, meaning thereby suit of the plaintiff for permanent prohibitory injunction was not maintainable at all. As per Mr. Goel, since defendants categorically stated in written statement that they are in exclusive possession of the suit land, no suit for permanent prohibitory injunction could be maintained by plaintiff in the absence of specific proof that he is in possession of suit land qua which defendants have allegedly interfered.

8. As per Mr. Goel, no suit for permanent prohibitory injunction could be filed/entertained, when admittedly possession of land qua which injunction was with the defendants. Mr. Goel forcefully contended that learned Courts below while passing impugned judgments and decree failed to take note of the fact that suit land was purchased by defendants from Shri Jagdish Chand alias Raj Kumar and Smt. Soma Devi, who had delivered peaceful possession of land measuring 4-3-0 bighas of Khasra No. 5818 at the spot in favour of appellants/defendants and since then they are in exclusive possession of the same. He also stated that both the Courts below have failed to take note of the positive evidence led on record by the appellants/defendants that after being put into possession by aforesaid Shri Jagdish Chand alias Raj Kumar and Smt. Soma Devi, defendants made improvement and raised plum orchard on the same by spending more than 3 lacs to the knowledge and notice of the respondent/plaintiff, but respondent/plaintiff at no point of time was in exclusive owner in possession of the suit land. Mr. Goel further contended that findings of both the Courts below to the extent that the appellants/defendants were not necessary party for the partition suit land as they had purchased the land in the year 1998 and the partition proceedings were of the year 1992-93, are wrong since the partition was allowed in the year 1999, which is admitted fact on record. Mr. Goel while concluding his arguments, argued with full vehemence that Courts below have failed to appreciate that the pleadings as well as evidence adduced on record by the respective parties and both the Courts below ignored the well settled principle of law that nothing in evidence beyond pleadings can be relied upon and as such he prayed for acceptance of the appeal by setting aside the impugned judgments and decree passed by both the Courts below.

9. Shri V.S. Chauhan, Advocate, counsel representing respondent/plaintiff supported the impugned judgments passed by both the Courts below. Mr. Chauhan, while referring to the impugned judgments passed by both the Courts below vehemently argued that bare perusal of the impugned judgments passed by the Courts below suggests that no interference of the Court is warranted especially, when it stands clearly established on record that judgments passed by both the Courts below are based upon the correct appreciation of the evidence available on record. Mr. Chauhan with a view to rebut the submissions having been made by counsel representing the appellants/defendants, that no suit for permanent prohibitory injunction could be filed without being in the possession of land qua which injunction is sought, referred to the statements made by plaintiff's witnesses wherein, they have unequivocally stated that plaintiff is owner in possession of suit land and defendants are causing interference by making an attempt to raise construction over the same.

10. Mr. Chauhan during arguments having been made by him also invited the attention of the Court to Ex.P/4, a copy of judgment passed by Senior Sub Judge, Lahaul & Spiti in Civil Suit No. 12/91, whereby suit filed by Smt. Soma Devi and Shri Jagdish alias Raj Kumar, who were co-sharer with the plaintiff in the landed property was dismissed, to substantiate his argument that appellants/defendants were never put into possession qua Khasra No. 5818. As per Mr. Chauhan, bare perusal of the aforesaid judgment passed by learned Sub Judge, Lahaul & Spiti at Kullu, clearly suggests that Smt. Soma Devi and Shri Jagdish alias Raj Kumar, from whom appellants/defendants purchased the land were not absolute owner in possession of Khasra No. 5818, as such, plea taken by the appellants/defendants that possession was delivered

to them is entirely false and has been rightly rejected by the Courts below. Mr. Chauhan also invited the attention of the Court to the statement given by PW3 i.e. Mohar Singh, Kanungo, who stated that warrant of possession related to suit land was executed by him on the order of Tehsildar, whereby, land in question was partitioned. PW3 categorically stated on oath that on 13.12.1999 he delivered the possession of land bearing Khasra No. 5818/1 (4-15-0), bighas and Khasra No. 7312/5817/2 (1-6-0 bigha) to plaintiff. Mr. Chauhan also invited the attention of the Court to partition instrument i.e. Ex.P/3 made available on record by plaintiff to demonstrate that property in question was partitioned and possession of respective share of the parties was delivered. While concluding his arguments, Mr. Chauhan forcefully contended that when it stands duly proved on record that Smt. Soma Devi and Shri Jagdish alias Raj Kumar, from whom appellants/defendants had purchased land were not held to be absolute owner in possession of Khasra No. 5818, claim of appellants/defendants that he was put into possession of the aforesaid Khasra number in its entirety by Smt. Soma Devi and Shri Jagdish alias Raj Kumar deserves to be rejected, on its face value.

11. Mr. Chauhan also urged that scope of interference of this Court in the present case is very limited especially when two Courts have recorded concurrent finding of facts as well as law. To substantiate the aforesaid plea he placed reliance upon the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264.**

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

13. This Court admitted the present appeal on the substantial questions of law as has been reproduced hereinabove. Keeping in view the text and contents of both the substantial questions of law, this Court would be taking up both the questions together for consideration.

14. In nutshell, the case of the plaintiff is that he became owner in possession of the suit land on the basis of partition having been effected inter se the parties in the court of competent jurisdiction. It clearly emerged from the record that prior to partition effected vide order dated 16.3.1999 Ex.DW/2B, passed by AC Ist Grade, Kullu, plaintiff and defendants were joint owner in possession of the suit land. After aforesaid partition order passed by AC Ist Grade, Kullu, plaintiff became owner in possession of the land measuring 4-15-0 bighas bearing Khasra No. 5818/1 and land measuring 1-6-0 bighas bearing Khasra No. 7312/5817/2 situated at Phati Shilihar, Kothi Kotkandi, Tehsil & District Kullu, H.P. Similarly, defendants also became owners in possession of the land measuring 1-6-0 bighas comprising Khasra No. 7312/5817/3 and land measuring 1-11-0 bighas comprising Khasra No. 5818/2. Pursuant to aforesaid partition proceedings, necessary mutation was also effected in respect of land as mentioned above, however, defendants started undue interference in July, 2004, compelling plaintiff/respondent to file suit for permanent prohibitory injunction restraining defendants from interfering in the suit land. Defendants resisted the claim of the plaintiff by stating that they are in possession of land measuring 4-3-0 of Khasra No. 5818, in an exclusive manner and plaintiff has no right, whatsoever, to claim any part of the same. To substantiate his aforesaid stand, appellants/defendants stated that they have purchased this piece of land from Shri Jagdish alias Raj Kumar and Smt. Soma Devi vide sale dated 23.1.1998. Defendants claimed that at the time of purchase of land from aforesaid persons, they were also delivered specific possession of land measuring 4-3-0 bighas comprising Khasra No. 5818 and as such they are in the exclusive possession of the aforesaid land. Defendants also claimed that they spent sufficient amount on the land in order to raise orchard and the revenue entries to the contrary are wrong, illegal and void. But, interestingly this Court while examining the aforesaid stand taken by the defendants/appellants was unable to lay its hand on any document available on record suggestive of the fact that they were put into possession of land measuring 4-3-0 bigha comprising Khasra No. 5818 by Shri Jagdish alias Raj Kumar and Smt. Soma Devi, who allegedly sold the land measuring 1-5-15 bighas out of Khasra No. 7312/5817 and land measuring 1-11-0 bighas being 1/4th share out of land measuring 6-6-0 bighas in Khasra No. 5818. To the

contrary, plaintiff placed on record judgment Ex.P4, suggestive of the fact that Smt. Soma Devi and Shri Jagdish alias Raj Kumar, from whom defendants had purchased land as referred above, filed suit before Senior Sub Judge, Lahaul & Spiti at Kullu to the effect that they are owner in possession of Khasra No. 5818, but aforesaid plea of Smt. Soma Devi and Shri Jagdish alias Raj Kumar was rejected outrightly by the learned Senior Sub Judge vide judgment dated 3.6.1997. Hence, contention put-forth on behalf of appellants/defendants that they were put into specific possession of land measuring 4-3-0 bighas of Khasra No. 5818, by Smt. Soma Devi and Shri Jagdish alias Raj Kumar from whom defendants have purchased land vide sale deed dated 23.1.1998 has been rightly rejected by the Courts below.

15. Since, Smt Soma Devi and Shri Jagdish alias Raj Kumar were not held to be in possession of Khasra No. 5818 by the Court of Senior Sub Judge, Lahaul & Spiti, which was decided on 6.3.1997, it is not understood how aforesaid persons could put appellants/defendant in possession of Khasra No. 5818 in its entirety vide sale deed dated 23.1.1998, as such, this Court sees no force in the contention put-forth on behalf of counsel representing the appellants/defendants and accordingly the same is rejected. But, in this regard perusal of evidence adduced on record by the plaintiff clearly establishes that he became owner in possession of land measuring 4-15-0 bighas bearing Khasra No. 5818/1, Khata Khatauni No. 1510/2126 and land measuring 1-6-0 bighas bearing khasra No. 7312/5817, khata khatauni No. 1509/2125 as depicted in the jamabandi for the year 1998-99 situated at Phati Shilihar, Kothi Kotkandi, Tehsil & District Kullu, H.P. Pursuant to partition order dated 16.3.1999 i.e. Ex.DW2/A, passed by Assistant Collector Ist Grade, Kullu, PW3 Mohar Singh, Kanungo executed warrant of possession relating to suit land. PW3 Mohar Singh, Kanungo, specifically stated on oath that warrant of possession relating to suit land was executed by him on the order of Tehsildar and land in question was partitioned as per order. It clearly emerges from the statement of PW3 that on 13.12.1999, he delivered the possession of land measuring 4-15-0 bighas comprising Khasra No. 5818/1 and land measuring 1-60 bighas bearing Khasra No. 7312/5817 to plaintiff, namely, Inder Dev. Similarly, this Court had an occasion to peruse instrument of partition placed on record by the plaintiff to demonstrate that suit land was partitioned and delivery of possession of the land to the respective parties was delivered pursuant to issuance of warrant of possession by Assistant Collector Ist Grade, Kullu. At this stage, contention put-forth on behalf of counsel representing the appellants/defendants that the Courts below gave undue credence to the statement of PW3 Mohar Singh, Kanungo, who nowhere stated in his statement that he delivered warrant of possession in the presence of some independent parties, may be examined. As per Mr. Goel, bare perusal of statement of PW3 Mohar Singh, Kanungo suggests that he never delivered warrant of possession in presence of parties and, as such, version put-forth on behalf of him could not be relied by the Courts below in the absence of some independent witnesses corroborating his statement with regard to delivery of possession. The aforesaid contention put-forth on behalf of appellants/defendants deserves to be rejected outrightly solely for the reason that bare perusal of instrument of partition Ex.P3 clearly suggests that partition was effected on 8.4.1999 by Assistant Collector Ist Grade, Kullu and pursuant to that parties to the partition proceedings were put to possession qua the land by warrant of possession. Moreover, defendants have not been able to extract anything contrary in cross-examination conducted on PW3, who categorically stated in his examination-in-Chief that pursuant to issuance of warrant of possession, he delivered possession of suit land to the plaintiff as well as other co-sharers. Rather, careful perusal of cross-examination conducted on this witness, nowhere suggests that appellants/defendants were able to shatter the testimony of PW3, who was candid enough to state that pursuant to warrant of possession issued by Tehsildar, he put plaintiff in the possession of the land measuring 4-15-0 bighas comprised in Khasra No. 5818/1.

16. Apart from above, appellants/defendants instead of pointing out discrepancies, if any, in the evidence adduced on record by the plaintiff, was expected to lead positive evidence on record to prove that plaintiff was never put into possession pursuant to issuance warrant of possession issued by Tehsildar after conclusion of partition proceedings. Rather conjoint reading

of statements given by PW1, PW2 and PW3 leaves no doubt that joint land was partitioned by the revenue authorities and the possession of the which was delivered to plaintiff by PW3 pursuant to warrant of possession issued by Tehsildar. Careful perusal of the cross-examination conducted on these aforesaid plaintiff witnesses, clearly suggests that defendants were not able to shatter the testimony of this aforesaid plaintiff witnesses, who unequivocally stated that after passing of order dated 16.3.1999 by Assistant Collector Ist Grade, plaintiff was put into possession of Khasra No. 5818 by PW3. Moreover, PW3, in his cross-examination categorically denied the suggestion put to him by the defendants that actual possession was not delivered to the plaintiff. Whereas statement of DW3 Lekh Ram itself falsifies the stand taken by defendants that possession of Khasra No. 5818 was delivered to him by Smt. Soma Devi and Shri Jagdish alias Raj Kumar on 23.1.1998 and since then he is in possession of the suit land, because as has been discussed above, when Smt. Soma Devi and Shri Jagdish alias Raj Kumar were not held to be in possession by the learned Senior Sub Judge in Civil Suit filed by Smt. Soma Devi and Shri Jagdish alias Raj Kumar, where was the occasion for them to put appellants/defendants in possession of the land as claimed by the appellants/defendants.

17. Similarly, DW1 Lekh Raj while making statement before the Court below stated that neither suit land has been partitioned nor possession has been disturbed. Moreover, close scrutiny of the cross-examination conducted on DW1suggests that he did not make truthful disclosure to the Court while making his statement because in his cross-examination he stated that prior to 1998 his father was in possession of suit land and thereafter he became owner of the suit land on the basis of sale deed. If the statement given by DW1 is read in its entirety, it clearly emerges that defendant No. 1 has not taken consistent stand rather he has taken contrary please with regard to sale and possession of the suit land. Though, DW1 Lekh Raj while making statement in his examination-in-chief, feigned ignorance with regard to partition proceedings conducted by Assistant Collector Ist Grade, Kullu, but in his cross-examination he categorically stated that he had not filed appeal against the partition, meaning thereby, property in question stand partitioned in accordance with law and parties were put to possession of respective shares in terms of order passed by Assistant Collector Ist Grade, Kullu, in the partition proceedings. This Court after perusing instrument of partition dated 8.4.1999 i.e. Ex.P3 and order dated 16.3.1999 is fully convinced that suit land was partitioned between the co-sharers strictly in terms of Section 122 of H.P. Land Revenue Act and pursuant to order dated 16.31999, plaintiffs were put into possession qua land measuring 4-15-0 bighas bearing Khasra No. 5818/1 and land measuring 1-6-0 bighas bearing Khasra No. 7312/5817/2. Perusal of instrument of partition dated 8.3.1999, clearly suggests that Smt. Soma Devi and Shri Jagdish @ Raj Kumar were impleaded as party in the partition proceedings since they were recorded as joint owner in the revenue record at the time of initiation of partition proceedings in the year 1992. It is admitted fact that appellants/defendants purchased share of land from Shri Jagdish @ Raj Kumar and Smt. Soma Devi in the year 1990, as such, there was no occasion for plaintiff to implead them as a party in partition proceedings in the year, 1993. When admittedly partition proceedings were initiated for the partition of land jointly owned by plaintiff and other co-owners and Smt. Soma Devi and Shri Jagdish alias Raj Kumar were arrayed as party to partitioned proceedings, appellant-defendants cannot be allowed to claim that partition proceedings were conducted at their back because admittedly after the purchase of the suit land, appellants/defendants entered into the shoe of Smt. Soma Devi and Shri Jagdish Chand @ Rajkumar. Hence, this Court is of view that there is no illegality and infirmity in the instrument of partition dated 8.3.1999 passed by Assistant Collector, pursuant to which plaintiff was put into the possession of the suit land vide warrant of possession 16.3.1999. Moreover, perusal of Ex.P3 i.e. instrument of partition, nowhere suggests that during partition proceedings said Smt. Soma Devi and Shri Jagdish alias Raj Kumar ever disclosed factum of sale, if any, made in favour of the appellants/defendants with regard to land measuring 4-3-0 bighas comprised in Khasra No. 5818. Since, Smt. Soma Devi and Shri Jagdish alias Raj Kumar were recorded as a joint owners in the revenue record pertaining to year, 1993, when the partition proceeding was initiated, this Court sees no illegality and irregularity in impleading Smt. Soma Devi and Shri Jagdish alias Raj Kumar as a party respondents in the partition proceedings. Careful perusal of the pleadings as well as evidence led

on record by both the parties, clearly suggests that vide instrument of partition dated 8.3.1999, joint land owned by plaintiff as well as Smt. Soma Devi and Shri Jagdish alias Raj Kumar, who were recorded as joint owners, were ordered to be partitioned vide order dated 16.3.1999. Plaintiff was put into possession of land measuring 4-15-0 bighas baring Khasra No. 5818/1 and land measuring 1-6-0 bighas bearing Khasra No. 7312/5817/2, as such, this Court sees no force in the contention put-forth by counsel representing the appellants/defendants that Courts below have misread the instrument of partition while passing impugned judgment.

18. In view of the detailed discussion made hereinabove, this Court sees no merit in the present appeal and accordingly substantial questions of law as referred to hereinabove are answered accordingly.

19. While exploring the answer to the substantial questions of law referred to hereinabove, this Court perused entire pleadings and record, it clearly emerges that though appellants/defendants while refuting the claim of the plaintiff stated that suit for permanent prohibitory injunction could not be filed by plaintiff since possession of suit land was with him. But as has been discussed in detail, appellants/defendants at no point of time were able to prove on record that they are in possession of the suit land. Though by placing reliance on the sale deed dated 23.1.1998, defendants made an attempt to demonstrate that at the time of sale, they were put into possession of suit land by Smt. Soma Devi and Shri Jagdish alias Raj Kumar but no document whatsoever was placed on record to substantiate the plea, whereas plaintiff by leading cogent and convincing evidence was successful in proving that after the partition of the land, which was jointly owned and possessed by plaintiff and defendants, he was put into possession of land measuring 4-15-0 bighas baring Khasra No. 5818/1 and land measuring 1-6-0 bighas bearing Khasra No. 7312/5817/2. Plaintiff specifically placed on record judgment Ex. P4 to prove that at no point of time defendants were put into exclusive possession of Khasra No. 5818 as claimed by them because suit filed by Smt. Soma Devi and Shri Jagdish alias Raj Kumar was dismissed by learned Senior Sub Judge, Lahaul & Spiti rejecting their claim that they are exclusive owner of the Khasra No. 5818. Moreover, written statement filed by the defendants nowhere suggest that claim of the plaintiff that he is in exclusive possession of Khasra No. 5818 was ever refuted, rather careful perusal of the averments made in the written statement suggest that though defendants claimed themselves to be in possession of Khasra No. 5818, but nowhere specifically denied the claim of the plaintiff that he is in possession of Khasra No. 5818. Rather perusal of the pleadings suggests that defendants took contradictory pleas to prove their case. At the first instance, defendants claimed to be owner in possession of the suit land in term of sale deed executed in their favour by Smt. Soma Devi and Shri Jagdish alias Raj Kumar, thereafter, they claimed themselves to be owner in possession by way of adverse possession. But admittedly, on both counts, as referred to above, defendants were unable to substantiate their pleas of becoming owner of suit land either by adverse possession or on the basis of sale deed, by leading cogent and convincing evidence. DW1 though stated that he became owner of the suit land by way of adverse possession but statement made by him nowhere suggests that he stated anything with regard to continuous possession qua suit land.

20. Consequently, in view of detailed discussion made hereinabove, this Court has no hesitation to conclude that judgments passed by both the Courts below are based upon the correct appreciation of record/evidence available on record. To answer the substantial questions, reproduced hereinabove, this Court traveled through entire evidence led on record by the parties to the lis and it can be safely concluded that both the Courts below have rightly returned the concurrent findings of facts as well as law after dealing with the evidence on record meticulously. Hence this Court is of the view that this is not a fit case wherein exercise of powers/jurisdiction under Section 100 CPC, concurrent findings returned by both the Courts below can be upset, especially when the defendants have failed to prove that impugned judgments are perverse. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in ***Laxmidevamma's*** case supra, wherein the Court has held as under:

"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)

21. Hence, in view of the aforesaid discussion, this Court is persuaded to conclude that the impugned judgments passed by both the Courts below are based on proper appreciation of the evidence, be it ocular or documentary on the record and, as such, substantial questions of law, framed above, are answered accordingly. Hence, present appeal fails and the same is, accordingly dismissed.

22. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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

Ramesh Rattan and another ..Appellants/plaintiffs.

Versus

Jeet Singh (through LRs) and others ..Respondents/defendants

RSA No. 100 of 2003.
Reserved on: 16/08/2016
Date of decision: 29/08/2016

Specific Relief Act, 1963- Section 13- Plaintiffs filed a civil suit for restraining the defendants from interfering with the suit land- it was pleaded that plaintiffs had purchased the suit land from one D for a consideration of Rs. 24,300/- possession of whole land except one small field was delivered to the plaintiffs - defendants took the possession of the suit land forcibly- defendants denied the sale of the suit land in favour of the plaintiffs- it was asserted that D was not competent to sell the suit land as it was in excess of the permissible limits under the provisions of the H.P. Ceiling Act- defendants are in possession of 13-13 bighas of land as tenants since the time of their father- they have constructed four shops at the cost of Rs. 25,000/-- suit was partly dismissed by the trial Court- an appeal was preferred, which was partly allowed- held, in second appeal that plaintiffs have acquired title of the suit land by sale deed- Courts had held defendants to be in possession of 13-13 bighas of land – the Land Reforms Officer had also found that predecessor-in-interest of the defendants was holding the land as a tenant and the land was given to him in lieu of personal services - proprietary rights were conferred upon the predecessor in interest of the defendants – Civil Court does not have jurisdiction to go into question of conferment of proprietary rights- the appeal dismissed and the judgment and decree of Appellate Court confirmed. (Para-8 to 11)

For the appellants: Mr. G.D.Verma, Sr. Advocate with Mr. B.C.Verma, Advocate.
For the respondents: Mr. Bhupender Gupta, Sr. Advocate with
Mr. Janesh Gupta, for respondents No. 1 & 2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

The instant appeal stands directed against the impugned judgement and decree of the learned Additional District Judge, Shimla, Himachal Pradesh, whereby, he reversed the verdict recorded by the learned trial Court qua the defendants holding ownership of 13.13 bighas of land comprised in Khasra No. 304/236/85/2 situated in Mauza Anu, Tehsil Theog, District Shimla. However, it maintained the verdict of the learned trial Court whereby it refused to accord injunction qua the aforesaid land qua the plaintiffs. The plaintiffs' standing aggrieved by the rendition of the Learned Additional District Judge concert through the instant appeal to seek reversal of the judgement and decree of the learned Additional District Judge, Shimla.

2. The facts necessary for rendering a decision on the instant appeal are that the plaintiffs filed suit for permanent prohibitory injunction restraining the defendants from interfering in any manner whatsoever with the ownership and possession of the plaintiffs over the land measuring 19 bighas 14 biswas, comprised in Khata Khatauni No. 2/2, Khasra No. 304/236/85/2 min, measuring 13.1 bighas and Khasra No. 92 min measuring 6.13 bighas as per jamabandi for the year 1977-78 of Mauza Annu, Tehsil Theog, District Shimla, Himachal Pradesh. There are also averments in the plaint that plaintiffs purchased the aforementioned suit land from Shri Devinder Chand son of Sh. Randhir Chand vide registered sale deed for consideration of Rs.24,300/- and possession of the whole land was delivered to the plaintiffs except one small field. Plaintiffs are in peaceful possession of the suit land since 28th March, 1981. The defendants tried to interfere with the peaceful possession of the plaintiffs on 10th April, 1981 when they were ploughing the fields and at that time threatened the plaintiffs to take forcible possession of the suit land.

3. The suit of the plaintiffs was resisted and contested by the defendants and they filed written statement wherein the defendants have denied that the plaintiffs had purchased land in suit from Davinder Chand. The defendants specifically denied the possession of the plaintiffs over the suit land. It has also been alleged that Davinder Chand, the original owner was not competent to sell the land in suit, as the land in suit is in excess of the permissible limits under the provisions of the H.P. Ceiling Act. Hence, the same is in contravention of the provisions of the said Act and same is void and inoperative. It was also alleged on behalf of the defendants that out of 49 bighas 13 biswas of land belonging to Davinder Chand, the defendants are in possession of 13-13 bighas of land comprised in Khasra No. 304/236/85/2 since the time of their father as tenant in lieu of services as rent. The defendants also annexed the Tatima of this parcel of land. The defendants have constructed four shops at the cost of Rs.25,000/- The shops are also over this parcel of land. The defendants have sowing and cultivating the part of the suit land mentioned above. The defendants have also denied the other allegations made in the plaint and it has also been alleged that the police had also visited the spot and maize which was sown by the defendants was found damaged. The defendants have also filed an application under Section 37 of the H.P.Land Revenue Act before the Tehsildar, Theog for correction of entries.

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

(1) Whether the defendants are owners in possession of the land in dispute, as alleged? OPD.

(2) Whether the plaintiffs are entitled to the relief of injunction, as prayed for, OPP.

(3) Whether the sale in favour of the plaintiffs is void, as alleged. OPD.

(4) Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court partly dismissed the suit of the plaintiffs besides the learned First Appellate Court partly modified the appeal preferred therefrom before it by the plaintiffs.

6. Now the plaintiffs/appellants instituted the instant Regular Second Appeal before this Court, assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 09.09.2003, this Court admitted the appeal on the hereinafter extracted substantial question of law:-

1. Whether the learned Additional District Judge misread and misinterpreted the ratio in Chuniya Devi's case to hold that the question of tenancy was to be determined by the Land Reforms Officer and Civil Court has no jurisdiction?

Substantial question of law.

7. The plaintiffs/appellants acquired title to the suit land under sale deed Ext.PW-1/A executed interse them and one Devinder Chand. Both the Courts below on traversing through the evidence on record concluded of the defendants/respondents holding possession of 13.13 bighas of land comprised in Khasra No. 304/236/85/2 sitliuated in Mauza Anu, Tehsil Theog, District Shimla. In the Courts below concluding of the defendants holding possession of 13.13 bighas of land had thereupon ousted the play of depictions in the revenue entries qua the plaintiffs/appellants holding recorded possession of the aforesaid tract of land. Needless to say of both the learned Courts below in concluding qua the prima donna factum aforesaid had repelled besides belied the presumption of truth garnered by the apposite revenue entries wherein a display to the contrary is held. The learned counsel for the appellants/plaintiffs has contended qua the inference drawn by the learned Courts below in disimputing sanctity to the reflections occuring in the apposite revenue records qua the plaintiffs/appellants holding possession of a tract of 13.13 bighas of the suit land standing untenably anchored upon Ext.DW-5/A comprising an affidavit sworn by one Kirpa Ram an attorney of Mathura Devi, Rani Sahiba of Dhandi wherein revelations stand displayed of one Budhi Singh standing inducted as a tenant in the suit land in lieu of personal services rendered to her. He contends qua the untenability of reliance placed thereupon by the learned First Appellate Court being garnerable from the factum of there existing no evidence in portrayal of Rani Sahiba of Dhandi constituting Kirpa Ram as her attorney whereupon he concerts to foist an inference of his affidavit Ext.DW-5/A holding no succor. The contention aforesaid reared by the counsel for the appellants for concomitantly rearing a formidable clout qua hence reliance placed thereupon by the learned First Appellate Court for dis-imputing sanctity to the apposite reflections in the revenue records vis-à-vis the plaintiffs suffering enfeeblement, enjoined upon them to adduce conclusive evidence emanating from the relevant records held with the Sub Registrar concerned magnificatory of Kirpa Ram not under any registered power of attorney executed by Rani Sahiba of Dhandi standing constituted therein as her attorney. However, the aforesaid evidence stands unadduced. Conspicuously, hence an apt conclusion warranting ensual therefrom is of Kirpa Ram standing constituted as an attorney by Rani Sahiba of Dhandi. In aftermath, reliance placed by the learned First Appellate Court upon Ext.PW-5/A holding pronouncements therein by Kirpa Ram while his holding the capacity of an attorney of Rani Sahiba of Dhandi qua the latter inducting one Budhi Ram father of the defendants as a tenant in the suit land in lieu of personal services rendered by him qua her standing not divested of any efficacy. Also reliance thereupon by the learned First Appellate Court to displace the sanctity of the apposite reflections in the apposite revenue records depictive of the plaintiffs holding as owners possession of the suit land obviously not suffering from any vice of its meteing reverence to a discardable piece of evidence. Furthermore in his testification even PW-1 Devinder Chand has not made any proclamation qua Kirpa Ram who swore affidavit Ext.DW-5/A not holding the relevant capacity to pronounce therein qua his standing constituted by Rani Sahiba of Dhandi as her attorney. His reticence qua the prima donna factum aforesaid read in coagulation with non adduction of the aforesaid best evidence stamps a firm inference of Kirpa Ram who swore Ext.DW-5/A standing constituted by Rani Sahiba of Dhandi as her attorney also his while making communications therein of his principal inducting Budhi Ram as a tenant in the suit land standing clothed with a virtue of solemnity.

8. Dehors the leanings by the First Appellate Court upon Ext.DW-5/A for belittling the credence of the apposite reflections in the relevant revenue records, it had also ridden them of their truth rather had falsified them by placing reliance upon Ext.DW-9/C comprising the

apposite registration by the authority concerned of a small scale industrial unit set up by the defendant in a part of the contentious tract hereat of the suit land. Also the learned First Appellate Court in concluding of the defendants holding possession of the contentious tract of the suit land placed reliance upon Ext.DW-11/A exhibit whereof stands issued by the Divisional Forest Officer vis-à-vis the defendant No.2. Accentuated vigour to the aforesaid conclusion drawn by the learned First Appellate Court qua the defendants holding physical possession of 13.13 bighas of land is lent by the testification of DW-2 who has made articulations therein qua the defendant Jeet Singh holding his house upon the suit land also his saw mill standing located thereupon. Furthermore a loud display is made in Ext.D-1 exhibit whereof comprises the order of the Tehsildar concerned rendered on an application laid therebefore by the aggrieved for correction of revenue entries for manifesting therein the factum of the defendants holding physical possession of 13.13 bighas of land depicted in Tatima D-2. His affirmative findings qua the facet aforesaid vis-à-vis the defendants remained un-assailed nor stood concerted to stand bereft of veracity by the plaintiffs adducing cogent evidence in rebuttal thereto. Consequently, depictions occurring in Ext.D-1 and Ext.D-2 qua the defendants holding physical possession of land measuring 13.13 bighas held in Khasra No. 304/236/85/2 acquire conclusivity. Reliance by the learned First Appellate Court on Ext.DW-5/A when stands concluded by this Court to stand not ingrained with any infirmity would not foist this Court to erect a conclusion of the defendants succeeding in firmly clinching the trite prima donna factum of their predecessor in interest Budhi standing inducted as a tenant in the suit land in lieu of personal services rendered by him to its erstwhile owner nor would this Court even if it finds the relevant entries displayed in the apposite revenue records holding no congruity with Ext.DW-5/A hence proceed to order for vestment of proprietary rights qua the land measuring 13.13 bighas comprised in Khasra No. 304/236/85/2 vis.a.vis the defendants, conspicuously when a statutory bar stands constituted in sub-section (4) of Section 104 of the H.P.Tenancy and Land Reforms Act against this Court rendering any adjudication qua the factum of the defendants holding the suit land as tenants given their predecessor in interest purportedly standing inducted as a tenant therein by its erstwhile owner also significantly when any rendition of a verdict thereupon stands vested within the exclusive jurisdictional domain of the Land Reforms Officer besides when the Land Reforms Officer concerned alone holds jurisdictional competence, to, on his concluding qua the defendants establishing the occurrence of continuance of tenancy qua the suit land in their favour since their predecessor-in-interest, confer upon them concomitant vestment of proprietary rights qua it whereafter the Civil Court concerned may on its standing motioned by the aggrieved, on existence of palpable evident display qua in his making his rendition qua the facets aforesaid his making a gross departure from the principles of natural justice, may hence interfere with his findings. Consequently, when there occurs before this Court no rendition of the Land Reforms Officer qua the facet aforesaid significantly also when he stands exclusively vested with the apposite jurisdictional domain to clinch findings qua the facet of the defendants since their predecessor in interest holding the suit land as tenants also qua thereupon their standing entitled to statutory conferment of proprietary rights thereon, fetters this Court to place any reliance thereupon for foisting any conclusion qua hence the defendants sustaining their espousal qua their predecessor in interest standing inducted as a tenant in the relevant tract of the suit land by its erstwhile owner in lieu of personal services rendered by him to her, contrarily this Court would obviously leave the aforesaid facet of controversy to be open for adjudication before the Land Reforms Officer concerned on the defendants constituting an apposite application there-before.

9. As an apt sequitur this Court would restrain to render a decree upon the defendants qua theirs delivering vacant possession of the suit land, as any rendition thereof would frustrate any endeavour of the defendants to before the Land Reforms Officer concerned sustain their plea qua theirs since their predecessor in interest holding the relevant tract of the suit land as tenants also would forestall theirs staking on theirs succeeding therebefore qua the facet aforesaid of hence theirs standing entitled to vestment of statutory proprietary rights thereupon. Also the further constraint which precludes this Court to render upon the defendants a decree of possession qua the suit land hereat rests upon the plaintiffs/appellants not in the suit

making an apposite prayer for a decree of possession being rendered qua the suit land vis-à-vis them. The rigour of the aforesaid constraint though stands canvassed by the learned counsel for the plaintiffs to stand both relaxed also its tenacity standing whittled down by his resting a contention herebefore, of this Court holding a plenary implicit jurisdiction to mould relief of possession qua the suit land vis-à-vis the plaintiffs. However, the aforesaid submission is ill-founded also is in gross transgression of the apposite statutory mechanism contemplated in the Code of Civil procedure wherewithin he held a right at the apposite stage to make resort thereto for begetting an apposite amendment to the relief clause of the plaint. In giving leverage to the contention for the plaintiffs/appellants qua this Court holding a plenary implicit jurisdiction to mould the apposite relief vis.a.vis the plaintiffs would detract the manifest salutary purpose behind the enactment of the relevant mechanism in the Code of Civil Procedure also would beget infraction of its relevant apposite provisions prominently when resort thereto by the plaintiff for the relevant purpose is preemptory, contrarily any whittling down of their statutory vigour qua the facet aforesaid would render them to stand relegated to the realm of obscurity besides redundancy, legal mishap whereof stands enjoined to be obviated by this Court. The further reason for this Court dispelling the contention of the plaintiffs/appellants for moulding qua the plaintiffs relief of possession qua the suit land stands founded upon the factum of the plaintiffs/appellants despite moving an application before the First Appellate Court for begetting an amendment to the relief clause by incorporating therein the relief of possession qua the suit land yet theirs not perseveringly pursuing the aforesaid application rather theirs as pronounced by an order rendered by the First Appellate Court on 4.4.1988 theirs evincing therebefore gross un-interestedness in prosecuting it, constraining it to dismiss it. The proclamation occurring in the order of the First Appellate Court pronounced on 4.4.1988 upsurges a visible display of the plaintiffs/appellants abandoning the aforesaid concert whereupon they are estopped to ventilate herebefore qua theirs holding any leverage to ask for affording qua them any relief of possession qua the suit land. Since the aforesaid statutory mechanism vested in the plaintiffs for begetting an amendment to the relief clause of the suit stood availed by them whereafter it stood abandoned also constitutes an estoppel against them arising from theirs waiving the relevant statutory mechanism, mechanism whereof alone foisted in them a right to claim a relief of possession qua the suit land whereas theirs extantly herebefore in the garb of making a specious plea of this Court holding an inherent jurisdiction to mould relief of possession vis-à-vis them qua the suit land make an espousal qua it standing granted qua them, conspicuously when any imputation of validation to the aforesaid contention would bring an avoidable conflict with the apt statutory mechanism. Upshot of the above discussion is of an inherent right vesting in a Court to mould relief only when the moulded relief as asked for does not either change the complexion or nature of the suit nor infringe the settled rights acquired under a conclusive judicial rendition by the opposite party. However, when hereat the complexion besides the structure of the suit stands concerted to be materially altered also when a settled right acquired by the opposite party under a conclusive judicial verdict is strived to be unsettled, obviously this Court holds no jurisdiction to mould the relief qua the plaintiff also when the apt mechanism contemplated in the Civil Procedure Code for moulding of relief though stood resorted to whereafter it stood waived, cannot clothe in the plaintiff any legal bestowment qua his espousal for moulding the relief of possession qua the suit land warranting vindication. In sequel, when the relief of possession stood not asked for in the plaint rather when the apt venture for its being asked was by theirs resorting to the apt mechanism incorporated in the Civil Procedure Code, mechanism whereof despite resort thereto by them stood waived, forestalls the plaintiffs to canvass qua this Court holding jurisdiction to modify relief of possession vis-à-vis the plaintiffs.

10. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment and decree rendered by the learned Additional District Judge is maintained and affirmed. Substantial question of law is answered against the plaintiffs. Decree sheet be prepared accordingly. No costs.

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

State of H.P. .....Appellant.
Versus
Ajay Soni & another .....Respondents.

Cr. Appeal No. 280 of 2012.
Reserved on : 20th August, 2016.
Date of Decision: 29th August, 2016.

Indian Penal Code, 1860- Section 366, 376 and 120-B- Prosecutrix received telephonic call from the accused that he had arranged a party at Pin Valley Hotel- accused offered a cup of coffee to the prosecutrix- accused had sexual intercourse with her- she was subsequently informed that her obscene video clip was sent- matter was reported- accused was tried and acquitted by the trial Court- held, in appeal that PW-3 did not support the prosecution version regarding the obscene video clip – matter was reported after the delay of two months- trial Court had rightly appreciated the evidence- appeal dismissed. (Para-9 to 13)

For the Appellant: Mr. P.M. Negi, Deputy A. G.
For the Respondents: Mr. Adarsh Sharma, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

The instant appeal stands directed by the State of H.P. against the judgment of the learned Additional Sessions Judge, Ghumarwin, District Bilaspur, Himachal Pradesh, rendered on 03.12.2011 in Sessions trial No. 18/7 of 2010, whereby, it acquitted the accused/respondents for offences punishable under Sections 366, 376 and 120-B of the Indian Penal Code (hereinafter referred to as the "IPC").

2. The facts relevant to decide the instant case are that the law enforcing machinery was set out in motion in this case pursuant to the statement given by the prosecutrix under Section 154 Cr.P.C. stating that she is running a Beauty Parlor under the name and style of Mona Beauty Parlor and the Karyana shop of accused Saurabh Mehta alias Rauni is situated near the Beauty Parlor due to which she is having talking terms with Rauni. On 03.01.2010, she received a telephonic call from Rauni informing that today is his birthday and he has arranged a party at Pin Valley Hotel, as such, she accompanied Rauni in his Wagnor-R to Hotel Pin Vally at about 3.00 p.m. Both of them were in the vehicle. At Pin Valley Hotel Rauni offered a cup of coffee to her. But, no party was organized there. Thereafter, she was brought to room and he requested to have sexual intercourse with him. But, she refused. Accused Saurabh Mehta promised to marry her. Thereafter, he committed sexual intercourse with her. After 15 minutes Rauni left the room and when she was coming out of the room she noticed that from bathroom of the said room, Ajay Soni alias Aju who is running a Mobile shop at Gurudwara chowk, Bilaspur came out and she inquired from him as to how he came here but Aju did not reply. She asked him as to how whether they are blackmailing her. She received a telephonic call from Shankey bhaiya who is running computer shop at Daira sector informing her that he has seen her obscene video clip with Rauni on the mobile of a boy. Rauni committed rape with her by making a false promise to marry her after conspiring with Aju and prepared her obscene video clip and blackmailed her. On the basis of aforesaid statement of the prosecutrix, the FIR was registered in the police station concerned against the accused. The police started investigations in the matter. During the course of investigations, the police completed all the codal formalities and

arrested the accused. Report of the FSL was procured. Statements of the witnesses were recorded.

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

4. The accused were charged by the learned trial Court for theirs committing offences punishable under Sections 366, 376 and 120-B of the IPC. In proof of the prosecution case, the prosecution examined 24 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 trial Court, in which the accused claimed innocence and pleaded false implication. However, they did not lead any defence evidence.

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

6. The State of H.P. stands aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation 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. On the other hand, the learned defence counsel has with considerable force and vigour, 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 prosecutrix alleged in her statement recorded under Section 154 of the Cr.P.C., comprised in Ex.PW2/A of accused Saurabh Mehta alias Rauni under a false allurement of marriage eliciting her consent for holding her to sexual intercourse. She alleges therein of her consent to the accused for his holding her to sexual intercourse when emanated from a false pretentious allurement of marriage, it holds no legal worth. Also, she alleges therein of the penal sexual misdemeanors perpetrated on her person by the accused rendering him liable for punishment. The relevant evidence which is enjoined to be delved into for disinterring therefrom the germane trite factum of the accused holding a false promise to marry her stands embedded in the testification of the prosecutrix. She in her testification makes a loud echoing therein of hers on 3.01.2010 on receiving a telephonic call from accused Saurabh Mehta, whereby he intimated her qua his birthday falling on the day aforesaid also requested her to join him at a party at Pin Valley Hotel, request whereof stood acceded to by her leading her to in the Wagnor-R of accused Saurabh Mehta accompany him to Pin Valley Hotel. On their arrival at 3.00 p.m. at the place aforesaid, whereat after theirs sipping coffee, they proceeded to room No. 703 of the Hotel, wherein she testifies of the accused requesting her to sexually access her, request whereof initially stood refused by her, whereafter accused Saurabh Mehta stands testified by her to promise to marry her leading her to succumb to his sexual misdemeanor. She proceeds to testify of on 15 minutes elapsing since her departure from room No.703 of Pin Valley Hotel, hers noticing the factum of co-accused Ajay Soni egressing from the bath room attached to room No.703 wherefrom whom she inquired the reason of his occupying the bathroom, endeavour whereof did not evince any satisfactory reply from co-accused Ajay rather his maintaining silence. On 3.3.2010, she received a telephonic call from Shankey alias Akshay apprising her qua his sighting on the mobile of a boy her obscene video clippings with accused Saurabh Mehta,

whereupon she lodged the FIR qua the occurrence of 3.1.2010 on 3.3.2010. Since a hiatus of two months has apparently occurred since the alleged incident of 3.1.2010, factum aforesaid is per se a visible display of the prosecutrix concocting the factum of hers succumbing to the sexual overtures of the accused on the accused holding a false allurement of marrying her. She has not made any loud echoings in her testification of the accused despite holding her to sexual intercourse on 3.1.2010 under his holding a false allurement of marriage to her, his thereafter on her beseechings upon him to marry her, his making a refusal. The absence of the aforesaid echoings in her testification renders waned the ascription by her in the FIR of hers succumbing to the sexual overtures of the accused on the latter holding a false allurement of marrying her, contrarily, the occurrence in her testification qua hers proceeding to lodge an FIR qua the occurrence which allegedly took place on 3.1.2010 only on Shankey alias Akshay apprising her qua his sighting on the mobile of a boy a video clip holding portrayals of her comprising her chastity vis-a-vis accused Saurabh Mehta, also her testifying qua dehors the aforesaid intimation qua the facet aforesaid purveyed to her by Shankey she would not have lodged the FIR is a forthright display of hers prevaricating the factum of hers succumbing to his sexual overtures under any pretext of marriage offered to her by the accused. Also PW-6, her father conceding to the factum of theirs lodging the FIR merely to salvage their prestige also his conceding to the factum of theirs lodging the FIR qua the incident of 3.1.2010 merely on hear say, amplifyingly scuttles the sinew of the revelations constituted by the prosecutrix in the apposite FIR comprised in Ex.PW21/A.

10. Be that as it may Shankey alais Akshay, PW-3, who on 3.3.2010 apprised the prosecutrix qua his sighting obscene video clipings of the prosecutrix with accused Saurabh, not supporting the prosecution case also with the father of the prosecutrix feigning ignorance qua the purported obscene video clippings contained in the CD besides PW-7, the mother of the prosecutrix making a communication in her deposition qua theirs proceeding to lodge the apposite FIR on information purveyed by Akshay alias Shankey is a loud display of the lodging of the FIR standing prodded by PW-3 Akshay Kumar alias Shankey, who too has not supported the prosecution case, on his purportedly purveying a false information to the prosecutrix qua his sighting the obscene video clippings of the prosecutrix with accused Saurabh Mehta. The aforesaid train of events foment an inference from this Court of the FIR lodged qua the occurrence of 03.01.2010 on 03.03.2010 hence with a procrastinated inordinate delay of more than two months elapsing therefrom standing not stirred by the prosecutrix succumbing to the sexual overtures of accused Saurabh Mehta on his holding a false allurement of marriage to her rather its institution standing stimulated by as deposed by PW-6 besides deposed by the prosecutrix to salvage their prestige, prestige whereof stood bruised by the afore-referred information purveyed by Shankey to the prosecutrix. Concomitantly the truth of the allegations constituted therein stands eroded.

11. Moreover, the prosecutrix has also conceded qua the factum of accused Saurabh Mehta holding her to sexual intercourse in the month of December, 2009 whereat she did not lodge the apposite FIR qua the incident aforesaid. Her omission to lodge the apposite FIR qua the incident of sexual intercourse to which she stood subjected to by accused Saurabh Mehta in the month of December, 2009, foists a derivative of thereat hers consensually succumbing to the sexual misdemeanors, if any, of the accused bereft of the accused holding any false allurement of marrying her. The apt sequitur ensuing from the deduction aforesaid is of this Court standing fomented to hold qua hers proceeding to room No.703 of Pin Valley Hotel on 3.1.2010 along with the accused, with hers holding knowledge of the accused leading her thereat with an intention to hold her to sexual intercourse, given both previously consensually holding sexual intercourse in the month of December, 2009. Also the factum of hers in the company of the accused proceeding to the aforesaid room of Pin Valley Hotel gives momentum to a deduction of thereby hers holding consent to the accused to hold her to sexual intercourse bereft of hers standing purveyed a false pretence of marriage by the accused. Furthermore, with no echoings occurring in her testification of the accused subsequent to 3.1.2010 refusing to marry her rather as aforestated the stimulation for hers to lodge the FIR standing afforded by a false information purveyed to her by

PW-3 Akshay Kumar alias Shankey qua the aforesaid purportedly sighting on the mobile of a boy her obscene video clippings with accused Saurabh Mehta, is for reiteration a categorical display of hers, alike in the month of December, 2009 to also on 3.1.2010 proceeding to consensually hold sexual intercourse with the accused bereft of any elements or traits of the accused holding any false allurement of marrying her. Predominantly, with the prosecutrix conceding in her deposition of hers standing engaged with one Vivek Sankhyan of Sarkaghat is a vivid display of hers contriving the factum of accused Saurabh Mehta purveying a false offer to marry her whereupon she goaded to succumb to his sexual overtures, conspicuously when given hers standing engaged with one Vivek Shankhyan also when there is no evidence of her betrothal with the aforesaid standing severed, he hence holding no intention to tie the nuptials knot with her, stains hence with a vice of falsity the offer of the accused to marry her wherefrom she purportedly stood prodded to succumb to his sexual overtures, prominently when hence the impact of the purported allurement of marriage proffered to her by the accused would naturally gain no impact upon her nor she would hence stand influenced by it contrarily she is to be construed to consensually succumb to the sexual overtures of accused Saurabh Mehta. Moreover, with the prosecutrix testifying qua accused Saurabh Mehta requesting her to permit his friend to hold coitus with her, bespeaks the trite factum of the accused Saurabh Mehta not holding any false allurement of marrying her. Contrarily, the aforesaid testification is magnificatory of the factum of the prosecutrix when hence acquiesces qua hers thereupon holding the capacity to discern the genuineness of the allurement of marriage purveyed to her by accused Saurabh Mehta, obviously, when she hence overlooked the spuriousness of the offer of marriage purveyed to her by accused Saurabh Mehta, she is defacilitated to espouse of hers succumbing to the sexual overtures of the accused under his purveying a false allurement of marriage to her rather her succumbings to his sexual overtures emanating from hers volitionally meteing consent to him.

12. The sequel of the aforesaid discussion is of hence the charge of conspiracy framed against co-accused Ajay Soni under Section 120-B of the IPC also staggering besides foundering. Even though there is a ascription to him of an inculpatory role of his capturing on his cell/mobile phone obscene postures of the prosecutrix with accused Saurabh Mehta alias Rauni given his occupying the bathroom attached to room No.703 of the Pin Valley Hotel, which he purportedly circulated amongst his friends yet the aforesaid inculpatory role ascribed to him stands demolished by the factum of the prosecutrix and her father testifying qua theirs not sighting the aforesaid purported obscene video clippings also with PW-3, who purveyed intimation to the prosecutrix qua his sighting her purported obscene video clipping with accused Saurabh Mehta, not supporting the prosecution case besides PW-4 denying the factum of his receiving any obscene video clipping on his cell phone, whereas both the aforesaid stand postured by the Investigating Officer to be the only persons who held knowledge qua the purported circulation by co-accused Ajay Kumar of the purported obscene video clippings of the prosecutrix with accused Saurabh Mehta, nails a conclusion of the charge of conspiracy framed against co-accused Ajay Soni under Section 120-B falling apart.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of the evidence on record, rather it has aptly appreciated the material available on record.

14. Consequently, there is no merit in the instant appeal and it is accordingly dismissed. In sequel, the impugned judgment is maintained and affirmed. Records be sent back forthwith.

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

State of H.P. .....Appellant.
Versus
Anil Kumar & another ....Respondents.

Cr. Appeal No. 80 of 2012.
Reserved on : 20th August, 2016.
Date of Decision: 29th August, 2016.

N.D.P.S. Act, 1985- Section 20- Police party signaled a motor cycle to stop - jacket of accused A was slightly lifted– his search was conducted during which one packet containing 985 grams charas was recovered - accused were tried and acquitted by the trial Court- held, in appeal that provision of Section 50 of N.D.P.S. Act was not complied with- accused were not apprised of their legal right to be searched before a Magistrate or Gazetted Officer- recovery cannot be relied upon- Trial Court had rightly acquitted the accused- appeal dismissed. (Para-9 to 14)

For the Appellant: Mr. P.M. Negi, Deputy A. G.
For the Respondents: Mr. N.S. Chandel, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

The instant appeal stands directed by the State of H.P. against the judgment of the learned Special Judge (I), Kangra at Dharamshala, Himachal Pradesh, rendered on 15.10.2011 in Sessions Case No. 42-D/VII-2009, whereby, it acquitted the accused/respondents for an offence punishable under Section 20-61-85 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the "NDPS Act").

2. The facts relevant to decide the instant case are that on 4.10.2009 PW-7 Inspector Rajeev Attri along with other police officials of P.S. Dharamashala were on patrol duty. At about 9.45, when they were present near bus stand on Sudher road a motor cycle bearing No. HP-39A-7144, occupied by two persons on sighting their vehicle, the rider of the motor cycle increased the speed of it. On suspicion they chased it and stopped it at some distance. On inquiry, the rider and the pillion rider of the motorcycle disclosed their names as Dharam Dhoj and Anil respectively. Both of them were not possessed with the documents of the motor cycle. The police noticed that the jacket worn by the pillion rider, namely, Anil Kumar, was slightly lifted from right side upon which suspicion regarding some objectionable article raised. On this, the Investigating Officer after complying with the provisions of Section 50 of the NDPS Act, the police conducted their personal search. Nothing was recovered from accused Dharam Dhoj. However, on conducting the personal search of accused Anil Kumar by the Investigating Officer, a packet concealed inside the jacket worn by him stood recovered. The said packet was found containing charas weighing 985 grams. Thereafter, other codal formalities were completed and the accused were arrested. Report of the FSL was procured. Statements of the witnesses were recorded.

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

4. The accused were charged by the learned trial Court for theirs committing offence punishable under Section 20-61-85 of the NDPS Act. In proof of the prosecution case, the prosecution examined 7 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 trial Court, in which the accused claimed innocence and pleaded false implication. However, they did not lead any defence evidence.

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

6. The State of H.P. stands aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of the 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. On the other hand, the learned defence counsel has with considerable force and vigour, 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 depositions of the official witnesses comprised in their respective examinations-in-chief qua effectuation of recovery of charas, under memo Ex.PW1/E by the Investigating Officer at the site of occurrence from the purported exclusive and conscious possession of accused Anil Kumar, are manifestly shorn off any vice of inter se contradictions vis-a-vis their respective cross-examinations. Also their respective depositions qua effectuation of recovery of charas, under memo Ex.PW1/E by the Investigating Officer at the site of occurrence from the exclusive and conscious possession of accused Anil Kumar are bereft of any vice of any intra se contradictions. Consequently, when the respective depositions of the prosecution witnesses when remained unstained with any vice of any inter se contradictions or any blemish of any intra se contradictions, hence, coax an inference from this Court of their respective versions qua effectuation of recovery of charas under memo Ex.PW1/E by the Investigating Officer at the site of occurrence from the purported exclusive and conscious possession of accused Anil Kumar being truthful as well as credible. Even when the testimonies of the official witnesses qua effectuation of recovery of charas under memo Ex.PW1/E by the Investigating Officer at the site of occurrence from the purported exclusive and conscious possession of accused Anil Kumar, when for reasons aforestated, remain unblemished with any stain of any intra se or inter se contradictions whereupon hence sanctity is imputable to their respective depositions.

10. Be that as it may, even if the official witnesses render a credible version qua the factum of recovery of charas weighing 980 grams under memo Ex.PW1/E by the Investigating Officer at the site of occurrence from the purported exclusive and conscious possession of accused Anil Kumar would not yet constrain this Court to reverse the findings of acquittal recorded by the learned trial Court vis-a-vis the accused. The reason for disimputing sanctity to the testimonies of the official witnesses spurs from the factum of the Investigating Officer proceeding to effectuate recovery of charas from Anil Kumar in sequel to his holding his personal search. The aforesaid effectuation of recovery of the relevant item of contraband weighing 980 grams stood made by the Investigating Officer on the right side of the Jacket adorned by accused Anil Kumar standing searched, wherefrom the relevant item of contraband stood retrieved therefrom while its standing enclosed in paper foil. Obviously since the effectuation of recovery of the aforesaid item of contraband stood effectuated on the Investigating Officer holding a personal search of accused Anil Kumar hence peremptorily entailed upon him to mete strict compliance to the mandatory statutory provisions encapsulated in Section 50 of the NDPS Act whereupon a mandate stood enjoined upon him to preceding his holding the personal search of accused Anil Kumar his under an apposite consent memo purveying to him intimation qua his holding a

vested statutory right qua his initially opting for his personal search standing conducted before a Gazetted Officer or a Magistrate, option whereof in case foregone by the accused also with the accused consenting to his personal search standing held by the Investigating Officer, would both empower him to hold his personal search also would validate the recovery of the relevant item of contraband by the Investigating Officer in sequel to his holding a personal search of accused Anil Kumar. Contrarily, the aforesaid intimation qua the facet aforesaid remained undisclosed besides unrecited by the Investigating Officer in the apposite consent memo comprised in Ex.PW1/A.. In aftermath, the mandate of Section 50 of the NDPS Act stood infracted whereas its mandate enjoining strict compliance thereto hence renders the entire proceedings relating to search besides on its consummation, the effectuation of recovery of the relevant item of contraband from co-accused Anil Kumar to be vitiated.

11. For making an ad nauseam determination whether the Investigating Officer meted reverence to the statutory mandate of Section 50 of the Act, an allusion to consent memo Ex.PW1/A is imperative. An incisive reading thereof makes a display of the Investigating Officer therein not enunciating the trite factum of accused Anil Kumar holding a vested statutory right to primarily besides initially opt for his personal search being held before a Gazetted Officer or a Magistrate. Withholding of the aforesaid intimation by the Investigating Officer in Ex.PW1/A to accused Anil Kumar renders Ex.PW1/A to not hold any legal significance rather renders its recitals to digress from the mandate of Section 50 of the NDPS Act. The sequel of the aforesaid non compliance by the Investigating Officer, non compliance whereof stands constituted in his not drawing Ex.PW1/A within the mandate of Section 50 of the NDPS Act begets an inference of his subjecting the accused to personal search standing both stained besides vitiated whereupon hence a conclusion is foisted of recovery of the relevant item of contraband by the Investigating Officer on his holding a personal search of accused Anil Kumar, holding no statutory sinew. In aftermath, with hence the entire relevant proceedings getting vitiated, leeway is opened for an inference of the accused as aptly concluded by the learned trial Court standing entitled to acquittal. Furthermore, the salutary solemn principle behind the engraftment of the mandatory statutory provisions embedded in Section 50 of the NDPS Act, whereupon the Investigating Officer stands fastened with a statutory duty to purvey in the apposite consent memo to the accused qua theirs holding a primary vested statutory right for their personal search standing initially held by an Executive Magistrate or a Gazetted Officer, is of its sequeling awakenings in the accused qua an indefeasible primary statutory right inhering in them qua theirs opting for their personal search standing initially held by an Executive Magistrate or a Gazetted Officer, right whereof unless stands foregone by the accused would dis-empower the Investigating Officer to hold their personal search. Holding of unequivocal communications in the apposite consent memo qua the apposite statutory right vesting in the accused is also a safe deterrent for them to refrain from opting for their personal search standing held by the Investigating Officer. It is also to inspire confidence in the accused to withhold their consent to their personal search standing carried by the Investigating Officer which may otherwise stand stained with an aura of false implication besides concoction. Since the recitals embodied in Ex.PW1/A flagrantly depart from the solemn salutary principle engrafted in Section 50 of the NDPS Act, the invincible conclusion therefrom is of an uncreditworhty legally frail personal search of the accused standing held by the Investigating Officer. Furthermore, amplifying vigour to the aforesaid inference of the salutary principle underlying Section 50 of the NDPS Act standing blunted by the Investigating Officer is lent by his mis-phrasing the recitals of consent memo Ex.PW1/A. Also, with the Investigating Officer intentionally blunting the play of Section 50 of the NDPS Act, reiteratedly his conducting the personal search of the accused in the guise of a vitiated consent memo cannot hold any formidability.

12. Be that as it may, a perusal of Ex.PW1/A makes a disclosure of the Investigating Officer concerned concerting to obtain thereunder a joint apposite consent of both the accused. The manifestations in Ex.PW1/A of the Investigating Officer thereunder concerting to elicit the joint apposite consent of both the accused qua his proceeding to subject them to personal search renders it to apart from the infirmity afore referred gripping it to also infract the mandate of law

foisting an obligation upon the Investigating Officer to obtain under the apposite consent memo, the individual rather than the collective consent of the accused. In aftermath, with the Investigating Officer under Ex.PW1/A endeavouring to obtain the collective or the joint apposite consent of both the accused also stains it with a legal infirmity. Consequently, a collective contrived consent obtained by the Investigating Officer from the accused qua his holding their personal search cannot stand clothed with any tinge of its holding any statutory validation.

13. Furthermore, PW-7 Inspector Rajeev Attri, who recorded a complaint qua the occurrence, proceeded to also carry out investigations in the matter. Consequently, besides cumulatively even the mandate of law interdicting him to hold investigations in the matter given his recording a complaint stands infracted prodding a sequel of the investigations as conducted by him being partisan whereupon no reliance can be imputed.

14. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of the evidence on record, rather it has aptly appreciated the material available on record.

15. Consequently, there is no merit in the instant appeal and it is accordingly dismissed. In sequel, the judgment impugned before this Court is affirmed and maintained. Records be sent back forthwith.

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

State of H.P. ....Appellant.
Versus
Samshya Devi & others ....Respondents.

Cr. Appeal No. 4251 of 2013.
Reserved on : 12th August, 2016.
Date of Decision: 29th August, 2016.

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased was married to the Accused A- accused started maltreating her and leveled allegations qua her chastity- she was not allowed to attend the function in the house of her in-laws- subsequently, she committed suicide by hanging herself- accused were acquitted by the Trial Court- held, in appeal that specific acts of cruelty were not mentioned by PW-1- testimony of PW-3 is not credible as same suffers from improvement – mere presumption is not sufficient to implicate the accused- prosecution version was not proved beyond reasonable doubt - Trial Court had rightly acquitted the accused- appeal dismissed. (Para-9 to 14)

For the Appellant: Mr. M.A. Khan, Additional A.G.
For the Respondents: Mr. Nareshwar Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed by the State of H.P. against the judgment of the learned Additional Sessions Judge (II), Kangra at Dharamshala, Himachal Pradesh, rendered

on 24.08.2013 in RBT S.C. No.51-K/VII/2010, whereby, it acquitted the accused/respondents for the offences punishable under Sections 498-A, 306 and read with Section 34 of the IPC.

2. The facts relevant to decide the instant case are that on 17.05.2010 at village Lakhamandal, Arti wife of accused Ajay Kumar had committed suicide by hanging herself from rope from ceiling of a room inside the house of the accused. The Police investigation reveals that marriage of accused Ajay Kumar with Arti (since deceased) was solemnized on 7th December, 2009 according to Hindu rites and custom and thereafter all the accused who are of the same family being mother-in-law, father-in-law and husband started maltreating the deceased. The accused also alleged to have given beatings to her as also leveling allegations upon her qua chastity. It has also come in the evidence that on 3rd May, 2010, retirement of father of complainant PW-1 Rakesh Kumar was to be organized in which deceased Arti alongwith her in-laws was invited but she was not allowed to attend the function on the pretext of some domestic problem. When said Arti informed complainant Rakesh Kumar that her in-laws did not allow her to attend function and she also narrated maltreatment and beatings given to her by the accused. It has also come in evidence that due to persistent beatings given to Arti, she had requested the complainant to accompany her to house of accused. It has come in the investigation that a telepehonic information was received at 3.15 p.m. on 17.05.2010 at the residence of complainant whereby he was informed that deceased had committed suicide whereupon complainant Rakesh Kumar along with his wife reached at the house of the accused and found the dead body of Arti hanging with rope tied with wooden beam of the roof of the house. Since the complainant suspected that deceased was harassed and tortured by accused persons as narrated by her prior to her death, he made a statement under Section 154 Cr. P. C. to the police on the basis of which FIR was registered in the Police Station concerned against the accused. The police carried out investigations in the matter, during the course whereof, recorded the statements of the witnesses, prepared the site plans, procured the postmortem report etc.

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

4. The accused were charged by the learned trial Court for theirs committing offences punishable under Sections 498-A, 306 read with Section 34 of the IPC. In proof of the prosecution case, the prosecution examined 13 witnesses. On conclusion of recording of the prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded by the trial Court, in which the accused claimed innocence and pleaded false implication. However, they did not lead any defence evidence.

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

6. The State of H.P. stands aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of the 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. On the other hand, the learned defence counsel has with considerable force and vigour, 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 marriage inter se deceased Arti and accused Ajay Kumar was solemnized on 7.12.2009. Within six months of hers solemnizing marriage with accused Ajay, she committed

suicide by hanging from a rope tethered to a wooden beam of her room as depicted in site plan Ex.PW13/A. Her hanging, as unraveled by postmortem report Ex.PW5/C, sequelled asphyxia leading to her demise. For the prosecution to succeed qua its proving the factum probandum of the accused abetting her suicide, it was enjoined to adduce cogent proof qua both mental and physical cruelty as stood purportedly perpetrated upon her by the accused holding proximity in time vis-a-vis the suicide committed by the deceased also it was enjoined to adduce potent proof holding loud articulations with specificity qua the timing of perpetration of acts of physical besides mental cruelty by the accused upon the deceased.

10. For gauging from the prosecution evidence qua the prosecution succeeding in adducing the aforesaid relevant besides germane evidence for constraining this court to clinch findings of conviction qua the accused, an allusion to the testimony of PW-1 is imperative. PW-1 is the complainant, who recorded Ex.PW1/A, comprising his statement under Section 154, Cr.P.C. For ensuring the trite factum of his testification in Court holding concurrence with Ex.PW1/A hence its standing bereft of any vice of improvements or embellishments vis-a-vis Ex.PW1/A, whereupon his testification would stand on a sacrosanct pedestal of veracity enjoins this Court to allude to his testification occurring in his cross-examination wherein he stood confronted with Ex.PW1/A qua the relevant facet communicated by him in his examination-in-chief for hence given its holding concurrence therewith credibility being fastenable qua the factum communicated therein qua the deceased intimating him qua hers standing belaboured by the accused besides theirs not allowing her to attend the retirement function of his father. Also thereon he stood confronted with Ex.PW1/A for with his testification therein holding concurrence with the apt echoings occurring therein credibility would stand fastened qua the echoings made by him in his examination-in-chief qua the mother of the deceased apprising him about the belabourings perpetrated upon her by the accused and of hers entreating him to accompany her to the house of the accused. However, the endeavour aforesaid for infusing credibility qua the aforesaid echoings made by PW-1 in his examination-in-chief has begotten the sequel of the facets aforesaid not finding existence in Ex.PW1/A rendering hence his testification qua the facets aforesaid to stand stained with a vice of improvements and embellishments vis-a-vis Ex.PW1/A. Consequently, his testification loses its creditworthiness. Further, his omitting to disclose with specificity the timing of perpetration of mental besides physical cruelty by the accused upon the deceased constrains an inference of the gravamen of the offence constituted under Section 306 of the IPC encapsulated in proximity with precision in timing occurring qua the perpetration of mental besides physical cruelty upon the deceased by the accused vis-a-vis the ill-fated occurrence standing grossly unsatiated leading this Court to conclude of the testimony of PW-1 holding no legal worth in concluding qua the prosecution succeeding in proving the charge against the accused.

11. PW-3 makes a testification qua the psyche of the deceased standing encumbered with mental cruelty arising from the factum of the accused suspecting her chastity. However, her testification is bereft of creditworthiness spurrable from the factum of hers making a disclosure in Court qua the Investigating Officer not during the course of his holding investigations, recording her statement under Section 161 of the Cr.P.C. Consequently, it has to be inferred therefrom qua hers not standing joined as a witness by the Investigating Officer wherefrom the ensuing sequel is of hers hence being unamenable for standing cited as a witness besides her testimony garnering no credibility. Even otherwise the ascription by her qua perpetration of mental cruelty upon the deceased by the accused when stands founded upon the accused suspecting her fidelity is bereft of credibility arousable from the factum of PW-1 omitting to underscore the aforesaid factum in Ex.PW1/A. Consequently, with PW-3 contradicting PW-1 qua the facet aforesaid, she is to be concluded to be contriving the factum of the accused encumbering her psyche with mental cruelty arousable from theirs casting aspersions qua her chastity. Likewise with the testimony of PW-7 also standing ingrained with infirmities and discrepancies akin to the one ingraining the testimony of PW-3, warrants this Court to draw an akin inference qua hence his testimony also holding no creditworthiness.

12. However, the learned Additional Advocate General has submitted before this Court qua with evidently the commission of suicide by the deceased occurring within six months of hers contracting marriage with accused Ajay Kumar, renders drawable qua the accused the presumption encapsulated under Section 113-A of the Indian Evidence Act, 1872 (hereinafter referred to as the "Act"), provisions whereof stand extracted hereinafter, qua hence theirs abetting the commission of suicide by the deceased whereupon he contends with force qua findings of conviction being returnable against the accused. Provisions of Section 113 of the Act read as under:

> **"113-A. Presumption as to abetment of suicide by a married woman.-** When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband."

13. The reliance as placed by the learned Additional Advocate General upon the provisions of Section 113-A of the Act for constraining this Court to statutorily presume the trite factum of the accused abetting the commission of suicide by the deceased prominently with her suicide occurring within six months of her marriage standing solemnized with accused Ajay Kumar warrants it standing discountenanced by this Court, given this Court standing stirred to invoke the presumption embedded in Section 113-A of the Act only on the prosecution adducing cogent evidence in satiation of the indispensable condition precedent for its arousal inasmuch as qua the accused subjecting the deceased to both mental besides physical cruelty, conspicuously, when satiation thereof stands statutorily embedded there within to constitute the imperative statutory precursor for warranting its awakening. In aftermath, when only on emanation of forthright proof qua the condition precedent aforesaid would give play to the presumption embedded in Section 113-A of the Act, contrarily with the prosecution abysmally failing to adduce cogent evidence in display of the accused perpetrating physical besides mental cruelty upon the deceased hence renders the condition precedent aforesaid qua the workability of the statutory presumption engrafted in Section 113-A of the Act to stand unsatiated whereupon the provisions of Section 113-A of the Act remain un-attracted vis-a-vis the accused.

14. The summon bonum of the aforesaid discussion is that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of the evidence on record, rather it has aptly appreciated the material available on record.

15. Consequently, there is no merit in the instant appeal and it is accordingly dismissed. In sequel, the judgment impugned before this Court is maintained and affirmed. Records be sent back forthwith.

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

State of H.P. .....Appellant.

Versus

Bhajan Singh .....Respondent.

Cr. Appeal No. 337 of 2010.
Reserved on : 11th August, 2016.
Date of Decision: 29th August, 2016.

Indian Penal Code, 1860- Section 302 read with Section 34- Dead body was found in a room of Dharamshala in a blanket tied with a cloth- subsequently it was identified to be that of M - it was found during investigation that the deceased was murdered by the accused- accused were tried and acquitted by the trial Court- held, in appeal that prosecution case is based upon circumstantial evidence- signatures of accused were not present against his name in the register- an inference can be drawn that name was written by the Investigating Officer for implicating the accused- merely because, accused had not participated in the test identification parade cannot lead to an adverse inference - finger prints lifted from the spot tallied with the finger prints of the accused but the recovery memo was written in different handwriting – possibility of planting them in relevant room cannot be ruled out- photographs were also printed with different papers- recoveries of golden ring, bag and mobile phone at the instance of the accused were not proved- trial Court had appraised the evidence in whole some and harmonious manner- conclusion returned by the trial Court does not suffer from any perversity or absurdity – appeal dismissed.

(Para-9 to 14)

For the Appellant: Mr. P.M. Negi, Dy. A.G.
For the Respondent: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed by the State of H.P. against the judgment of the learned Additional Sessions Judge, Ghumarwin, District Bilaspur, H.P. rendered on 30.12.2009 in Sessions Trial No. 17/7 of 2006, whereby, it acquitted the accused/respondent for an offence punishable under Section 302/34 of the IPC.

2. The facts relevant to decide the instant case are that 17.08.2005 at about 10.30 a.m. M.C. Amar Nath, No. 97 of P.P. Sri Naina Devi Ji, gave information in Police Station Kot Kehloor that as per telephonic message received from press reporter Sh. Rakesh Gautam, a dead body of a person was lying in Devraj Dharamshala. On this information SHO, P.S. Kot Kehloor visited the spot and found that an unidentified dead body was lying wrapped in the blanket in the room of the Dharamshala. On inquiry made from Smt. Anuradha Sharma, owner of the Dharamshala, it was revealed that on 15.8.2005 at about 10.00 a.m., 2 males and 2 females had approached her to hire one room and she accordingly let out one room to them upto 17.8.2005 on payment of Rs. 100/- per day. On 17.8.2005 when Smt. Anuradha went to the said room to check and lock it and when she unlocked the chain and opened the door she found that one person was lying with a blanket on him. When she called him he did not respond. Thereafter, the SHO took photographs of the spot and inspected the dead body and found that the hands of the dead body were tied with a piece of the cloth and were placed on the stomach. The throat of the dead body was also tied tightly with a cloth. After inspection of the spot and the dead body the SHO concluded that the unidentified person aged about 55 years had been murdered. Upon this he scribed a rukka containing the aforesaid information and sent the same to P.S. Kot Kehloor, on the basis of which FIR No.106/2005, under Section 302/34 IPC was registered. During investigating the deceased was identified as Mohan Singh son of Sh. Dalip Singh, resident of Saundha Lehran, District Bhatinda (Punjab). The investigation further revealed that deceased Mohan Singh came to pay obeisance to goddess Sri Naina Devi Ji along with accused Bhajan Singh, Rani Kaur and Ramandeep Kaur on 15.8.2005 and stayed in Devraj Dharamshala in a room which was booked by the accused from 15.8.2005 to 17.8.2005. All of the three accused persons committed the murder of deceased Mohan Singh and left the aforesaid Dharamshala on 16.8.2005.

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

4. The accused was charged by the learned trial Court for his committing an offence punishable under Section 302/34 of the IPC. In proof of the prosecution case, the prosecution examined 22 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the trial Court, in which the accused claimed innocence and pleaded false implication. However, he led defence evidence and tendered in evidence copy of judgment of 6.12.2006 (Ex. D1) rendered by the Juvenile Justice Board, Una.

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

6. The State of H.P. stands aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of the 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. This Court with the able assistance of the learned Deputy Advocate General, has, with studied care and incision, evaluated the entire evidence on record.

8. The prosecution case rests upon circumstantial evidence. For the prosecution to succeed in a case hinged in its entirety upon circumstantial evidence, it stood enjoined to adduce conclusive evidence in display of each of the links in the pack of circumstances standing unflinchingly proven. Contrarily, with any of the links in the chain of circumstances getting dismembered, the prosecution case would suffer the ill-fate of its collapsing.

9. The initial circumstance relied upon by the prosecution to clinch the guilt of the accused /respondent herein stands anvilled upon the testimony of PW-4, Kuldeep Singh, who testified in corroboration to the prosecution version qua the accused/respondent along with Ramandeep Kaur visiting the dhaba of deceased Mohan Singh on 13th day of Savan whereto on the date aforesaid he had also proceeded given his brother serving in the dhaba of aforesaid deceased Mohan Singh. He has also testified in corroboration to the prosecution version of the aforesaid after remaining present at the dhaba of deceased Mohan Singh for 3-4 hours, theirs along with deceased Mohan Singh proceeding to Sri Naina Devi Ji. His testification qua the aforesaid facet occurring in his examination-in-chief has remained unshattered during the ordeal of the rigorous cross-examination to which he stood subjected to. Consequently, the prosecution has succeeded in proving the initial link in the chain of circumstances constituted in the factum of PW-4 noticing at the dhaba of deceased Mohan Singh, the accused/respondent herein along with Ramandeep Kaur also its on the anvil of the testimony of PW-4 proving the further factum of theirs after remaining for 3 to 4 hours at the dhaba of deceased Mohan Singh, theirs along with deceased Mohan Singh proceeding to Sri Naina Devi Ji. However, proof of the aforesaid link would not be sufficient to record findings of conviction vis-a-vis the accused/respondent herein unless the further links in the chain of circumstances also stand cogently proven.

10. The demise of Mohan Singh occurred in Devraj Dharamshala owned by PW-1. Obviously vigorous proof was enjoined to be adduced by the prosecution in portrayal of on the ill-fated day the accused along with the deceased occupying Devraj Dharamshala. In proof of the aforesaid factum, the prosecution has relied upon the testimony of PW-1 Smt. Anuradha Sharma. She in her testification makes underscorings of on 15.8.2005 four persons including the accused/respondent along with Rani Kaur, along with the deceased and one minor girl visiting her Sarai wheretowhom she provided a room in her Sarai on payment of rent of Rs.100/-. She deposes qua an apposite entry qua theirs occupying a room in the Sarai owned by her standing recorded at serial No.26 of the apposite register comprised in Ex.P-1. She has also made communications therein qua hers noticing the accused to be staying in the Sarai. She proceeds to depose of on 16.8.2005 accused Bhajan Singh and Rani Kaur after apprising her qua theirs

intending to visit Baba Balak Nath, theirs departing from the Sarai. On 17.8.2005, she testifies of hers noticing the dead body of the deceased lying in a room of the Sarai owned by her. She was subjected to the ordeal of a rigorous cross-examination, wherein, she made a disclosure of the Sarai owned by her holding eight rooms. She has also admitted the suggestion put to her by the learned defence counsel qua the remaining rooms of her Sarai having one door and one window. Furthermore, she testified qua the Sarai being a three storeyed building and of the accused occupying its ground floor wherein two rooms exist also she has disclosed in her cross-examination qua hers taken to obtain in the apposite register the signatures of the pilgrims, who occupied her Sarai. However, she has disclosed that at the time of arrival of the accused at the Sarai no entry was recorded in the register. Nonetheless, she deposes of the relevant entry in the relevant register standing recorded by her son Shashank. Also she deposes of on the relevant day no other pilgrim(s) occupying any other room in her Sarai. She pronounces in her deposition qua the non existence of the signatures of the accused in the apposite register, Ex.P-1.

11. PW-3 Sh. Shashank Kumar, the son of PW-1 makes a communication in his deposition qua his in the apposite register comprised in Ex.P-1 under the instructions of his mother recording an entry therein qua the accused occupying a room in their Sarai. He alike PW-1 underscores in his deposition qua the non existence of the signatures of the accused in the apposite register comprised in Ex.P-1. However, he contradicts PW-1 qua the factum deposed by the latter of none other than the accused along with the deceased besides others accompanying them occupying rooms in their Sarai rather he deposes of on the relevant day four persons besides the aforesaid also staying in their Sarai. Also he concedes to the factum of the signatures of the aforesaid standing obtained on Ex. P-1.

12. For the testimonies of PW-1 and PW-3 to acquire sanctity in personification of the trite factum of the accused on the relevant day along with the deceased occupying their Sarai, their respective testimonies on their mutual incisive scanning stand enjoined to be bereft of any intra se contradictions besides they imperatively stand enjoined to be bereft of any ring of unnaturalness whereupon an inference qua their testifications qua the facet aforesaid standing not stained with a vice of inveracity would stand aroused. PW-1 and PW-3 both depose qua the non existence of the signatures of the accused against the relevant entry recording his name in the apposite register comprised in Ex.P-1,. The non existence of the signatures of the accused against his name existing in Ex.P-1 would be both insignificant also would not belittle the factum of his on the relevant day along with the deceased staying in the Sarai owned by PW-1 and PW-3, factum whereof stands borne by his name standing recorded in Ex.P-1 unless forthright evidence emerged qua Ex.P-1 not also holding the signatures of all the other occupants who besides the accused along with the deceased and others accompanying them, also obviously on the relevant day stood lodged in the Sarai owned by PW-1 and PW-3. Now when PW-3 concedes to the factum qua four persons besides the deceased along with accused also on the relevant day standing lodged in their Sarai, also his further conceding qua theirs appending their respective signatures against their names recorded in Ex.P-1 does arouse suspicion qua the absence of the signatures of the accused against his name recorded in Ex. P-1. Conspicuously, PW-1 testifies of hers taken to obtain signatures of all persons who occupied her Sarai. Consequently, with momentous skepticism standing generated qua the absence of the signatures of the accused/respondent against his name occurring in Ex.P-1 dispels the factum of his on the relevant day occupying the Sarai owned by PW-1 and PW-3. Furthermore, even if the accused/respondent had not appended his signatures against the relevant entry comprised in Ex. P-1 wherein his name stands recorded yet with cogent proof emanating embedded in the report of the Handwriting Expert qua the name of the accused existing in Ex.P-1 standing scribed by him would garner vigour to the assay of the prosecution qua the accused along with the deceased on the relevant day occupying the Sarai. However, the aforesaid evidence qua the accused scribing his name in Ex.P-1 is amiss. Consequently, an apt inference which stands generated qua the recording of the name of the accused in the apposite register comprised in Ex. P-1 is of it standing scribed by a person other than the accused also an inference stands aroused qua its occurrence therein germinating from a sheer contrivance employed by the Investigating Officer for falsely implicating the accused. Even

otherwise when PW-3 contradicts PW-1 qua none other than the accused purportedly along with the deceased and others accompanying them occupying room(s) in their Sarai, contradiction whereof stands underscored by his deposing of four persons other than the aforesaid on the relevant day occupying their Sarai, renders the deposition of PW-1 to stand ingrained with a pervasive vice of intra se contradictions vis-a-vis the testimony of PW-3 whereupon the vigour of the prosecution case qua the factum of the accused/respondent along with the deceased on the relevant day occupying the Dharamshala/Sarai gets frail besides emasculated. In sequel, the pivotal link in personification of the accused along with the deceased staying on the relevant day in Devraj Dharamshala stands not cogently proven. In aftermath, with the aforesaid pivotal link in the chain of circumstances standing hence severed, the vigour of the deposition of PW-4 also holds no strength.

13. Be that as it may, the prosecution had relied upon the circumstance of the accused refusing to participate in the test identification parade whereupon it espouses of an adverse inference therefrom standing generated vis-a-vis the accused. However, the aforesaid espousal made by the prosecution is unworthy of credence given the accused explicating his refusal to participate in the test identification parade by projecting qua his standing already shown by the police to the relevant witnesses. Since, the explication aforesaid purveyed by the accused for his refusal to participate in the test identification parade remains unrebutted, the inevitable sequel therefrom is of no adverse inference standing enjoined to be drawn vis-a-vis the accused qua his refusal to participate in the test identification parade also the identification, if any, in Court of the accused by PW-1 and PW-3 also hence holds no sinew prominently when their respective versions qua the ill-fated occurrence holding ascription of inculpation vis-a-vis the accused stand ingrained with a pervasive vice of inveracity. Despite the aforesaid frailties ingraining the testimonies of PW-1 and PW-3 hence rendering their testifications qua the facet aforesaid of the accused along with the deceased on the relevant day visiting their Sarai being bereft of any credence, the prosecution has depended upon the testimony of PW-5 Sh. Madan Lal to make a vigorous concert for sustaining the factum of the accused along with the deceased preceding the occurrence standing last seen in the vicinity of the Sarai owned by PW-1 and PW-3 for hence empowering it to thereupon erect a concomitant link for clinching the factum probandum of his committing the offence alleged.

14. A close scrutiny of the testimony of PW-5 unveils the factum of his identifying the accused to be the person, who along with other three visited his shop whereupon they solicited his help qua availability of rooms on rent for facilitating their stay, leading him to make an inquiry from PW-1, who stands testified by him to stand sighted to occupy her veranda adjoining his shop, inquiry whereof made by PW-5 from PW-1 qua the facet aforesaid evinced a reply in the affirmative from her, whereafter he sent them to PW-1. He has also identified the girl and the man depicted in Mark-A and Mark- B to be respectively the accused and the deceased respectively. Primarily veracity to his deposition qua a request standing made upon him by the accused qua the availability of rooms on rent for their stay at Sri Naina Devi Ji whereupon he made an inquiry from PW-1, who stands testified by him to be sightable from his shop, enjoins to be dwelt upon. In dwelling upon the veracity of the aforesaid factum, an allusion to Ex.PW21/F is imperative wherefrom an inference is garnerable of the house of PW-1 standing not located in the vicinity of the shop of PW-5. Given the non occurrence of the shop of PW-5 in the vicinity of the house of PW-1 mobilizes an apt derivative of PW-5 making a false testification qua his on an entreaty made upon him by the accused qua availability of rooms on rent at Sri Naina Devi Ji for his along with others accompanying him staying there, his making an inquiry from PW-1, who stood sighted by him from his shop, also leads to a further sequeling inference of his concocting the factum of the accused along with the deceased visiting his shop on 15.8.2005 also denudes the vigour of his testimony of his last sighting them together. Furthermore, also his identification in Court of the accused to be the same person who stood sighted byhim in the company of the deceased in proximity to the site of occurrence holds no vigour, more so, when preceding the holding of the test identification parade the accused stood evidently for reasons aforestated shown to him besides to other prosecution witnesses by the police, rendering both inefficacious

besides nugatory any endeavour of the prosecution to constrain the accused to participate in the relevant test identification parade also rendering inconsequential his refusal to participate therein, rather also conspicuously, for reiteration any identification in Court by accused PW-5 is unworthy of any creditworthiness.

15. Jug, Ex. P-12 and glasses Ex.P-13 and P-14 stood recovered under memo Ex.PW2/C from the shelf of the room of the Sarai wherein the body of the deceased was found lying, finger prints existing thereon stood lifted by the Investigating Officer whereupon they stood transmitted to the Finger Print Expert who on tallying the finger prints borne on Ex.P-13 and P-14 with the finger prints of the accused opined qua occurrence of intra se compatibility. On anvil aforesaid the prosecution makes a fervent endeavour qua findings of conviction being returned against the accused. However, the factum of recovery of Ex.P-13 and P-14 under memo Ex.PW2/C from the shelf of the room of the Sarai wherefrom the dead body of the deceased was recovered is vulnerable to skepticism emanating from the factum of rukka, Ex.PW21/A which stood scribed by the Investigating Officer after his verifying the spot, omitting to make a disclosure therein qua their existence therein also inquest report, Ex.PW21/B being reticent qua their existence therein. Both rukka, Ex.PW21/A and inquest report, Ex.PW21/B stood prepared on 17.08.2005 by the Investigating Officer. Both the aforesaid exhibits stand scribed in similar handwriting also both stands scribed on papers holding a similar colour yet with Ex.PW2/C whereunder jug, Ex.P-12 and glasses, Ex.P13 and P-14 stood recovered standing scribed in a handwriting distinct from the handwriting occurring on Ex.PW21/A and Ex.PW21/B, stimulates an aggravated impetus to a formidable conclusion qua preparation of Ex.PW2/C standing imbued with a vice of concoction also with a vice of an ingenuous contrivance employed by the Investigating Officer. Also the omission of the Investigating Officer to record in both Ex.PW21/A and Ex.PW21/B, the presence of Ex.P12, Ex.P13 and Ex.P-14 in the relevant room holds an effect of its opening leeway to the Investigating Officer to subsequently plant them in the relevant room, consequently, it appears of his engineering the occurrence of Ex.P-12, P-13 and P-14 in the relevant room. Necessarily, hence their engineered occurrence in the relevant room negates any imputation of credibility qua the prima dona factum of their occurrence thereat holding contemporaneity with the visit to the relevant room of the Investigating Officer. For lack of contemporaneity qua their existence thereat vis-a-vis the visit thereat of the Investigating Officer amplifyingly begets a deduction in coagulation with the inference of their existence thereat standing stained with a vice of invention besides concoction of hence their occurrence thereat not holding any creditworthiness for ascribing any inculpatory role to the accused qua his occupying the relevant room along with the deceased. Though photographs Ex. PA to Pk pertain to the relevant spot whereamongst whom Ex. PF pertains to the location on the relevant spot of Ex. P-13 and P-14. However, the depictions in Ex.PF of Ex.P-13 and P-14 is insufficient to sway this Court of the Investigating Officer succeeding to countervail the effect of the aforesaid inferences prominently when Ex.PF stands printed on a paper nomenclatured as “Professional Colour Paper” whereas other photographs clicked by the Investigating Officer stand printed on a distinct paper nomenclatured as “ Super Cold Paper” hence leaving latitude for harbouring a deduction of the Investigating Officer in consonance with Ex.PW2/C besides to corroborate the recitals embodied in Ex.PW2/C his photographing the existence at the relevant spot of Ex.P-13 and P-14 merely as an engineered ploy or a sheer contrivance for falsely implicating the accused. Since, a pervasive aura of skepticism seeps qua the existence in the relevant room of Ex. P-13 and P-14 also this Court erecting an inference of their existence thereat standing ingenuously contrived by the Investigating Officer hence fostering an evident sequel qua the opinion of the Finger Print Expert in sequel to his tallying the finger prints existing on Ex.P-13 and P-14 with the finger prints of the accused qua both holding intra se compatibility, also holding no clout for thereupon rendering findings of conviction against the accused. Contrarily, it is apt to conclude of the Investigating Officer during the course of his holding the accused to custodial interrogation his obtaining on Ex.P-13 and P-14 the finger prints of the accused necessarily hence with the Investigating Officer under coercion obtaining on Ex.P-13 and P-14 the finger prints of the accused dispels the factum of their existence thereon being a sequel to the accused voluntarily holding them also benumbs the conclusion of his along with the deceased occupying the relevant room.

16. The last circumstance pressed into service by the prosecution for clinching the guilt of the accused is the recovery of golden ring, Ex.P-17, Bag Ex.P16 and mobile phone, Ex.P15. However, the recovery of the items aforesaid at the instance of the relevant accused respectively under recovery memos, Ex.PW 8/A, Ex.PW7/B and Ex.PW7/A, items whereof purportedly belong to the deceased would not connect the accused in the commission of the alleged offence, given non adduction of emphatic proof qua the articles aforesaid belonging to the deceased. More so, when PW-8 who identified the aforesaid items to be the property of the deceased has been unable to communicate qua his ever sighting the deceased adorning them also has omitted to vociferously articulate qua the source of knowledge qua the factum of theirs standing owned by the deceased. In aftermath, all the links in the chain of circumstances erected by the prosecution against the accused get severed besides dismembered.

17. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of the evidence on record, rather it has aptly appreciated the material available on record.

18. Consequently, there is no merit in the instant appeal and it is accordingly dismissed. In sequel, the judgment impugned before this Court is maintained and affirmed. Records be sent back forthwith.

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

Cr. Revision No.:190, 191, 192 of 2015 &
Cr.MMO No.211 of 2015.
Reserved on: 10/08/2016.
Date of Decision: 29.08.2016.

Cr. Revision No. 190 of 2015.
Sunil Kumar ...Revisionist.
Versus
State of Himachal Pradesh ...Respondent.
Cr. Revision No. 191 of 2015.
Baldev Singh ...Revisionist.
Versus
State of Himachal Pradesh ...Respondent.
Cr. Revision No. 192 of 2015.
Sansar Chand ...Revisionist.
Versus
State of Himachal Pradesh ...Respondent.
CRMMO No. 211 of 2015.
Rajesh Kumar and another ...Revisionists.
Versus
State of Himachal Pradesh ...Respondent.

Code of Criminal Procedure, 1973- Section 319- Principal offenders were charge sheeted for the commission of offences punishable under Sections 302, 341, 323 read with Section 34 IPC- application for impleading the petitioner was filed, which was allowed - held, that prosecution witnesses had stated the name of the petitioner- the Court is not to see whether statements are sufficient to record the conviction as only a prima facie inquiry has to be made at the stage of impleadment - trial Court had rightly exercised the discretion - petition dismissed. (Para-6 to 8)

For the petitioners: Mr.Rajiv Rai, Advocate, for petitioners in Cr. R. No. 190, 191 and 192 of 2015.
Mr. Suneet Goel, Advocate, for petitioners No. Cr.MMO No. 211 of 2015.
For the respondent: Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The petitioner(s) stand(s) aggrieved by the impugned order(s) pronounced by the learned Additional Sessions Judge (II), Mandi, District Mandi, Himachal Pradesh, orders whereof occurred on an application preferred therebefore by the learned Public Prosecutor under Section 319 of the Code of Criminal Procedure whereby it allowed the application aforesaid. Consequently he/they by instituting the instant petition(s) herebefore concert to assail it.

2. The principal offenders stood charged sheeted by the learned trial Court for theirs committing offences constituted under Sections 302, 341, 323 read with Section 34 IPC. The counsel for the petitioner contends of the discretion vested in the learned trial Court under Section 319 Cr.P.C. standing capriciously besides arbitrarily exercised by him arising from his proceeding to impute sanctity qua the relevant factum embodied in the incriminatory evidentiary material purportedly pronouncing upon their inculpation in the offences alleged, though it warranted ouster, it standing ridden with entrenched taints of embellishment besides improvements vis-à-vis the relevant previous statements recorded in writing of the witnesses concerned. The learned counsel appearing for the revisionist has placed reliance upon a judgement reported in Ramdhan Mali and another Vs. State of Rajasthan and another (*2014) 3 SCC 92* encapsulating therewithin the principles enjoined to borne in mind by the Court concerned while pronouncing a verdict upon an application constituted therebefore under Section 319 Cr.P.C. The trite expostulation of law encompassed therein is qua the inculpatory evidence, as upsurges against the accused who initially stood not arrayed as an accused alongwith the principal accused, holding a degree of vigourous tenacity, vigour whereof if remains unrebutted would sequel findings of conviction standing returned against the accused sought to be summoned as an accused. He contends of only on evident display of reverence standing meted thereto by the Court concerned would imbue validation to its apposite order for subsequent impleadment of accused/petitioner alongwith the initially arrayed principal accused, contrarily when reverence thereto stands unmeted by the Court concerned, its rendition would stand visited with a vice of invalidation. However, the aforesaid rendition of the Hon'ble Apex Court does not hold out any straitjacket formula for guiding courts of law qua theirs therewithin exercising the discretion conferred upon them under Section 319 Cr.P.C. Consequently, on anvil thereof alone a conclusion cannot be rested by this Court of the impugned order suffering invalidation. However, the trite test for imputing sanctity qua emanation of incriminatory evidence subsequent to the principal accused standing charge-sheeted by the Court concerned emanation whereof vis-à-vis persons other than the principal accused hence warrants theirs standing joined as accused with the principal accused, is of the relevant incriminatory evidence prima facie on its objective discernment holding potent portrayals qua the penal inculpability of a person not therebefore initially arrayed as an accused alongwith the principal accused whereupon his standing joined as an accused alongwith principal accused is warranted. Also the relevant incriminatory evidence qua them if remaining unrebutted would constrain the Court concerned to record findings of conviction against them, would lend amplifying incriminatory vigour to it. Furthermore, even if the rendition of the Hon'ble Apex Court does not hold any straitjacket formula qua the facet aforesaid yet the discretion as vested in the learned trial Court under Section 319 Cr.P.C. enjoins its standing exercised on its drawing an objective satisfaction from the relevant evidentiary material qua its pronouncing with tenacity qua the purported penal culpability of the persons/person sought to be arrayed as an accused alongwith the principal accused besides the relevant evidentiary material occurring therebefore standing bereft of any stain of improvement

besides embellishments vis-à-vis the previous statements of the relevant prosecution witnesses whereupon no findings of conviction are warranted to be returned against a person concerted by the Public Prosecutor concerned to be arrayed alongwith the principal accused concerned to face trial.

3. Bearing in mind the aforesaid principles it is the solemn duty of this Court to gauge from the depositions of the prosecution witnesses, the trite factum of the relevant echoings occurring therein qua the ascriptions of penal inculpability vis-à-vis the petitioners herein holding concurrence with the aforesaid principle also to conclude therefrom of in the event of the aforesaid principles standing irrevered by the learned Court concerned, its ordering for summoning the petitioner herein as co-accused for facilitating his facing trial alongwith the principal accused, warranting interference, its obviously standing rendered in gross departure by it of the legal principles governing the exercise of jurisdiction by it on an application moved therebefore under Section 319 Cr.P.C. whereupon a concomitant inference of its standing ridden with a vice of its standing rendered in a post haste manner also its suffering from a vice of thorough non application of mind would stand garnered. The ascription of an inculpatory role vis-à-vis Sunil stands deposed by Virender, Kulbhushan and Surinder. The name of Sunil does not occur in the statement of the informant recorded under Section 154 Cr.P.C. PW-8 in his previous statement recorded in writing, statement whereof stood recorded on two days elapsing since the lodging of the F.I.R, makes underlinings therein of one Bhopal unravelling to him qua his receiving a telephonic intimation from one Surinder qua the latter holding a scuffle with Kalyan, Anil and Onkar during course whereof Sunil stood struck a knife blow on his back by one Kulbhushan. In consonance therewith he made a statement under Section 164 Cr.P.C. However, when in departure therefrom hence in gross improvement besides embellishment thereof PW-8 voices of Sunil snatching an axe from Kalyan Singh renders the aforesaid ascription by him of an inculpatory role vis-à-vis Sunil to be wanting in legal vigour. Consequently, the learned trial Court in relying upon the deposition of PW Virender in concluding qua its constituting an incriminatory evidence vis-à-vis Sunil appears to infract the expostulation of law cast in the rendition of the Hon'ble Apex Court qua its imperatively making an objective assessment of the degree of vigour of the inculpatory evidence adduced therebefore whereupon it would hold solemnity besides sanctity, specifically if it remains unrebutted, for recording of findings of conviction against the petitioner Sunil. Also the rendition of the learned trial Court permitting the arraying of Sunil as a co-accused alongwith the principal accused for facilitating his facing trial alongwith the latter hence suffers from an apparent vice of non -application of mind rather its standing prima facie ingrained with a taint of it standing rendered in a post haste besides mechanical manner wherefrom it prima facie formed erroneous conclusions qua the inculpatory role fastenable vis-à-vis petitioner Sunil. Likewise, the testimony of Surinder suffers from an alike infirmity. Consequently, reliance thereupon by the learned trial Court suffers from an akin infirmity. The conclusion aforesaid constrains this Court to tentatively conclude qua the order rendered by the learned trial Court qua arraying of the petitioner as co-accused alongwith principal accused may be warrant its being quashed and set-aside. Be that as it may with Surinder who had purveyed an information to Bhopal, the latter whereof conveyed the information qua the occurrence to informant Virender significantly hence when PW Surinder an ocular witness to the occurrence in his statement recorded under Section 161 Cr.P.C. ascribes an incriminatory role to Sunil qua his holding him by his neck besides subjecting him to beatings would yet render belittled the afore-referred infirmities gripping the respective testimonies of PW Varinder and Kulbhushan. Contrarily his deposing in tandem therewith gives succor to his testification wherein he makes ascriptions qua the incriminatory role of petitioner Sunil. Moreover when hence it is bereft of any vice of it constituting an improvement besides embellishment vis-à-vis his previous statement recorded in writing, as a corollary when the ocular testification of PW Surinder qua the occurrence embodies therein prima facie a credible ocular account qua it, it hence constitutes the prime incriminatory evidence whereupon a relevant conclusion is warranted qua hence the amenability of accused/petitioner Sunil facing trial alongwith the principal accused for the offences constituted in the F.I.R. preponderantly when the factum of its holding a prima facie virtue of truth emanates on its objective

discernment. Also hence the impugned rendition of the learned trial Court vis-à-vis the petitioner Sunil is not bereft of its standing rendered in a summary manner without application of mind to the potency of the relevant evidentiary material which prima facie warrants the arraying of the petitioner Sunil as an accused alongwith the principal accused also with PW Surinder alone eye witnessing the occurrence whereas both PW Virender and Kulbhushan not witnessing it rather theirs rendering a hearsay account qua it renders their respective deposition being may be discardable even when they stand visited with any vice of any improvement or embellishment vis-à-vis their previous statements recorded in writing sequelly also with theirs respective testifications being both irrelevant to rest the relevant pivotal fact, factum whereof prima facie stands rested by the relevant ocular account qua his inculpatory role rendered by Surinder besides when the latter's ocular testification alone constitutes the relevant evidence for inculpating besides arraying him as an accused alongwith the principal accused also hence alone holds sway for the learned trial Court to on anvil thereof rest its relevant findings qua the relevant accused, imperatively warrants deference standing meted thereto.

4. Hereinafter it is imperative to allude to the tenacity of upsurgings of an incriminatory role vis-à-vis Baldev Singh subsequent to the principal accused standing subjected to face trial for the charge as stood put to them by the learned trial Court also it is an utmost obligation of this Court to determine whether the relevant incriminatory evidentiary material vis-à-vis Baldev Singh satiating the expostulation of law aforesaid. PW Surinder an ocular witness to the occurrence who purveyed an information qua it to the informant PW-Virender hence is the solitary PW warranting discernment of his testification, for constraining this Court to conclude qua his testification wherein he ascribes an incriminatory role vis-à-vis Baldev Singh prima facie holding legal worth. He in his testification in concurrence with his previous statement recorded in writing has ascribed to Baldev Singh an incriminatory role qua his belabouring him. His deposing in tandem with his previous statement recorded in writing renders the taint of improvement if any vis.a.vis his previous statement recorded in writing hence gripping the testification of PW Virender the informant to stand effaced. Moreso when the informant made a disclosure qua the occurrence on intimation standing purveyed to him by Surinder, an ocular witness thereto who occularly testifies in concurrence with his previous statement recorded in writing rendering hence his testimony to be construable to be bereft of any taint. Also reliance thereupon by the learned trial Court for ordering the summoning of Baldev is apt.

5. Also even when the testification of PW Virender the informant holds any taints of his improving upon his previous statement recorded in writing its effect stands effaced, on account of his making a disclosure qua the occurrence on intimation standing purveyed to him by Surender an ocular witness thereto, the latter whereof rather prima facie at this stage has rendered a credible ocular account qua it bereft of any taint. In sequel, when the relevant test encapsulated in the rendition of the Hon'ble Apex Court (supra) qua the relevant incriminatory evidence qua the petitioners herein holding on their objective discernment a degree of vigour when for reasons aforestated stands satiated. In aftermath, the order of the learned trial Court summoning them as accused does not suffer from any infirmity.

6. Likewise, the inculpation of Sansar Chand by PW- Virender and PW Kulbhushan when may suffer from taints of improvements or embellishment vis-à-vis their respective previous statements recorded in writing nonetheless effect thereof stands subsumed by PW-Surinder an ocular witness to the ill-fated occurrence testifying in tandem with his previous statement recorded in writing.

7. The ascription of an inculpatory role qua Rajesh and Satish Kumar occurs in the statement recorded under Section 154 Cr.P.C. wherein the informant narrates of petitioner accused Rajesh in association with Satish assaulting her family. However, in her statement recorded under Section 164 Cr.P.C. she exculpates the penal inculpation in the occurrence of accused Rajesh and Satish. She in her testification on oath in departure from her previous statement recorded in writing ascribes an incriminatory role to them comprised in theirs alongwith Surinder, Kulbushan and Bhopal exchanging hot words with Kalyan Singh and of

accused Surrender holding him from his collar. Even if PW Shreshta Devi has by improving also by embellishing vis-à-vis her previous statement recorded in writing rendered her testimony to be tainted hence standing imbued with a taint of uncreditworthiness. However, the deposition of PW Kalyan Singh warrants its not standing slighted prominently when therein he makes an incriminatory ascription vis-à-vis accused Rajesh and Satish qua theirs alongwith other co-accused holding and pushing him towards the house of one Punjab Singh. The prosecution version qua the occurrence for it to attain a virtue of credibility is enjoined to be bereft of any inter se contradictions, contradictions whereof occur in the testimonies of PW Shreshta Devi. However, with PW Kalyan Singh while testifying qua the inculpation of accused Rajesh Kumar has deposed in tandem with his previous statement recorded in writing renders the rendition by him of an ocular account qua the occurrence wherein he makes echoings of penally inculpable participation of petitioner Rajesh in the alleged occurrence, to be not discardable also the factum of his rendering a deposition qua the occurrence with rife intra se contradictions vis-à-vis testifications qua the occurrence rendered by Shreshta Devi also with the latters testification standing ingrained with an inherent vice of improvement besides embellishment vis.a.vis Rajesh and Satish Kumar would not deter this Court to not interfere with the impugned rendition of the learned trial Court as the incriminatory evidence aforesaid is open to rebuttal by the learned counsel for the aforesaid or by the Public Prosecutor by his subjecting PWs aforesaid to cross-examination on completion whereof alone it would be appropriate to conclude of their respective depositions standing unrebutted whereupon alone it would be apt to conclude of any renditions by PWs aforesaid qua the occurrence wanting or not wanting in legal vigour for hence the learned trial Court founding or not founding thereupon findings of conviction vis-à-vis Rajesh and Satish. However, when the stage aforesaid has not arrived it would be inexpedient for this Court to make a conclusion aforesaid also any making of the conclusion aforesaid by this Court would tantamount to its embarking upon a deep fishing inquiry qua the veracity of their respective depositions qua the occurrence, concert whereof at this stage is not warranted. Also when it is for the learned trial Court to respectively weigh the probative worth of the respective testifications of Kalyan Singh and Shreshta Devi, hence in this Court validating or invalidating herebefore the sanctity of their respective testimonies would tantamount to its arrogating to itself the primary duty of the learned trial Court also would benumb the effort if any of the learned Public Prosecutor concerned to from Shreshta Devi unearth revelations qua the occurrence in support of the prosecution case.

8. Accordingly, all the petitions are dismissed. However, it is made clear that any observation made hereinabove 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 hereinabove.

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

Deepak Kumar ....Petitioner.

Versus

State of Himachal Pradesh. ...Respondent.

Cr. MP (M) No. 1007 of 2016.
Decided on: 30th August, 2016.

Code of Criminal Procedure, 1973- Section 439- Accused was found in possession of 18 bottles of Corex, each containing 100 ml and one box containing 144 Capsules of Spasmo Proxyvon plus-held, that petitioner was previously involved in the similar kind of offence- he will temper with the prosecution evidence, therefore, discretion, to admit the petitioner on bail cannot be exercised-petition dismissed. (Para-4)

For the petitioner : Mr. Ajay Sharma, Advocate.
For the respondent : Mr. Virender Kumar Verma, Addl. Advocate General with Mr. Pushpinder Singh Jaswal, Dy. Advocate General.
SI Biri Singh, P.S. Jawali, District Kangra, H.P.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge (oral).

The present bail application is maintained by the petitioner under Section 439 of the Code of Criminal Procedure for releasing him on bail in case FIR No.100 of 2016, dated 20.06.2016 under Section 21 of Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act'), registered at Police Station, Jawali, District Kangra, H.P. As per the prosecution story, on 20.06.2016 around 7.20 PM, ASI Rattan Chand alongwith other police officials was on patrolling duty at place Reedi. He received secret information that accused Deepak Kumar is indulged in the trade of selling Psychotropic Substances, for which he is about to come from his home towards place Kandor. He sent this information to Police Station for registration of the case and also complied the provision of Section 42 (2) of the Act. When accused was seen coming with the bag, Police searched his bag from which 18 bottles of Corex, each containing 100 ml and one box containing 144 Capsules of Spasmo Proxyvon plus were recovered.

2. Learned counsel for the petitioner has argued that no purpose will be served by keeping the petitioner behind the bars.

3. On the other hand, learned Additional Advocate General has argued that the petitioner has committed heinous crime, spoiling the youth of the Country and the recovery has been affected from him. He has further argued that the petitioner was involved in selling the huge quantity of Narcotics Substance and the manner in which the crime has been committed makes it a fit case where the judicial discretion is not required to be exercised in favour of the petitioner.

4. Taking into consideration the above facts, it is clear that the petitioner was previously involved in the similar kind of offence. Though, the petitioner is the resident of the place, but there is reasonable apprehension that he shall tamper with the prosecution evidence. At this stage, as the petitioner is involved in the second case, the judicial discretion, to admit the petitioner on bail is not required to be exercised. Accordingly, the petition, being devoid of merits, is dismissed.

5. In view of the above, the petition stands disposed of.

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

M/s V.S. Saini Government Contractor .....Petitioner.
Versus
State of H.P. through Principal Secretary, HP PWD and another. .....Respondents.

Arbitration Case No. 71 of 2015
Date of decision: 30th August, 2016

Arbitration and Concilation Act, 1993- Section 8- Petitioner was awarded work of construction of road under Pardhan Mantri Gram Sarak Yojna- work was to be completed in 12 months- petitioner failed to start and complete the work in time- certain concerns were raised by the petitioner, which were not redressed on which petitioner rescinded the work- petitioner filed a petition for appointment of an Arbitrator- held, that clause 24 of the agreement provides for

dispute redressal mechanism by way of amicable settlement- however, respondent has failed to resort to the mechanism – further, claim of the petitioner was rejected in the meeting- hence, there is no impediment in appointment of arbitrator - petition allowed and Arbitrator appointed to adjudicate the dispute raised by the petitioner as well as counter-claim preferred by the respondent. (Para-5 to 8)

For the petitioner: Mr. Sumeet Raj Sharma, Advocate.
For the respondents: Mr. D.S. Nainta and Mr. Virender Verma Addl. A.Gs.

The following judgment of the Court was delivered:

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

The petitioner is a Government Contractor. He was awarded the work namely construction of road from Jhroli to Jara Km 0/0 to 3/0 (SH: Cleaning grass, Construction of retaining wall, Breast wall, cross drainage work, Side drain, parapets, road sign boards and metalling & Tarring including construction of one Bridge as well as maintenance of the said road for a period of five years) under the Prime Minister Gram Sarak Yojna (PMGSY) Phase-9 at an estimated cost of Rs.1,20,38,241/-. The work was to be commenced after 15th day of issuance of letter of award. The letter of award was issued on 24.02.2011. The work was agreed to be completed within a period of 12 months. The agreement, Annexure P-1 came to be executed between the petitioner-Contractor and the respondent-department in this regard. It appears that for want of site clearance and the hindrances attributed to the respondent-department, the petitioner-Contractor failed to start the work well within the stipulated period. The work though commenced and even was executed partly, however, during the course of further execution of the work, certain disputes were raised by the petitioner-Contractor before the respondent-department. The Chief Engineer concerned vide Annexure P-3 to the supplementary affidavit filed on 25.04.2016 was apprised by the petitioner-Contractor about the difficulties he faced during the course of execution of the work and according to him, no one was there to hear his hue and cry, therefore, left with no other option except to rescind the work. He also made a request to the Chief Engineer concerned to convene work management meeting in his office so that the matter could be inquired into as to who is responsible in the department for causing the inordinate delay occurred on the part of the department. The letter Annexure P-3 was followed by another letter Annexure P-4 dated 24.04.2015, highlighting therein his claims against the respondent-department by the petitioner-Contractor. No action was taken by the respondent-department on the letters, AnnexureP-3 and P-4. This has led in issuance of a legal notice, Annexure P-2 on 08.07.2015 by the petitioner-Contractor to the respondent-department through its Chief Engineer, H.P.P.W.D, Kangra Zone, Dharamshala. The notice, Annexure P-2 was received by the respondent-department and in reply thereto i.e. Annexure R-3 dated 14.08.2015 to its counter-affidavit filed on 30th May, 2016, the petitioner-Contractor was advised to resort to Disputes Redressal Mechanism provided under Clause 24 of the agreement, Annexure P-1. The petitioner-Contractor instead of resorting to Clause 24 of the contract agreement has, however, filed this petition for appointment of Arbitrator by this Court.

2. In reply to the petition, there is no dispute qua awarding of work in question to the petitioner-Contractor. There is also no dispute qua execution of the agreement, Annexure P-1. The petition has only been resisted and contested on the ground that the petitioner-Contractor has not resorted to Clause 24 of the contract agreement before seeking appointment of the Arbitrator by the Court.

3. Mr. Sumeet Raj Sharma, learned counsel has contended that the petitioner-Contractor has resorted to the redressal mechanism provided under Clause 24 of the agreement. He has pressed in service in this regard the correspondence, Annexure P-3 and Annexure P-4 made by the petitioner-Contractor with the Chief Engineer (Kangra Zone) and Superintending Engineer, 9th Circle Nurpur, H.P.P.W.D. District Kangra. According to Mr. Sharma when there

was no response for sufficient long time, the petitioner-Contractor was forced to serve the competent authority i.e. Chief Engineer, Kangra Zone at Dharamshala with legal notice, Annexure P-2 and as the respondent-department has already missed the opportunity of making appointment of the Arbitrator in terms of Clause 25 of the contract agreement, the petitioner-Contractor was not left with any other and further remedy to approach this Court by way of this petition for seeking appointment of the Arbitrator.

4. Mr. Virender Verma, learned Additional Advocate General while drawing the attention of this Court to the provisions contained under Clause 24 of the agreement has strenuously contended that now the Chief Engineer, Kangra Zone, Dharamshala has rejected the claim of the petitioner-Contractor and as such in terms of Clause 24.2, he is at liberty to prefer an appeal to the Standing Empowered Committee as contemplated under Clause 24.3 of the agreement.

5. Having gone through the record and also analyzing the rival submissions, true it is that Clause 24 of the contract agreement provides for disputes redressal mechanism by way of amicable settlement, however, the respondent-department has failed to resort to the mechanism as provided irrespective of the petitioner-Contractor approached the competent authority i.e. Chief Engineer (Kangra Zone) H.P.P.W.D Dharamshala long back on 12.08.2014 vide Annexure P-3 to the counter affidavit filed by the petitioner-Contractor. Not only this but Annexure P-3 was followed by a detailed representation, Annexure P-4 highlighting therein his claims by the petitioner-Contractor against the respondent-department which was addressed to the Superintending Engineer concerned. The correspondence so made by the petitioner-Contractor well before he having served the competent authority with legal notice, Annexure P-2 should have been dealt with in terms of Clause 24 of the contract agreement. However, no explanation is forthcoming as to why efforts were not made to settle the disputes, if any, between the parties in terms of Clause 24 of the agreement. Even if the Superintending Engineer was not the competent authority, he should have made a reference of Annexure P-4 to the Chief Engineer concerned and initiated the process to deal with the matter in terms of Clause 24 of the agreement. True it is that in reply Annexure R-3 to the legal notice, Annexure P-2, the petitioner-contractor was advised to have recourse in terms of Clause 24 of the agreement, however, in the given facts and circumstances and also that no action was taken by the respondent-department on the receipt of Annexure P-3 and Annexure P-4 the petitioner-Contractor has rightly approached this Court for seeking appointment of the Arbitrator to adjudicate the disputes having arisen between the parties during the execution of the work.

6. It is worth mentioning that during the course of proceedings in this petition, learned Additional Advocate General has drawn the attention of this Court qua disputes settlement mechanism provided under the agreement. Learned counsel for the petitioner, however, had informed this Court that despite representation made, the respondent-department never came forward to get the disputes settled amicably. It is recorded so in the order passed in this petition on 08.01.2016. Being so and taking into consideration such submissions, the petitioner-Contractor was directed to file a supplementary affidavit to substantiate that irrespective of he having approached to get the disputes settled amicably, the authorities in the respondent-department failed to do so. The supplementary affidavit came to be filed by the petitioner-Contractor and the correspondence he made highlighting therein the disputes having arisen Annexure P-3 and Annexure P-4 also annexed thereto. Irrespective of the competent authority failed to adhere to Annexure P-3 and Annexure P-4, this Court during the course of hearing in this petition deemed it appropriate to direct the parties on both sides to sit together and chalk-out the possibility of amicable settlement. The following order in this regard came to be passed on 21.07.2016.

> "Rejoinder is not intended to be filed.
>
> Heard for sometime. In the nature of the claims and counter-claims as laid on both sides impending further consideration a direction to the petitioner-Contractor and Chief Engineer, Kangra zone at Dharamshala to sit together on

5.8.2016 at 11.00 AM in the office of the later and chalk out the possibility to settle the dispute amicably as provided under Clause 24 of the contract agreement. The Court be informed on the next date about the progress, if any, made in this regard. List on 10.8.2016."

7. The meeting, however, did not take place on 10.08.2016 as directed. The petitioner-Contractor as such, was directed to attend the office of Chief Engineer concerned at Dharamshala on 16.08.2016, as per order passed in this petition on the previous date. Now the meeting is already held on 16.08.2016 and learned Additional Advocate General has placed on record the copy of proceedings dated 27.08.2016, which reveals that claims of the petitioner-Contractor stood rejected. I am not in agreement with the submissions made on behalf of the respondent-State that the petitioner-Contractor should prefer an appeal against the decision of the Chief Engineer concerned for the reason that the competent authority has lost such right having failed to resort to the provisions contained under Clause 24 of the agreement at the time when the petitioner-Contractor has made the representation, Annexure P-3 and Annexure P-4.

8. Since this Court is satisfied that during the execution of the construction of road from Jhroli to Jara, disputes have arisen between the parties, therefore, such disputes in terms of arbitration agreement now can only be resolved by an Arbitrator to be appointed by this Court. Consequently, I allow this petition and appoint Mr. Mrigender Singh, District and Sessions Judge (Retd.) as Arbitrator to adjudicate the disputes raised by the petitioner-Contractor and also the counter-claim, if any, if preferred by the respondent-department. The Registry is directed to supply an authenticated copy of this judgment to learned Arbitrator forthwith. It is expected from the learned Arbitrator to enter upon the reference within two weeks from the date of receipt of a copy of this judgment under intimation to the parties on both sides. Learned Arbitrator shall be free to fix his fee, of course being guided by the schedule to the Arbitration and Conciliation Act in this regard. The fee so fixed shall be shared by the parties on both sides equally. A sum of Rs.50,000/- in equal proportion shall tentatively be paid to the Arbitrator by each party on the first date of hearing. The remaining amount, however, shall be payable to learned Arbitrator before the termination of the proceedings i.e. announcement of award.

9. The petition is accordingly allowed and stands disposed of.

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

State of H.P. and anr. ....Appellants

Versus

Govind Singh and ors. ....Respondents

RSA No. 17/2004
Reserved on: 29.8.2016
Decided on: 30.8.2016

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit pleading that G, M, J and D were previous owners of the land- G mortgaged the suit land with the possession - mortgage was redeemed - plaintiffs and proforma defendants had purchased the land from G- land was mentioned as Shamlat Taraf Raja Khassa- consolidation authorities without any right to change or convert the ownership of the land- suit was opposed by the defendants pleading that land had vested in the State- Consolidation Authorities were competent to consolidate the holding and then to divide it amongst the owners- suit was dismissed by the trial Court- an appeal was filed, which was allowed- held, in second appeal that G and M etc. were recorded as owners of the suit land in the jamabandi for the year 1955-56- Khasra No. 514 was recorded in the ownership of Shamlat Taraf Raja Khassa but it was recorded in the possession of plaintiffs and proforma defendants- subsequently, land was recorded in the ownership of the State and the possession of Bartandarans- nature of land was also changed- there is an entry regarding redemption of mortgage- there was no reason to record the ownership of the State and possession of

Bartandarans- entry was changed without hearing the plaintiffs and without any order a person can challenge the revenue entries when he feels aggrieved- Appellate Court had rightly allowed the appeal- appeal dismissed. (Para-12 to 13)

Case referred:
Shiam Singh vs. Chaman Lal, 2011 (Suppl.) Him. L.R. 2065

For the appellants: Mr. Neeraj K. Sharma, Dy.A.G.
For the respondents: Mr. Rajneesh K. Lal, Advocate for respondents No. 1 and 2.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

This regular second appeal is instituted against the impugned judgment and decree dated 11.7.2003 rendered by learned District Judge, Kangra at Dharamshala, H.P. in Civil Appeal No. 137-N/XIII/2002.

2 The key facts necessary for the adjudication of the appeal are that the respondents/plaintiffs (hereinafter referred to as the "plaintiffs" for convenience sake) filed a suit for declaration and injunction against appellants as well as proforma respondents No.3 and 4 (hereinafter referred to as defendants and proforma defendants respectively for convenience sake) on the averments that Guro, Munshi, Jaswant and Dharam Singh, sons of Mehtab Singh were the previous owners of the land measuring 0-46-66 hectares as detailed in the plaint. Later on, Guro etc. mortgaged the suit land with possession in favour of Dinu and Tasirudin. The suit land remained under the possession of the mortgagees as per the revenue record till 1940-41. The mortgage was redeemed vide mutation No.1109 dated 18.3.1952. The suit land was mutated in the names of plaintiffs and proforma defendants because in the meantime they had purchased the suit land from the previous owner namely Guro. They started cultivating the suit land and raised orchard over it. However, during consolidation proceedings in the year 1952, the suit land, which was earlier in possession of Guro etc. was wrongly, illegally and without any notice to the plaintiffs and the proforma defendants mentioned as "Shamlat Taraf Raja Khassa". The consolidation authorities had no right to change or convert the ownership of the land, which was under the ownership and possession of the plaintiffs and proforma defendants.

3 The suit was contested by the defendants. It is alleged that as per mutation No.1109, Munshi Ram, Jaswant Singh and Dharam Singh, owners/mortgagors had sold half of the land comprised in Khasra Nos. 539 and 552 to one Jai Chand and remaining half to Dhian Singh, Onkar Singh, Jaswant Singh and Govind Singh. However, during consolidation proceedings, Jai Chand and Dhian Singh etc. were given Khasra Nos. 459 and 513 in lieu of the aforesaid purchased land, which was redeemed vide mutation No.1269 dated 7.3.1956 and mutation No.1270 dated 30.5.1956. It was denied that Khasra No. 1830 of Mohal "Raja Khassa" was part of the land purchased by the plaintiffs and proforma defendants. The suit land being "Shamlat Taraf Raja Khassa" was vested in the State of H.P. under the provisions of law vide mutation No.2207 dated 20.1.1983. During consolidation proceedings, the suit land was measured in old Khasra No.514 in the ownership of "Shamlat Taraf Raja Khassa" and was recorded in possession of the plaintiffs and proforma defendants as co-sharers of Shamlat land and one Sardhu was non-occupancy tenant under Jai Chand, a co-sharer in the Shamlat land. The consolidation authorities were competent to consolidate the holding and then to divide amongst the owners as per the scheme framed under the consolidation. In lieu of Khasra No.539 i.e. landed property before consolidation proceedings, the land owners were given Khasra Nos.459 to 513, in which the entry of ownership as well as mortgage was made as per old entries.

4 The replication was filed by the plaintiffs. The learned trial court framed the issues on 9.2.1998 and dismissed the suit vide judgment and decree dated 29.6.2002. The

plaintiffs feeling aggrieved with the judgment and decree dated 29.6.2002 preferred an appeal before the learned first Appellate Court, who allowed the same vide impugned judgment and decree dated 11.7.2003. Hence, this regular second appeal, which was admitted on following substantial questions of law on 1.3.2004:-

1. Whether the judgment and appeal under challenge is vitiated as the suit filed was barred by limitation?

2. Whether the Courts below have wrongly entertained the suit in view of the appeal pending before the learned Commissioner?

5 Mr. Neeraj K. Sharma learned Deputy Advocate General appearing for the defendants, on the basis of the substantial questions of law framed, has vehemently argued that the suit was barred by limitation and the learned first appellate court has misread and mis-appreciated the oral as well as documentary evidence.

6 Mr. Rajnish K. Lal, learned Advocate appearing for the plaintiffs, has supported the impugned judgment and decree dated 11.7.2003 passed by the learned first appellate court.

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

8. Since both the substantial questions of law are interlinked and interconnected, the same are taken together for determination to avoid repetition of discussion of evidence.

9. PW1, Govind Singh, has testified that they possessed the suit land after its purchase. They had raised an orchard over the suit land. Neither defendants nor any other person ever remained in possession of the suit land. They were maintaining the orchard.

10. PW2, Baldev Singh and PW3 Surinder Singh have corroborated the statement of PW1 Govind Singh. According to them, the plaintiffs remained in possession of the suit land and they had raised an orchard over it. The State Government never remained in possession of the suit land.

11. DW1, Om Parkash, deposed that the plaintiffs and proforma defendants had purchased half share of the land comprised in Khasra No.539 and remaining half was purchased by one Jai Chand. In consolidation proceedings, the land comprised in Khasra No.539 was assigned new Khasra Nos. 512, 513 and 514. The land comprised in Khasra Nos. 512 and 513 went to the share of the plaintiffs and proforma defendants and the land comprised in Khasra No.514 was converted into “Shamlat” land and in lieu thereof, Subedar Jai Chand was given different land by the State.

12. According to jamabandies for the years 1936-37 Ext.P18, 1940-41 Ext.P17 and 1945-46, Ext. D3, the old Khasra number of the suit land was 539. Guro, Munshi etc. were recorded as owners of the suit land comprised in Khasra No.539 measuring 11 Kanals 12 Marlas. According to jamabandi for the year 1955-56, Ext.D4, land comprised in Khasra No.539 min was entered in the ownership of “Shamlat Taraf Raja Khassa” and in possession of Dhian Singh, Onkar Singh, Jaswant Singh and Govind Singh, i.e. plaintiffs and proforma defendants as non-occupancy tenants under Jai Chand, who was co-owner of half share of the land. In jamabandi of Missal Haqiayat Istemal for the year 1954-55, Ext.D-5, Khasra No.539 min was assigned new Khasra No.514 and the remaining land of Khasra No.539 was assigned Khasra Nos. 512 and 513. The land comprised in Khasra No.512 was entered in ownership and possession of the plaintiffs and proforma defendants and the land comprised in Khasra No. 513 measuring 5 Kanals 2 Marlas was entered in possession of the mortgagees. Though, later on in jamabandies for the years 1956-57 Ext. D6, 1965-66 Ext. D7, 1970-71 Ext. D8 and 1975-76 Ext. D9, the land comprised in Khasra No. 514 was recorded in ownership of the “Shamlat Taraf Raja Khassa”, however in possession of the plaintiffs and proforma defendants. Subsequently, in jamabandi for the year 1983-84, Ext.D10, this entry qua Khasra No.514 was changed. It was recorded in ownership of the State of Himachal Pradesh and in possession of bartandarans. Khasra No.514

was also assigned new Khasra No.1830 and the classification of the land was mentioned as "Charagah Darkhtan". The same entry was repeated in jamabandies for the years 1989-1990 Ext. D11 and 1994-95 Ext. D12.

13. The classification of the land comprised in Khasra No.514 was recorded as "Barani Ek Fasli" in the jamabandies for the years, 1954-55 Ext. D1, 1956-57 Ext. D6, 1965-66 Ext. D7, 1970-71 Ext. D8 and 1975-76 Ext. D9. The nature of the land was changed for the first time in the jamabandi for the year 1983-84, Ext.D10 from "Barani Ek Fasli" to "Charagah Darkhtan". Thus, it is crystal clear that prior to settlement proceedings in the year 1983-84, the plaintiffs and proforma defendants were recorded in possession of the land comprised in Khasra No.514 and the nature of the land was "Barani Ek Fasli" and in the jamabandi for the year 1970-71, Ext. D8 the classification of the land was entered as "Bagicha" (orchard). However, after settlement, the classification of the land comprised in Khasra No.514 was shown as "Charagah Darkhtan" in the ownership of the State and in possession of the "Bartandarans".

14. Guro, Munshi Ram, Jaswant Singh and Dharam Singh, sons of Mehtab Singh were owners-mortgagors of the suit land. They had mortgaged the suit land with possession in favour of the mortgagees. The mortgage was redeemed by the mortgagors. The land comprised in old Khasra No.539 measuring 33 Kanals 5 Marlas was sold to the plaintiffs and proforma defendants and one Jai Chand. There is reference of mutation to this effect in the jamabandi for the year 1945-46, Ext. D3. Khasra No.539 was subsequently converted into three new Khasra Nos. 512, 513 and 514. The land comprised in Khasra No.512 measuring 16 Kanals 8 Marlas was recorded in possession of the plaintiffs and proforma defendants and land comprised in Khasra No.513 measuring 5 Kanals 2 Marlas though recorded in the ownership of the plaintiffs and proforma defendants, but was shown in the possession of the mortgagees. The mortgage was redeemed vide mutation No.1269 dated 7.3.1956 as per entry made in jamabandi for the year 1954-55, Ext. D5 and vide mutation No.1109 dated 18.3.1952, as per jamabandi for the year 1945-46, Ext. D3, the entire land comprised in Khasra No.539 measuring 33 Kanals 5 Marlas was purchased by Jai Chand to the extent of half share and remaining half was purchased by the plaintiffs and proforma defendants.

15. It has come on record that the possession of the plaintiffs and proforma defendants qua the suit land comprised in Khasra No.514 from the year 1954-55 till 1975-76 shows that actually they were in possession of the suit land as co-owners. There was no plausible reason to record the suit land in the ownership of the State and in possession of the "Bartandarans". The classification of the land could also not be changed from "Barani Ek Fasli" and "Bagicha" to "Charagah Darkhtan". The plaintiffs have duly proved that they were in possession of the suit land. They had raised orchard there. Learned first appellate court has rightly come to the conclusion that change effected during consolidation proceedings qua nature of the land and then showing in settlement in possession of "Bartandarans" and in the ownership of the State was apparently wrong and without any justification. Moreover, entry has been changed without any order, that too, without hearing the plaintiffs. The suit was not barred by limitation. This Court in ***Shiam Singh vs. Chaman Lal, 2011 (Suppl.) Him. L.R. 2065*** has held that the person can challenge the revenue entry when he feels aggrieved. This Court has held as under:-

> "13. Coming to substantial question of law No.4, a reading of Section 46 of the HP. Land Revenue Act shows that if any person considers himself aggrieved as to any right of which he is in possession by an entry in a record-of-rights or in a periodical record, he may institute a suit for declaration of his right under Chapter VI of the Specific Relief Act, 1963.
>
> 14. It is well settled that for a suit for declaration, referred to in Section 46, limitation begins to run not from the date of the entry affecting the right of the person concerned, but from the date when he feels aggrieved by the entry and it is the satisfaction of such person as to when does he feel aggrieved. Defendant

cannot be heard to say that he(the plainatiff) felt aggrieved by the entry at some earlier point of time or when the entry was actually made.

15. Learned counsel for the appellants submitted that the plaintiffs-respondents were out of possession of the suit land and, hence, their suit was not covered by the provision of Section 46 of H.P. Land Revenue Act. Submission is misconceived. Section 46 does not speak of physical possession of the subject matter or the land with respect to the entry of which a person is aggrieved, but the right of the plaintiff. The person should be in possession of the right and not the land, with respect to the entry of which he is aggrieved. Predecessors-in-interest of the plaintiffs, namely Prem Singh, Kushal Singh and Nand Lal were the real brothers. They were recorded as joint tenants, though Nand Lal was being recorded in exclusive possession as Hissedaar (one of the co-sharers/co-tenants).

16. It is well settled proposition of law that possession of a co-sharer is the possession of all. A co-sharer in exclusive possession holds the property for himself and also on behalf of the co-sharers not in physical possession. Such a co-sharer is an agent of other co-sharers, who are out of possession, in regard to their shares in the joint property. In view of this legal position, plaintiffs are to be presumed to be co-sharers with the defendants. This is especially so when the defendants-appellants have not taken the plea of ouster of the plaintiffs-respondents. Question is answered accordingly."

16. Consequently, in view of analysis and discussion made hereinabove, there is no merit in the appeal and the same is dismissed. Pending application(s), if any also stands disposed of. No order as to costs.

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

Archana Chauhan .....Appellant

Versus

Ashwani Kumar alias Biru & another .....Respondents

Cr. Appeal No. 278 of 2011.
Reserved on: 17.06.2016.
Decided on: 31.08.2016

Indian Penal Code, 1860- Section 376, 506 and 417- Accused used to commit sexual intercourse with the prosecutrix with an assurance to marry her- prosecutrix was taken to Solan, where accused married her and filed an application for registration of marriage- marriage was not accepted by the family of the accused- accused and the prosecutrix stayed in Rest House, Subathu, where accused committed sexual intercourse with the prosecutrix with the assurance to keep her happy- prosecutrix was taken to Parwanoo, where she was tortured physically and mentally- accused left the prosecutrix on Subathu Road Solan after telling her that the accused would not marry her- accused was tried and acquitted by the trial Court- held, in appeal that prosecutrix had admitted that application for registration of marriage was submitted to SDM, Solan who had asked them to come after one month- she further admitted that she had filed a complaint prior to the expiry of period of one month- she further admitted that her father was not liking the accused as the accused was not earning anything- statement of PW-7 also shows that father of the prosecutrix was not happy with the marriage of the deceased with the accused and was worried about future of his daughter- there are lots of contradictions, discrepancies and improvements in material facts which render the genesis of the prosecution version doubtful- version of the defence that false case was filed by the prosecutrix at the instance of her father is

probable - contradictions and discrepancies cast doubt on the veracity of the prosecutrix- conduct of the prosecutrix makes her statement doubtful- trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-5 to 18)

For the appellant : Mr. Ashwani Kumar Sharma-II, Advocate.
For the respondent No. 1. : Mr. Anup Chitkara, Advocate.
For the respondent No. 2. : Mr. M.A. Khan Additional Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Appellant has assailed acquittal of respondent No. 1, vide judgment dated 05.10.2010, passed by Sessions Judge, Solan, H.P. in Session Trial No. 3-S/7 of 2009, under Sections 376, 506 and 417 IPC, in Case FIR No. 116/2009, registered in Police Station Dharampur, District Solan, H.P.

2. Case of Prosecutrix in brief is that respondent No. 1, had been committing sexual intercourse with her since 2008 without her consent but with assurance to marry her. An application Ex. DA was submitted by prosecutrix on 1.09.2009 to the Superintendent of Police. As per this application, prosecutrix had met respondent No.1 in the year 2007 in Subathu who had assured to marry her but she had not disclosed this fact to anyone and respondent No.1 had committed sexual intercourse with her so many times at Subathu. Thereafter respondent No.1 was out of Subathu for a long time. On noticing respondent No.1 in Subathu on 16.08.2009 prosecutrix had conveyed him that he had cheated her but respondent No.1 had again assured to marry her. On 17.08.2009 respondent had taken prosecutrix to Solan alongwith his brother-in-law Jaggi uncle. At Solan, after marrying prosecutrix, respondent had filed an application in the court of Sub Divisional Magistrate for registration of marriage. After that Ashwani Kumar brought prosecutrix to Subathu but on refusal for acceptance of marriage by family of respondent, they stayed in Rest House Subathu where respondent committed sexual intercourse with her with assurance to keep her happy. On 18.08.2009 at about 12.00 O'clock respondent took prosecutrix to Parwanoo and kept her in the house of his cousin Sohan Lal in Sector No. 4, where she resided till 28.08.2009 and during this period respondent tortured her physically and mentally. In the evening of 28.08.2009, respondent left prosecutrix on Subathu road Solan by asking her to go to her home because he was not to keep her. Thereafter he was not contacting her and had threatened her not to approach him and there was threat to her life from respondent. It is further stated that respondent had married prosecutrix with intention to develop physical relations with her resulting in physical and mental harassment to her. This application was sent to Police Post, Subathu for necessary action on 2.09.2009.

3. On 5.09.2009, prosecutrix had submitted another application Ex. PW-11/B to Superintendent of Police, Solan by giving further details stating therein that at the time of writing application on 1.09.2009, she was perplexed and could not mention complete details in the said application, and no action had been taken against respondent after submitting that application. This application was sent to SHO, Dharampur to register a case and investigate the matter as per law. Consequently, FIR Ex. PW-11/A was registered and after completion of investigation, challan was presented in Court against the respondent. On conclusion of trial respondent has been acquitted and the State has not preferred to file an appeal and present appeal has been preferred by prosecutrix.

4. Prosecution has examined 17 witnesses to prove its case. Whole case revolves around testimony of prosecutrix, who has been examined as PW-16. In the application Ex. DA, prosecutrix had claimed developing of intimacy with respondent in the year 2007 and having intercourse with her so many times in Subathu with assurance to marry her. Whereas in application Ex. PW-11/B, she had stated that in the year 2008 her neighbour (respondent) had

called her to upload songs in newly purchased computer of his brother. Earlier she had already installed typing software in computer of his brother in presence of his family members. By taking such excuse, prosecutrix was called by respondent in his house but when she did not find his family members there, she tried to come back but respondent had committed forcible intercourse without her consent. On weeping of prosecutrix, respondent had assured to marry her but with threatening that in case incident was disclosed to anyone then he will defame prosecutrix and in similar manner he continued to have intercourse with her. She has stated that when respondent did not marry then she had filed an application on 11.08.2009 before Deputy Superintendent of Police, Solan and on 17.08.2009 respondent and his all family members were called in Police Post, Subathu, where respondent had agreed to marry prosecutrix. Thereafter respondent alongwith his family members had taken prosecutrix to Solan Court and in the presence of his family members had married prosecutrix and Hardev Sharma and Jagdish had witnessed the same.

5. It is further stated in the application Ex. PW-11/B that thereafter respondent had taken prosecutrix with him to his house in Subathu. Family members and other relatives of respondent, present there had stated that respondent had married without their desire and had respondent been married with their desire, they would have also received dowry. But greedy father of prosecutrix will not be able to give them anything and therefore, daughter of such person will not be allowed by them in their home. Thereupon respondent had taken prosecutrix to rest house Subathu. At that time, he was accompanied by his brother Jai**,** brother-in-law Sanjay and one Soni son of MalKhan. Soni had arranged for stay. On desire to have copulation prosecutrix had expressed to have such relations only after performing Sapatpati in Temple but respondent had committed forcible intercourse with prosecutrix without her desire and prosecutrix was not spared despite weeping. On next day i.e. on 18.08.2009, respondent alongwith his brother Jai, brother-in-law Sanjay and friend Soni took her to house of cousin at Parwanoo and there also till 28.08.2009, respondent had committed intercourse with prosecutrix without her desire and treated her brutally. On 22.08.2009 parents and other relatives came and abused prosecutrix alleging that she had ruined them and in case of marriage from Chandigarh they would have had sufficient dowry and had asked her to bring Rs. 1.00 lac and other articles i.e. furniture, Refrigerator, motorcycle etc. from her father for living with respondent, failing which they had threatened to arrange second marriage of respondent. She had expressed her inability to ask her father to fulfill this demand as she had married without desire of her father. Thereupon all of them threatened to oust her from house and to vanish. On 28.08.2009, prosecutrix was brought to Solan in a vehicle. Family members and relatives of respondent stopped vehicle at bypass Solan and asked to throw prosecutrix there. Father of respondent had said that father of prosecutrix will not give anything whereupon sister-in-law of respondent had pushed prosecutrix from the vehicle and all of them left the place. On approaching Deputy Superintendent of Police, prosecutrix was sent to Police Station Dharampur, but in absence of SHO, no action was taken. Prosecutrix had submitted an application on 31.08.2009 to the Superintendent of Police, who referred prosecutrix to Police Women Cell but no action was taken there also. Prosecutrix had submitted application before Deputy Superintendent of Police on 1.09.2009 by writing the same there.

6. In her deposition in the Court, prosecutrix has further stated that in the year 2008, she was working as Computer Operator in Airtel Sharma Enterprises Subathu. Respondent had purchased new computer and younger brother of respondent had borrowed software of computer and Pen drive from her. Firstly, she states that on 5th July, 2008 respondent had taken her to his house to download songs in his computer but again she states that respondent had told that his brother and bhabhi were asking for downloading songs and thereupon she had gone to house of respondent from her office for 10 to 15 minutes. There was no one in the house except respondent and respondent had bolted the door from inside and put his hand on her mouth and on attempt to speak loudly she was slapped and pushed on the bed whereupon she received injury near her eye on hitting corner of bed but the respondent asked her to keep quiet by putting his hand on her mouth and it was difficult for her to breath. She

was frightened and after putting her on bed respondent had committed sexual intercourse with her without her will. On her weeping respondent asked her not to weep and put Sindoor on her forehead by saying that thereafter she was his wife and had promised to marry her.

7. She has further stated that thereafter respondent used to call her in his house to have to sexual intercourse asserting his right being her husband with assurance to marry her after marriage of his sister. She has further stated that on 4th May, 11th May and 15th May, 2009 respondent called her in Mahadev Complex Hotel and committed sexual intercourse with her against her wishes. On 11.08.2009 she was sitting on the stairs of her office and was weeping as respondent was not responding to her calls. She was noticed by PW-7 Shakun Chauhan and on her consistent inquiry prosecutrix had disclosed the matter to her. She had told Shakun Chauhan that matter had not been disclosed to anyone including her parents but one application was submitted to Deputy Superintendent of Police. Besides reiterating averments made in the complaint Ex. PW-11/B, prosecutrix has stated that family of respondent did not allow her and respondent to enter the house and they had to stay in Forest Rest House, Subathu.

8. In cross-examination, prosecutrix has stated that she had mentioned year 2007 in Ex. DA, under duress. However, she has admitted that before 1.09.2009, she had also made a complaint to the police on 11.08.2009. Police had also recorded her statement under Section 161 Cr.P.C. on 7.09.2009 and in that statement also she had mentioned that first intercourse was committed in the year 2007. She has tried to explain that she had stated so as she was alone and under stress. Her statement under Section 161 Cr.P.C., dated 7.09.2009 is Ex. DB. In that statement, she has stated that she had submitted complaint to Superintendent of Police, on the basis of which FIR was registered and the said complaint was drafted by Shri Arvind Kumar, who was son in law of her Aunt (Buaa), but in the Court, she has denied to have made such statement. There is also one supplementary statement Ex. DC of prosecutrix recorded under Section 161 Cr.P.C. In this statement, prosecutrix had stated that when she was left at Solan by respondent she had made call to her Aunt (Buaa), and after reaching home had narrated entire episode to family members. However, as per statement made in the Court prosecutrix has stated that one lady met her at Solan through whose mobile she had contacted PW-7 Shakun Chauhan and on request of Shakun Chauhan that lady had provided Rs. 50/- to prosecutrix so as to enable prosecutrix to reach Subathu. Prosecutrix has shown her ignorance regarding the place where the statement Ex. DB was recorded. She has been confronted with all improvements made in the Court, which she claimed to have been stated in FIR as well as in her statement Ex. DA but not found to be recorded. She has also stated in the Court that she was asked to sign divorce papers and on refusal to sign to such papers she was thrown out of the vehicle at Solan. But no such fact was ever stated in her earlier complaints or applications Ex. DA or Ex. PW-11/B or Ex. DB or Ex. DC.

9. It has also been admitted by the prosecutrix that application for registration of marriage was submitted to the S.D.M. Solan who had asked to come after one month. She has also admitted that prior to expiry of one month she had lodged complaint against respondent and respondent was behind the bar on the day when both of them were called by the S.D.M. for registration of marriage. She has admitted that her father wanted to marry her with more educated and better boy and was not liking respondent, who was earning nothing. She has admitted that Shakun Chauhan had also accompanied her in the Court on previous occasions. She has also admitted that respondent used to talk to her on mobile through telephone No. 98056-53934, which was in the name of prosecutrix but she has claimed that respondent had forcibly taken Sim from her but she has not disclosed in any complaint regarding forcible taking of mobile Sim by respondent.

10. Firstly prosecutrix has denied that S.D.M. had asked them after one month on 17.08.2009 to check marriage certificate. However, later on she has admitted that S.D.M. had asked them to come after one month. She has also stated so in her statement Ex. DB.

11. PW-2 Himanshu has been examined by prosecution to prove that respondent had booked rooms in Mahadev Guest House on 4th May, 11th May and 15th May, 2009 and had stayed

with prosecutrix in those rooms, for 2 to 3 hours in the morning time after 10:00 AM. In cross examination, this witness has admitted that both respondent and prosecutrix had come on foot for first time and on second time the girl had come on foot earlier to boy and boy was late about 20 to 25 minutes. He has also stated that for second time payment of guest house was made by prosecutrix.

12. PW-3 father of prosecutrix has shown his ignorance about marriage of his daughter. He has admitted that they referred matter to Community Panchayat and Community Panchayat was organized on 6.09.2009. He has admitted that he had asked to marry her. He has denied that he had demanded money in the Community Panchayat for withdrawing the case.

13. PW-7 Shakun Chauhan has also admitted convening of Community Panchayat meeting on 6.09.2009. She has stated that Community Panchayat had inquired brothers of the accused regarding help they could provide respondent and prosecutrix. Brothers of respondent had responded that they will provide rented accommodation for prosecutrix and respondent and help both of them by providing daily needs. She has further stated that Secretary of Panchayat had put humiliating indecent questions to prosecutrix and therefore, prosecutrix, her father and this witness had left the Panchayat without signing proceedings. This witness has admitted that she had accompanied prosecutrix and her father in the Court on 8.03.2010. She has admitted that she had not received any summons for appearance on 8.03.2010.

14. From the statement of PW-7, it appears that father of prosecutrix was not happy with marriage of respondent and prosecutrix and was worried about future of her daughter as respondent was not having any means of income and for that reason only Community Panchayat had shown concern about future of prosecutrix and had asked question to brothers of respondent with respect to providing help to respondent and prosecutrix in future.

15. From the application, statements Ex. DA, Ex. PW-11/B, Ex. DB and DC and deposition of prosecutrix in the Court it transpires that there are lot of contradictions discrepancies and improvements on material facts which render genesis of the prosecutrix case doubtful. Veracity of prosecutrix is shrouded by suspicion.

16. Allegations of committing forcible sexual intercourse do not seem to be true. First instance of sexual intercourse as narrated by prosecutrix in her deposition in the Court is highly improbable. She has admitted developing intimacy with respondent in her application Ex. DA and has stated because of that intimacy coupled with assurance of marriage by respondent physical relations were developed. Respondent has shown his intention to marry her by submitting his application to the S.D.M. Consent of prosecutrix in maintaining physical relations is at large.

17. Defence propounded by respondent is that respondent agreed to marry with prosecutrix and for that purpose he had taken her to office of S.D.M., Solan and had submitted application for registration of marriage but father of prosecutrix did not agree for this marriage and under pressure of her father in connivance with PW-7, prosecutrix had lodged complaint prior to expiry of one month when certificate of marriage was to be issued.

18. From the admissions of prosecutrix, defence put forward by respondent is probablised than proving commission of offence by the respondent beyond shadow of all reasonable doubts.

19. Statements of other officials witnesses including doctors are not relevant to be discussed to determine guilt of respondent.

20. Contradictions and discrepancies cast doubt on the veracity of prosecutrix. Conduct of prosecutrix renders her statement under cloud of suspicion. It appears that truth is something else as is being portrayed in Court by prosecutrix, her father and PW-7. Version of prosecutrix is not credible, trustworthy and confidence inspiring so as to rely to convict respondent under Section 376, 417 and 506 IPC.

21. The accused has been acquitted by the trial Court. From perusal and scrutiny of evidence, it cannot be said that trial court has not appreciated the evidence correctly and completely and acquittal of accused has resulted into travesty of justice or has caused miscarriage of justice. After considering arguments of respective counsel for the parties and minutely examining the testimonies of the witnesses and other documentary evidence placed on record, we are of the considered view that prosecution has failed to prove the guilt of respondent accused beyond reasonable doubt and thus, no case for interference is made out.

22. The present appeal, devoid of any merit, is dismissed, as also pending applications, if any. Bail bonds, if any, furnished by the accused are discharged. Records of the Court below be immediately sent back.

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, JUDGE

Darsho Ram .....Appellant
Versus
Nidhia and another .....Respondents

RSA No. 52/2008
Reserved on: August 30, 2016
Decided on: August 31, 2016

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit seeking injunction pleading that they are owners in possession of the suit land and defendant started raising construction of Gharat forcibly without any right to do so- suit was dismissed by the trial Court- an appeal was preferred, which was allowed- held, in second appeal that PW-4 had found the encroachment of 0-0-9 Biswansis on the land of the plaintiffs - defendant could not explain on which khasra number gharat was constructed by him- DW-3 admitted that Gharat was constructed over the land of the plaintiffs- plaintiffs have proved the encroachment on the suit land- defendant could not prove the plea of adverse possession- Appellate Court had rightly appreciated the evidence- appeal dismissed. (Para-15 and 16)

For the Appellant : Mr. Rajnish K. Lal, vice Counsel.
For the Respondents : Mr. R.K. Sharma, Senior Advocate with Ms. Anita Parmar, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

This Regular Second Appeal has been instituted against judgment and decree dated 22.11.2007 rendered by the learned District Judge, Chamba, District Chamba, Himachal Pradesh in civil Appeal No. 31/2007.

2. "Key facts" necessary for the adjudication of the present appeal are that the respondents-plaintiffs (hereinafter referred to as 'plaintiffs ' for convenience sake) filed a suit against the appellant-defendant (hereinafter referred to as 'defendant' for convenience sake) for permanent prohibitory and mandatory injunction restraining the defendant, his agents, servants and workmen from raising any construction over the suit land as detailed in the plaint, as per Jamabandi for the year 1997-98. According to the plaintiffs they were recorded in joint ownership and possession of the suit land with other cosharers. Defendant was a complete stranger. On 10.8.2004, defendant started forcibly raising construction of *Gharat* on Khasra No. 30. He started collecting construction material with a view to grab the land of the plaintiffs to which he had no right. Defendant forcibly raised construction over the suit land and changed nature thereof. Thus, in these circumstances, the plaintiffs sought relief of permanent

prohibitory injunction as cosharers and a decree for mandatory injunction and if the defendant forcibly raised construction over the suit land during the pendency of the suit, to restore the suit land to its original position.

3. Suit was contested by the defendant. According to the defendant, he had already constructed *Gharat* over Khasra No. 595 prior to the filing of the suit. Construction over Khasra No. 595 was made in the year 1980-81.

4. Plaintiffs filed replication. Issues were framed by the learned trial Court on 11.4.2005. Additional issue No. 4(A) was framed on 6.7.2006. Learned Civil Judge (Senior Division) dismissed the suit on 31.8.2006. Plaintiffs fled an appeal before the District Judge, Chamba. He allowed the same on 22.11.2007. Hence, this Regular Second Appeal.

5. The present Regular Second Appeal was admitted on 6.8.2008, on the following substantial question of law:

> "Whether in view of the fact that the Gharat was being run since the year 1980 and the construction had been made more than twenty four years before the filing of the suit, the plaintiff was entitled to a decree for mandatory injunction, possession as also permanent injunction from a portion of the land where the gharat was being run and the plaintiff could only be granted damages/ compensation even if the appellant was not found to be in adverse possession of the property.""

6. Mr. Rajnish K. Lal, Advocate, on the basis of substantial question of law framed, has vehemently argued that the first appellate Court has not correctly appreciated oral as well as documentary evidence. He has also argued that the first appellate Court could not order the defendant to deliver the possession of the suit land to the plaintiffs.

7. Mr. R.K. Sharma, learned Senior Advocate has supported the judgment and decree passed by the first appellate Court.

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

9. PW-1 Nidhia Ram testified that he was owner-in-possession of the suit land with Sukhdev and defendant was stranger, who had started construction of *Gharat* over Khasra No. 1276/30. He had also got the spot inspected. Defendant had encroached upon ½ Biswa of land.

10. PW-2 Janam Singh has corroborated the statement of PW-1 Nidhia Ram. According to him, Nidhia and Sukhdev were co-owners-in-possession of the suit land, which was situate at a distance of 1 km from his house. Defendant did not own any land there. He had inspected the spot when plaintiff filed the suit. Suit land was demarcated in the presence of the parties. Defendant was found to have encroached 9 *Biswansis* of land, under his *Gharat*.

11. PW-4 Shamsdeen, Kanungo testified that application titled Nidhia v/s Darsho was entrusted to him. He went to the spot and demarcated the land in suit. *Tatima* Ext. PW-4/B was prepared by Patwari, which was attested by him. Statements of the parties were recorded vide Ext. PW-4/C. Report is Ext. PW-4/A was correct as per spot.

12. Defendant has appeared as DW-1. He led his evidence by filing affidavit. According to him, he has installed *Gharat* over Khasra No. 595 about 25-26 years ago. He had not raised any construction in the year 2004. Plaintiffs dismantled his *Gharat* and he made a complaint to the police in this regard. He had been coming in possession of the *Gharat* since 1980-81. He had become owner of the suit land by way of adverse possession.

13. DW-2 Punnu has also led his evidence by filing affidavit. According to him, *Gharat* was constructed by the defendant about 25-26 years back. He was in possession of the same. Defendant did not raise any construction over the suit land. Defendant had become owner of the land by way of adverse possession.

14. DW-3 Budhi Singh also led his evidence by filing affidavit. In his cross-examination, he has categorically admitted that the *Gharat* was constructed over the land of Nidhia. He further admitted that defendant had raised construction of *Gharat* in August, 2004.

15. Plaintiff has led evidence that he is in possession of the suit land comprising of Khata Khatauni No. 1/1 Khasra No. 30, 34, 35, 37, 38 and 42 Kita 6 situate in Mauja Seri, Pargna Jundh, Tehsil Salooni, District Chamba, as per Jamabandi for the year 1997-98. Spot was inspected by PW-4 Shamsdeen. He prepared Ext. PW-4/A. *Tatima* Ext. PW-4/C was prepared by Patwari. He attested the same. According to the report of PW-4 Shamsdeen, defendant had encroached the land of the plaintiffs to the extent of 0-0-9 Biswansis. When the defendant appeared as DW-1, he could not narrate on which Khasra number, he has constructed the *Gharat*. He did not mention about the Khasra number in his affidavit. According to DW-2 Punnu, *Gharat* was constructed on the government land. He did not know whether the defendant had constructed the *Gharat* over the plaintiffs' land in August, 2004. Surprisingly, DW-3 Budhi Singh has admitted that the *Gharat* was constructed over the land of the plaintiffs by the defendant in the year 2004.

16. Thus, the plaintiffs have duly proved that the defendant has encroached upon their land measuring 0-0-9 Biswansi, in the month of August, 2004. He has started raising construction over the same. Defendant could not prove his plea of adverse possession. Plaintiffs, besides seeking mandatory injunction have also prayed that if the defendant had forcibly raised construction of *Gharat* during the pendency of the suit, suit land be restored to its original position. Thus, the first appellate Court has correctly appreciated the oral as well as documentary evidence on record. Mr. Rajnish K. Lal, Advocate has failed to pinpoint any discrepancy or illegality in the demarcation report of Shamsdeen. Moreover, the parties were present at the time of demarcation, as per the statement of PW-2 Janam Singh.

17. The substantial question of law is answered accordingly.

18. Accordingly, in view of the discussions and analysis made hereinabove, the present appeal has no merits and the same is dismissed. Pending application(s), if any, also stand disposed of. No costs.

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

Smt. Krishna Devi and others .....Appellants.

Vs.

Smt. Raj Kumari .....Respondent.

RSA No: 221 of 2007
Reserved on: 26.08.2016
Date of Decision: 31.08.2016

Specific Relief Act, 1963- Section 5- Plaintiff filed a civil suit for possession pleading that plaintiff had purchased the same for consideration of Rs. 70,000/-- one temporary Dhara was constructed on a portion of land, whereas rest of the land was vacant- predecessor-in-interest of the defendants entered into an agreement to purchase the suit land but he was not an agriculturist and was not competent to purchase the property- agreement was declared to be void in a civil suit- possession of the defendants was illegal, hence, suit was filed for possession along with mesne profits- suit was partly decreed by the trial Court- an appeal was preferred- cross objections were filed, which were allowed and the suit was decreed for recovery of Rs. 68,000/- along with future interest @ Rs. 50 per day till possession- held, in second appeal that agreement was held to be not enforceable in view of Section 118 of H.P. Tenancy and Land Reforms Act- possessors could not have been ejected except in accordance with the law- no appeal was filed against the judgment and decree- plaintiff being owner is entitled for possession of the land and

mesne profit @ Rs. 50/- per day cannot said to be excessive – judgment passed by the Court below calls for no interference- appeal dismissed. (Para-17 to 24)

Case referred:
M/s. Murudeshwara Ceramics Ltd. and another Vs. State of Karnataka and others AIR 2001 Supreme Court 3017

For the appellants: Mr. G.D. Verma, Sr. Advocate, with Mr. Romesh Verma, Advocate.
For the 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 present appeal, appellants/defendants have challenged the judgment passed by the Court of learned District Judge, Shimla in Civil Appeal No. 65-S/13 of 2005/04 dated 03.03.2007 vide which, learned appellate Court while dismissing the first appeal filed by the present appellants, has upheld the judgment and decree passed by the Court of learned Civil Judge (Junior Divison), Court No. (4) in Civil Suit No. 37/1 of 2001 dated 01.07.2006, vide which learned trial Court had decreed the suit of the present respondent/plaintiff.

2. For clarification of the records, it is stated that initial judgment passed by the Court of learned Civil Judge (Junior Division), Court No. (4), Shimla in Civil Suit No. 37/1 of 2001 dated 02.09.2004 was remanded back in appeal by learned appellate Court in Civil Appeal No. 65-S/13 of 2005/04 dated 05.08.2005 for adjudication only on Issue No. 3-A and the same culminated in judgment passed by the Court of learned Civil Judge (Junior Division), Court No. (4), Shimla in Civil Suit No. 37/1 of 2001 dated 01.07.2006

3. This appeal was admitted on the following substantial questions of law on 31.05.2007:

> *"1. Whether agreement for sale having been arrived at between late Shri Jeet Ram, predecessor of the appellants and Shri Roop Chand, predecessor of the respondent on 18.05.1990 as later on affirmed on 05.02.1991 and the fact that appellants are still read and willing to perform their part of the agreement, therefore, respondent is not entitled to a decree for possession and recovery of mesne profits?*
>
> *2. Whether agreement for sale is still enforceable between the parties, respondent having entered into the footsteps of previous owner Sh. Roop Chand, therefore, he cannot claim decree for possession and recovery of mesne profits.*
>
> *3. Whether in view of the law as laid down by the Hon'ble Apex Court as reported in AIR 2001 SC 3017, the requirement of obtaining prior permission for purchase of the land in suit was not essential and therefore, the sale deed can be executed in favour of the appellants?*

4. Brief facts necessary for the adjudication of the present case are that respondent/plaintiff (hereinafter referred to as 'the plaintiff') filed a suit for possession with regard to the suit land on the ground that the suit land was previously owned by Shri Roop Chand, S/o Shri Ram Dayal and vide sale deed dated 19th December, 2000, said land had been sold by its previous owner in favour of the plaintiff for a sale consideration of Rs.70,000/-, which was duly registered before the concerned registration authority, i.e. in the office of Sub Registrar, Shimla. As per the plaintiff, on the suit land, one temporary *Dhara* was constructed on a portion of land about 15 sq. mtrs., whereas rest of the land was vacant. It was the case of the plaintiff that defendants were in unlawful possession of the suit property owned by her. It was further mentioned by the plaintiff that predecessor-in-interest of the defendants had entered into an

agreement to sell with the predecessor-in-interest of the plaintiff with respect to the suit property on 05.02.1991. However, as the predecessor-in-interest of the defendants was not an agriculturist in Himachal Pradesh and was not entitled to purchase any property in the State of Himachal Pradesh in view of the provisions of Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, the said agreement was illegal and void and in a Civil Suit filed by the defendant, i.e. Civil Suit No. 621/1 of 95/94 filed in the Court of learned Sub Judge (1), Shimla against Roop Chand, i.e. previous owner, Issue No. 2 framed therein stood decided against the defendants (plaintiffs therein) and vide this issue, the agreement to sell the suit land entered into between the predecessor-in-interest of the defendants and Sh. Roop Chand was held to be illegal and void. It was further mentioned in the plaint that in Civil Suit No. 621/1 of 95/94, it was also held that predecessor-in-interest of the plaintiff will be entitled to obtain possession of the suit property by due process of law. It was further the case of the plaintiff that as the agreement for sale of the suit land previously entered into between the defendants and Roop Chand was not enforceable in law, the possession of the defendants on the suit property was illegal and on these basis, the plaintiff filed the suit for possession of the suit property by demolition of temporary shed (*Dhara*) alongwith a decree for recovery of Rs.6800/- and future mesne profits/damages for use and occupation of the suit land by the defendants @50/- per day from the date of filing of the suit till the recovery of possession thereof. Plaintiff also prayed for a decree of permanent prohibitory injunction restraining the defendants from changing the nature of the suit property in any manner.

5. The suit so filed by the plaintiff was contested by the defendants, i.e. present appellants. In the written statement, defendants denied the factum of the plaintiff being owner in legal possession of the property and as per the defendants the sale deed entered into between the plaintiff and the previous owner of the suit land was a sham transaction and not binding on the defendants. Defendants denied that they were in unlawful possession of the suit land and it was also denied that predecessor-in-interest of the plaintiff was not an agriculturist, as alleged. The claim of mesne profits @ 50/- per day was also not admitted by the defendants.

6. On the basis of pleadings of the parties, learned trial Court framed the following issues:

"(i) Whether the plaintiff is entitled for possession, as alleged? OPP

(ii) In case issue NO. 1 is proved to be in affirmative, whether the plaintiff is entitled for the relief of injunction as claimed? OPP

(iii) Whether the suit is not maintainable?

(iii-A) Whether the plaintiff is entitled to mesne profits of Rs.6,800/- and also at the rate of Rs.50/- per day from the date of suit till delivery of possession of the suit property to the plaintiff, as alleged? OPP

(iv) Relief.

7. On the basis of material placed on record by way of ocular and documentary evidence, learned trial Court returned following findings to the issues so framed:

"Issue No. 1:	*Yes.*
Issue No. 2:	Yes.
Issue No. 3:	No.
Issue No.3-A:	*No.*
Relief:	*The suit is partly decreed, as per the operative part of the judgment.*

8. Learned trial Court while partly decreeing the suit of the plaintiff held the plaintiff entitled for possession of the property comprised in Khata Khatauni No. 108/188, Khasra No. 886, measuring 65 sq. meters, situated at Mauja Kanlog, Tehsil and District Shimla by demolition of temporary shed (*Dhara*) standing on the part of the suit land and learned trial Court also held the plaintiff to be entitled to a decree of permanent prohibitory injunction

restraining the defendants from changing the nature of the suit land in any manner. However, learned trial Court dismissed the suit of the plaintiff for recovery of damages/mesne profits.

9. The judgment so passed by learned trial Court was challenged by way of an appeal by the defendants, whereas the plaintiff also filed Cross-objections under Order 41 Rules 22 and 33 of the Code of Civil Procedure feeling aggrieved by the denial of grant of *mesne* profits in their favour.

10. Learned appellate Court vide its judgment dated 03.03.2007 while dismissing the appeal filed by the defendants against the judgment and decree passed by learned trial Court in favour of the plaintiff, accepted the Cross-objections filed by the plaintiff. Thus, learned appellate Court while setting aside the findings of learned trial Court on Issue No. 3-A, decreed the suit of the plaintiff with costs for recovery of Rs.6800/- as damages till the filing of the suit alongwith future damages/*mesne* profits at the rate of Rs.50/- per day till the date of delivery of possession in her favour.

11. Findings so returned by both the learned Courts below in favour of the plaintiff are under challenge in the present appeal.

12. I have heard the learned counsel for the parties and also gone through the records of the case as well as the judgments passed by both the Courts below.

13. Mr. Romesh Verma, learned counsel for the appellants challenged the findings so arrived by learned trial Court on the ground that it was wrongly and erroneously presumed by learned trial Court that agreement to sell the suit property which initially entered into between the predecessor-in-interest of the present appellants and Shri Roop Chand, i.e. original owner of the suit land was illegal and void. According to Mr. Verma, this finding was perverse as there was nothing on record from which this inference could have been drawn by learned trial Court. According to Mr. Verma, the judgment passed by learned trial Court was otherwise also not sustainable in law in view of the amendment which had been subsequently carried out in the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act in lieu of which, the suit land could have been easily purchased by the predecessor-in-interest of the defendants without facing the embargo of Section 118 of the H.P. Tenancy and Land Reforms Act. According to Mr. Verma, because the suit property was situated within the municipal limit of Shimla Town, therefore, rigours of Section 118 of the H.P. Tenancy and Land Reforms Act were not attracted. His submission was that this very important aspect of the matter had been ignored both by learned trial Court as well as by learned appellate Court and further learned appellate Court had grossly erred in accepting the Cross-objections filed by the plaintiff and decreeing the suit of the plaintiff for recovery of Rs.6800/- alongwith future interest and *mesne* profits @50/- per day as the plaintiff had not adduced any evidence on record to substantiate or justify the amount which was claimed by the plaintiff. .

14. On the other hand, Mr. Ajay Kumar, learned Senior Counsel appearing for the respondent argued that the appeal filed by the present appellants was without any merit and the argument of Mr. Verma that argument to sell dated 05.02.1991 was still subsisting was totally unacceptable in law because keeping in view the fact that in a previous legal proceedings between the plaintiff and Shri Roop Chand, the original owner of the suit land, this issue stood decided by the Court of learned Sub Judge (1), Shimla in Civil Suit No. 621/1 of 95/94 that agreement dated 05.02.1991 was illegal and void. According to Mr. Sood, the findings so returned in Civil Suit No. 621/1 of 95/94 had attained finality (which aspect of the matter was not disputed by Mr. Romesh Verma) and therefore, as per Mr. Sood, the argument of Mr. Romesh Verma to the effect that there was no material on record from which learned trial Court could have drawn this inference that the agreement entered into between Shri Roop Chand and the predecessor-in-interest of the present defendants was a totally misconceived argument.

15. Mr. Sood also argued that substantial question of law No. 1 in fact is not borne out from the records of the case itself because it is not a case between the parties which had signed the agreement to sell dated 05.02.1991 nor it is a case where the sale deed entered into

between the plaintiff and Shri Roop Chand was under challenge by way of filing of a suit for declaration by any alleged aggrieved party. It was further argued by Mr. Sood that the agreement to sell dated 05.02.1991 was not enforceable at all in view of the quietus having been given to the said agreement by the judgment passed by the Court of learned Sub Judge (1), Shimla in Civil Suit No. 621/1 of 95/94 dated 31.03.2000. Mr. Sood also argued that the judgment of the Hon'ble Supreme Court being relied upon by the appellants was also of no assistance to the appellants and on these basis, he argued that there was no merit in the appeal and the same be dismissed with costs.

16. In my considered view, the contention of learned counsel for the appellants that the judgment and decree of possession and injunction passed in favour of the plaintiff and against the defendants by learned trial Court is not sustainable in law is without any merit.

17. Ex.-PX is the copy of judgment passed by the Court of learned Sub Judge 1st Class, Court No. 1, Shimla in Case No. 621/1 of 95/94 vide which, suit for permanent prohibitory injunction filed by the present appellants against the original owner of suit property Sh. Roop Chand and Sh. Balak Ram was dismissed. Issue No. 2 framed in the said suit reads as under:

> *"2. Whether the agreement dated 05.02.91 is illegal and void as alleged? OPD*

18. In the said suit, this issue was decided against the plaintiffs therein, i.e. present appellants. The findings returned by learned Court in the said suit in para-14 of the judgment passed by it read as under:

> *"14. From the above discussion, it appears that the plaintiffs are in possession of the suit land, though their possession is under the agreements, which cannot be enforced by them, in view of the bar under Section 118 H.P. Land Tenancy and Land Reforms Act. The Ld. Counsel for defendants has argued that since the possession of the plaintiffs is unlawful, therefore, they are not entitled to any injunction. However, it appears that the plaintiffs have been in possession of the suit property with the consent of the defendants, therefore, they cannot be ejected from the suit land by the defendants, by using force. Even in case of a tress, the real owner cannot evict the encroacher by force, though, he can recover the possession in accordance with law. Simply because agreement, Ex. PW1/A and B are invalid in view of Section 118 H.P. Tenancy and Land Reforms Act, it will not entitle them to use force and disturb the possession of the plaintiffs."*

19. It has been stated at the Bar by learned counsel for the appellants that the judgment so passed by the Court of learned Sub Judge 1st Class, Court No. 1, Shimla in Case No. 621/1 of 95/94 dated 31.03.2000 was not challenged by way of an appeal etc. In other words, the findings which have been returned with regard to agreement to sell dated 05.02.1991 to the effect that the said agreement cannot be enforced in view of the bar contained in Section 118 of the H.P. Tenancy and Land Reforms Act has attained finality. The respondent herein has purchased the suit land by way of a registered sale deed from Shri Roop Chand, who was the defendant in Civil Suit No. 621/1 of 95/94. The judgment in the abovementioned Civil Suit is dated 31.03.2000, whereas the sale deed executed between the present respondent and Roop Chand is dated 19.12.2000. Therefore, as on the date when the sale deed was executed between the present respondent and Shri Roop Chand finding to the effect that the agreement to sell entered into between the predecessor-in-interest of the present appellants and Shri Roop Chand already stood returned by the Court of law. Not only this, the present appeal has arisen out of a suit which was filed by the present respondent seeking possession of the suit land and it is not as if the appellants herein had filed a suit for declaration to the effect that sale deed entered into between the present respondent and Shri Roop Chand was bad in law. Therefore, in this view of the matter, in my considered view, substantial question of law No. 1 as has been framed is not borne out from the records of the case. This is more so keeping in view the fact that even in the written statement, no such stand was taken by the appellants/defendants that the appellants/defendants were ready and willing to perform their part of the agreement. Besides

this, even otherwise the appellants at this stage cannot be permitted to say that the plaintiff was not entitled for decree of possession and recovery of *mesne* profits on the ground that appellants are still ready and willing to perform their part of the agreement as the said agreement has already been held to be not enforceable in law vide judgment and decree passed by the Court of learned Sub Judge 1st Class, Court No. 1, Shimla in Case No. 621/1 of 95/94 dated 31.03.2000. Therefore, this issue whether the agreement for sale was/is enforceable or not stands decided as far back as in the year 2000 vide judgment dated 31.03.200 passed in Case No. 621/1 of 95/94 (*supra*) and in this view of the fact, it cannot be said that the agreement in issue is still enforceable between the parties.

20. Keeping in view the fact that both the learned Courts below have concurrently come to the conclusion that plaintiff was entitled for possession of the suit land and the said suit land was illegally occupied by the defendants, while learned trial Court erred in granting the mesne profits in favour of the plaintiff, learned appellate Court had rightly set aside the judgment and decree passed by learned trial Court to this effect by allowing the Cross-objections filed by the plaintiff.

21. During the course of arguments, it has also been brought to the notice of this Court that the judgment and decree passed by learned trial Court of possession has also been executed and the possession of the suit land has been handed over to the present respondent. Appellants admittedly remained in possession of the suit land without any legal right and the claim of mesne profits by the owner of the suit land @50/- per day cannot be said to be unjustified. The claim of mesne profits was duly pleaded in the plaint and claimed by the plaintiff in her deposition as PW-1.

22. The judgment of the Hon'ble Supreme Court relied upon by the learned counsel for the appellants in **M/s. Murudeshwara Ceramics Ltd. and another** Vs. **State of Karnataka and others** AIR 2001 Supreme Court 3017, in my considered view, has no applicability in the facts of the present case. In the said case, the Hon'ble Supreme Court dealt with the provision of Karnatka Land Reforms Act and exemption contained therein with regard to transfer of land in favour of non agriculturists. In view of the facts of that case, it was held by the Hon'ble Supreme Court:

> *"6. Section 109 of the Act confers power on the State Government to grant exemption in regard to a land in any area from the provisions of Sections 63, 79A, 79B and 80 of the Act to be used for industrial purposes, educational institutions, places of worship, a housing project or horticulture including floriculture or an agro based industry. Further, the Government has also the power even in the absence of such purposes to grant exemption in public interest. If the aspect that it is not with reference to any particular person or transaction such exemption is granted but it is with reference to a land such exemption is granted is borne in mind the interpretation and application of law becomes clear. It may be that such exemption could be granted before the acquisition of the land or thereafter when it is actually sought to be put to those particular uses, which are enumerated under Section 109 of the Act. Therefore, once we come to the conclusion that the Government has powers to grant exemption from the operation of the provisions of Sections 63, 79A, 79B and 80 of the Act and those provisions will be out of place insofar as the land in question is concerned, the examination by the High Court as to whether there has been contravention of the provisions thereof was totally uncalled for. The High Court need not have embarked on the investigation as to whether the sale is in contravention of the provisions of the Act and ought to have held that those provisions are not applicable in the case of the land in question in view of the exemption granted. Thus the finding recorded by the High Court in this regard is set aside."*

23. However, as far as the present case is concerned, the amendment on which learned counsel for the appellants is insisting which has been carried in Section 118 of the H.P.

Tenancy and Land Reforms Act by introduction of clause (dd) in sub-section 21 of Section 118 of the said Act has been inserted by way of Section 3 of H.P. Tenancy and Land Reforms Act, 1997. The agreement to sell entered into between predecessor-in-interest of the defendants and Shri Roop Chand is dated 05.02.1991, meaning thereby the exemption which has been inserted by way of amendment carried in the year 1997 and the same is also subject to riders. *De hors* this fact, in the present case, the fact of the matter still remains that the finding returned by the Court of learned Sub Judge 1st Class, Court No. 1, Shimla in Case No. 621/1 of 95/94 to the effect that the agreement in issue was not enforceable had attained finality and was not challenged by the appellants and the sale deed entered into between the present respondent and Shri Roop Chand was after the said adjudication by the Court of learned Sub Judge 1st Class, Court No. 1, Shimla in Case No. 621/1 of 95/94. Therefore, in this view of the matter, it cannot be said that the judgment and decree passed by learned trial Court and upheld by learned appellate Court in favour of respondent/plaintiff and against appellants/defendants qua the possession of suit land and injunction calls for no interference. Substantial questions of law are answered accordingly.

24. In view of the discussion held above, there is no merit in the appeal and the same is dismissed. Miscellaneous application(s), if any, stand disposed of.

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

Mr. Markar Masih ...Petitioner
Versus
Smt. Padma Sahni ...Respondent

Civil Revision No. 2/2008
Reserved on: August 30, 2016
Decided on: August 31, 2016

H.P. Urban Rent Control Act, 1987- Section 14- An eviction petition was filed against the tenant on the ground of arrears of rent, material alterations, impairing the value and utility of the shop in question- Rent Controller allowed the petition and ordered the eviction on the ground of arrears of rent as well as impairing the value and utility of the premises- an appeal was preferred, which was dismissed- held, in revision that PW-3 had found that cages were kept inside the shop, which were welded with the shutter- it was also proved that partition was constructed by the tenant after taking the premises on rent - tenant had made holes in the roof of the shop and had exposed the iron bars of lintel to hang the weighing scale- tenant admitted that he had made additions and alterations without the consent of the landlady- nature of the construction is permanent and in case of removal, damage would be caused to the premises- Courts had rightly ordered the eviction - petition dismissed. (Para-15)

For the petitioner: Mr. Bhupender Gupta, Senior Advocate with Mr. Neeraj Gupta, Advocate.
For the respondent: Mr. K.D. Sood, Senior Advocate with Mr. Rajnish K. Lal, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

This civil revision petition has been filed against Judgment dated 30.10.2007 rendered by the Appellate Authority Solan, District Solan, Himachal Pradesh in Rent Appeal N. 22-S/14 of 2006.

2. "Key facts" necessary for the adjudication of the present civil revision petition are that the respondent-landlady (hereinafter referred to as 'landlady' for convenience sake) instituted

a petition under Section 14 of the Himachal Pradesh Urban Rent Control Act, against the petitioner-tenant (hereinafter referred to as 'tenant' for convenience sake) for his eviction from the premises situate on Rajgarh Road, which is stated to be a shop i.e. non-residential and used by the tenant for the sale of meat. Eviction of the tenant has been sought on the ground that he has not paid rent since October, 2001 at the rate of Rs.335/- per month. Other ground taken in the petition was that the tenant without the permission of the landlady and without the permission of the Rent Controller, 10 days prior to the filing of the petition, has done material alterations and illegal acts, which have impaired the value and utility of the shop in question. Tenant has constructed room by raising one partition wall made of bricks and cement inside the shop and has made two rooms of the shop. It is further alleged that the tenant had created big holes in main walls and raised /constructed huge RCC shelves and inserted three heavy iron bars in the holes so as to construct these shelves by adding extra load on the walls. It is further alleged that the tenant has also constructed a hose (*Khurli*) below the retaining wall inside the shop and retaining wall has become dangerous and can fall at any time. Tenant has also raised one poultry house made of iron bars by permanently welding the same with the main shutter frame of the demised premises and thus the value and utility of the premises has been diminished. He has also changed the user and created nuisance.

3. Reply was filed by the tenant. According to the tenant, rent upto 31.1.2001 stood already paid and rent upto 30.10.2002 was sent to the landlady. It was denied that any material alterations and illegal acts have been done by him impairing the value and utility of the shop. No room has been constructed by the petitioner. Shop was already partitioned at the time when it was rented out in the year 1981. No holes have been dug in the walls. No *Khurli* has been constructed. It was denied that any permanent poultry house of iron bars has been raised by the tenant.

4. Issues were framed by the learned Rent Controller on 13.12.2004. He allowed the petition on 31.8.2006 and ordered eviction of the tenant by holding him to be in arrears of rent @ Rs.335/- per month from 1.10.2004 till the date of order. It was also held that the tenant has materially impaired the utility and value of the demised premise and he was ordered to be evicted on this ground also. Tenant filed an appeal before the Appellate Authority. The appellate authority also dismissed the appeal on 30.10.2007. Hence, this civil revision.

5. Mr. Bhupender Gupta, learned Senior Advocate has vehemently argued that his client has not impaired the utility and value of the shop in question. According to him, no permanent structures have been raised by his client.

6. Mr. K.D. Sood, learned Senior Advocate has supported the order and judgment passed by the authorities below.

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

8. Landlady has appeared as PW-1. She has led her evidence by filing affidavit. According to the averments made in the affidavit tenant without her consent has constructed a water tank and also constructed partition wall. He has also raised two platforms. He has also dug holes in the ceiling. He has constructed two cages to keep the poultry. Structures are permanent in nature. Permanent structures have damaged the premises. She has shown the premises to an Engineer. She has placed on record report Mark 1 and Map Mark 2.

9. PW-2 Jagmohan Suri has also led his evidence by filing affidavit. It is averred in the affidavit that he has gone to the shop in the month of December 2001. Tenant was constructing water tank and partition wall. It was on the verge of completion. He has also raised two platforms.

10. PW-3 R.P. Swami has also led his evidence by filing affidavit. According to the averments made in the affidavit, he has retired in 1994 as Junior Engineer from Irrigation & Public Health Department. He has done civil engineering diploma from Sundernagar in the year 1962. He has got many buildings constructed in his tenure. He has inspected the shop on

2.1.2005. He has proved report Ext P2 and site plan Ext P3. He has also averred that the value and utility of the building was impaired by the construction raised by the tenant.

11. PW-4 Om Parkash Sahni has also corroborated the statement of PW-1 Smt. Padma Sahni about the manner in which tenant has partitioned the shop, constructed water tank and has also inserted holes in the walls.

12. Tenant has appeared as RW-1. He has also placed on record photographs. It is averred in the affidavit that the shop was already partitioned into two parts. He has not done any alteration or addition. He has not caused damage to the shop. He has not constructed any water tank. In his cross-examination, he has admitted that the shop is 20 feet in length and 10 feet in width. He has admitted that he has constructed shelves made of bricks, cement and granite inside the shop without the consent of the landlady. He has also hanged one weighing scale with the walls. He admitted that he has inserted a bolt of 4 inches inside the wall and the hook with which the weighing scale was hanging. He further admitted that he has made hole in the roof of the shop and exposed the iron bars of lintel for hanging the goat. He has constructed shelves inside the shop made of marble. He has also inserted one iron pipe in the wall.

13. RW-2 Nand Lal deposed that he used to purchase meat from the tenant. However, in his cross-examination, he testified that he was a vegetarian. He admitted that the partition wall was raised from the floor upto lintel, however, it was not plastered.

14. RW-3 Bhag Singh deposed that he used to purchase meat from the petitioner. He has also admitted that the partition wall was touching lintel though it was not plastered.

15. Premises were visited by PW-3 RP Swami. He prepared map Ext. P3. As per the report, cages were kept inside the shop. These are welded with the shutter. He has also made minutest details of the additions carried out inside the shop like construction of water tank and construction of platforms. Landlady has duly proved that the partition was constructed by the tenant after the premises were rented to him. Tenant has made holes in the wall. He has also exposed iron bars of lintel in order to hang weighing scale. Tenant has categorically admitted that he has made additions and alterations without the consent of the landlady. Nature of the construction raised by the tenant is permanent and these are not removable. In the event of permanent structures being removed, it is bound to damage the premises. Construction of permanent structures inside the shop has definitely impaired the value and utility of the premises. Construction raised by the tenant can not be termed as temporary additions and alterations. Construction raised by the petitioner has substantially changed the character, form and structure of the building. Permanent construction is bound to make changes in the premises on permanent basis. Damage by inserting iron rods would be caused to walls. Partition is by brick wall and it is upto the lintel.

16. There is neither any illegality nor perversity in the Judgment passed by the appellate authority below as well as the order passed by the Rent Controller.

17. Accordingly, there is no merit in the present petition and the same is dismissed. Pending applications, if any, are disposed of. However, in the interests of justice, tenant is directed to vacate the premises within a period of three months from the date of this judgment and to pay use and occupation charges to the landlady, within a period of same period.

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

Smt. Neetu Sharma .... Petitioner

Versus

Indian Oil Corporation Limited and others ...Respondents

CWP No. 1027 of 2013
Reserved on: 07.07.2016
Date of decision: 31.08.2016

Constitution of India, 1950- Article 226- Applications were invited for appointment of retail sale outlet dealers in different locations in the State of Himachal Pradesh – appointment was to be made by holding interview and according to prescribed criteria - petitioner and respondents No. 4 and 5 submitted applications- petitioner was awarded highest marks- a civil suit was filed by respondent No. 4, which was dismissed in default- State Government issued notification and the location was changed- petitioner was informed that the dealership selection for subject location had been cancelled- a fresh advertisement was issued- petitioner filed a writ petition, which was disposed of with a direction to hear the parties- order was issued justifying cancellation and re-advertisement – respondent No. 5 was declared successful- petitioner was placed at serial No. 2- petitioner challenged the order and selection- held, that same parties had responded to the earlier advertisement and the second advertisement- petitioner was earlier evaluated at number one but subsequently she was placed at serial No. 2- a complaint was filed by respondent No. 5, which was motivated complaint as the same site was offered- allegations in the complaint were not found to be correct- respondent-corporation is a public Corporation and has to act fairly and reasonably- writ petition allowed and selection of respondent No. 5 cancelled- Corporation directed to allot the retail outlet in favour of the petitioner. (Para-22 to 33)

Case referred:

Centre for Public Interest Litigation and others Vs. Union of India and others (2012) 3 Supreme Court Cases 1

For the petitioner: Mr. Satyen Vaidya, Senior Advocate with Mr. Rohan Chauhan, Advocate.

For the respondents: Mr. K.D. Sood, Senior Advocate with Mr. Dhananjay Sharma, Advocate, for respondents No. 1 to 3.
Respondent No. 4 *ex parte.*
Mr. Ramakant Sharma, Senior Advocate with Mrs. Devyani Sharma and Basant Thakur, Advocates, for respondent No. 5.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

This petition has been filed praying for the following reliefs:

"(i) This Hon'ble Court may kindly be pleased to quash Annexure P-11.

(ii) This Hon'ble Court may kindly be pleased to quash the decision of respondents No. 1 to 3 to re-allot the retail dealership of Indian Oil Corporation in respect of location "in and around Fatehpur between mile stones 28-30" in District Kangra, HP and to strike down the action of respondents No. 1 to 3 to re-invite applications for the said location vide Annexures P-13 to th extent it deals with said location.

(iii)This Hon'ble Court may kindly be pleased to quash and set aside the order Annexure P-16 being irrational, illegal and arbitrary.

(iv)This Hon'ble Court may kindly be pleased to quash and set aside Annexure P-18 and the entire selection process undertaken by Respondents No. 1 to 3 in pursuance to Annexure P-13.

(v) This Hon'ble Court may kindly be pleased to issue a writ of mandamus directing respondents 1 to 3 to issue Letter of Intent to the petitioner in pursuance of her selection as retail outlet dealer of respondent no. 1 in respect of the location detailed herein above.

(vi)That the respondents 1 to 3 may kindly be directed to produce the entire record pertaining to the controversy in hand.

(vii)Any other writ, order or directions, as this Hon'ble Court may deem just and proper in the facts and circumstances of the case may also be passed in favour of the petitioner.

2. Case of the petitioner is that on 04.09.2009 respondents No. 1 to 3 published an advertisement in various newspapers inviting applications for appointment of retail sale outlet dealers in different locations in the State of Himachal Pradesh.

3. As per the said advertisement, the appointment was to be made for a single particular location by holding interview (viva-voce) and the parameters for evaluation of the applicants/ candidates prescribed therein were as under:-

"a)	Capability of providing land and infrastructure facility	= 35 marks
b)	Capability to provide finance	= 25 marks
c)	Capability to generate business	= 25 marks.
d)	Age	= 4 marks
e)	Experience	= 4 marks
f)	Business availability/acumen	= 7 marks
	Total Marks	= 100"

4. One of the locations so advertised by respondents No. 1 to 3 was "Fatehpur (20-22 Meel Ka Pathar Ke Beach)". This site was in District Kangra and was meant for women (open category).

5. As the petitioner fulfilled the qualification criteria laid down in the advertisement issued by the Respondent Corporation, she submitted her application alongwith all documents/affidavit etc. to the authority concerned within the stipulated period to be considered for allotment of the site in issue. Respondents No. 4 and 5 also applied for the allotment of the said location. The respective lands/sites offered by all the parties i.e. petitioner and respondents No. 4 and 5 were duly inspected by the officials of respondents No. 1 to 3 and thereafter, respondent No. 3 vide letter dated 01.04.2010 called upon the petitioner to appear before the Selection Committee for the interview which was scheduled at 10.00 A.M. on 22.04.2010.

6. This interview was conducted in the office of respondent No. 3 i.e. 21-SDA Commercial Complex, Kausmpti, Shimla-9, H.P. and alongwith petitioner, private respondents were also called for interview by respondent No. 3 on the said date at the same venue. The result of the interviews so held on 22.04.2010 were declared on 23.04.2010. Following were the marks allotted to the petitioner as well as the private respondents:-

"Petitioner	=	89.10 marks
Respondent No. 4	=	83.07 marks
Respondent No. 5	=	77.57 marks"

7. Thus, the petitioner was evaluated at number one by the Respondent Corporation in the merit panel so drawn. Respondent No. 4 filed a civil suit in the last week of April, 2010 in the Court Civil Judge (Junior Division), Jawali, District Kangra against the present petitioner as well as the Respondent Corporation seeking a decree for declaration as well as permanent injunction for cancellation of the allotment of the dealership in issue in favour of the present petitioner. The suit was dismissed in default on 05.06.2010. Thereafter, an application for restoration of the same was filed but the same was later on withdrawn vide order dated 20.06.2010.

8. It was further the case of the petitioner that village Fatehpur was situated on Pong Dam-Fatehpur-Jassur road, declared as State Highway No. 27 by the Government of Himachal Pradesh vide notification dated 19.07.2005. As per this notification, total distance of

Pong Dam-Fatehpur-Jassur is 53 KMs. Thereafter, Government of Himachal Pradesh had again issued notification dated 22.05.2007 in partial modification of the earlier notification dated 19.07.2005 and the roads mentioned in the said notification were declared as State Highway and Major District Roads. In this notification Pong Dam-Fatehpur-Jassur was mentioned at serial No. 15 and the length of the same was 53 KMs. In both these notifications, the number of the said State Highway was 27 and according to the petitioner, the marking of the mile stone of the said Highway No. 27 Pong Dam-Fatehpur-Jassur road was done by the Government of Himachal Pradesh on the basis of the said two notifications. According to the petitioner, the site in issue advertised vide Annexure P-1 i.e. Fatehpur (between mile stones 20-22) was identified and indicated on the basis of the chainage of the mile stones based on the said two notifications. All the applicants i.e. the petitioner and respondents No. 4 and 5 submitted their applications indicating therein the proposed sites between mile stones 20-22 on the basis of chainage of State Highway No. 27 fixed by the Government of Himachal Pradesh as per Annexures P-6 and P-7 and as per the said chainage the mile stones was from the direction Pong Dam to Jassur via Fatehpur.

9. When the civil suit mentioned above was filed by respondent No. 4, the petitioner became apprehensive and enquired from Assistant Engineer, H.P.P.W.D., Sub Division, Fatehpur, District Kangra, who intimated her vide correspondence dated 03.05.2010 that the RDS of the State Highway-27 had been altered on account of inclusion of additional length of road in the said highway from Pong Dam to Terrace. It was mentioned in communication dated 03.05.2010 that the location of the plots earlier located from KMs 20/0 to 22/0 were now located between KMs 28/0 to 30/0 due to re-marking of the RDs additional length from Pong Dam to Terrace.

10. Similar query was also raised by respondent No. 3 from the concerned Engineer of P.W.D. Division Fatehpur and vide Annexure P-9 dated 14.06.2010, respondent No. 2 called upon the said authority to intimate the date of repainting the mile stone on above chainage and date of notification of old chainage and present chainage. In response to the said communication, Assistant Engineer, HPPWD Sub Division Fatehpur, District Kangra, intimated respondent No. 3 that the date of repainting of the miles tone was 26.02.2010 and the date of chainage of old chainage to new chainage was as per Government notification dated 22.05.2007. Vide communication dated 25.08.2010 respondent-Corporation intimated the petitioner that the Corporation had received a complaint against the dealership selection pertaining to the retail outlet subject matter of the present writ petition and the said complaint was got investigated and the investigation substantiated the substance of the complaint. On these basis, vide said communication, the petitioner was informed that the dealership selection for subject location had been cancelled.

11. This was followed by issuance of advertisement dated 15.09.2010 vide which the same site was again advertised in the following words:-

"In and around Fatehpur between miles stone 28 to 30 in District Kangra."

12. Petitioner being aggrieved by the cancellation of her allotment of retail sale outlet dealership as communicated her vide communication dated 25.08.2010 (Annexure P-11), filed CWP No. 6266 of 2010 in this Court. Said writ petition was disposed of by this Court vide its decision dated 07.03.2012 in the following terms:

> *"I direct that the Corporation shall consider the complaint of respondent No. 5 in terms of the policy for which purpose both the parties herein as also respondent No. 4 Aman Kumari shall be given an opportunity of being heard. All the grounds raised herein will be open to the petitioner to be urged before the appropriate authority. The respondent will also be at liberty to place before the authority such other or further material in support of their contentions. Writ petition stands disposed of. No order as to costs. The entire proceedings shall be*

concluded within four months from the date when this order is presented before the Corporation. Liberty to the parties to approach this Court again."

13. As per the petitioner, in purported compliance to the directions passed by this Court in CWP No. 6266 of 2010, respondent-Corporation issued order dated 20.12.2012 (Annexure P-16) and by way of this order, the cancellation of selection of the petition and issuance of second advertisement for establishment of retail outlet dealership was justified in the following terms:

"In view of the above stated facts, the competent authority has observed that the said location has been rightfully cancelled. Decision to issue the second advertisement for the establishment of retail outlet dealership regarding the location "in or around Fatehpur (between milestone 28 to 30) in District Kangra is in accordance with the norms and policies of the respondents."

14. This was followed by declaration of the result pursuant to the second advertisement issued by the Respondent Corporation in which now respondent No. 5 was declared as the successful candidate who was allotted 90.1 marks, whereas the petitioner was placed at serial No. 2 and she had been allotted 88.9 marks. As per petitioner, perusal of the earlier marks sheet and the subsequent marks sheet would demonstrate that both the petitioner and respondent No. 5 had been allotted almost similar marks, however, now under the heading "capability to earn finance", the respondent had been granted more marks than the petitioner.

15. Feeling aggrieved by the issuance of order dated 20.12.2012 as well as the subsequent advertisement issued by respondent/Corporation, in the process initiated under which respondent No. 5 was found more meritorious than the petitioner, she filed the present petition.

16. According to the petitioner, the act of respondents No. 1 to 3 of cancelling the dealership selection of the petitioner and re-advertising of the same location was wrong and illegal. Unilateral decision taken by respondents No. 1 to 3 to cancel the selection of the petitioner without affording an opportunity was violative of the principle of natural justice. Further according to the petitioner, earlier the petitioner was at serial No. 1 over and above respondent No. 5 on the basis of the marks obtained by her in the interview and the said interview was conducted strictly as per the procedure contemplated in Annexure P-1. As per the petitioner, cancellation of the lawful selection of the petitioner was done with a malafide intent by respondents No. 1 to 3 in collusion with respondents No. 4 and 5. It was further her case that whereas on one hand the petitioner has been denied the right to have retail sale outlet dealership for a location to which she was held to have qualified, now the same site was re-advertised only with an intent to give benefit to others who were earlier found to be behind the petitioner and who otherwise were not entitled to be allotted the site in preference to the petitioner who was already selected. It was further the case of the petitioner that impugned act of respondents No. 1 to 3 otherwise was blatant abuse of powers and the said act was a result of manipulation. Respondent/Corporation in the garb of administrative power had acted in an arbitrarily and unreasonable manner to deny the petitioner her legal right and to confer upon respondent No. 5 such rights to which she was not entitled to. According to the petitioner, the reasons which had been assigned by respondents No. 1 to 3 were irrational, illegal and smack of clear malafides on the basis of which allegedly the chainage was notified to be changed on and with effect from 22.05.2007.

17. Respondents No. 1 to 3 in the reply filed by them have put forth their stand in the preliminary objections. According to the said respondents, advertisement dated 04.09.2009 was issued in which amongst other locations, the location in question, i.e. Fatehpur (between milestone 20-22, District Kangra was also advertised. As per the said respondents, they received complaints regarding the change of the chainage and in view of the complaints, they sought information from SDE PWD Division, Fatehpur, who informed them that date of repainting of the

milestone was 26.02.2010 and the date of change of old chainage to new chainage was 22.05.2007. As per the above notification, milestone 20-22 was to be read as milestone 28-30 and accordingly, land of all the applicants including the petitioner lay between milestone 28-30, whereas location advertised by respondents was Fatehpur (between milestone 20-22). In view of the above, as per respondents No. 1 to 3, it scrapped the merit panel and issued fresh advertisement on 16.09.2010 for location which was now advertised as Fatehpur (between milestone 28-30). As per said respondents, petitioner alongwith private respondents No. 4 and 5 again applied for new location with the same land as was offered in the previous advertisement. In the second panel, the petitioner was declared to be number two, whereas Smt. Jyoti was found to be at number one. It was further the stand of the said respondents that in compliance of order dated 07.03.2012 passed by this Court in CWP No. 6266/2010, competent authority appointed a senior officer of the Corporation to investigate the matter and complaint of Smt. Jyoti (respondent No. 5) was reconsidered and for this purpose, all the concerned parties were given an opportunity of being heard and after hearing them, the competent authority passed the order in issue. Thus, the said respondents justified their act.

18. In the reply filed by respondent No. 5, setting aside of the selection of petitioner was justified on the grounds that respondent No. 5 had made a complaint to the respondent Corporation against the illegal selection of the petitioner and while investigating the said complaint, respondent Corporation found after physical verification of the site that advertisement dated 04.09.2009 with respect to the allotment of Retail Sale Outlet Dealership for Fatehpur location between 20-22 milestone was wrongly issued and, therefore, vide communication dated 25th August, 2010, said site location was cancelled because land of none of three applicants was falling within milestone 20-22. It was further stated in para-7 of the preliminary submission as under:

> *"7. That the present writ petition is liable to be dismissed on the ground that the respondents No. 1 to 3 are well within their right to have cancelled the earlier advertisement dated 4.9.2009 and this right was reserved by respondents No. 1 to 3 in the advertisement itself as is clear from clause 10(b), therefore, no benefit can be derived by the petitioner, more particularly, when the petitioner participated in the selection in pursuance to the advertisement dated 16.9.2010. It is submitted on behalf of the replying respondent that after the order was passed by this Hon'ble Court vide judgment dated 7.3.2012, the petitioner has been granted ample opportunity by the respondents No. 1 to 3 so as to show that the earlier advertisement dated 4.9.2009 was not factually incorrect, whereas to the contrary, the replying respondent had placed ample material before the authorities of respondents No. 1 to 3, perusal of which would go to show that the earlier advertisement dated 4.9.2009 was factually incorrect and, therefore, the subsequent advertisement was issued with respect to the exact location of mile stones, which mile stones were changed from 20-22 to new mile stones 27-29. It is submitted on behalf of the replying respondent that from the information, supplied in pursuant to the application under Right to Information Act, dated 9.4.2012 from PWD Nurpur Division, copy of which is annexed as Annexure R5/B, it is clear that in State Highway No. 27, kilometers have been changed from 45/920 to 53/600 during 7/2008 and these new kilometers stand completed in all respect, that is, fixing and painting from 03/0 to 53/600 under this Division. It is further clear from Annexure R5/B that the painting of the mile stones portion 03/0 to 42/680 has been done during March 2006, May 2007, February 2008, May 2009 and portion 42/680 to 53/600 once during 2007/2008. It is submitted on behalf of the replying respondent that the Fatehpur Division falls under the Superintending Engineer 9th Circle HP PWD Nurpur. It is clear from Annexure P-16 that the authorities of respondents No. 1 to 3 have categorically come to the right conclusion after considering the material placed before them by the replying respondents and also on the basis of the investigation made by their independent*

investigator that there was a notification (old chainage to new chainage) prior to the date of advertisement of location of Fatehpur (between mile stones 20-22) and to that extent the advertisement was factually incorrect and, which surfaced during complete investigation. Therefore, the earlier advertisement location was cancelled and a new advertisement was made re-advertising the location with correct details as per policy guidelines. As such the writ petition is liable to be dismissed."

19. The stand so taken by respondent No. 5 was refuted by the petitioner by way of rejoinder.

20. By way of CMP No. 5448 of 2016, respondent-Corporation has placed on record the complaint filed by respondent No. 5 and the documents relating to investigation which was carried by respondents No. 1 to 3 on the said complaint and action taken thereon.

21. I have heard the leaned counsel for the parties and have also gone through the pleadings of the parties.

22. Admittedly, in the present case two advertisements were issued by the respondent-Corporation inviting applications for appointment of retail sale outlet dealers at Fatehpur in District Kangra, which was meant for women (open category). As per the earlier Notification, the details of the site were "Fatehpur (20-22 Meel Ka Pathar Ke Beach)". After the acceptance of the complaint filed by respondent No. 5, by way of second advertisement, which was issued by respondents No. 1 to 3, the site now advertised was as under:

"In and around Fatehpur between milestone 28 to 30 in District Kangra"

23. It is undisputed position that besides the petitioner, respondents No. 4 and 5 had responded to the earlier advertisement dated 04.09.2009 and the same set of parties responded to the second advertisement issued for the same location vide advertisement dated 15.09.2010. It is also an admitted position that earlier also the sites/locations which were offered by the petitioner and respondents No. 4 and 5 were the same which were subsequently offered by them in response to the subsequent advertisement dated 15.09.2010. It is evident from the documents produced on record by the parties that whereas earlier after evaluation of the respective case of the parties, present petitioner was evaluated at No. 1, but in the second evaluation carried out by respondent-Corporation pursuant to advertisement dated 15.09.2010, respondent No. 5 has been evaluated at No. 1 and the petitioner has been evaluated at No. 2. The statement of performance of the petitioner and private respondent dated 20.09.2011, which is appended as Annexure P-18 demonstrates that the following marks have been allotted to the parties by the Evaluating Committee:

Sr. No.	Name of Candida-te	Capability to provide infrastructure and facility	Capability to arrange finance	Educational qualification	Capacity to generate business	Age	Exper i-ence	Business Acumen	Personality	Total
	Max. marks	35	25	15	10	4	4	5	2	100
1.	Smt. Jyoti	33.1	25.0	10.0	9.0	4.0	4.0	3.5	1.5	90.1
2.	Ms. Aman Kumari	31.3	25.0	12.0	8.5.	2.0	2.0	2.0	1.0	83.8

3.	Ms. Nitu Sharma	33.4	21.0	12.0	9.0	4.0	4.0	3.5	2.0	88.9

24. It is apparent from the perusal of this document that petitioner has been given more marks under the head "Capability to provide infrastructure & facility" and the private respondent was found more meritorious than the petitioner as she was granted more marks under the head "Capability to arrange finance". The earlier evaluation carried out in respect of the parties which is available on record as Annexure P-3 was as under:

Sr. No.	Name of the Candi-date	Capability to provide land and infrastructure facilities (Max 35)	Capability to provide finance Max.(25)	Educational Qualification (Max. 15)	Capability to generate business-s (10 marks)	Age (4 mar-ks)	Exper-ience (4 marks)	Busine-ssability/ acumen (5 marks)	Pers o-nality(2 marks)	Total marks (100)	Merit Panel
1.	Ms. Nitu Shar-ma	33.43	21.00	12.00	8.67	4.00	4.00	4.00	2.00	89.10	I
2.	Smt. Jyoti	33.43	21.64	10.00	3.50	4.00	0.00	3.50	1.50	77.57	III
3.	Ms. Aman Kuma-ri	32.40	21.00	12.00	8.00	4.00	1.00	3.17	1.50	83.07	II

25. As I have already stated above, after the petitioner was found successful on the basis of the initial advertisement issued by the respondent-Corporation, a complaint was filed by respondent No. 5 making a grievance out about the location in issue which led to the cancellation of the selection of the petitioner and resulted in the issuance of advertisement dated 15.09.2010, but it is a matter of fact and record that same site was offered both by the petitioner as well as respondent No. 5 pursuant to advertisement dated 15.09.2010 which was earlier offered by these parties pursuant to advertisement dated 04.09.2009. It is thus apparent that the complaint which was filed by respondent No. 5 to the effect that the selection of the petitioner pursuant to first advertisement was vitiated on the ground of location was a motivated complaint. This is apparent from the fact that the location which was offered by the private respondent in response to the earlier advertisement was again re-offered by her in response to the subsequent advertisement. Had there been any merit in the complaint so filed by respondent No. 5, then obviously she would have had offered some other location pursuant to second advertisement. Besides this, both in the evaluation which was carried pursuant to the first advertisement and the second advertisement, the petitioner has been given more marks under the head capability to

provide infrastructural facilities. In the evaluation which has been carried on the basis of second advertisement, respondent No. 5 has been declared successful on the basis of additional marks granted to her under the head "Capability to provide finance". Thus, it is apparent that filing of complaint by respondent No. 5 after the petitioner was initially selected for the allotment of the retail outlet and its acceptance by respondent-Corporation, resulting in setting aside the selection of the petitioner was a motivated act and an act of colourable exercise of power. This entire exercise apparently was undertaken by the respondent-Corporation at the behest of respondent No. 5 and to confer undue advantage upon respondent No. 5. The act of respondent-Corporation of accepting the complaint so filed by respondent No. 5 is arbitrary and cannot be justified on the grounds on which the said complaint was allowed. It is thus apparent that the change in the chainage of the highway in issue had in fact neither any impact nor any effect on the site of the retail outlet.

26. A perusal of order dated 20.12.2012 which has been assailed by way of present writ petition will demonstrate that this is a communication which was addressed to the present petitioner as well as respondent No. 5 on behalf of General Manager (Retail Sales) Punjab State Office, Chandigarh. The subject of the said communication was "*Order in compliance of order dt. March 7th 2012 of Hon'ble High Court of Himachal Pradesh at Shimla in Civil Writ Petition No. 6266 of 2012 titled Smt. Neetu Sharma Versus Indian Oil Corporation Limited and others*." Further, this communication reveals that initial selection of the present petitioner was challenged by respondent No. 5 on various grounds before respondent Corporation. These grounds find mention in order dated 20.12.2012 as Point No. 1 to Point No. 8. All these points are enumerated hereinbelow:

> *"Point No. 1: The first and very important point is that the company has allocated the Retail outlet to the such candidate whose land is in the range of mile stone 29-30 km's Fatehpur and that is not as per advertisement of IOCL.*
>
> *Point No. 2: The offered land of the candidate is also not within 1 km both the side at Fatehpur.*
>
> *Point No. 3: The offered land from the candidate is in approximate Rhombus shape and also less land as required by IOCL in advertisement.*
>
> *Point No. 4: The selected candidate provide 4 marks for the Business experience COCO Pump, so the company also required cross checking, is the candidate really works or not, because as company provide 4 marks for the purpose.*
>
> *Point No. 5: All the candidates provide approximately equal works in land verification approx. 33.42. Is that possible that all the candidates offered Land is same i.e. No. tree, No filing required, No cutting required, No telephone line, No sewerage under the land, No Power Pillars in all the Land. It also conferred me some objection.*
>
> *Point No. 6: I have own land with square shape, No leased based land and No leased over lease land as other candidates provide, but the company has not preferred this land those provide own land and free of all the objections.*
>
> *Point No. 7: In the interview, the interview team provides marks 8-8.5 out of 9 to the first selected candidate and only 3-3.5 marks given to me only i.e. minimum marks 33% only may as per interview guidelines.*
>
> *Point No. 8: As per the brochure, that at the time of interview the candidate will see the field verification report and sign there, but at the time of interview no such action taken by the company.*

27. A perusal of the findings which have been returned on the points so formulated demonstrate that except for Point No. 1, none of the points so formulated on the complaint of respondent No. 5 found in favour with the respondent Corporation. The perversity with regard to the findings returned on Point No.1 has already been discussed by me in the above paras of the

judgment. Incidentally, it is apparent from communication dated 20.12.2012 that though the said communication is termed as an order in compliance of the directions issued by this Court in CWP No. 6266 of 2012, however, communication dated 20.12.2012 actually is not the original order, if any, passed by the competent authority, but it just conveys as to what order actually was passed by the competent authority by way of observations. Be that as it may, the fact of the matter still remains that after the initial selection of the petitioner was set aside by respondent Corporation on the basis of complaint filed by respondent No. 5 and fresh advertisement was issued, the sites which were respectively offered by the petitioner and private respondents including respondent No. 5 were the same which were earlier offered by them in response to original advertisement. This demonstrates that in fact the change of chainage was used as a tool by the respondents to cancel the initial allotment of retail outlet in favour of the petitioner, which act of the respondent Corporation is highly arbitrary, discriminatory and nothing but an act of colourable exercise of power.

28. Learned counsel for respondent Corporation has relied upon the judgment passed by the Hon'ble Supreme Court in **Sr. Divisional Retail Sales Manager, Indian Oil Corporation Ltd. through Poa Holder and Ors.** Vs. **Ashok Shankaral Gwalani**, Civil Appeal No. 9101 of 2012 decided on 14.12.2012, in which the Hon'ble Supreme Court has been pleased to hold:

> *"17. Generally, if an irregularity is detected in the matter of selection or preparation of a panel, it is desirable to have a fresh selection instead of re-arranging the panel which is found to be vitiated. The Authority empowered to appoint, is the competent authority to decide as to whether the panel should be discarded and there should be a fresh selection in view of the facts narrated above. In such circumstances, the High Court under Article 226 of the Constitution of India ought to not have interfered with the decision of the competent authority in canceling the selection."*

29. In my considered view, the finding returned by the Hon'ble Supreme Court in the above mentioned judgment is of no help to the respondent Corporation because in the present case, there was no irregularity in the selection of the petitioner for the purpose of allotment of retail outlet pursuant to first advertisement issued by the respondent Corporation. The cancellation of selection of the petitioner by respondent Corporation is totally unjustified in law. Accordingly, in my considered view, the judgment so cited by learned counsel for the respondent Corporation has no applicability in the facts of the present case.

30. Respondent Corporation is a 'Public Corporation' and is 'Other Authority' within the meaning of Article 12 of the Constitution of India. Its action as far as distribution of retail outlet is concerned has to be tested for constitutional infirmities vis-à-vis Article 14 of the Constitution of India. Each and every action of the authority has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. Each and every action of the Corporation should conform to the norms which are rational, informed with reasons and guided by public interest.

31. In the present case, it cannot be said that the impugned acts of respondent Corporation including arbitrary setting aside of selection of the petitioner for allotment of retail outlet were fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It is obvious from the facts of the case that said decisions were result of favouritism and nepotism. Therefore, the impugned acts of respondent Corporation cannot be sustained in law.

32. The Hon'ble Supreme Court in **Centre for Public Interest Litigation and others** Vs. **Union of India and others** (2012) 3 Supreme Court Cases 1 has held:

> *"86. In Akhil Bharatiya Upbhokta Congress v. State of M.P. (2011) 5 SCC 29, this Court examined the legality of the action taken by the Government of Madhya*

Pradesh to allot 20 acres land to an institute established in the name of Kushabhau Thakre on the basis of an application made by the Trust. One of the grounds on which the appellant challenged the allotment of land was that the State Government had not adopted any rational method consistent with the doctrine of equality. The High Court negatived the appellant's challenge. Before this Court, learned senior counsel appearing for the State relied upon the judgments in Ugar Sugar Works Ltd. v. Delhi Administration (2001) 3 SCC 635, State of U.P. v. Choudhary Rambeer Singh (2008) 5 SCC 550, State of Orissa v. Gopinath Dash (2005) 13 SCC 495 and Meerut Development Authority v. Association of Management Studies (2009) 6 SCC 171 and argued that the Court cannot exercise the power of judicial review to nullify the policy framed by the State Government to allot Nazul land without advertisement.

87. This Court rejected the argument, referred to the judgments in Ramanna Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC 489, S.G. Jaisinghani v. Union of India AIR 1967 SC 1427, Kasturilal Lakshmi Reddy v. State of J & K (1980) 4 SCC 1, Common Cause v. Union of India (supra), Shrilekha Vidyarthy v. State of U.P. (1991) 1 SCC 212, LIC v. Consumer Education and Research Centre (1995) 5 SCC 482, New India Public School v. HUDA (1996) 5 SCC 510 and held:

"What needs to be emphasised is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State."

33. Accordingly, the present writ petition is allowed and Annexures P-11 dated 25.08.2010, Annexure P-13 dated 13.09.2010 (to the extent prayed), Annexure P-16 20.12.2012 and Annexure P-18 dated 29.09.2011 are quashed and set aside and the respondent Corporation is directed to allot the retail outlet subject matter of the writ petition in favour of the petitioner.

With this direction, the writ petition is disposed of. No order as to costs.

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

The Oriental Insurance Company. .....Appellant.

Versus

Smt. Deeno & ors. .....Respondents.

FAO(WCA) No. 160 of 2009.
Date of decision: August 31, 2016**.**

Workmen Compensation Act, 1923- Section 5- Deceased was working as labourer- he met with an accident during the course of his employment- claim petition was filed by his parents- petitioners claimed that wages of the deceased were Rs. 4,500/- per month, whereas, according

to respondent No. 1, wages of deceased were Rs. 2,400/- per month- compensation of Rs. 5,52,366/- along with interest was awarded- aggrieved from the order, present appeal has been filed- held, that employer had not stepped into the witness box to prove that income of the deceased was Rs. 2,400/- per month- witnesses of the petitioner stated that income was Rs. 4,500/- per month- in these circumstances, Commissioner had correctly assessed the income as Rs. 4,500/- per month- insurer was directed to pay penalty, whereas, liability is that of the employer- appeal allowed and respondent No. 1 directed to pay the penalty. (Para-3 to 8)

Cases referred:

Ved Prakash Garg versus Premi Devi and Others, (1997) 8 Supreme Court Cases 1,

For the appellant Mr. J.S. Bagga, Advocate,
For the respondents Mr. Vivek Singh Thakur, Advocate, for respondents No. 1 and 2.
Ms. Jamuna, Advocate, vice counsel for respondent No. 3.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. *(Oral)*

In this appeal award dated 30.9.2008 passed by learned Commissioner under the Workmen's Compensation Act, Chamba is under challenge. The commissioner after holding full trial has assessed the compensation amounting to Rs.5,52,366/- together with interest @12% per annum payable to respondents No. 1 and 2-claimants herein against the Insurer respondent No. 2 (appellant in the present appeal). Besides on the failure of the deposit of the amount of compensation within 30 days, the appellant-Insurer was also held liable to pay the penalty @25% of the total amount i.e. Rs.5,52,366/-. The complaint, therefore, is that the amount of penalty i.e. 25% of the awarded amount should have not been imposed upon the Insurer-respondent No. 2 and rather on the employer who is respondent No. 1 Kamlesh Kumar before learned Commissioner whereas respondent No. 3 in this appeal. The further grouse of respondent No. 2-Insurer is that the monthly wages of the deceased workman i.e. Rs.4500/- have been erroneously determined as cogent and reliable evidence was not produced to substantiate the same by the petitioners-claimants.

2. The appeal has been admitted on the following substantial question of law:-

1. Whether the findings of the Court below are result of misreading, misinterpretation of the evidence on record and against settled position of law?

3. Pawan Kumar son of the petitioners has died in an accident occurred on 4.11.2006. He was working as labourer with respondent No. 1 Kamlesh Kumar. On the fateful day Pawan Kumar was on duty at Urie to Ghator road in district Chamba. He while on duty met with an accident which resulted in his death on the same day. The claimants are his parents. There claim that the wages of deceased Pawan Kumar was as Rs.4500/- in the claim petition, has been denied by his employer-respondent No. 1 being incorrect as according to him the deceased was being paid his wages @2400/- per month. On behalf of respondent No. 2-Insurer there is however, denial simplicitor qua this aspect of the matter.

3. Petitioner No. 2 Gizo while in the witness box as PW4 has stated that the wages of the deceased were Rs.4500/- per month. The suggestion given to him on behalf of respondent No. 2 that he was being paid Rs.2400/- per month as wages has been denied being wrong. PW2 Vido Ram while in the witness box has also stated that the wages of the deceased at the time of his death were Rs.150/- per day. In his cross-examination he has also denied the suggestion that the wages of the deceased at the time of accident was Rs.2400/- per month.

4. The employer respondent No. 1 no doubt has claimed that wages were being paid to deceased Pawan Kumar @ Rs.2400/- per month, however, has not stepped into the

witness box. Therefore, in view of the evidence produced by the petitioner learned Commissioner below has rightly taken the monthly wages of the deceased as Rs.4500/- per month. Therefore, no case qua interference by this Court qua this aspect of the award is made out and rather learned Commissioner has assessed the monthly wages of the deceased on appreciation of the evidence in its right perspective.

5. Now, if coming to the second ground of challenge, it would not be improper to conclude that the penalty to the extent of 25% of the awarded amount could have not been imposed upon the Insurer-respondent No. 2 for the reason that Section 4-A(3) of the Act provides that if employer fails to pay the compensation within one month from the date it fall due, he shall have to pay a further sum not exceeding 50% of such amount by way of penalty.

6. The apex Court in ***(1997) 8 Supreme Court Cases 1,*** titled ***Ved Prakash Garg*** versus ***Premi Devi and Others*** qua this aspect of the matter has held as follows:

> *…….But so far as the amount of penalty imposed on the insured employer under contingencies contemplated by Section 4-A(3)(b) is concerned as that is on account of personal fault of the insured not backed up by any justifiable cause, the insurance company cannot be made liable to reimburse that pat of the penalty amount imposed on the employer,. The latter because of his own fault and negligence will have to bear the entire burden of the said penalty amount with proportionate interest thereof if imposed by the Workmen's Commissioner.*
>
> 20. *In view of the aforesaid conclusion of ours the present appeals will have to be partly allowed. The impugned judgments of the High Court will stand confirmed to the extent they exonerate the respondent-insurance companies of the liability to pay the penalty imposed on the insured employers by the Workmen's Commissioner under Section 4A(3) of the Compensation Act. But the impugned judgments will be set aside to the extent to which they seek to exonerate insurance companies for meeting the claims of interest awarded on the principal compensation amounts by the Workmen's Commissioner on account of default of the insured in paying up the compensation amount within the period contemplated by Section 4A(3) of the Compensation Act. Accordingly it must be held that the respondent insurance company will be liable to meet the claim of the appellant- insured in Appeals Nos. 15698-15699 of 1996 to the extent of Rs. 88,548/- in Claim Case No.2 of 1992 with interest thereon at the rate of 6% per annum of from the date of accident till the date of payment. But the respondent- insurance company will not be liable to meet the claim of penalty of Rs.44,274/- imposed on the appellant-insured along with the interest of 6% per annum on the said amount of Rs. 44,274/-. To that extent the award of the Commissioner will stand modified. So far as the Claim No.3 of 1992 is concerned the respondent-insurance company will be liable to reimburse the compensation amount of Rs. 88,968/- with interest at the rate of 6% p.a. thereon from the date of the accident till the date of payment. But it will stand exonerated of its liability of reimbursement so far as the penalty amount of Rs.41,984/- and amount of interest at 6% p.a. thereon are concerned. To that extent the award of the Workmen's Commissioner in Claim Case No.3 of 1992 will stand modified. Similarly in Civil Appeal No. 15700 of 1996 the impugned judgment of the High Court will stand partly set aside so far as the claim for interest as imposed on appellant-insured is concerned and the award of the Workmen's Commissioner in so far as his award of Rs. 81,540/- as compensation along with interest will stand confirmed. But the further part of the award to the extent it directs that in the event of failure to pay the said amount within one month a penalty of 30% p.a. shall be payable by the insurance company, will stand set aside. Consequently the respondent-insurance company in this case will be liable to pay Rs.81,540/- by way of compensation with interest at 6% per annum thereon from the date of the accident till the date of payment to the claimants. The awards of the Commissioner will stand modified accordingly. They will obviously remain untouched so far as they are against the employers. It will be open to the claimants to enforce their claims of penalty amounts with proportionate interest thereon against employers concerned."*

7. Similar is the view of the matter even taken by this Court also in a recent judgment delivered on 11.7.2016 in FAO No. 177 of 2006 titled ***Nirmala and others*** Vs. ***Kaushalaya Devi & another.*** Being so, the Insurer-respondent No. 2 is not liable to pay the penalty as imposed i.e. 25% of the awarded amount. The petitioners-claimants had therefore, to recover the amount of penalty @ 25% of the total compensation i.e. Rs. 5,52,366 from the employer-respondent No. 1 in the claim petition.

8. In view of what has been said hereinabove, this appeal is partly allowed. Consequently, the award will stand modified to the extent that the liability of respondent No. 2-Insufer shall be restricted only to the tune of Rs.5,52,366/- whereas the amount of penalty i.e. 25% of this amount, the petitioners are at liberty to recover the same from the employer-respondent Kamlesh Kumar.

9. The appeal is accordingly disposed of. Pending application(s), if any, also stands disposed of.

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

Ajeet Kumar. .....Petitioners.

Versus

State of Himachal Pradesh & Ors. .....Respondents.

CWP No. 11207 of 2011
Reserved on: 22.08.2016
Decided on: 01.09.2016

Industrial Disputes Act, 1947- Section 25- Petitioner was working as daily wage Road Inspector and Mason w.e.f. 01.10.1994 to 31.10.1994- he was disengaged on 1.11.1995 by oral orders- original application was filed before the Administrative Tribunal, which was dismissed for want of jurisdiction- a reference was made to the Labour Court-cum-Industrial Tribunal, which dismissed the petition- held, that employer had not placed on record any muster roll and a reasonable inference can be drawn that the workman was not allowed to perform duties- plea of abandonment taken by the employer cannot be accepted- petition allowed- award passed by Labour Court set aside- direction issued to re-engage the workman with continuous service without any back wages or monetary relief. (Para-7 to 9)

For the petitioner: Mr. G.R. Palsra, Advocate.
For the respondents: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The petitioner by way of the present petition has laid challenge to the award dated 31.10.2011, passed by the learned Industrial Tribunal-cum-Labour Court, Dharamshala, H.P. whereby the reference petition was dismissed.

2. Brief facts giving rise to the present petition are that the petitioner was working as daily wage Road Inspector and Mason with the respondent/department w.e.f. 01.10.1994 to 31.10.1994. On and w.e.f. 01.11.1995 he was disengaged by oral orders. Pursuant to this oral disengagement, the petitioner maintained an Original Application before the H.P. State Administrative Tribunal. However, the same was dismissed for want of jurisdiction and the

liberty was reserved to the petitioner to approach the competent Forum. Thereafter, before the learned Tribunal below the petitioner sought his re-engagement with all consequential benefits.

3. On the other hand, the respondent/department resisted the reference petition by raising preliminary objection qua maintainability and that the petitioner has suppressed the material facts. As per the respondent/department the petitioner left the job on his own and he did not complete 240 days w.e.f. 01.10.1994 to 31.10.1995. Pursuant to the interim order passed by the learned H.P. State Administrative Tribunal, the petitioner continued working till October, 1998 and thereafter again abandoned the job. The respondent/department, on merits, contended that w.e.f. 01.10.1994 to 31.10.1995 the petitioner worked with the respondent in different capacities, viz., Road Inspector, Mason and beldar. However, he never completed 240 days in a calendar year during the above period. On 01.11.1995, the petitioner himself left the job. However, pursuant to the interim orders of the learned H.P. State Administrative Tribunal he continued working till October, 1998. Thereafter, he did not turn up. On 23.11.1998, a communication directing him to rejoin the duty was sent which was followed by a reminder dated 21.11.1999, but the petitioner did not resume his duty. The respondent/department prayed for dismissal of the reference petition.

4. The learned Tribunal below framed the following issues for determination:

> "1. Whether the services of the petitioner were terminated by the respondent w.e.f. 18.10.1998? OPP
>
> 2. If the above issue 1 is proved, whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? OPP
>
> 3. Whether the claim petition is not maintainable? OPR
>
> 4. Relief."

After deciding issues No. 1 and 2 against the petitioner (claimant) and issue No. 3 against the respondent/department, the reference petition was dismissed.

5. Reply to the petition, laying challenge to the award passed by the learned Labour Court below, has been filed by the respondents, whereby they have mainly reiterated the stand taken before the learned Labour Court below.

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

7. The case of the employer is that the workman himself has abandoned the job, but no muster roll were placed on record. As per the employer, the workman was served with a notice, but again no copy of muster roll issued to the workman was placed on record. Since the muster rolls issued in favour of the workman were not placed on record, it can be safely assumed that respondent/department has not issued any muster roll to the workman/petitioner. Had the muster rolls been issued, the same would have been placed on record. Therefore, the possible inference could have been drawn that the workman was not allowed to perform duties. The plea of abandonment, raised by the employer, is not proved as the employer has failed to prove the delivery of notice and issuance of muster rolls. Otherwise also, from the conduct of the employer it is clear that he was pursuing the case and wanted to work. Had he abandoned the job, he would not have approached the various authorities time and again for the job.

8. In ***CWP No. 7162 of 2011***, titled ***Paras Ram vs. Himachal Pradesh State Electricity Board Limited & another***, the Hon'ble High Court of Himachal Pradesh, in a similar set of circumstances allowed the petition of the workman/petitioner, relevant text whereof is reproduced as under:

> *"9. Their Lordships of the Hon'ble Supreme Court in G.T. & others vs. Chemicals and Fibers India Ltd., AIR 1979 Supreme Court 582 have held as under:*

6. *From the connotations reproduced above it clearly follows that to constitute abandonment, there must be total or complete giving up of duties so as to indicate an intention not to resume the same. In Buckingham Co. V. Venkatiah (1964) 4 SCR 265: (AIR 1964 SC 1271), it was observed by this Court that under common law an interference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an interference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf. Thus whether there has been a voluntary abandonment of service or not is a question of fact which has to be determined in the light of the surrounding circumstances of each case."*

9. As noticed above, the Hon'ble Apex Court has ordered reinstatement of the workman as Beldar with seniority and continuity, but without back wages for the reason as discussed above. Keeping in view the above decisions, the petition is allowed, the award of the learned Tribunal below is set aside and it is ordered that the petitioner (workman) be re-engaged by the respondent/department with continuity in service, but he will not be entitled to any back wages or any monetary benefits for the period he has not performed the duties. No orders as to costs.

10. In view of the above, the petition stands disposed of, as also pending application(s), if any.

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

Sh.Khem Chand son of late Sh. Prem Dutt and another. ....Appellants/Defendants.

Vs.

Sh. Prem Lal Bhambra son of Gopal Dass. ...Respondent/Plaintiff.

RSA No.160 of 2009.
Judgment reserved on: 14.6.2016
Date of judgment: September 1, 2016.

Specific Relief Act, 1963- Section 5- Plaintiff filed a civil suit for possession and mesne profit pleading that he had purchased the property by sale deed and defendants had illegally opened the lock of the suit property- a criminal complaint was filed against them- suit was decreed by the trial Court for possession and for the recovery of Rs. 15,200/- along with interest @ 9% per annum- two appeals were filed before the Appellate Court- Appellate Court decreed the suit for recovery of Rs. 51,200/-- held, in second appeal that plaintiff has been recorded in the ownership column of the suit property- names of the defendants have neither been recorded in the ownership column nor in the possession column- sale deed was duly proved- title of the defendants was not established- there was nothing on record to show that defendants are owners- Appellate Court had rightly decreed the suit- appeal dismissed. (Para-12 to 17)

Cases referred:

Inacio Martins Vs. Narayan Hari Naik and others, AIR 1993 S.C 1756
Lonankutty Vs. Thomman and another, AIR 1976 SC 1645
Satyadhyan Ghosal Vs.Deorajin Debi and another, AIR 1960 SC 941
Ram Saran Lall and others Vs. Domini Kuer and others, AIR 1961 SC 1747

For the appellants: Mr.G.D.Verma, Sr. Advocate with Mr. B.C.Verma Advocate.
For respondent: Mr.T.S.Chauhan Advocate.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present RSA is filed under Section 100 of Code of Civil Procedure 1908 against consolidated judgment and decree dated 7.11.2008 passed by learned Additional District Judge Shimla in Civil Appeal No. 15-S/13 of 2008/2007 title Prem Lal Bhambra Vs. Smt. Shakuntla Devi and others and civil appeal No. 58-S/13 of 2007 title Smt. Shakuntla Devi and others Vs. Sh Prem Lal whereby learned Ist Appellate Court partly allowed appeal No.15-S/13 of 2008/2007 and dismissed appeal No. 58-S/13 of 2007. During pendency of RSA No. 160 of 2009 Smt. Shakuntla died and her name deleted from memo of parties vide interim order dated 21.12.2009 passed by HP High Court.

Brief facts of the case:

2. Sh. Prem Lal Bhambra plaintiff filed civil suit for decree of Rs.15200/- (Fifteen thousand two hundred) being mesne profit @ 800/- per month and also Rs.550/-(Five hundred fifty) being cost of notice dated 14.12.2001. Plaintiff also sought additional relief of interest @ 9% per annum w.e.f. 24.9.2000 from the date of filing of suit till realization. Plaintiff also sought additional relief for possession of suit property. It is pleaded that plaintiff has purchased suit property from Sh Ram Dutt on dated 6.7.2000 by way of registered sale deed Ext PW1/C in consideration amount of Rs.55000/- (Fifty five thousand) and acquired title in suit property. It is further pleaded that predecessor-in-interest of plaintiff namely Sh Ram Dutt was exclusive owner of suit property. It is further pleaded that on 24.9.2000 defendants illegally opened lock of suit property and criminal complaint was also filed in police station vide FIR No. 218 of 2000. Prayer for decree as mentioned in relief clause of plaint sought.

3. Per contra written statement filed on behalf of defendants pleaded therein that plaintiff has no locus standi to file present suit and suit is bad for non-joiner of necessary parties. It is further pleaded that suit is not properly valued for the purpose of court fee and jurisdiction and plaintiff is estopped to file suit on account of his own acts, conduct, deeds, lapses, admissions and omissions. It is further pleaded that suit filed on the basis of wrong revenue entries. It is further pleaded that Ram Dutt had no right and interest in suit property. It is further pleaded that entries in revenue record in favour of Ram Dutt are illegal. It is further pleaded that plaintiff had no right, title and interest in suit property. It is further pleaded that suit property was previously in exclusive ownership and possession of late Sh Prem Dutt predecessor-in-interest of defendants and after his death suit property is in ownership and possession of defendants. It is further pleaded that plaintiff did not remain in possession of suit property at any point of time. It is further pleaded that co-defendant No.1 Smt. Shakuntla Devi reconstructed the building in the year 1980-81 and electricity connection was also granted. It is further pleaded that defendants also inducted tenants in the premises. It is further pleaded that plaintiff did not acquire any right, title and interest in suit property. It is further pleaded that sale deed on behalf of Ram Dutt in favour of plaintiff is illegal and void. It is further pleaded that Ram Dutt had no saleable interest in suit property. It is further pleaded that defendants are in physical possession of suit property. Prayer for dismissal of suit sought. Plaintiff filed replication and reasserted allegations mentioned in plaint.

4. As per pleadings of parties learned Trial Court framed following issues on dated 16.11.2005.

1. Whether plaintiff is entitled for a decree of amount of Rs.15200/- on account of mesne profit as alleged? …OPP.

2. Whether plaintiff is entitled for interest @ 9% per annum from 24.9.2000 till the date of filing of suit and further interest from the date of suit till the date of recovery as alleged?. …OPP

3. Whether plaintiff is lawful owner of suit property as alleged? …OPP.

4. Whether defendants are in unlawful possession of suit property as alleged? …OPP

5. Whether suit in the present form is not maintainable as alleged? ...OPD.

6. Whether plaintiff is estopped to file suit on account of his own acts, deeds, conduct, lapses and admissions as alleged? ...OPD.

7. Whether plaintiff has no locus standi to file suit as alleged? ....OPD

8.Whether suit is bad for mis-joinder of parties as alleged? ...OPD.

9. Whether suit is not properly valued for purpose of court fee as alleged?....OPD

10. Relief.

5. Learned Trial Court decided issues No. 1 to 4 in affirmative and learned Trial Court decided issues No. 5 to 9 in negative. Learned Trial Court passed decree of possession in favour of plaintiff qua suit property and learned Trial Court also passed decree for recovery of Rs. 15200/- (Fifteen thousand two hundred) in favour of plaintiff and against defendants with interest @ 9% per annum w.e.f. 24.9.2000 till date of filing of suit and future interest at the rate of Rs.6% per annum from date of filing suit till realization.

6. Feeling aggrieved against judgment and decree passed by learned Trial Court two appeals filed i.e. Civil Appeal No. 15-S/13 of 2008/2007 title Prem Lal Bhambra Vs. Smt. Shakuntala Devi and others and Civil Appeal No. 58-S/13 of 2007 title Smt. Shakuntla Devi and others Vs. Prem Lal Bhambra. Learned Ist Appellate Court disposed of both appeals simultaneously vide same judgment. Learned Ist Appellate Court dismissed appeal filed by Smt. Shakuntla Devi and others and partly allowed appeal fi led by Prem Lal Bhambra. Learned first Appellate Court decreed the suit of plaintiff for recovery of Rs.51200/- (Fifty one thousand two hundred) with direction to pay court fee within period of fortnight from the date of relief. Learned first Appellate Court further directed that if plaintiff would not pay court fee within fortnight then decree for recovery of Rs.51200/- (Fifty one thousand two hundred) would be deemed to be declined.

7. Feeling aggrieved against judgment passed by learned first Appellate Court Smt. Shakuntla and others filed present RSA. Following substantial questions of law framed by Hon'ble High Court of HP on dated 5.5.2010 in RSA No. 160 of 2009.

1. Whether civil suit No. 93 of 1999 title Ram Dutt Vs. Shakuntla and others for decree of permanent prohibitory injunction and in the alternative for the decree of mandatory injunction to restore possession in question having been dismissed on 14.12.2000 on account of non prosecution of suit and as per material on record application filed for restoration on behalf of Ram Dutt on 21.2.2001 also dismissed therefore present suit for recovery of possession and recovery of mesne profits is not maintainable?.

2. Whether earlier suit No. 93 of 1999 having been dismissed for want of prosecution therefore subsequent suit with respect to same property and between the same parties bearing No. 48/1 of 2002 was not maintainable?.

3. Whether respondent did not acquire any title in suit property on the basis of revenue entries in the absence of source of title of seller?.

8. Court heard learned Advocates appearing on behalf of parties and also perused entire record carefully.

9.Findings upon point No.1 of substantial question of law with reasons.

10. Oral evidence adduced by parties.

10.1 PW1 Prem Lal has stated that he has purchased suit property on dated 6.7.2000 by way of registered sale deed. He has stated that two storeys building is situated over suit property and shed is also situated over suit property. He has stated that mutation was also sanctioned qua suit property in his favour. He has stated that possession of building and shed was also handed over to him in the presence of defendants qua suit property after execution of sale deed. He has stated that defendants did not object when possession of suit property was

delivered to him by vendor after execution of sale deed. He has stated that on dated 24.9.2000 defendants opened lock of suit property and forcibly entered into rooms of building. He has stated that thereafter FIR was lodged in police station Boileauganj. He has stated that defendants told before police officials that they would compromise the matter. He has stated that defendants did not compromise the matter. He has stated that thereafter he has given notice to defendants. He has stated that possession of suit property be delivered to him along with mesne profit. He has stated that copy of jamabandi is Ext PW1/A and Ext PW1/B and copy of sale deed is Ext PW1/C. He has denied suggestion that Smt. Shakuntla Devi reconstructed building over suit property. He has denied suggestion that defendants are in settled possession of suit property since 1981. He has denied suggestion that defendants have inducted tenants in suit property. He has denied suggestion that vendor Ram Dutt did not remain in possession of suit property. He has denied suggestion that electricity meter installed by defendants is situated in building. He has denied suggestion that plaintiff has no legal right to file present suit.

10.2 PW2 Harminder Singh has stated that he retired on 31.3.2006 from accountant general office as senior audit officer. He has stated that plaintiff Prem Lal purchased suit property from Ram Dutt by way of registered sale deed. He has stated that possession of building and land was given to plaintiff by vendor. He has stated that plaintiff Prem Lal locked building in the presence of defendants. He has stated that defendants congratulated plaintiff. He has stated that on 24.9.2000 plaintiff told by way of telephone to him that Smt. Shakuntla Devi and others have illegally took possession of building and locked the building. He has denied suggestion that he deposed false in Court at the instance of plaintiff.

10.3 PW3 Shyam Lal Sharma has stated that Ram Dutt was his father-in-law. He has stated that he was general attorney of his father-in-law. He has stated that he alienated suit property vide sale deed Ext PW1/C in consideration amount of Rs.55000/- (Fifty five thousand). He has stated that suit property was in possession of Ram Dutt. He has stated that sale deed Ext PW1/C was executed on dated 6.7.2000. He has stated that after sale deed possession of suit property was given to plaintiff and plaintiff locked the suit property. He has stated that thereafter defendants illegally entered into suit property and matter was also reported in police station. He has stated that defendants told before police officials that they would compromise the matter. He has stated that mutation was also sanctioned in favour of plaintiff relating to suit property. He has admitted that Ram Dutt and Prem Dutt were real brothers. He has denied suggestion that Prem Dutt was in settled possession of suit property. He has denied suggestion that after death of Pam Dutt defendants came in settled possession of suit property. He has denied suggestion that Ram Dutt vendor has no legal right to alienate suit property in favour of plaintiff.

10.4 DW1 Harish Kumar has stated that defendants are known to him. He has stated that defendants have inducted tenants in suit property. He has stated that defendants are in settled possession of suit property. He has stated that plaintiff did not remain in possession of suit property. He has denied suggestion that he is deposing in favour of defendants in order to acquire votes. He has denied suggestion that suit property remained in settled possession of plaintiff.

10.5 DW2 Shishu Pal has stated that he is residing in the residence of Smt. Shakuntla Devi. He has stated that building is two storeys building. He has stated that he is tenant and paying rent to the tune of Rs.50/- per month. He has stated that he is tenant for the last 24/25 years. He has stated that earlier his father was tenant and after his death he is residing as tenant in the suit property. He has stated that plaintiff Prem Lal is not known to him. He has stated that plaintiff did not meet him. He has stated that plaintiff did not demand rent from him. He has stated that disputed property remained in settled possession of Smt. Shakuntla Devi. He has stated that he is posted as Clerk in directorate of education. He has stated that his father was also posted in education department. He has stated that his father died in the month of January 1996. He has stated that Ram Dutt is not known to him. He has denied suggestion that Ram Dutt was in possession of suit property. He has denied suggestion that after death of Ram Dutt

plaintiff remained in settled possession of suit property. He has denied suggestion that he did not remain as tenant in suit property.

10.6 DW3 Joginder junior assistant record room Shimla has stated that be has brought summoned record. He has stated that document Ext DW3/A is correct as per original record. He has stated that civil suit No. 93/1 of 1999 title Sh. Ram Dutt Vs Smt. Shakuntla Devi was decided on 14.12.2000. He has stated that Sh Ram Dutt filed suit against Smt. Shakuntla, Khem Chand and Ashok Kumar. He has stated that copy Ext PW3/B is correct as per original record.

10.7 DW4 Piaray Lal has stated that he is tenant and residing in Shakuntla Niwas. He has stated that building is comprised of two storeys and he is residing in upper storey of the building. He has stated that he is paying rent to the tune of Rs.50/- per month. He has stated that he is tenant for the last 18/19 years. He has stated that defendants are owners of the building. He has stated that plaintiff is not known to him. He has stated that plaintiff did not demand rent from him. He has stated that he is not familiar with plaintiff. He has stated that he is mason by profession. He has stated that he does not know that quarrel took place between plaintiff and defendants. He has denied suggestion that he deposed false in Court at the instance of defendants.

10.8 DW5 Khem Chand has stated that two storeys building is situated over suit property. He has stated that tenants have been inducted in the building. He has stated that he produced documents Ext DW5/A and Ext DW5/B. He has stated that electricity meter also installed in favour of his mother. He has stated that plaintiff tried to cut electricity connection. He has stated that defendants are in settled possession of suit property. He has stated that plaintiff did not remain in possession of suit property. He has stated that suit property is joint and no partition took place. He has stated that revenue entries relating to ownership are wrong. He has stated that defendants did not open lock forcibly at any point of time. He has stated that his father was in government service in HP Secretariat. He has stated that his father died in the year 1980. He has denied suggestion that four biswas of land was allotted to his father and eighteen biswas of land was allotted to Sh Ram Dutt in revenue records. He has stated that he is also posted in HP secretariat. He has admitted that sale deed executed in favour of plaintiff was not challenged in any civil court of law. He has admitted that FIR was filed by plaintiff. He has denied suggestion that defendants forcibly opened the locks of suit property and inducted tenants in illegal manner. He has denied suggestion that defendants have illegally occupied suit property. He has denied suggestion that defendants are legally liable to pay use and occupation charges qua suit property.

11. Following documentaries evidence adduced by parties.(1) Ext PW1/A copy of jamabandi for the year 2002-2003 qua suit property wherein Prem Lal son of Sh Gopal Dass plaintiff has been shown as owner of suit property qua khasra No. 1089 and 1095. In possession column possession of tenants recorded qua suit property and annual rent recorded Rs.2800/-. (2) Ext PW1/B is the copy of jamabandi for the year 1997-98 qua suit property wherein in the ownership column name of Ram Dutt son of Sh Goverdhan has been recorded qua suit property and in possession column possession of tenants recorded and annual rent recorded as Rs.2800/-. In remarks column there is entry that suit property has been sold to plaintiff and mutation No. 347 has been attested on 10.7.2000 in favour of plaintiff qua suit property. (3) Ext PW1/C is the registered sale deed dated 6.7.2000 wherein suit property alienated in consideration amount of Rs.55000/- (Fifty five thousand) by Sh Ram Dutt through general attorney Sh Shyam Lal in favour of plaintiff. (4) Ext PW1/E is reply of notice dated 20.12.2001 given by defendants. (5) Ext DX is copy of judgment and decree passed in civil suit No. 107-1 of 2000 decided on 19.4.2006 title Prem Lal Vs. Shakuntla Devi and others. (6) Ext.DX1 is the statement of Prem Lal in criminal case. (7) Ext DX2 is the report of field kanungo. (8) Ext DW3/A is copy of judgment announced in criminal case No. 76/2 of 2001 title State of HP Vs. Ashok Kumar and others. (9) Ext DW3/B is the copy of order dated 14.12.2007 passed in civil suit titled Ram Dutt Vs. Smt. Shakuntla Devi wherein civil suit was dismissed on 14.12.2007 for non prosecution. (10) Ext DW5/A is the copy

of judgment announced in criminal case No. 44/2 of 2004 title State Vs. Smt. Shakuntla and others. (11) Ext DW5/B is copy of order announced in civil miscellaneous appeal No. 74-S/74 of 2000. title Prem Lal Vs. Smt. Shakuntla Devi and others. (12) Ext DW5/C is bill issued by electricity department in favour of Smt. Shakuntla Devi. (13) Ext DW5/D is legal notice given by Smt. Shakuntla Devi to executive engineer HPSEB. (14) Ext DW5/E is postal receipt. (15) Ext DW5/F is registered notice given by Smt. Shakuntla to executive engineer. (16) Mark X is the copy of judgment announced in criminal case No. 76/2 of 2001 title State of HP Vs. Ashok Kumar and others.

12. Submission of learned Advocate appearing on behalf of appellants that civil suit No. 93 of 1999 title Ram Dutt Vs. Shakuntla Devi and others were dismissed on 14.12.2000 on account of non prosecution and present suit by subsequent vendee namely Prem Lal for possession and recovery of mesne profit is not maintainable is rejected being devoid of any force for reasons hereinafter mentioned. It is proved on record that plaintiff Prem Lal was not party in civil suit No. 93 of 1999 title Ram Dutt Vs. Shakuntla Devi. It is held that order passed in civil suit No. 93 of 1999 dated 14.12.2000 is order in personam and not order in rem. It is well settled law that subsequent suit on basis of subsequent different cause of action and different title can be filed. It is held that cause of action and title in civil suit No. 93 of 1999 and cause of action and title in civil suit No. 48-1 of 2002 are distinct. Hence concept of resjudicata will not apply. See *AIR 1993 S.C 1756* title *Inacio Martins Vs. Narayan Hari Naik and others*. Point No. 1 of substantial question of law is decided against appellants.

Findings upon point No. 2 of substantial question of law with reasons.

13. Submission of learned Advocate appearing on behalf of appellants that earlier suit No. 93 of 1999 was dismissed for want of prosecution and subsequent suit with respect to same property bearing No. 48/1 of 2002 is not maintainable is also rejected being devoid of any force for reasons hereinafter mentioned. It is held that in earlier suit No. 93 of 1999 Sh Prem Lal was not party. It is held that earlier civil suit No. 93 of 1999 was not decided on merits. It is held that present civil suit No. 48/1 of 2002 is filed on the basis of separate cause of action. It is held that in order to attract the provision of section 11 CPC the following ingredients should be established. (1) Decision should be based upon merits. (2) Party should be same (3) Cause of action should be same. It is held that in former suit and in present suit parties are different and cause of action is also distinct. Hence it is held that civil suit No. 48/1 of 2002 is maintainable. Principle of resjudicata is based upon finality to judicial decision. It is based upon concept that once res is judicata it would not be adjudged again. Primarily it applies when there are prior litigation and present litigation relating to same cause of action and title. See *AIR 1976 SC 1645* title *Lonankutty Vs. Thomman and another*. See *AIR 1960 SC 941* title *Satyadhyan Ghosal Vs.Deorajin Debi and another*. Hence substantial question of law No.2 is decided against appellants.

Findings upon point No.3 of substantial question of law with reasons.

14. Submission of learned Advocate appearing on behalf of appellants that Ram Dutt did not acquire any title in suit property on the basis of revenue entries and he was not legally entitled to alienate suit property in favour of plaintiff and on this ground appeal be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Court has carefully perused copy of jamabandi Ext PW1/A for the year 2002-2003 and copy of jamabandi Ext PW1/B for the year 1997-98 placed on record. As per jamabandi Ext PW1/A Prem Lal plaintiff has been recorded in ownership column of suit property and in possession column possession of tenants have been recorded. Court has also carefully perused jamabandi Ext PW1/B for the year 1997-98 placed on record relating to suit property. In ownership column name of Ram Dutt son of Goverdhan has been recorded and in possession column there is entry relating to tenants. In the remarks column it has been specifically recorded that vide mutation No. 347 dated 10.7.2000 the suit property has been alienated in favour of plaintiff Prem Lal. The name of appellants did not figure in ownership column as well as in possession column of revenue entry prepared by public

servants in discharge of their official duties. Jamabandi Ext PW1/A and Ext PW1/B have been prepared by public servants in discharge of their official duties and are relevant fact under section 35 of Indian Evidence Act 1872. Defendants did not examine any revenue officials in order to rebut revenue entry Ext PW1/A and Ext PW1/B placed on record. It was held in case reported in AIR 2011 SC 1691 titled Murugam Vs. State of Tamil Nadu that public document can be safely relied when public documents are admissible under Section 35 of Indian Evidence Act 1872. Appellants did not examine any revenue officials who have prepared aforesaid documents in discharge of their public official duties in order to rebut the revenue entries. Hence it is held that revenue entries recorded in jamabandi Ext PW1/A for the year 2002-2003 and jamabandi Ext PW1/B for the year 1997-98 qua suit property prepared by revenue official are relevant fact. It is held that appellants did not rebut relevant fact by way of examination of revenue officials who have prepared revenue entries. Even defendants did not file any suit for declaration that revenue entries are contrary to factual position as required under section 46 of HP Land Revenue Act 1954. Even defendants did not file any civil suit for declaration under Specific Relief Act 1963 that sale deed Ext PW1/C dated 6.7.2000 in favour of plaintiff qua suit property is null and void. Even co-defendant Khem Chand has admitted when he appeared in witness box that sale deed dated 6.7.2000 executed in favour of plaintiff qua suit property was not challenged by defendants by way of declaratory suit in civil court. It is well settled law that fact admitted need not to be proved as per section 58 of Indian Evidence Act 1872. Defendants did not prove their title in suit property in accordance with law. It is held that plaintiff is legally entitle for relief of possession and mesne profit upon suit property on the basis of title i.e. sale deed dated 6.7.2000 Ext PW1/C placed on record.

15. Sale deed Ext PW1/C is proved as per testimonies of PW3 Shyam Lal who has executed sale deed as general attorney qua suit property in favour of plaintiff. Sale deed Ext PW1/C is registered under section 57 of Registration Act 1908 and same is admissible under section 57 (5) of Registration Act 1908.

16. Even executor of sale deed Ext PW1/C did not deny execution of sale deed but admit execution of sale deed Ext PW1/C when he appeared in witness box in civil suit No. 48-1 of 2002. It is held that sale deed Ext PW1/C is proved under section 68 of Indian Evidence Act 1872. It is well settled law that title passes in immovable property when sale deed is registered under Registration Act 19 08. See *AIR 1961 SC 1747* title *Ram Saran Lall and others Vs. Domini Kuer and others.*

17. Oral testimonies of DW1 to DW5 did not prove title of defendants over suit property. Oral testimonies of DW1 to DW5 simply proved possession of defendants over suit property. Even documents filed by defendants did not prove title of defendants over suit property. Documents filed by defendants simply proved possession of defendants over suit property. Electricity bill is not sufficient to prove title in immovable property. Electricity bill simply proved possession in immovable property. Judgments of criminal courts placed on record are also not helpful to defendants to prove civil title in suit property. It is well settled law that criminal courts cannot decide civil rights of parties. Even judgment and decree passed by learned civil Judge (Senior division) Court No.II Shimla in civil suit No. 107-1 of 2000 title Prem Lal Vs. Shakuntla Devi are also not helpful to defendants because cause of action and title of civil suit No. 107-1 of 2000 and civil suit No. 48/1 of 2002 are distinct. It is well settled law that suit for possession and mesne profit can be filed on the basis of title. It is held that judgment and decree passed by learned Ist Appellate Court are based upon oral and documentaries evidence placed on record. It is held that defendants did not prove their title over suit property in accordance with law. Plea of defendants that they are owner of suit property is defeated on the concept of ipse dixit (An assertion made without proof). In view above stated facts it is held that judgment and decree passed by learned first Appellate Court are not perverse. It is held that judgment and decree passed by learned first Appellate Court are based upon proved oral as well as documentaries evidence. Point No.3 of substantial quest b ion of law is decided against appellants.

Relief.

18. In view of above findings RSA is dismissed. Copy of jamabandi Ext PW1/A for the year 2002-2003 relating to suit property, copy of jamabandi Ext PW1/B for the year 1997-98 relating to suit property and copy of sale deed Ext PW1/C dated 6.7.2000 relating to suit property will form part and parcel of decree. Parties are left to bear their own costs. Learned Registrar Judicial will prepare decree sheet as required under section 100 of Code of Civil Procedure 1908 in accordance with law forthwith. File of learned Trial Court and file of learned Ist Appellate Court be sent back forthwith along with certify copy of judgment and decree sheet. RSA No. 160 of 2003 is disposed of. Pending applications if any also disposed of.

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

Lajya Devi and others .....Appellants

Versus

The District Cooperative Union Ltd. .....Respondent

RSA No. 524/2014
Reserved on: August 31, 2016
Decided on: September 1, 2016

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs filed a civil suit for declaration to the effect that exparte judgment and decree obtained by defendant was illegal, null and void and not binding upon the plaintiffs- it was pleaded that M, predecessor-in-interest of the plaintiffs had purchased the suit land from one J by registered sale deed- gate and boundary wall were constructed by M- exparte proceedings against M were illegal, since, he was not duly served and decree was obtained by mis-representation and suppression of material facts- suit was dismissed by the trial Court- an appeal was preferred, which was also dismissed- held, in second appeal that Collector Settlement had changed the nature of the suit land from Banjar Kadim to Gair Mumkin Sehan- defendant challenged this entry by filing a civil suit, which was decreed exparte- plaintiffs had not led any cogent evidence to prove that decree was obtained by playing fraud on the Court – predecessor in interest of the plaintiffs was served by way of publication- he did not appear to contest the suit- plaintiffs have taken a plea of adverse possession and the suit cannot be filed on the basis of adverse possession- Courts had rightly appreciated the evidence- appeal dismissed. (Para-20 to 23)

Case referred:

Gurdwara Sahib v. Gram Panchayat Village Sirthala, (2014)1 SCC 669

For the Appellants : Mr. R.K. Sharma, Senior Advocate with Mr. Navlesh Verma, Advocate.

For the Respondent : Mr. Bhuvnesh Sharma and Mr. Ramakant Sharma, Advocates.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

This Regular Second Appeal has been instituted against judgment and decree dated 30.7.2014 rendered by the learned District Judge, Hamirpur (HP) in Civil Appeal No. 120 of 2011.

2. "Key facts" necessary for the adjudication of the present appeal are that the appellants-plaintiffs (hereinafter referred to as 'plaintiffs' for convenience sake) filed a suit against

the respondent-defendant (hereinafter referred to as 'defendant' for convenience sake) for declaration to the effect that the ex parte judgment and decree obtained by the defendant in Civil Suit No. 43/96 decided on 26.12.2001 titled as District Cooperative Union vs. Munshi Ram, was illegal, null and void and not binding upon the plaintiffs as they are owners-in-possession of the land comprised in Khata No. 323, Khatauni No. 533 Khasra No. 1379 measuring 97.5 square metres with the consequential relief of permanent prohibitory injunction restraining the defendant from causing any interference over the suit land. Suit land as per Jamabandi for the year 1997-98 was wrongly and illegally recorded in the name of defendant against factual position. Predecessor-in-interest of the plaintiffs, Munshi Ram had purchased the suit land from one Jayanti Das vide registered sale deed dated 6.7.1965 pertaining to Khata No. 32 Khatauni No. 53 min. Khasra No. 646 min. 624 min. Bakadar 4 Marla 654 whole Khasra No. 969/660, 971/660, 812/655 Salam Kita 7 area 4 K 7 M share 1/3rd measuring 1 K 9 M. pertaining to the Jamabandi for the year 1960-61 and mutation No. 275 dated 18.3.1967 was sanctioned in the name of Late Major Munshi Ram and possession was given to him. It was further averred that in the year 1965, a boundary wall was raised by Munshi Ram. A gate was also installed by the plaintiffs and a house was constructed over the suit land purchased by Munshi Ram. Building was given on rent to Central Government office. Possession of the plaintiffs' predecessor-in-interest and that of the plaintiffs was never objected by anyone, which is hostile, uninterrupted, peaceful and adverse to the knowledge of all concerned. It was also averred that the ex parte proceedings against Late Major Munshi Ram dated 1.12.1999 were illegal since he was not duly served and decree had been obtained in fraudulent manner by mis-representation and suppression of material facts. Gift deed executed by Prithi Chand in favour of the defendant vide which mutation No. 387 had been sanctioned on 26.8.1994 in favour of the defendant was also illegal, null and void and not binding upon the plaintiffs.

3. Suit was contested by the defendant. On merits, the defendant stated that it is in possession of the suit land, which was gifted to the defendant vide gift deed dated 7.7.1994. It was denied specifically that the land was in possession of the plaintiffs' predecessor-in-interest. It was also denied that the ex parte judgment and decree obtained by the defendant in Civil Suit No. 43/9 dated 26.11.2001 titled as District Cooperative Union vs. Munshi Ram was illegal, null and void and Munshi Ram was wrongly proceeded ex parte and no notice under law was served upon him.

4. Plaintiffs filed replication. Learned Civil Judge (Junior Division) framed issues on 17.5.2006 and an additional issue was framed on 12.5.2011. He dismissed the suit on 22.9.2011. Plaintiffs filed an appeal against judgment and decree dated 22.9.2011 before the District Judge, Hamirpur. He also dismissed the appeal on 30.7.2014. Hence, this Regular Second Appeal.

5. The Regular Second Appeal was admitted on 3.12.2014, on the following substantial questions of law:

> "1. In Exhibit P-4 Civil Suit 43/1996, the defendant Major Munshi Ram was shown as resident of Ward No. 3. The report of the Process Server dated 22-23 February 1996 in C.S. No. 43/1996 clearly mentions that there is no person in name of Major Munshi Ram in Ward No. 3 Hamirpur. However his house is situated in Ward No. 4, but on inquiry at that house, it revealed that this house in Ward No. 4 is given on rent to Tar Ghar (Telegraph Office) and he himself is residing in Jammu. Still Notice (with wrong address of Ward No. 3 Hamirpur) under Order 5, Rule 20 was published in Himachal Time which has no circulated in Jammu and was proceeded ex-parte on 01-12-1999. Whether such service is legal and whether such ex-parte order have not been obtained by fraud and misrepresentation and such decree is not liable to be set aside in collateral proceedings?
>
> 2. Vide Exhibit P-8 dated 10-01-1995 the Learned Settlement Officer competent authority ordered the correction of Khasra No. 1379 measuring 97.50 Square Meters from the name of Prithi Chand to the name of Major Munshi Ram.

The nature of this land was also changed from Banjar Kadim to Gair Mumkin Sehan (Courtyard). The entry to this effect was made vide *Rapat* No. 233 Exhibit P-3 dated 12-1-1995 by the Patwari in the Revenue record. Whether the Learned Civil Court vide Exhibit P-4 Civil Suit No. 43/1996 dated 26-12-2001 was justified to set aside the entries of *Rapat* No. 233 without examining the order of the competent authority Exhibit P-8 and whether the defendant ahs not committed the fraud by obtaining the decree Exhibit P-4 without placing the present Exhibit P-8 on record and whether such a decree can not be set aside in the collateral proceedings?

3. Exhibit P-4 Civil Suit 43/1996 was instituted on 27-1-1996. The sole defendant in that case Major Munshi Ram was proceeded ex-parte on 01-12-1999. Major Munshi Ram expired on 08-08-2000 at Jammu. His LRs were never brought on record. Thereafter the case was listed and was proceeded effectively on various dates. Ultimately the suit was decreed on 26-12-2001 vide Exhibit P-4. Whether the judgment and decree Exhibit P-4 against a dead person is not a nullity and whether such decree can not be set aside in the collateral proceedings?"

6. Mr. R.K. Sharma, learned Senior Advocate, on the basis substantial questions of law framed, has vehemently argued that the Munshi Ram was served under Order 5 Rule 20 CPC in Himachal Time, which had no circulation in Jammu and was proceeded ex parte on 1.12.1999. He also contended that the entries of *Rapat* No. 233 could not be set aside in Civil Suit No. 43/1996. He lastly contended that the legal representatives of Munshi Ram were not brought on record. Munshi Ram expired on 8.8.2000.

7. Mr. Bhuvnesh Sharma, Advocate, has supported the judgments and decrees passed by both the learned Courts below.

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

9. Since all the substantial questions of law are interconnected and interlinked, the same are taken together for determination to avoid repetition of discussion of evidence.

10. PW-1 Suman Kumar, Superintendent testified that with effect from 1.6.1999 to 28.2.1980, the building of Lajya Devi was leased out to the Deputy Director Agriculture for a rent of Rs.6,300/-.

11. PW-3 Rattan Chand is Field Kanungo. He has proved Ext. PW-3/A. In his cross-examination, he has stated that no demarcation was carried out by him on the spot. Self stated that he had prepared the report by visiting the spot as per factual position on the spot.

12. PW-4 Mangat Ram deposed that the HPSC & ST Development Corporation remained tenant with effect from 9.1.1980 to 31.3.1981.

13. PW-5 Bishamber is the official of Telegraph Department. He testified that from 1990 onwards, building was rented to the Telegraph Department for a monthly rental of Rs.2700/.

14. PW-7 Ishwar Dass testified that the plaintiff's father Munshi Ram had purchased the land in Ward No. 4 in the year 1965 and house was constructed by him and boundary wall was also raised. Possession over the land was of Lajya Devi and her heirs. He was conversant with the signatures of Naib Tehsildar, Sharuti Prakash. Ext. PW-7/A was signed by him. Plaintiff constructed house in 1965. Boundary wall was also raised.

15. PW-8 Prakash Chand testified that land over which house of plaintiff was constructed, was purchased by Major Munshi Ram from Jayanti in 1965 and area was about 1 ½ Kanal. Plaintiffs were in possession of the land.

16. PW-11 Suresh Kumar is the son of Major Munshi Ram. He did not know that the house was situate over Khasra Nos. 1361, 1362, 1363 and 1380. According to him, old Khasra

number was 812. He also admitted that the land was never demarcated in his presence. He has pleaded his ignorance about the fact that the suit land was gifted to the defendant by Prithi Chand on 7.7.1994. He has pleaded ignorance that the defendant had instituted a suit on 27.1.1996 against his father bearing Suit No. 43/1996. He denied that the summons were received by his father during the proceedings and that he deliberately did not appear before the Court.

17. DW-1 Pratap Singh testified that Khasra number of the suit land is 1379 measuring 5 Marla and Prithi Chand was its owner. The suit land was never in the possession of Munshi Ram. Munshi Ram was wrongly shown to be in possession in the revenue record. Suit was filed for correction of revenue entries, in which Munshi Ram was proceeded ex parte and suit was decreed in favour of the District Cooperative Union.

18. DW-2 Pratap Chand testified that the suit land in Khasra No. 1379 was gifted by Prithi Chand to District Cooperative Union.

19. DW-3 also deposed that the suit land over Khasra No. 1379 was in possession of Prithi Chand.

20. Collector Settlement passed an order on 10.1.1995 and entries of Khasra No. 1379 in the column of nature of the suit land were changed from Banjar Kadim to Gair Mumkin Sehan in favour of Major Munshi Ram and *Rapat* Rojnamcha Ext. P3 recorded change of possession in favour of Munshi Ram. Defendant challenged this entry by filing civil suit by stating that Munshi Ram was wrongly recorded as *Kabiz* by way of Sehan over the land in Khasra No. 1379. In that suit, Munshi Ram was proceeded ex parte and suit was decreed on 26.12.2001. Revenue entries of Khasra No. 1379 were changed vide judgment/order dated 26.12.2001.

21. Plaintiff has not led any cogent proof that the decree obtained by the defendant was obtained by playing fraud upon the Court. Civil Suit No. 43/1996 was instituted by the defendant. He was served by way of publication. Munshi Ram was proceeded ex parte on 1.12.1999. He did not appear to contest the suit. He had not furnished written statement. Though, admittedly, he died on 8.8.2000. Plaintiffs should have moved an application under Order 9 Rule 13 CPC for setting aside ex parte judgment and decree or they could file appeal against the ex parte judgment and decree. Plaintiffs have taken plea of adverse possession. However, fact of the matter is that initially Prithi Chand was owner of the suit land. He has gifted this land to the defendant on 7.7.1994. Plaintiffs could not file suit based on the plea of adverse possession. Even PW-3 Rattan Chand and PW-5 Bishamber have not deposed that the building in question was situated over Khasra No. 1379.

22. Their Lordships of the Hon'ble Apex Court in **Gurdwara Sahib v. Gram Panchayat Village Sirthala** reported in (2014)1 SCC 669, have held that even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Their Lordships have held as under:

> "8. There cannot be any quarrel to this extent that the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."

23. Courts below have correctly appreciated the oral and documentary evidence. The substantial questions of law are answered accordingly.

24. Accordingly, in view of the discussions and analysis made hereinabove, the present appeal has no merits and the same is dismissed. Pending application(s), if any, also stand disposed of. No costs.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Land Acquisition Collector, N.H.P.C. ...Appellant.
Versus
Shri Tedhi Singh & another ...Respondents.

RFA No. 229 of 2009 alongwith
RFA Nos.230 to 272 of 2009.
Date of Decision: September 1, 2016.

Land Acquisition Act, 1894- Section 18- Land was acquired for the construction of Parvati Hydro Electric Project- compensation was awarded by the Land Acquisition Collector – separate references were made and the Reference Court enhanced the compensation - sale deeds produced by the respondent were not taken into consideration by the trial Court on the ground that vendor and vendee were not examined - held, in appeal that sale deeds can be taken into consideration without examination of the vendor and vendee but the similarity of the land sold by the deeds has to be established with the land sought to be acquired – respondent had only examined the clerk to prove the execution of the exemplar sale deed- he is not local resident of the area- he was not aware of the area, nature or category of land- hence, exemplar sale deed could not be taken into consideration for adjudicating the rights and contentions of the parties- three exemplar sale deeds were produced by the claimants - witnesses examined by the claimants deposed that acquired land is just adjacent to exemplar land having similar potentiality with regard to the use, nature and similarity of classification and value- it was not proved that sale transaction was made or executed only in anticipation of the project coming in the near future- acquired land was put for a public use and no area was left for carrying any developmental activity- claimants are entitled for compensation for the acquired land, at uniform rates, regardless of its categorization- exemplar award had determined the market value at Rs. 4,00,000/- per bigha or Rs.20,000/- per biswa- trial Court had rightly re-determined the market value at Rs. 17,800/- per biswa or Rs.3,56,000/- per bigha- appeal dismissed. (Para-5 to 32)

Cases referred:

Cement Corpn. of India Ltd. Versus Purya and others, (2004) 8 SCC 270
Special Land Acquisition Officer Versus Karigowda and others, (2010) 5 SCC 708
Land Acquisition Officer & Sub-Collector Gadwal Versus Shreelatha Bhoopal (Smt.) & another, (1997) 9 SCC 62
Bhule Ram Versus Union of India and another, (2014) 11 SCC 307
Mehta Ravindrarai Ajitrai (Deceased) through his Heirs and LRs. and Others v. State of Gujarat (1989) 4 SCC 250
Nelson Fernandes & Ors. v. Special Land Acquisition Officer, South Goa & Ors. (2007) 9 SCC 447
Haridwar Development Authority vs. Raghubir Singh & others, (2010) 11 SCC 581
Union of India vs. Harinder Pal Singh and others 2005(12) SCC 564
Gulabi and etc. Vs. State of H.P., AIR 1998 HP 9
H.P. Housing oard vs. Ram Lal & Ors. 2003(3) Shim. L.C. 64
Executive Engineer & Anr. vs. Dilla Ram {Latest HLJ 2008 HP 1007
Atma Singh and others v. State of Haryana and another (2008) 2 SCC 568
Union of India v. Pramod Gupta (Dead) by LRs. & Ors. [(2005) 12 SCC 1
Suresh Kumar v. Town Improvement Trust, Bhopal [(1989) 2 SCC 329
Bhagwathula Samanna and others Versus Special Tahsildar and Land Acquisition Officer, Visakhapatnam Municipality, Visakhapatnam, (1991) 4 SCC 506.

For the Appellant: Mr. K.D. Shreedhar, Sr. Advocate with Ms.Shreya Chauhan, Advocate, for the appellant in all the appeals.

For the Respondents: M/s Sunil Mohan Goel & Naveen K. Bhardwaj, Advocates, for the private respondent(s) in respective RFAs.
Mr. Shrawan Dogra, Advocate General with Mr.R.S. Verma, Additional Advocate General, for the respondent-State in all the appeals.

The following judgment of the Court was delivered:

Sanjay Karol, J (oral).

Primarily issue before this Court is as to whether in view of the law laid down by the Apex Court in *Cement Corpn. of India Ltd. Versus Purya and others,* (2004) 8 SCC 270, more specifically paragraphs 25 to 31 of the said report trial Court was right in not considering the sale deeds (Ex.R1, Ex.R3, Ex.R5, Ex.R7, Ex.R9, Ex.R11, Ex.R13, Ex.R15 & Ex.R17) tendered in evidence by the beneficiary/appellant herein only on account of non examination of the vendor(s) and vendee(s).

2. Also legality of the award in redetermining the market value of the acquired land varying from Rs.7,772/- to Rs.2,46,000/- per bigha to Rs.3,56,000/- per bigha (Rs.17,800/- per biswa) with respect to the acquired land in Phatti: Raila, Suchain and Manyashi, falling within the jurisdiction of Collector, Kullu, is subject matter of consideration.

3. For the public purpose, namely, construction of Parvati Hydro Electric Project, land situate in Phati Raila, Suchain and Manyashi, came to be acquired with the publication of the notification in the official dated 22.03.2003, under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act). The Collector Land Acquisition in terms of his award No. 19, dated 06.01.2005, so passed under Section 11 of the Act, determined the market value of the acquired land category wise as under:-

Sr.No.	Name of Phati	Classification of land	Market price per bigha (Rs.)
I.	Raila		
1.		Bathal Awwal	93,088.00
2.		Bathal Dom	69,816.00
3.		Bathal Som	46,544.00
4.		Bathal Chaharm	34,908.00
II.	Suchain		
1.		Ropa	1,51,554.00
2.		Bathal Awwal	1,16,580.00
3.		Bathal Dom	97,150.00
4.		Bathal Som	73,834.00
5.		Bathal Chaharm	23,316.00
6.		Bagicha	1,16,580.00
7.		Banjar Kadeem	7,772.00

III. Manyasi

1.		Ropa Awwal	2,46,000.00
2.		Ropa Dom	2,16,480.00
3.		Ropa Som	1,72,200.00
4.		Bathal Awwal, Bagicha Bathal	1,52,520.00
5.		Bathal Dom	1,47,600.00
6.		Bathal Som	1,08,240.00
7.		Bathal Chaharm	68,880.00
8.		Banjar Kadeem	9,840.00

4. It is a matter of record that various land owners laid challenge to the award by filing separate land reference petitions under Section 18 of the Act, which came to be clubbed together by the Court below. It is also a matter of record that subsequent to the consolidation of these petitions, Reference Petition No.58/2007, titled as *Sh. Tedhi Singh Versus Collector Land Acquisition and another,* was taken as a lead case, wherein as mutually agreed, parties led their evidence.

5. Market value stands redetermined by the Court below by returning the following findings: (a) In the absence of the vendor and the vendee having proved the sale transactions sale deeds (Ex.R1, Ex.R3, Ex.R5, Ex.R7, Ex.R9, Ex.R11, Ex.R13, Ex.R15 & Ex.R17) tendered in evidence by the beneficiary could not be taken into consideration; (b) sale deeds (Ex.P1, Ex.P3 & Ex.P5) proved on record by the claimants established the average market value of one biswa of land to be Rs.44,500/- (Rs.8,90,000/- per bigha), over which, deduction to the extent of 65% was required to be allowed in view of the exemplar sale deeds being of small chunk of land; (c) In the award dated 29.09.2007, titled as *Bhagwan Dass Versus Collector, Land Acquisition & others* (Ex.P10), passed by the District Judge, pertaining to the very same acquisition proceedings, market value already stands redetermined at much higher rate.

6. A Constitution Bench of the Apex Court in *Cement Corpn. of India* (supra) has observed as under:-

> "26. In the acquisition proceedings, sale deeds are required to be brought on record for the purpose of determining market value payable to the owner of the land when it is sought to be acquired.
>
> 27. Although by reason of the aforementioned provision the parties are free to produce original documents and prove the same in accordance with the terms of the rules of evidence as envisaged under the Indian Evidence Act, the LA Act provides for an alternative thereto by inserting the said provision in terms whereof the certified copies which are otherwise secondary evidence may be brought on record evidencing a transaction. Such transactions in terms of the aforementioned provision may be accepted in evidence. Acceptance of an evidence is not a term of art. It has an etymological meaning. It envisages exercise of judicial mind to the materials on record. Acceptance of evidence by a court would be dependent upon the facts of the case and other relevant factors. A piece of evidence in a given situation may be accepted by a court of law but in another it may not be.
>
> 28. Section 51-A of the LA Act may be read literally and having regard to the ordinary meaning which can be attributed to the term "acceptance of evidence" relating to transaction evidenced by a sale deed, its admissibility in evidence

would be beyond any question. We are not oblivious of the fact that only by bringing a documentary evidence in the record it is not automatically brought on the record. For bringing a documentary evidence on the record, the same must not only be admissible but the contents thereof must be proved in accordance with law. But when the statute enables a court to accept a sale deed on the records evidencing a transaction, nothing further is required to be done. The admissibility of a certified copy of sale deed by itself could not be held to be inadmissible as thereby a secondary evidence has been brought on record without proving the absence of primary evidence. Even the vendor or vendee thereof is not required to examine themselves for proving the contents thereof. This, however, would not mean that the contents of the transaction as evidenced by the registered sale deed would automatically be accepted. The legislature advisedly has used the word "may". A discretion, therefore, has been conferred upon a court to be exercised judicially i.e. upon taking into consideration the relevant factors.

29. In *Land Acquisition Officer & Mandal Revenue Officer V. Narasaiah,* (2001) 3 SCC 530, this Court correctly understood the said scope and object of insertion of Section 51-A in the LA Act when it held thus: (SCC p. 535, para 13)

> "It was in the wake of the aforesaid practical difficulties that the new Section 51-A was introduced in the LA Act. When the section says that certified copy of a registered document 'may be accepted as evidence of the transaction recorded in such document' it enables the court to treat what is recorded in the document, in respect of the transactions referred to therein, as evidence."
>
> … … …
>
> … … …

31. Thus, the reasoning of this Court in Narasaiah's case that Section 51-A enables the party producing the certified copy of a sale transaction to rely on the contents of the document without having to examine the vendee or the vendor of that document is the correct position in law. This finding in Narasaiah's case (supra) is also supported by the decision of this Court in the case of *Mangaldas Raghavji Ruparel* (supra).

32. Therefore, we have no hesitation in accepting this view of the Court in the Narasaiah's case as the correct view.

33. The submission of Mr. G. Chandrasekhar to the effect that the contents of a sale deed should be a conclusive proof as regard the transaction contained therein or the Court must raise a mandatory presumption in relation thereto in terms of Section 51-A of the Act cannot be accepted as the Court may or may not receive a certified copy of sale deed in evidence. It is discretionary in nature. Only because a document is admissible in evidence, as would appear from the discussions made hereinbefore, the same by itself would not mean that the contents thereof stand proved. Secondly, having regard to the other materials brought on record, the Court may not accept the evidence contained in a deed of sale. When materials are brought on record by the parties to the lis, the Court is entitled to appreciate the evidence brought on records for determining the issues raised before it and in the said process, may accept one piece of evidence and reject the other.

… … …

35. A registered document in terms of Section 51-A of the Act may carry therewith a presumption of genuineness. Such a presumption, therefore, is rebuttable. Raising a presumption, therefore, does not amount to proof; it only shifts the burden of proof against whom the presumption operates for disproving

> it. Only if the presumption is not rebutted by discharging the burden, the Court may act on the basis of such presumption. Even when in terms of the Evidence Act, a provision has been made that the Court shall presume a fact, the same by itself would not be irrebuttable or conclusive. The genuineness of a transaction can always fall for adjudication, if any, question is raised in this behalf."
>
> (Emphasis supplied)

7. The trial Court thus erred in outrightly rejecting the exemplar sale deeds produced by the beneficiary.

8. However, in para-40 of the report itself the Apex Court clarified that comparative nature of the location, suitability or marketability of the exemplar sale deed was necessarily required to be proved by the proponent.

9. Now in the instant case, only one witness was examined by the beneficiary and that being Bishan Kashyap (RW.1), a Clerk from the office of Sub-Registrar, Sainj, who only proved execution of these exemplar sale deeds. He is not even a witness to such transactions or is aware of the parties; area; nature or category of land. No sale transaction ever took place in his presence. He is also not a local resident of the area. Hence, exemplar sale deeds (Ex.R1, Ex.R3, Ex.R5, Ex.R7, Ex.R9, Ex.R11, Ex.R13, Ex.R15 & Ex.R17) cannot be looked into for the purposes of adjudicating the respective rights and contentions of the parties in the determination of a fair market value. More so in the teeth of evidence of rebuttal led by the claimants. In the passing reference, it may only be observed that even in terms of the said sale transactions, land stood sold in different Phatis ranging Rs.5,000/- to Rs.73,500/- per bigha. These sale transactions pertain to the period December, 2001 up to August, 2002. None from the office of the Land Acquisition Collector was produced by the beneficiary. Even no revenue officer was examined to establish the comparability of the acquired land with the exemplar sale land.

10. However, it is a settled principle of law that a petition under Section 18 of the Act is to be treated as a plaint and the onus to establish the true and correct market value of the acquired land is always upon the claimants.

11. The claimants are expected to lead cogent and proper evidence in support of their claim. Onus primarily is on the claimants, which they can discharge while placing and proving on record sale instances and/or such other evidences as they deem proper, keeping in mind the method of computation for awarding of compensation which they rely upon. However, it cannot be said that there is no onus whatsoever upon the State in such reference proceedings. The court cannot lose sight of the fact that obligation to pay fair compensation is on the State in its absolute terms. Every case has to be examined on its own facts and the courts are expected to scrutinise the evidence led by the parties in such proceedings. (See: *Special Land Acquisition Officer Versus Karigowda and others,* (2010) 5 SCC 708).

12. Now in the instant case, one finds that the claimants have proved on record three exemplar sale deeds. Sale deed (Ex.P1), dated 19.04.1994, pertaining to sale of 1 biswa of land situate in Phati Raila, for a sum of Rs.40,000/-, stands proved on record by vendor Prittam (PW.1); sale deed (Ex.P3), dated 29.11.2002, pertaining to sale of 2 biswas of land situate in Phati Suchain, for a sum of Rs.66,000/- (Rs.33,000/- per biswa), stands proved by Bale Ram (PW.2); and sale deed (Ex.P5), dated 02.01.2003, pertaining to sale of 2 biswas of land situate in Phati Manyashi, for a sum of Rs.1,21,000/- (Rs.60,500/- per biswa), stands proved by Gian Chand (PW.3).

13. Significantly, all the aforesaid witnesses (vendors/vendees) have uncontrovertedly deposed that the acquired land is just adjacent to the exemplar land, having similar potentiality with regard to the use, nature and similarity of classification and value. On this issue, beneficiary did not cross-examine these witnesses. It is a matter of record that not only these sale transaction were accepted to be genuine by the authorities, but also parties acted thereupon, and entries of mutation effected by the revenue authorities, which fact stands proved on record by Bale Ram (PW.2) and Bhagat Ram (PW.4).

14. From the testimony of claimant Maan Chand (PW.6), it is also evident that even he has been able to establish the market value determined by the Collector to be miserably low and the true and correct market value to be the one as depicted in the exemplar sale deeds. Noticeably, acquisition proceedings commenced in March, 2003 and sale transactions (Ex.P3 and Ex.P5) are more proximate to that time. In fact, it is evident that since the year, 1994, when sale transaction (Ex.P1) came to be executed, there has been increase in the market value. From Rs.40,000/-, cost of the land has arisen to Rs.60,000/- per biswa. Significantly, it could not be pointed out by the beneficiary that these sale transactions were sham or executed only in anticipation of the project coming in the near future. Thus, there is no difficulty in accepting these exemplar sale deeds in determining the market value of the acquired land.

15. It is urged on behalf of the beneficiary that system of belting ought to be adopted as the exemplar sale transactions pertain to small pieces of land, whereas, acquisition proceedings pertains to large chunk of land (approximately 109-12-08 bighas). Reliance is sought on the decision rendered by the Apex Court in *Land Acquisition Officer & Sub-Collector Gadwal Versus Shreelatha Bhoopal (Smt.) & another,* (1997) 9 SCC 628 and *Bhule Ram Versus Union of India and another,* (2014) 11 SCC 307.

16. The aforesaid decisions clearly do not lay down the principle, as is sought to be argued before this Court. It is not the mandate of law, that sale transactions pertained to small chunk of land cannot not be considered at all.

17. The market value of a property for the purposes of Section 23 of the Act is the price at which the property changes hands from a willing seller to a willing, but not too anxious a buyer, dealing at arms length. Prices fetched for similar lands with similar advantages and potentialities under bona fide transactions of sale at or about the time of the preliminary notification are the usual and, indeed the best evidences of market value. {*Mehta Ravindrarai Ajitrai (Deceased) through his Heirs and LRs. and Others v. State of Gujarat* (1989) 4 SCC 250, *Nelson Fernandes & Ors. v. Special Land Acquisition Officer, South Goa & Ors*. (2007) 9 SCC 447}.

18. Now it is a settled principle of law that if the entire land is put for a public use and no area is left out for carrying out any developmental activity, then the claimants are entitled for compensation for the entire acquired land, at uniform rates, regardless of its categorization.

19. The apex Court in *Haridwar Development Authority vs. Raghubir Singh & others,* (2010) 11 SCC 581 has upheld the award of compensation on uniform rates.

20. In *Union of India vs. Harinder Pal Singh and others* 2005(12) SCC 564, while determining the compensation for acquisition of land pertaining to five different villages, the apex Court uniformly awarded a sum of Rs. 40,000/- per acre, irrespective of the classification and the category of land.

21. Further, in *Nelson Fernades vs. Special Land Acquisition Officer* 2007(9) SCC 447 while dealing with the case where the land was acquired for laying a Railway line, the Court held that no deduction by way of development charges was permissible as there was no question of any development thereof.

22**.** Similar view stands taken by this Court in *Gulabi and etc. Vs. State of H.P.,* AIR 1998 HP 9 and later on in *H.P. Housing oard vs. Ram Lal & Ors.* 2003(3) Shim. L.C. 64, which judgment has attained finality as SLP (Civil) No. 15674-15675 of 2004 titled as Himachal Pradesh Housing Board vs. Ram Lal (D) by LRs & Others, filed by the H.P. Housing Board came to be dismissed by the Apex Court on 16.8.2004.

23. This judgment was subsequently referred to and relied upon by this Court in *Executive Engineer & Anr. vs. Dilla Ram* {Latest HLJ 2008 HP 1007} and relying upon the decision of the Apex Court in *Harinder Pal Singh (supra)*, wherein the market value of the land under acquisition situated in five different villages was assessed uniformly, irrespective of its nature and quality, also awarded compensation on uniform rates.

24. It is a matter of fact that the entire land was put to public purpose. Power project stood constructed thereupon. It was used for only one purpose and as such there cannot be any error in the uniform determination of the market value of the acquired land.

25. Now what is that real market value of the acquired land, the Apex Court has clearly held it to be that which a willing vendor and willing vendee are ready to receive and pay.

26. The market value is the price that a willing purchaser would pay to a willing seller for the property having due regard to its existing condition with all its existing advantages and its potential possibilities when led out in most advantageous manner, excluding any advantage due to carrying out of the scheme for which the property is compulsorily acquired. In considering market value disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy should be disregarded. The question whether a land has potential value or not, is primarily one of fact depending upon its condition, situation, user to which it is put or is reasonably capable of being put and proximity to residential, commercial or industrial areas or institutions. The existing amenities like, water, electricity, possibility of their further extension, whether near about Town is developing or has prospect of development have to be taken into consideration. (*Atma Singh and others v. State of Haryana and another* (2008) 2 SCC 568).

27. In *Union of India v. Pramod Gupta (Dead) by LRs. & Ors*. [(2005) 12 SCC 1], the Apex Court held that the best method, as is well-known, would be the amount which a willing purchaser would pay to the owner of the land. In absence of any direct evidence, the court, however, may take recourse to various other known methods. Evidence admissible therefor inter alia would be judgments and awards passed in respect of acquisitions of lands made in the same village and/or neighbouring villages. Such a judgment and award in the absence of any other evidence like deed of sale, report of the expert and other relevant evidence would have only evidentiary value.

28. In *Suresh Kumar v. Town Improvement Trust, Bhopal* [(1989) 2 SCC 329], the Apex Court has held that while determining the market value of the land acquired, it has to be correctly determined and paid so that there is neither unjust enrichment on the part of the acquirer nor undue deprivation on the part of the owner.

29. Now in the instant case, the geographical location and situation of the land; existing use of the land; its potentiality and comparability stands established on record. The entire acquired land even though being a large chunk could be put to agricultural use. Trial Court, was right in applying deduction to the extent of 60%. (See: *Bhagwathula Samanna and others Versus Special Tahsildar and Land Acquisition Officer, Visakhapatnam Municipality, Visakhapatnam,* (1991) 4 SCC 506.

30. Significantly, exemplar award (Ex.P10) pertaining to the land situate in Dhaugi, can be compared with the acquired land with respect to its location, quality and potentiality. In terms of the said award, entire land stands re-determined @ Rs.4,00,000/- per bigha (Rs.20,000/- per biswa) and can be relied upon in view of *Pramod Gupta* (supra).

31. Entire land stands utilized by the beneficiary for the acquired purpose. It has not come on record that any developmental activity was required to be carried out by the beneficiary. In fact, the entire land stands utilized for the construction of the power project. As such, trial Court rightly re-determined the market value of the acquired land @ Rs.17,800/- per biswa (Rs.3,56,000/- per bigha) irrespective of its category and classification.

32. Hence in the given facts and circumstances, no interference is warranted. It cannot be said that all the findings returned by the Courts below are perverse, illegal or erroneous. As such, present appeals stand disposed of, so also pending application(s), if any.

33. Efforts put in by Ms.Shreya Chauhan, learned counsel, in rendering valuable assistance to this Court, are highly appreciable.

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

Manpreet Singh ....Petitioner
Versus
Chaudhary Sarwan Kumar HP
Krishi Vishvavidyalaya and another ...Respondents

CWP No.1961 of 2016
Judgment reserved on: 11.8.2016
Decided on: 1.9.2016

Constitution of India, 1950- Article 226- Petitioner claims himself to be a ward of NRI- he sought admission in B.V. Sc. & AH programme- he was denied admission - writ petition was filed challenging the denial of admission - held, that purpose of reserving the seat for NRI is to bring him into Indian mainstream and to make available facilities in the country of his origin- admission could not have been given to NRI sponsored candidate- petitioner is residing in India and merely because his uncle is residing abroad will not make him NRI- admission was rightly refused to him- petition dismissed. (Para-10 to 18)

Case referred:
P.A. Inamdar and others Vs. State of Maharashtra and others, 2005(6) SCC 517

For the petitioner: Mr. R.K. Gautam, Senior Advocate with Mr. Gaurav Gautam and Ms. Megha Kapur Gautam, Advocates.
For the respondents: Mr. B.M. Chauhan, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

The petitioner is a resident of village Alipur, Tehsil and District Roop Nagar, Punjab. He has qualified for All India Senior School Certificate Examination, 2014, vide Annexure P-3, which is equivalent to plus two. Respondent No.2 University is running various courses, including Bachelor in Veterinary Science & Animal Husbandry, B.V. Sc & AH in short, in its campus at Palampur, District Kangra, H.P. In Chapter II under the heading "Admission and Enrolment" of Information Brochure-cum-Prospectus for the Academic Session 2016-17, provision qua reservation of seats for various categories was made. Amongst other categories, two seats were reserved for NRIs (non-resident Indians, residing abroad) and two seats for foreign nationals for admission in B.V. Sc. & AH. Although the term "NRI" has not been defined in the prospectus, yet as per the judgment of a Division Bench of this Court in CWP No.432 of 2006 and CWP No.1104 of 2007, Annexure R-V to the reply, an NRI candidate is one, who does not reside in India and is a non-resident Indian residing abroad. In Chapter II of the prospectus, there is a provision for reservation of seats, not exceeding 15% of the sanctioned seats for admission to B.V. Sc.& AH course, for non-resident Indians. The method to fill up the same is merit and on fulfillment of the eligibility criteria. An NRI candidate is required to furnish the certificates with the application, as provided in the Check List, Annexure IX to the prospectus, which is re-produced here-as-under:-

"CHECK LIST OF CERTIFICATES ETC. TO BE SUBMITTED WITH THE APAPLICATION BY NRIs/FOREIGN NATIONALS

1. Photocopy of Passport (duly self attested);

2. Photocopy of parent's Passport;

3. Certificate in evidence of being NRI;

4. Affidavit by the NRI candidate/s parent/guardian on prescribed proforma (Annexure X);

5. Self attested photocopy of certificate in evidence of date of birth;

6. Self attested photocopies of degrees, diplomas and certificates for the examinations passed including qualifying examination;

7. Self attested photocopies of detailed marks certificates of all the examinations passed;

8. Self attested photocopy of character certificate from the school/college/institution last attended.

9. Two copies of the recent passport size photograph of the candidates.

10. Self attested supporting documents for conversion of OGPA/OCPA;

11. Self attested copy of the syllabi of courses studied at 10+1 & 10+2 standard along with website address (only for admission to an undergraduate programme).

Note: Original degrees, diplomas, certificates etc. attested copies of which have been enclosed with the application form shall have to be produced at the time of Registration, otherwise, the claim of the candidate for the seat will stand forfeited."

2. Besides, NRI candidate's parent/guardian is also required to furnish an affidavit on the format as at Annexure-X to the prospectus, which for the sake of convenience is also reproduced here-as-under:

"**AFFIDAVIT BY NRI CANDIDATE'S PARENT/ GURADIAN**

I, Sh./Smt._____ S/O.D/O,W/O_____and parent of_____who is applying for admission under NRI category in the _____(write the name of programme) programme at Chaudhary Sarwan Kumar Himachal Pradesh Krishi Vishvavidyalaya, Palampur do hereby solemnly affirm and declare as under:

1. That my State of origin in India is _____, where I am having ancestral and inheritable property. My ancestral address in India is _____

2. That, I migrated to _____ (country) on _____ as a resident of _____(country). My permanent alien Registration Card/Non-residential Card No.is_____ (if applicable).

3. That my ward is an NRI.

4. That, I undertake to make full payment of the prescribed tuition fee and other charges for the entire duration of the programme in the manner as may be fixed by the University.

5. That, if any of the information furnished is found to be incorrect at any stage, the admission of my child/ward be cancelled and fee deposited by me be forfeited and proceedings, as permissible under the law of the land, be initiated against me.

Deponent

Verification:

I solemnly declare that the above contents of para 1 to 5 of mine are true and correct to the best of my knowledge and belief and nothing has been concealed therein.

Deponent

Dated: _____
Place: _____
Sworn to and appeared before me at_____(Place of country)
On this_____(date)

Signature and seal
(Notary Public/Magistrate Class I)"

3. There is provision for admission in B.V. Sc. & AH course to be the child/ward of NRIs. The petitioner claims himself to be the ward of one Devinder Karray, who is a non-resident Indian, residing in USA. His Passport is Annexure P-3. The inquiry conducted by respondent No.2, while scrutinizing the application and the documents annexed therewith by the petitioner for seeking admission in the course, reveals that Shri Devinder Karray, aforesaid is maternal uncle of the petitioner. Petitioner claims himself eligible for seeking admission against one of the two seats which were reserved for the category of NRIs under B.V. Sc. & AH programme. As per his further claim in the event of suitable candidate could have not been found available against the seats meant for the category of foreign nationals, the seats meant for this category were also to be filled up from amongst the category of NRIs. Since no one applied for seeking admission from the category of foreign nationals, therefore, as per his further case, there were four seats available for being filled up from the category of NRIs.

4. Admittedly, the petitioner has submitted his application for seeking admission in the course within the time schedule prescribed therefor under the prospectus. He has also submitted his educational qualification certificate and also a bank draft in the sum of 500 US dollar towards admission fee. The Passport of Shri Devinder Karray, his so called guardian, is Annexure P-3, whereas his affidavit on the format of Annexure P-X to the prospectus is Annexure P-6. In order to answer the query made by the respondents, said Shri Devinder Karray has also sworn in an affidavit in the form of declaration of adoption, stating therein that he has adopted the petitioner for the purpose of his entire educational expenses and it is he, who will pay full fee qua his higher education. As per the Check List Annexure P-IX to the prospectus, the petitioner, amongst other documents, was required to have submitted the photocopy of his own passport to show that he is a non-resident Indian and also a certificate in proof of he being an NRI. Since he is permanent resident of village Alipur, Tehsil and District Roop Nagar, Punjab and is not an NRI residing abroad, therefore, he could have not submitted the photocopy of his passport and also the requisite certificate to show that he is an NRI, residing abroad.

5. The 2nd respondent during the course of scrutiny of the application of the petitioner and the documents he submitted therewith omitted to take note of the factum of non-furnishing of the aforesaid two documents and only asked for the adoption deed whereby the petitioner was adopted by his maternal uncle Shri Devinder Karray aforesaid. In order to answer such query Shri Devinder Carry has sworn in his affidavit Annexure P-6 to the writ petition and the petitioner has submitted the same to the respondent-University. Respondent No.2, however, was not satisfied that this affidavit brings the petitioner under the category of NRI and as such has recommended the rejection of his candidature for admission to the course vide Annexure R-2 to the reply filed on behalf of the respondents. The proceedings of respondent No.2-Committee are Annexure R-2 (Colly). The petitioner, as such, has been denied the admission in the Course.

6. Aggrieved by such action on the part of the respondents, this writ petition has been filed with the following prayers:

> "i) That in view of the facts and circumstances mentioned here-above in this writ petition, the writ petition may kindly be allowed and the respondents may kindly be directed to allow the petitioner to deposit the admission fee and to grant him admission in the course of B.V. Sc. & AH in the interest of justice and fair play."

7. The response of the respondent-University, in a nutshell, is that against two seats of NRI quota, only two applications, including that of the petitioner were received for admission to B.V. Sc. &AH Course. Respondent No.2 on scrutiny of the applications recommended the name of one of the candidates, i.e. Ms. Himani Kundlas, who otherwise was also found eligible for admission in the Course and rejected the candidature of the petitioner as he was not found eligible for seeking admission under NRI quota. Reliance on behalf of the respondents has been placed on the judgment dated 20.8.2007 of a Division Bench of this Court in CWP No.1104 of 2007, titled Abhinav Verma Vs. State of H.P. and others, Annexure R-V to the reply.

8. Shri R.K. Gautam, learned Senior Advocate, assisted by Shri Gaurav Gautam and Ms. Megha Kapur Gautam, Advocates, has urged that the petitioner was never informed by the respondents that he is not eligible for seeking admission against the seats reserved for NRI candidates. The only query, as raised, was answered by tendering the affidavit Annexure P-7, sworn in by the guardian of the petitioner Shri Devinder Karray, who is an NRI, residing in USA. According to Mr. Gautam, the petitioner has been denied admission in the course arbitrarily. It has also been urged that since a seat meant for NRI category is lying unfilled, therefore, as a special case and by way of indulgence, the respondents may be directed to grant admission to the petitioner so that such seat does not go waste.

9. On the other hand, Shri B.M. Chauhan, Advocate, learned Standing Counsel, while drawing the attention of this Court to the law laid down by a Division Bench of this Court in the judgment Annexure R-V, has urged that the petitioner who is residing in India is not NRI candidate and as such not eligible for the grant of admission against the seats meant for NRI category. According to Mr. Chauhan, the petitioner at the most can be said to be an NRI sponsored candidate, however, the practice to grant admission to NRI sponsored candidates has been deprecated by this Court vide the judgment (Annexure R-V) in ***Abhinav Vernma's*** case supra. While answering a query as to whether the seat lying unfilled under NRI category can be given to the petitioner or any other candidate on merits, Mr. Chauhan, on instructions, has stated that the seats reserved under this category cannot be inter-changed with a candidate of any other category, as according to him there is no such provision in the prospectus.

10. The provisions of the prospectus, as have been noticed supra, make it crystal clear that two seats in B.V. Sc. &AH programme were reserved for the candidates belonging to NRI category. Who is an NRI has been defined by a Division Bench of this Court in the judgment dated 20.8.2007 in ***CWP No.1104 of 2007*** titled ***Abhinav Verma*** *Vs.* ***State of H.P. and others*** (Annexure R-V). As per the ratio of this judgment, a non-resident Indian candidate is one who though belongs to India, however, resides in abroad. The object sought to be achieved by making such reservation, as explained in the judgment supra, is the integration of non-resident Indian living abroad into Indian mainstream and making available to them the facilities in existence in the country of their origin. We may refer the relevant part of this judgment which reads as follows:

> "The distinction between NRI candidates and NRI sponsored candidates is quite clear. There is no vagueness in so far as definition as well as description of these two categories are concerned. Whereas NRI candidates are such persons who do not reside in India and who are Non Resident Indians (residing abroad), NRI sponsored candidates are such Indians who do not reside abroad, but actually and physically reside in India, and who, for the purposes of their admissions have been or might be sponsored by NRIs. The sponsorship of course, as everyone understands, is limited only with respect to the funding of their admissions.
>
> In the case of **P.A.Inamdar and others** vs. **State of Maharashtra and others**, 2005(6) SCC 537 dealing with the aforesaid aspect, their Lordships of the Hon'ble Supreme Court observed and held as under:

"Here itself we are inclined to deal with the question as to seats allocated for Non-Resident Indians ("NRI" for short) or NRI seats. It is common knowledge that some of the institutions grant admissions to a certain number of students under such quota by charging a higher amount of fee. In fact, the term "NRI" in relation to admissions is a misnomer. By and large, we have noticed in cases after cases coming to this Court, neither the students who get admissions under this category nor their parents are NRIs. In effect and reality, under this category, less meritorious students, but who can afford to bring more money, get admission. During the course of hearing, it was pointed out that a limited number of such seats should be made available as the money brought by such students admitted against NRI quota enables the educational institutions to strengthen their level of education and also to enlarge their educational activities. It was also pointed out that people of Indian origin, who have migrated to other countries, have a desire to bring back their children to their own country as they not only get education but also get reunited with the Indian cultural ethos by virtue of being here. They also wish the money which they would be spending elsewhere on education of their children should rather reach their own motherland. A limited reservation of such seats, not exceeding 15%, in our opinion, may be made available to NRIs depending on the discretion of the management subject to two conditions. First, such seats should be utilized bona fide by NRIs only and for their children or wards. Secondly, within this quota, merit should not be given a complete go-by. The amount of money, in whatever form collected from such NRIs, should be utilized for benefiting students such as from economically weaker sections of the society, whom, on welldefined criteria, the educational institution may admit on subsidized payment of their fee. To prevent misutilisation of such quota or any malpractice referable to NRI quota seats, suitable legislation or regulation needs to be framed. So long as the State does not do it, it will be for the Committees constituted pursuant to the direction in Islamic Academy to regulate."

This Court, therefore, in the aforesaid judgment dated 1st June, 2006 had clearly, un-ambiguously and in no uncertain terms had mandated that it was not open to the State Government to create a category of NRI sponsored candidates because in the considered opinion of this Court doing so would mean, in effect and substance selling admissions on commercial basis, pure and simple by practicing patent discrimination against other Indian nationals who would be selected only on the basis of their merit and would not be in a position to obtain sponsorships from NRIs for the purpose of funding their admissions by receiving finances from abroad.

We are pained to observe that the aforesaid judgment of this Court has been observed in total breach by the respondents. In flagrant violation of the ratio as well as the mandate contained in the aforesaid judgment of this Court, respondents No. 1 & 2 proceeded to create a category of candidates which actually was a step even beyond the NRI sponsored candidates. In a blatant act of total violation and disobedience of the judgment of this Court, respondents No. 1 & 2 went whole hog in creating a situation whereby by creating a category of Ordinary Indians under the of NRI candidates it simply created a devious mechanism of selling seats on commercial basis, that too perhaps in a clandestine manner. Let us notice the facts now"

11. It is seen that in Abhinav Verma's case supra, admission in medical college was granted to the private respondents, who had applied for seeking admission to the course, as general category candidates and also from the NRI as well as NRI sponsored categories. The Division Bench had noticed with all anguish and pain that in total violation of an earlier judgment delivered by a Division Bench of this Court on 1.6.2006 in CWP No.432 of 2006, an NRI sponsored candidates category was created. It was observed that to grant admission to an NRI sponsored candidate would tantamount to selling admission on commercial basis at the cost of the meritorious candidates. The admission to the private respondents in that case, who were

ordinarily residing in India and had claimed themselves NRI sponsored candidates, was therefore, quashed.

12. The petitioner herein is also a similarly situate person to that private respondents in ***Abhinav Verma's*** case supra, because he is not a non-resident Indian, residing in abroad and rather permanent resident of village Alipur, Tehsil and District Roop Nagar, Punjab. He has qualified for All India Senior Secondary School Certificate examination in the year 2014 from Central Board of Secondary Education, Delhi. Merely that his maternal uncle Shri Devinder Karray is a non-resident Indian, residing in USA and ready to bear all educational expenses qua education of petitioner cannot be taken to determine the eligibility of the petitioner for being considered from NRI category. As a mater of fact, only a candidate belonging to India, however, residing in abroad and having studied there alone, is eligible for being considered against the seat reserved for NRI category.

13. The petitioner was not found eligible as he did not produce the photocopy of his Passport and also the certificate to show that he belongs to NRI category and rightly so, as he is not residing in abroad. He even cannot be termed to be ward of an NRI for the reason that no deed could be produced by the petitioner showing that he was adopted by said Shri Devinder Karray in accordance with law. The petitioner as such has rightly been refused admission to the course by the respondent-University.

14. This Court in ***Abhinav Verma's*** case supra has declared granting admission to a candidate ordinarily residing in India having no link or connection with NRIs, except for that their relations were residing in abroad, in complete departure to the merit in the entrance test not only being violative of the judgment of the Apex Court in ***P.A. Inamdar and others*** *Vs.* ***State of Maharashtra and others***, ***2005(6) SCC 517,*** referred to in para supra but also that of Article 14 of the Constitution of India. This part of the judgment reads as follows:

> "Ultimately, it was decided to grant admissions to respondents No. 3 & 4 in the NRI category, treating them as belonging to para 9 (ii) and (iii) supra. Apart from the fact that the aforesaid action of respondents No. 1 & 2 clearly tantamounts to violating and breaching the judgment of this Court dated 1st June, 2006, passed in CWP No. 432 of 2006 which having assumed finality in law was binding upon respondents No. 1 & 2 and everyone else in the State of Himachal Pradesh, by creating the aforesaid category of so called NRI sponsored candidates, respondents No. 1 & 2 have violated the mandate contained in the Supreme Court judgment in the case of ***P.A.Inamdar and others*** *vs.* ***State of Maharashtra and others*** (supra) as well as Article 14 of the Constitution of India because the merit in the entrance test has been given a complete go bye and seats have been sold on commercial basis to such students who were, pure and simple, ordinary, resident Indians residing in India and who had no link or connection with NRIs except perhaps that their relations were residing abroad who also might have financed their admissions in India. Actually, we are not sure about the source of funding also. The fact remains that two seats in MBBS course in the Medical Colleges of Himachal Pradesh, both the Colleges belonging to the State Government were allotted purely on commercial basis even though a large number of candidates superior and higher in merit than respondents No. 3 & 4 could not be admitted only because perhaps they could not afford to pay the exorbitant amount which respondents No. 3 & 4 were and are ready and willing to pay.
>
> Under the cloak of either "NRI candidates" or "NRI sponsored candidates", a devious method has been adopted for granting admission to normal, ordinarily residing Indians on payment of charges being equivalent to and which are fixed and prescribed for NRI students. Normal ordinarily resident Indians cannot be equated with NRI students who constitute a different category altogether and who deserve to be treated differently.

The aforesaid action of respondents No. 1 & 2 is patently unconstitutional as well as illegal, violating the judgment of this Court, the mandate of the Supreme Court in the case of ***P.A. Inam Dass*** *vs.* ***State of Maharashtra (supra),*** as well as Article 14 of the Constitution of India. This action of respondents No. 1 & 2 accordingly is quashed and set aside with all consequences with a clear and binding direction upon respondents No. 1 & 2 to be absolutely careful in future while drawing up the list of categories for admission in the Colleges.

Admissions granted to respondents No. 3 & 4 accordingly are hereby quashed and set aside with all consequences."

15. In view of the ratio of the judgment hereinabove, the respondent-University has rightly refused to consider the candidature of the petitioner for admission against the seats reserved for NRI category, because to do so would certainly be in violation of the judgment of this Court in ***Abhinav Verma's*** case supra.

16. The submission that a seat under B. V. Sc. and AH programme is still available and that as a special case and by way of indulgence, the respondent-University may be directed to grant admission to the petitioner against the said seat cannot be accepted for the reason that to do so would be nothing, but merely a misplaced sympathy which has no place in law. Above all, allowing the petitioner to be admitted against the available seat would also amount to selling admission, which in terms of the judgment in ***Abhinav Verma's*** case supra, is not legally permissible.

17. We are not oblivious to the fact that one seat meant for the NRI category would go waste and feel that there should have been provision in the prospectus to divert the seat meant for this category or for that matter the category of foreign nationals in favour of the candidates, belonging to general/reserved category(s), who are next in merit, of course subject to their agreeing to pay the requisite admission fee and other charges throughout at par the candidates belonging to NRI category and the category of foreign nationals. Although we are not issuing any direction in this regard, yet leave it open to the respondent-University to consider this aspect of the matter and chalk out the possibility of diverting the seat(s), if left vacant, after the admission as per the time schedule under various programmes is over, to other category(s), of course having regard to the merits and on fulfillment of the eligibility criteria by the candidate(s) to be considered for admission against such seat(s).

18. With the observations hereinabove, the writ petition is dismissed. Pending application(s), if any, shall also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Smt. Nirmala Devi ...Appellant.

Versus

Land Acquisition Collector (Railways) & another. ...Respondents.

RFA No. 687 of 2011 with RFA Nos.33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45 and 46 of 2013.
Reserved on : 04.08.2016
Date of Decision: September 1, 2016.

Land Acquisition Act, 1894- Section 18- Land was acquired for the construction of Una-Talwara railway line- Collector determined the value of acquired land as Rs. 640 to Rs. 24005/- depending upon the category of land- a reference was filed and the Reference Court determined the market value as Rs.76,000/- per Kanal- held, in appeal that whole of the acquired land was used and no area was left for carrying any developmental activities- claimants are entitled to compensation for entire acquired land at the uniform rate regardless of categorization- there was no error in uniform determination of the market value of the acquired land- Reference Court had re-

determined the market value on the basis of the award pertaining to the very same Up-Mohal-similarity of the acquired land with the land regarding which award was passed was never disputed - the Court had rightly re-determined the market value by placing reliance upon the award - appeal dismissed. (Para-4 to 21)

Cases referred:

Fernades vs. Special Land Acquisition Officer 2007(9) SCC 447

Mehta Ravindrarai Ajitrai (Deceased) through his Heirs and LRs. and Others v. State of Gujarat (1989) 4 SCC 250

Atma Singh and others v. State of Haryana and another (2008) 2 SCC 568

Union of India v. Pramod Gupta (Dead) by LRs. & Ors. [(2005) 12 SCC 1]

Suresh Kumar v. Town Improvement Trust, Bhopal [(1989) 2 SCC 329]

Periyar and Pareekanni Rubbers Ltd. Versus State of Kerala, (1991) 4 SCC 195

For the Appellants:	Mr. Ajay Sharma, Advocate, for the appellant(s) in RFA No.687 of 2011 and Mr. Rahul Mahajan, Advocate, for the appellant(s) in RFA Nos.33 to 46 of 2013.
For the Respondents:	Mr. R.M. Bisht, Addl. AG., and Mr.Puneet Rajta, Dy. AG., for the respondent-State and Mr.Rahul Mahajan, Advocate, for respondent No.2 in RFA No.687 of 2011

The following judgment of the Court was delivered:

Sanjay Karol, J.

For public purpose, namely, construction of Una-Talwara railway line, land belonging to the claimants came to be acquired with the publication of Notification dated 31.10.2000, under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act). The Collector Land Acquisition, in terms of award dated 04.12.2001, No. 24, determined the market value of the acquired land ranging from Rs.640/- to Rs.24005/- depending upon the various category of land. In all, 0-94-93 hectares of land, came to be acquired.

2. Aggrieved thereof, claimants filed land reference petitions under Section 18 of the Act, seeking re-determination of the market value of the acquired land, which stand decided in terms of impugned award dated 26.07.2011, passed by Additional District Judge, Una, District Una, H.P., in Land Reference No.58 of 2009, titled as *Prakash Chand through LRs and others Versus The Land Acquisition Collector, Railways, Una & another*, alongwith connected reference petitions, in terms whereof, the market value of the acquired land stands re-determined @ Rs.76,000/- per Kanal, irrespective of the classification and category of land.

3. Both the beneficiary and the claimants are aggrieved of the impugned award.

4. To establish their respective claims, both the claimants and the beneficiary examined one witness each. In support of their claim, claimants have produced on record sale deeds (Ex.P-1 to Ex.P-4) and award dated 27.02.2010 (Ex.P-13) pertaining to Land Reference No.19 of 2005, titled as *Bhagat Ram Versus LAC & others,* whereby land came to be acquired in Revenue Estate Basal, wherein the market value came to be re-determined at Rs.75,000/- per Kanal, irrespective of its classification.

5. On the other hand, beneficiary has placed on record sale deeds (Ex.R-1 to Ex.R-3).

6. Now if one peruses the sale deeds produced on record by the beneficiary as also the claimants, one finds that they are not reflective of the true and correct market value of the prices prevalent at the time of initiation of the acquisition proceedings. Sale deeds (Ex.P-1 & Ex.P-3) pertain to the years 1992 and 1998. Whereas, sale deeds Ex.P-2 and Ex.P-4 pertain to the years 2001 and 2000. In terms of the later sale deed, small chunk of land came to be sold for a

sum of Rs.50,000/- to Rs.60,000/-. On the other hand, sale deeds (Ex.R-1 to Ex.R-3) also pertain to small chunk of land, whereby land came to be sold for a sum of Rs.5,000/- to 10,000/, prior to initiation of the acquisition proceedings. There is nothing on record to establish the proximity and similarity of the acquired land with that of the exemplar sale deeds.

7. The question which needs to be considered is as to whether the awards need to be interfered, on the asking of either of the parties or not? Having heard learned counsel for the parties as also perused the record, Court is of the considered view, that the re-determination of the market value of the acquired land is absolutely just, fair and reasonable.

8. It is not in dispute before this Court, as is also evident from the material placed on record, that the entire acquired land stood fully utilized for the public purpose. Railway line stood constructed over the entire acquired land.

9. Now it is a settled principle of law that if the entire land is put for a public use and no area is left out for carrying out any developmental activity, then the claimants are entitled for compensation for the entire acquired land, at uniform rates, regardless of its categorization.

10. Further, in *Nelson Fernades vs. Special Land Acquisition Officer* 2007(9) SCC 447 while dealing with the case where the land was acquired for laying a Railway line, the Court held that no deduction by way of development charges was permissible as there was no question of any development thereof.

11. It is a matter of fact that the entire land was put to public purpose. Railway line stood constructed thereupon. It was used for only one purpose and as such there cannot be any error in uniform determination of the market value of the acquired land.

12. Now what is that real market value of the acquired land, the Apex Court has clearly held it to be that which a willing vendor and willing vendee are ready to receive and pay.

13. The market value of a property for the purposes of Section 23 of the Act is the price at which the property changes hands from a willing seller to a willing, but not too anxious a buyer, dealing at arms length. Prices fetched for similar lands with similar advantages and potentialities under bona fide transactions of sale at or about the time of the preliminary notification are the usual and, indeed the best evidences of market value. {*Mehta Ravindrarai Ajitrai (Deceased) through his Heirs and LRs. and Others v. State of Gujarat* (1989) 4 SCC 250, *Nelson Fernandes & Ors. v. Special Land Acquisition Officer, South Goa & Ors*. (2007) 9 SCC 447}.

14. The market value is the price that a willing purchaser would pay to a willing seller for the property having due regard to its existing condition with all its existing advantages and its potential possibilities when led out in most advantageous manner, excluding any advantage due to carrying out of the scheme for which the property is compulsorily acquired. In considering market value disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy should be disregarded. The question whether a land has potential value or not, is primarily one of fact depending upon its condition, situation, user to which it is put or is reasonably capable of being put and proximity to residential, commercial or industrial areas or institutions. The existing amenities like, water, electricity, possibility of their further extension, whether near about Town is developing or has prospect of development have to be taken into consideration. (*Atma Singh and others v. State of Haryana and another* (2008) 2 SCC 568).

15. In *Union of India v. Pramod Gupta (Dead) by LRs. & Ors*. [(2005) 12 SCC 1], the Apex Court held that the best method, as is well-known, would be the amount which a willing purchaser would pay to the owner of the land. In absence of any direct evidence, the court, however, may take recourse to various other known methods. Evidence admissible therefor inter alia would be judgments and awards passed in respect of acquisitions of lands made in the same village and/or neighbouring villages. Such a judgment and award in the absence of any other evidence like deed of sale, report of the expert and other relevant evidence would have only evidentiary value.

16. In *Suresh Kumar v. Town Improvement Trust, Bhopal* [(1989) 2 SCC 329], the Apex Court has held that while determining the market value of the land acquired, it has to be correctly determined and paid so that there is neither unjust enrichment on the part of the acquirer nor undue deprivation on the part of the owner.

17. Significantly the Court below itself re-determined the market value by referring to and relying upon the award dated 27.09.2010, passed in Land Reference No.43/2008, titled as *Sita Ram & others Versus LAC and another.*

18. What is important is that the said award pertains to the very same Up-Mohal i.e. Thakurdwara/Basal, whereby the land in question also came to be acquired for the very same public purpose. This award was placed by the parties on the file of the Court below. The similarity of the acquired land with that of the land acquired in terms of the said award as also its potentiality with regard to its use and nature was never disputed before the Court below. As such, Court below rightly re-determined the market value by seeking reliance thereupon. The potentiality and the advantage of the acquired land with that of the exemplar award was never disputed. To this extent no factual error can be highlighted even before this Court. As such, impugned award cannot be said to be erroneous, perverse or illegal, warranting interference by this Court.

19. In *Periyar and Pareekanni Rubbers Ltd. Versus State of Kerala,* (1991) 4 SCC 195, Apex Court has clarified that onus to establish the money spent or damage caused to the property is on the owner, which in the instant case has not been established by any means. What is the effect of that severance of land also remains un-established. How and in what manner the productivity of their land stands diminished, remains un-disclosed. As such, on this count no claim for award of compensation is sustainable. In this view of the fact, it is held that though the reasoning adopted by the Court below, on other points, is unsustainable in law, but nonetheless the amount re-determined with respect to the acquired land, irrespective of its classification and category cannot be held to be illegal, erroneous or perverse, warranting interference by this Court. It cannot be said that the market value stands unjustifiably re-determined and that the impugned award is illegal, unfair, unjust or inequitable.

20. The claimants are poor villagers whose land came to be acquired way back in the year 2000. They have been litigating before various Courts for adjudication of their rights. It is high time that all litigation must come to an end at some stage. Poor villagers, who have been deprived of their land have been put to great disadvantage. They are villagers and not businessmen, who can re-invest money in the form of real estate. In some manner or other they stand deprived of their vocation. Hardship caused to them cannot be compensated in terms of money save and except that they get a fair market price.

21. Hence in the given facts and circumstances, no interference is warranted. It cannot be said that the findings returned by the Courts below are perverse, illegal or erroneous. Also no case for enhancement of the market value arises. As such, present appeals stand dismissed, so also pending application(s), if any.

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

O.P. Thakur ...Petitioner.

Versus

The Shimla Municipal Corporation and others ...Respondents.

CWP No. 2117 of 2016
Decided on: 01.09.2016

Constitution of India, 1950- Article 226- Writ petition was filed for quashing the order passed by the District Consumer Disputes Redressal Forum, Shimla- held, that Consumer Protection Act, 1986 contains the mechanism to deal with the complaints – it also provides mechanism for filing an appeal against the order of District Consumer Disputes Redressal Forum- petitioner has an alternative and efficacious remedy of filing an appeal- petition dismissed with liberty to file an appeal in accordance with law. (Para-2 to 11)

For the petitioner: Mr. Sameer Thakur, Advocate.
For the respondents: Mr. Hamender Chandel, Advocate, for respondent No. 1.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

By the medium of this writ petition, the petitioner has sought quashment of order, dated 8th March, 2016 (Annexure P-1) made by the District Consumer Disputes Redressal Forum, Shimla (H.P.) (for short "the District Forum") in Complaint No. 279 of 2013, titled as O.P. Thakur versus The Shimla Municipal Corporation and another, whereby the complaint filed by the petitioner came to be dismissed (for short "the impugned order").

2. It is a moot question – whether the writ petition is maintainable?

3. The writ petition, on the face of it, is not maintainable for the following reasons:

4. The petitioner filed a complaint before the District Forum. The respondents appeared, resisted the complaint and order was made by the District Forum, which is subject matter of the writ petition in hand.

5. It is apt to record herein that The Consumer Protection Act, 1986 (for short "the Act") contains the mechanism how to deal with the complaints. Section 15 of the Act provides appeal against the orders of District Forum passed in terms of Section 14 of the Act.

6. The words 'an order' have been used in Section 15 of the Act. Meaning thereby, any order passed by the District Forum is appealable before the Consumer Disputes Redressal Commission (for short "State Commission"). Thus, the petitioner has an alternative and efficacious remedy available in terms of Section 15 of the Act, which he has not availed so far, but, has chosen to come to this Court perhaps on the ground that the District Forum has not followed the mechanism contained in the Act and has committed procedural irregularities. All these questions are to be gone into by the Appellate Authority, i.e. the State Commission, and not by the Writ Court.

7. In view of the above, we deem it proper to dispose of this writ petition by providing that the petitioner is at liberty to file an appeal before the Appellate Authority in terms of Section 15 of the Act.

8. At this stage, it is stated that limitation will come in the way of the petitioner in filing the appeal. Keeping in view the facts of the case read with the fact that the petitioner is a senior citizen, we deem it proper to condone the delay in filing the appeal before the Appellate Authority. The petitioner is at liberty to file the appeal within two weeks.

9. Mr. Hamender Chandel, learned counsel appearing on behalf of respondent No. 1, stated at the Bar that respondent-Corporation will appear before the Appellate Authority. His statement is taken on record.

10. The petitioner to furnish copy of the appeal alongwith all documents to the respondents enabling them to appear on the date of presentation of the appeal.

11. The State Commission is requested that in case appeal is filed, the same be decided as early as possible, preferably within four weeks from the date the respondents cause appearance.

12. The writ petition is disposed of accordingly alongwith all pending applications.

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

Poonam Sharma .....Petitioner.

Versus

Kamal Dev Sharma .....Respondent.

Cr.MMO No. 257 of 2016.
Reserved on: 31.8.2016.
Decided on: 01.9.2016.

Code of Criminal Procedure, 1973- Section 311- Petitioner and her husband approached respondent for providing financial assistance of Rs. 2 lacs- petitioner issued a cheque of Rs. 2 lacs, which was dishonoured by the Bank- a legal notice was issued but the amount was not paid- complaint was filed- an application was filed by the respondent for placing on record certified copy of notice and postal receipt exhibited in other complaint- application was allowed by the trial Court- aggrieved from the order, present petition was filed- held, that respondent had dispatched two legal notices - one to the petitioner and other to R- inadvertently, notice issued to R was placed on record of present complaint along with postal receipt – notice which was issued to the petitioner was placed on record of other complaint filed against R- notices were not placed on record inadvertently - there is no illegality in the order passed by the trial Court- there is no merit in the petition and the same is dismissed. (Para-2 to 4)

For the petitioner: Mr. O.C.Sharma, Advocate.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner has sought setting aside and quashing of summoning order dated 16.3.2013 rendered in complaint No. 50/3 of 2013 (RBT No. 147/3 of 2015), pending before the learned Judicial Magistrate Ist Class, Kasauli and all other consequential orders.

2. "Key facts" necessary for the adjudication of this petition are that the respondent had cordial and family relations with the petitioner and out of the relationship, the petitioner along with her husband approached him and requested to provide her financial assistance to the tune of Rs. 2,00,000/-. The petitioner issued cheque of Rs. 2,00,000/- bearing No. 011605 dated 10.10.2012 drawn on Bhagat Urban Cooperative Bank Ltd. Chambaghat. The respondent presented the cheque for its encashment through his banker i.e. Central Bank of India, Dharampur Branch. The banker of the respondent sent the same for its collection to the drawee bank but to the utter surprise the cheque was dishonoured by the drawee bank and returned the same as unpaid. The respondent issued a legal notice dated 28.1.2013 to the petitioner which was sent through registered post. Thereafter, the respondent filed complaint under Section 138 of the Negotiable Instruments Act on 13.3.2013 against the petitioner. The preliminary evidence of the respondent was recorded on 16.3.2013 in complaint No. 50/3 of 2013 (RBT No. 147/3 of 2015). The summons were issued to the petitioner vide order dated 16.3.2013. The trial Court put notice of accusation to the petitioner on 12.5.2015. She pleaded not guilty and claimed trial.

The evidence of the respondent was recorded by the learned trial Court on 10.7.2015. The respondent filed an application under Section 311 Cr.P.C. in the Court of learned Chief Judicial Magistrate, Solan for placing on record certified copy of notice and postal receipts as exhibited in complaint No. 49/3 of 2013, titled as Kamal Dev vs. Rajinder. The reply to the application was filed by the petitioner. Application bearing No. 181/4 of 2016 was allowed by the learned trial Court on 13.6.2016.

3. It is apparent from the record that respondent infact has dispatched two legal notices on the same date, one to the petitioner and other to Rajinder Sharma. These were dispatched on 30.1.2013 against postal receipts. However, inadvertently, the notice which was issued to Rajinder Sharma has been placed along with its postal receipt in complaint i.e. complaint No. 50/3 of 2013 (RBT No. 147/3 of 2015). Similarly, in the complaint instituted against the husband of the petitioner, namely, Rajinder Sharma, bearing case No. 49/3 of 2013, the notice which was issued to the present petitioner along with the postal receipt has been annexed.

4. The fact of the matter is that respondent had issued legal notice to the petitioner on 30.1.2013 within the stipulated period. It was only inadvertently that the notice dated 28.1.2013 and receipt which was required to be placed in complaint No. 50/3 of 2013 (RBT No. 147/3 of 2015), was inadvertently placed in complaint No. 49/3 of 2013, titled Kamal Dev vs. Rajinder Sharma. The notice which was required to be placed on record along with the postal receipt in complaint No. 49/3 of 2013 was placed in complaint No. 50/3 of 2013 (RBT No. 147/3 of 2015). Thus, there is no illegality in the order dated 16.3.2013 whereby cognizance was taken by the trial Court, petitioner was summoned in complaint No. 50/3 of 2013 (RBT No. 147/3 of 2015) and notice of accusation was put to the petitioner on 12.5.2015 and order dated 13.9.2016, whereby an application preferred under section 311 Cr.P.C. by the respondent has been allowed.

5. Accordingly, there is no merit in this petition, the same is dismissed so also the pending application(s), if any.

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

State of H.P. .....Appellant.
Versus
Vijay Singh ....Respondent.

Cr. Appeal No. 4075 of 2013.
Reserved on : 24.06.2016
Date of Decision: 1.09.2016

Indian Penal Code, 1860- Section 498-A and 306- Deceased was married to the accused- when she was coming on motorcycle with accused, accused pushed her from the motorcycle causing injuries to her- accused used to torture the deceased without any reason - the deceased consumed poison due to maltreatment - accused was tried and acquitted by the trial Court- held, in appeal that parents and brother of the deceased had stated that deceased was residing with them for two months prior to commission of suicide- it was also admitted that they had asked the deceased 5-7 times to compromise the matter- forcing the deceased to compromise the matter could be a possible cause for committing the suicide – it cannot be said with certainty that behaviour of the accused was responsible for the death of the deceased - when two views are possible, the view favourable to the accused has to be preferred- trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-5 to 15)

For the Appellant: Mr. Neeraj K. Sharma, Deputy Advocate General.
For the Respondent: Mr. Rajesh Mandhotra and Ms.Kanta Thakur, Advocates.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Respondent has been acquitted vide judgment dated 1.05.2013 passed by learned Additional Sessions Judge, in Sessions Case No. 61-1/2010 in Case FIR No. 18/2010 registered under Section 498-A and 306 IPC in Police Station Indora District Kangra H.P. Acquittal of respondent has been assailed by State of H.P. in present appeal.

2. On receiving telephonic information in Police Station Indora from Medical Officer, CHC Indora, PW-11 SI Karam Chand had rushed to CHC Indora after recording the same information in Daily Station Diary vide GD entry No. 31(A) (Ex. PW-5/A), in Police Station Indora.

3. In CHC Indora, PW-1 Kamlesh Kumari mother of deceased made statement (Ex. PW-1/A) under Section 154 Cr.P.C., stating therein that her daughter had married to respondent in the year 2009 and after few months of marriage when her daughter was going with respondent somewhere on motorcycle, respondent had pushed her daughter from motorcycle causing injuries to her daughter and in this matter a case was registered in Police Station Indora. She further stated that respondent had been torturing her daughter without any reason and her daughter had consumed poison due to maltreatment by her husband (respondent). The said statement was sent to Police Station through HHC Chand Lal, upon which FIR PW-7/A was registered by PW-7 ASI Nardev Singh. After endorsement Ex. PW-7/B on the said statement (Ex. PW-11/A) the case file was sent to spot through HHC Chand Lal.

4. An application Ex. PW-4/A was moved by Investigating Officer to Medical Officer for medical examination of deceased and also for recording statement of deceased. However, statement of deceased could not be recorded as deceased was not found fit to make statement. Later on, deceased was referred to Ravi Hospital Pathankot, where she expired on the same day. Postmortem of deceased (Ex. PW-12/B) was conducted by PW-10, Doctor Subhash Thakur and as per his opinion deceased had died because of celphos (alluminium phosphide) poison. After completion of investigation, challan was presented in Court against respondent and he was charge sheeted under Section 498-A and 306 IPC and was acquitted on conclusion of trial.

5. Entire prosecution case hinges upon testimonies of mother PW-1, father PW-2 and brother PW-3 of deceased. All of them deposed that respondent used to torture, beat and abuse deceased and was doubting her character. Once respondent had pushed deceased from running motorcycle resulting into injuries to deceased whereupon a case under Section 498-A IPC was registered vide FIR No. 290 dated 4.11.2009 in Police Station Indora. As per depositions of prosecution witnesses, after that incident deceased was living with her parents and on 7th January, 2010 parents of deceased had called respondent and his parents to Indora for compromise. Respondent and deceased alongwith their parents were present in Indora for re-conciliation and respondent used abusive language raising doubt about character of deceased and also stated that he did not want to keep deceased with him where upon deceased went to tap to drink water but had consumed poisonous substance there. She was immediately taken to CHC Indora and thereafter Ravi Hospital Pathankot where she expired in the evening.

6. PW-1 Kamlesh Kumari, PW-2 Lal Singh and PW-3 Dalip Kumar admitted that deceased was living with them since about two months prior to 7th January, 2010. FIR Ex. PW-7/A with regard to incident of pushing deceased from motorcycle was lodged on 4th November, 2009. Meaning thereby that deceased was living with her parents since lodging of said FIR under Section 498-A IPC. Therefore after 4.11.2009 there was no occasions for fresh occurrence of harassing or maltreating deceased by respondent subjecting her to cruelty to attract provisions Section 498–A. Case in FIR No. 290 of 2009 (Ex. PW-7/A) registered in Police Station, Indora was to be decided on its own merit.

7. For attracting provisions of 306 IPC prosecution had to establish that act of respondent was so directed, co-related and proximate with the act of suicide that it could be safely inferred that deceased had committed suicide only on account such act committed on the

part of respondent. Mere abuse or indecent behaviour of respondent towards deceased could not be considered that respondent had committed offence under Section 306 IPC.

8. Parents and brother of deceased stated that deceased was residing with them since last two months before committing suicide and they had decided to compromise the matter and had asked deceased to compromise with family of respondent and therefore, they had called family of respondent to Indora. PW-1 Kamlesh Kumari had admitted that she had been asking deceased for compromise but had denied that she had been forcing deceased for compromise. PW-2 Lal Singh had also admitted that during stay of deceased with him he had asked her for 5-7 times to compromise the matter. However, PW-3 had denied that he had been asking his sister for compromise.

9. PW-1 stated that they had reached Indora Tehsil at 1.00 PM and at that time parents of respondent were present there. However, in later part of cross examination she stated that parents of respondent had come to their house wherefrom they had gone together to Indora in one vehicle brought by parents of respondent. She had admitted that deceased had consumed poison within 10 minutes after their arrival at Indora. PW-3 had also admitted the said fact in his cross examination.

10. In cross examination PW-2 had denied to have checked bag of his daughter, finding celphos tablets in that bag and taking into possession of those tablets whereas it was so mentioned in his statement recorded by police under Section 161 Cr.P.C.

11. PW-4 Doctor Satish Pal had conducted medical examination of the deceased in CHC Indora. In his cross examination he had admitted that relatives of patient had shown and handed over him poisonous substance which was celphos. All these facts indicated that deceased had already having celphos with her with predetermined mind to commit suicide. She was living with her parents since last two months and was not inclined to commit suicide but to fight but on the date when both families had decided to sit together for re-conciliation, she was carrying celphos with her and within 10 minutes of meeting of families she had consumed poison.

12. Question of asking deceased to compromise for 5-7 times had arisen only of parents of deceased were insisting for compromise whereas deceased was not agreeing to reconcile. Forcing deceased to compromise with respondent and his family could also be reason for committing suicide.

13. In these circumstances, it cannot be said with certainty that it was behaviour of respondent or pressure of parents to reconcile the matter with respondent which forced deceased to consume poison.

14. From testimonies of prosecution witnesses there were two possible reasons for committing suicide by deceased. Having such evidence on record it cannot be said that it was only respondent who was responsible for committing suicide by deceased. It is well settled law when two views were possible, the view favourable to the accused was to be preferred. Possibility of another reason for committing suicide by deceased is fatal for prosecution case. Therefore, it cannot be said that prosecution has been able to prove guilt of respondent beyond all reasonable doubts.

15. Respondent has been acquitted by trial Court. From perusal and scrutiny of evidence, it cannot be said that trial court has not appreciated evidence correctly and completely and acquittal of accused has resulted into travesty of justice or has caused miscarriage of justice.

16. After considering arguments of respective counsel for the parties and minutely examining the testimonies of the witnesses and other documentary evidence placed on record, we are of the considered view that no case for interference is made out.

17. The present appeal, devoid of any merit, is dismissed, as also pending applications, if any. Bail bonds, if any, furnished by the accused are discharged. Records of the Court below be immediately sent back.

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

State of Himachal Pradesh and Ors. .....Petitioners.
Versus
Padma Youdan. .....Respondent.

CWP No. 1684 of 2015
Reserved on: 24.08.2016
Decided on: 01.09.2016

Industrial Disputes Act, 1947- Section 25- Respondent filed a claim petition before the Labour Court contending that she was engaged on muster roll /daily wage basis in the month of May, 1999 and was working as such till 31.10.1999- her services were terminated orally – matter was referred to Labour Court, which directed the continuation of service with all consequential benefits, except back-wages- it was further directed that she be considered for regularization as per policy of the State Government- held, that there is no illegality or perversity in the award passed by the Labour Court-cum-Industrial Tribunal – petition dismissed. (Para-7 to 10)

For the petitioners: Mr. Virender K. Verma, Addl. Advocate General, with Mr. Pushpinder Jaswal, Dy. Advocate General.
For the respondent: Mr. Rahul Mahajan, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioner/State laying challenge to the award of learned Labour Court-Cum-Industrial Tribunal, Kangra at Dharamshala, camp at Kaza, Lahaul Spiti, H.P., passed in Reference No. 129 of 2013, decided on 22.09.2014, whereby the claim petition of the respondent herein, Smt. Padma Youdan, who is petitioner before the learned Tribunal, was allowed.

2. Briefly stating facts giving rise to the present petition are that respondent, Smt. Padma Youdan, maintained the claim petition before the learned Labour Court contending that she was engaged on muster roll/daily wage basis in the in the month of May, 1988 by respondent No. 2 and with fictional breaks she worked with the said respondent upto 31.10.2009. She could not complete 160 days in a calendar year and ultimately on 01.11.2009, her services were terminated by way of verbal orders. Thereafter, when the dispute was raised and the conciliation took place before the Conciliation Officer, the matter was referred by the State Government to the learned Labour Court. However, as the reference was not proper, the same was withdrawn and again fresh demand notice was issued by the petitioner on 07.05.2012 and reference was again made. As per the claimant, her services were terminated again in 2010 and she was not allowed to complete 160 days in a calendar year, as she was given fictional breaks, thereby the respondents have violated the mandate of Section 25-B of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act'). It is further alleged by the claimant that respondent/department has also violated the principle of 'last come first go', as juniors to the claimant have been retained without giving them any breaks and the same is in utter violence of Sections 25-G and 25-H of the Act. The respondent has terminated the services of claimant for the reason of fictional breaks. It is further alleged that the claimant has continuously worked w.e.f. May, 1998 to 2007 and thus completed ten years. Therefore, as per the Mool Raj Upadhaya's case the claimant has right to be regularized as work charge beldar from 01.01.2008 when her juniors were regularized. It is further alleged that the breaks given to the claimant amounts to unfair labour practice under Section 2(ra) of the Act, so the claimant also prays for setting aside the fictional breaks given to her.

3. The respondent, by way of filing reply to the reference petition, took preliminary objections qua delay and cause of action. As per the respondent before the learned Labour Court, the claimant is still in service and she has not been disengaged. On merits it is submitted that claimant was engaged in May, 1998, on daily wage basis. As per the respondents, the claimant was engaged in tribal area of Spiti Sub Division, which is snow bound for six months. Due to this, the respondent/department could not provide any work to the petitioner during the whole year. Furthermore, the claimant was habitual absentee from duty at her own will, therefore, she could not complete 160 days in a calendar year. The respondent has denied that any fictional breaks were given to the claimant and her juniors have been regularized. Lastly, the respondent prayed for rejection of the claim of the claimant.

4. The learned Tribunal below has framed the following issues for determination:

"1. Whether time to time termination of the services of the petitioner/giving breaks in service to the petitioner by the respondent during the year 2000 to 2010 is/was illegal and unjustified as alleged? OPP

2. Whether the final termination of services of the petitioner by the respondent in the year 2011 is/was illegal and unjustified as alleged? OPP

3. Whether the petitioner has a cause of action? OPR

4. Whether the claim petitioner is not maintainable in the present form? OPR

5. Whether the petition is hit by the vice of delay and laches as alleged. If so, its effect? OPR

6. Whether the claim petition is premature and has become infructuous as alleged. If so, its effect? OPR

7. Whether the petitioner has not come to the Court with clean hands as alleged. If so, its effect? OPR

8. Relief."

After deciding Issue No. 1 in favour of the petitioner herein (claimant before the learned Labour Court below), Issue No. 2 against the petitioner and held that no fictional breaks were granted. Issues No. 3 to 7 were decided against the respondent/State, and the reference was answered by holding that the claimant is in continuous service of the respondent with all consequential benefits, except back-wages and she was to be considered for regularization from the time her juniors were regularized, as per the Policy framed by the State Government.

5. No reply to the writ petition was filed by the respondent.

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

7. PW-1 (petitioner) by filing her affidavit, Ext. PW-1/A, in her examination-in-chief, has re-asserted the facts averred in the claim petition. She has also filed letter, Ext. PW-1/B, whereby the Government took a decision that the daily wagers should be given full work for full months and their fictional breaks are not considered by the Courts and they are deemed to be in continuous employment on daily wage basis. PW-1 in her cross-examination, has denied that she used to remain absent occasionally and due to this, she could not complete 160 days in a year.

8. On the other hand, petitioner/State examined Shri Sanjeev Kumar Sharma, Executive Engineer, I&PH Division, Kaza, who also filed his affidavit, Ext. RW-1/A, wherein the contents of the reply filed before the learned Labour Court were re-asserted. This witness, in his cross-examination, has admitted that no appointment letter to the respondent herein, as daily wagers, was issued, as no practice was prevalent during that time. He has admitted that the respondent (claimant) was not given any work from November to May. This witness has also admitted mandays chart, Ext. PX. This witness has also brought on record the seniority list of work charged Class IV Beldars, which is Ext. RW-1/G. He has further testified that employees at serial No. 57 to 60 were employed after the year 1998 and they have been regularized. This

witness has further deposed that no notice was issued to the respondent when she did not come for work.

9. Learned Additional Advocate General, for the petitioner has argued that the award passed by the learned Labour Court is not justified and the same may be set aside. On the other hand, learned counsel for the respondent has relied upon the judgment rendered by this Hon'ble High Court In ***CWP No. 1681 of 2015***, titled as ***State of Himachal Pradesh Vs. Smt. Chhering Butith***, decided on 15.06.2016, text whereof is reproduced hereinbelow in extenso:

> *"Mr. R.M. Bisht, learned Additional Advocate General is right to the extent that directions issued by the Labour Court-cum-Industrial Tribunal, Kangra at Dharamshala, H.P., Camp at Kaza, Lahaul & Spiti, in terms of award dated 22.09.2014, in Reference No.131/2013, titled as Smt. Chhering Butith Versus The Executive Engineer, with regard to regularization of the workman employee, more so, in the light of lack of any reference thereof, are unwarranted. As such, the same are directed to be deleted.*
>
> *2. Insofar as, other submissions with regard to non-maintainability of the petition on account of delay and*
>
> *laches is concerned, the matter is no longer res integra and in view of law laid down by the Apex Court in Jasmer Singh Versus State of Haryana and another (2015) 4 SCC 458 and Raghubir Singh Versus General Manager, Haryana Roadways, Hissar, (2014) 10 SCC 301, the Tribunal rightly based on the evidence led by the parties, held the petition to be maintainable and to have been filed within reasonable period. Noticeably, reference came to be issued immediately upon the alleged illegal termination of the employee.*
>
> *3. From the record, it cannot be inferred that the employee willfully/voluntarily abandoned the job which she was performing as a daily wage labourer. The issues, so framed by the Tribunal rightly stand answered in favour of the workman. Noticeably, juniors were retained and the employee had completed more than 160 days of service in the respective calendar year i.e. preceding 12 months prior to the date of the alleged termination.*
>
> *4. Petitioner's reinstatement thus cannot be said to be illegal.*
>
> *5. However, insofar as, question of regularization is concerned, needless to add, parties shall be governed by the Policies framed from time to time. The directions in the impugned award to such extent are modified accordingly."*

10. In view of what has been discussed hereinabove and applying the law, as cited by the learned counsel for the respondent/claimant, I find no illegality or perversity in the award passed by the learned Labour Court-cum-Industrial Tribunal, Kangra at Dharamshala, camp at Kaza, H.P. Consequently, the petition is devoid of merits and deserves dismissal and is accordingly dismissed.

11. In view of the above, the writ petition, as also pending application(s), if any, shall stand(s) disposed of.

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

State of Himachal Pradesh ... Appellant

Versus

Jatinder Paul and Another ... Respondents

Cr. Appeal No. 243 of 2008
Reserved on: 16.08.2016
Date of decision: 01.09.2016

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased was married to the accused J- accused S and J started beating and maltreating the deceased for bringing less dowry - deceased was left at her parental house on the pretext that accused could not bear the expenses of the delivery of a child by her - she gave birth to a dead child but no one came from the side of the accused to meet the deceased- after 1¼ month, deceased was sent to the house of her in-laws- she disclosed that accused were demanding Rs. 50,000/-- deceased asked her brother to arrange five more suits in addition to 7 suits already agreed to be presented at the time of marriage of sister's son of accused S- she subsequently consumed poison and died- accused were tried and acquitted by the trial Court- held, in appeal that it was admitted by PW-1 that no dowry was demanded at the engagement and marriage- it was admitted that husband of the deceased had given Rs. 20,000/- to bear expenses of delivery- it was admitted that he had brought a nurse and had stayed at the time of delivery - this fact was also admitted by PW-2- all these contradictions and inconsistencies made prosecution version doubtful- trial Court had rightly acquitted the accused- appeal dismissed. (Para-12 to 19)

Cases referred:
Madivallappa V. Marabad and others Vs. State of Karnataka, (2014) 12 Supreme Court Cases 448
Sangara Bonia Sreen Vs. State of Andhra Pradesh,1997 (5) Supreme Court Cases 348

For the appellant:	Mr. V.S. Chauhan, Addl. Advocate General with Mr. Punit Rajta, Deputy Advocate General.
For the respondents:	Mr. Abhay Kaushal, Advocate vice Mr. T.S. Chauhan, Advocate. Mr. Vijay Arora, Advocate, as Amicus Curiae.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of present appeal, State has challenged the judgment passed by the Court of learned Additional Sessions Judge, Una, in Sessions Case No. 16 of 2005 dated 12.10.2007, vide which, learned trial Court has acquitted accused therein for commission of offence punishable under Sections 498-A and 306 read with Section 34 I.P.C.

2. The case of the prosecution was that deceased Asha Devi was married to accused Jatinder Paul in November, 2003 as per Hindu rites. The relations between husband and wife remained cordial only for four months and thereafter, accused Swarni Devi and Jatinder Paul started beatings and maltreating the deceased for bringing less dowry. Accused often taunted the deceased in this regard and she used to be compared with the wife of the elder brother of accused Jatinder Paul. As per the parents of the deceased, they had given sufficient dowry at the time of the marriage of the deceased. Further, as per the prosecution, two months before her death, deceased was left at her parental house by the accused on the pretext that the accused could not bear the expenses of the delivery of a child by the deceased. In September, 2004, deceased gave birth to a dead child, however, no one came from the side of the accused to meet the deceased. After 1¼ month, son of the complainant left Asha Devi (deceased) in the house of her in-laws. On 04.12.2004 deceased visited the house of her parents and disclosed that her husband was demanding an amount of Rs.50,000/-. Further, as per prosecution, father of the deceased assured Jatinder Paul that he will arrange the said money after selling his land. On the said assurance, deceased returned back to her in-laws house. On 06.12.2004 one Dev Raj received a telephonic call which was thereafter attended to by the son of complainant Kuldeep and as per said telephonic conversation Asha Devi i.e. the deceased requested Kuldeep that five more suits be arranged, which would be in addition to 7 suits already agreed in order to present the same in the marriage of the sister's son of accused Swarni Devi. As per the prosecution story, when this conversation took place, deceased was weeping and some one snatched the phone from her and disconnected the same. On the same night, at about 12.45

A.M., complainant received a message from the police informing her that Asha Devi had died in Civil Hospital Una due to consumption of some poisonous substance. As per the complainant, Asha Devi was beaten and maltreated by the accused persons on the ground of bringing insufficient dowry and it was for this reason that deceased had ended her life by consuming poison. On the basis of complaint which was filed by Smt. Trishla Devi, mother of the deceased, FIR was lodged.

3. After completion of the investigation, challan was presented in the Court and as a prima facie case was found against the accused, accordingly, they were charged for commission of offences punishable under Sections 498-A and 306 read with Section 34 I.P.C., to which they pleaded not guilty and claimed trial.

4. Complainant entered the witness box as PW-1 and she stated in the Court about the factum of the marriage of the deceased with accused Jatinder Kumar in the year 2003. As per this witness, after 2-3 months of the marriage, the deceased was maltreated by her husband as well as her mother-in-law for want of dowry. This witness further deposed that Asha Devi was left by accused Jatinder at her house i.e. house of PW-1 when Asha was expecting a child in the year 2004. She further deposed that Asha Devi gave birth to a dead female child and thereafter no one visited Asha Devi from her in-laws nor any penny was spent by them on the delivery of Asha Devi. As per this witness, after 40 days of the delivery Kuldeep (brother of the deceased) took the deceased to the house of her in-laws. Deceased came to the house of PW-1 on 04.12.2004 and told that her mother-in-law was demanding Rs.50,000/- and seven suits which were to be given in the marriage of the son of her mother-in-law's sister. This witness further deposed that as they were unable to meet this demand, her daughter went to her in-laws house. On 06.12.2004 she rang her which phone call was attended by her son Kuldeep and she again told that five more suits were again demanded by her in-laws. This witness also stated that her son while hearing the phone felt that someone snatched the phone from the hand of her daughter. She further stated that on 06.12.2004 in the evening they came to know that her daughter had died and phone call was received by them at around 1.00 A.M. in the night. As per this witness, they received telephonic information from the police who told them that her daughter had consumed poison. In her cross-examination, this witness admitted that marriage of the deceased with the accused took place on the mediation of her sister Urmila. She also admitted that at the time of engagement there was no demand of dowry from the side of the in-laws of her daughter. She also admitted that there was no demand of dowry at the time of marriage. She also admitted that the accused (husband of deceased) worked as Halwai at Jallandhar in the marriages. She admitted that after the marriage of her daughter she started living separately from her in-laws. She also admitted it to be correct that as per the custom prevailing, first delivery was to take place in the house of parents of the daughter. She also admitted it to be correct that her daughter was left at her house on her desire i.e. the desire of PW-1. She also admitted it to be correct that her son-in-law had given Rs.20,000/- to her daughter for bearing delivery expenses. She thereafter self stated that her daughter had given the said amount to her and her son-in-law had taken back the said amount after 4-5 days. She admitted it to be correct that on the morning of delivery her son-in-law had brought nurse from Keori Badehra Dispensary to her house. Though she denied the suggestion that her son-in-law remained there for 10-11 days. However, she stated that her son-in-law remained at her house for one night after delivery. This witness was confronted with her statement recorded under Selection 154 Cr.P.C. wherein it was not recorded that the mother-in-law of her daughter had demanded Rs.50,000/- and seven suits for giving the same in the marriage of the son of the sister of the mother-in-law of the deceased. This witness also admitted that after marriage of her daughter, she frequently used to visit her house and PW-1 also used to frequently visit her daughter in the house of her in-laws.

5. Kuldeep Kumar, brother of the deceased, entered the witness box as PW-2. This witness deposed that after the marriage of the deceased with the accused for about 2-3 months the relation of his sister with her in-law remained cordial and thereafter, her in-laws started maltreating her for bringing less dowry. This witness further deposed that on 04.12.2004 his

sister came to their house in his absence and when he reached his house, his parents told him that his sister had come and she told that her husband was demanding Rs.50,000/-. He further deposed that on 06.12.2004 in his absence a telephonic call had come in the house of one Yashpal which was attended by said Yashpal. He further stated that thereafter another telephone call was received which was attended by him in which his sister told him that in addition to seven suits already arranged five more suits be arranged and she also asked to arrange money. He also deposed that during the conversation he felt that someone had snatched telephone from his sister and she was weeping. Thereafter, he deposed with regard to the factum of his sister having consumed poison being intimated to them. This witness also stated that information about the death of the deceased was received by that at 12.45 A.M. in the night from the police and on the next day at 6.30 A.M. he alongwith his parents and some other villagers reached at Una hospital and saw dead body of his sister. In his cross-examination, this witness stated that he had not lodged any complaint against the accused to the effect that they were maltreating his sister. He admitted the suggestion that his sister was short tempered. He denied that before delivery his brother-in-law stayed therefore 10-11 days and self stated that he in fact never visited.

6. Yashpal entered the witness box as PW-3 and deposed about the factum of having received telephone calls from Asha Devi on 06.12.2004, However, he expressed his ignorance about the conversation between Asha and Kuldeep. He also deposed that on the fateful night at about 12.45A.M. he had received telephone from the police and police told him that Asha Devi had consumed poison.

7. Dr. N.S. Dogra entered the witness box as PW-4 and deposed that on 07.12.2004 at about 12.10 A.M. Asha Devi was brought to the hospital by her husband with alleged history of consumption of insecticide tablets delphos. The patient was having excessive vomiting and was not responding to verbal commands. This witness further deposed that he issued MLC Ext. PW4/A and the patient was declared dead at 12.40A.M. on the same date.

8. The postmortem of the deceased was conducted by PW-10 Dr. Manoj Kapoor and the postmortem report issued by him is Ext. PW10/A. This witness deposed that in his opinion the death resulted from phosphide poisoning.

9. These are the material witnesses whose testimony will be relevant in order to adjudicate as to whether learned trial Court has erred in acquitting the accused for commission of offences punishable under Sections 498-A and 306 read with Section 34 I.P.C. or not.

10. As we have already stated above, vide its judgment dated 12.10.2007, learned trial Court acquitted the accused by holding that the prosecution has miserably failed to prove the fact that the deceased was ever maltreated or harassed by the accused persons for dowry.

11. We have heard learned counsel for the parties and gone through the records of the case as well as judgment passed by learned trial Court.

12. It is settled law that because a married woman commits suicide within seven years of marriage of her marriage, presumption under Section 113-A of the Evidence Act would not automatically apply. The mandate of the law is that where a woman commits suicide within seven years of her marriage and it is shown that her husband or any relative of the husband had subjected the deceased to cruelty, then the presumption as defined under Section 498-A I.P.C. may attract having regard to all other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband. This presumption according to us is discretionary. As far as the present case is concerned, we have already indicated that the prosecution has not succeeded in showing that there was any dowry demand.

13. The Hon'ble Supreme Court has held in **Madivallappa V. Marabad and others Vs. State of Karnataka**, (2014) 12 Supreme Court Cases 448, that in a case where no evidence is adduced to prove any particular act of cruelty or harassment to which the deceased was subjected to and where no complaint was made to the police about any such assault or

harassment before the death of the deceased, the conclusion arrived at by the trial Court that the prosecution story was not established beyond reasonable doubt was the correct view.

14. In order to substantiate the charge framed against the accused under Selection 498-A I.P.C. it was incumbent upon the prosecution to have had adduced evidence on record to the effect that the deceased was subjected to cruelty by the accused for want of dowry. In order to prove its case in this regard the prosecution had relied upon the testimony of PW-1 and PW-2. PW-1 is the mother of the deceased and PW-2 is the brother of the deceased. Because both these witnesses are interested witnesses, therefore, their testimony is required to be scrutinized with care and caution. Deposition of these witnesses have already been discussed by us in the above paras of the judgment.

15. It is apparent from the testimony of PW-1 that her deposition in the Court was not in consonance with her statement recorded under Section 154 Cr.P.C. In the statement of the complainant recorded under Section 154 Cr.P.C., this witness inter alia stated that when the deceased was expecting a child then the accused left the deceased in the house of the complainant on the pretext that they cannot bear the expenses of the birth of a child. It is further recorded in her statement under Section 154 Cr.P.C. that in September, 2004 deceased gave birth to a dead child and none of the accused came to see the deceased. She further deposed that on 04.12.2004 Asha Devi came to her house and told her and her husband that accused **Jatinder Paul** was demanding an amount of Rs.50,000/- to which husband of the complainant stated that they will arrange money after selling the land. It is further recorded in her statement that on 06.12.2004 deceased had made telephonic call in the house of Dev Raj which phone call was attended to by Kuldeep in which deceased stated that five more suits were required for the purposes of marriage of cousin of her husband and she was crying on the phone and at that time someone snatched telephone from her hand. When this witness entered the witness box as PW-1 and deposed on oath, then she stated that on 04.12.2004 the deceased had come to her and stated that it was her **mother-in-law** who was demanding Rs.50,000/- alongwith 7 suits and when they showed inability, her daughter went back. Now a perusal of the cross-examination of this witness demonstrates that she has admitted it to be correct that neither at time of engagement nor at the time of marriage any dowry was demanded by the accused. She has admitted it to be correct that deceased came to her house at the time when she was expecting a child because of the custom and on her asking. She has also admitted it to be correct that husband of the deceased had paid her an amount of Rs.20,000/- to bear the expenses of the child and on the date of the delivery he had also brought nurse and had also stayed back. This demonstrates that besides improvements which have been made by the said witness in her statement, there are also contradictions in the two statements and in her cross-examination, the defence was able to impinge the credibility of the said witness because the alleged incidents of the cruelty meted out by the accused to the deceased have not been substantiated at all.

16. Similarly, testimony of PW-2 also demonstrates that the factum of Rs.50,000/- having been demanded by the accused from the deceased on 04.12.2004 is hearsay as far as he is concerned. Not only this, in his cross-examination, this witness admitted that his sister was short tempered. Whereas PW-1 admitted in her cross-examination that when deceased gave birth to dead child her husband had brought nurse and had also stayed back for one day, however, PW-2 in his testimony has stated that the husband of the deceased or the accused never visited the deceased when she had given birth to a dead child.

17. In our considered view, the contradictions and inconsistencies in the statements of PW-1 and PW-2, who happen to be the mother and brother of the deceased, raise a serous doubt over the credibility of the story of the prosecution. It is apparent from their testimony that at no stage the factum of deceased being allegedly maltreated by the accused for want of dowry was ever reported by them to anyone. Therefore, the allegation of the deceased having been maltreated and subjected to cruelty by the accused for demand of dowry has not been at all substantiated by the prosecution.

18. It has been held by the Hon'ble Supreme Court in ***Sangara Bonia Sreen Vs. State of Andhra Pradesh*,*1997 (5) Supreme Court Cases 348***, that the basic ingredients of offence under Section 306 are (a) suicidal death and (b) abetment thereof. In order to attract the ingredients of abetment the intention of the accused to aid or instigate or abet the deceased to commit suicide is necessary. In order to substantiate the charge under Section 306 I.P.C., it has to be established that the death by commission of suicide was desired object of the abettors and with that in view they must have instigated, goaded, urged or encouraged the victim in commission of suicide. The instigation may be by provoking or inciting the person to commit suicide and this instigation may be gathered by positives acts done by the abettors or by omission in the doing of a thing. Thus, the acts or omission committed by the abettors immediately before the commission of suicide are vital. In the present case, the prosecution was not able to substantiate any of the above ingredients. The prosecution could not prove any act of provocation or incitement or omission or commission on the part of the accused, vide which they had instigated the deceased to commit suicide. The prosecution has not been able to establish any intention of the accused to aid or instigate or abet the deceased to commit suicide. Therefore, it cannot be said that the judgment passed by learned Trial Court whereby the accused have been acquitted is either perverse or the acquittal of the accused by the learned Trial Court has amounted to travesty of justice.

19. Therefore, we conclude by holding that prosecution has failed to establish beyond reasonable doubt that the accused were guilty of the offences alleged against them. We have also gone through the judgment passed by the learned trial Court at length. Learned trial Court after due deliberation and due application of mind has come to the conclusion that the prosecution could not bring home the guilt against the accused persons beyond reasonable doubt. We find no reason to disagree with the said conclusion arrived at by learned trial Court. According to us also, accused persons are entitled to the benefit of doubt as the prosecution has failed to prove beyond reasonable doubt the guilt of the accused. Therefore, we uphold the findings recorded by the learned trial Court and the appeal is accordingly dismissed. Bail bonds, if any, furnished by the accused are discharged.

20. We place on record our appreciation for the assistance rendered to the Court by learned Amicus Curiae in the adjudication of the present case.

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

State of Himachal Pradesh ...Appellant

Versus

Kishori Lal ...Respondent

Criminal Appeal No. 201 of 2016
Judgment reserved on: 12.05.2016
Date of Decision: 01.09.2016

N.D.P.S. Act, 1985- Section 20- Police party was on patrolling duty- accused got frightened on seeing the police party and went to the toilet- he was apprehended and his search was conducted - 1.2 kg. charas was recovered from his possession- accused was tried and acquitted by the trial Court- held in appeal, mere fact that investigation was conducted by the complainant is not sufficient to doubt the prosecution version- independent witnesses were associated but they did not support the prosecution version- it was suggested that there was enmity between the I.O. and the accused, but this fact was not established- no prejudice was caused by non-production of the seal and malkhana register to show that case property was taken to the Court- however, testimonies of police officials were contradictory – Trial Court had rightly held that prosecution version was not proved beyond reasonable doubt- appeal dismissed. (Para-4 to 33)

Cases referred:
State of H.P. Vs. Hanacho alias Stewert Latest HLJ 2004(HP) (DB) 642
Bhagwan Singh versus State of Rajasthan, AIR 1976 S.C. 985
State of H.P. versus Shesh Ram, 2015(2) Him.L.R. (DB) 720
State versus V. Jayapaul (2004) 5 SCC 223
S. Jeevanantham versus Sate (2004) (5) SCC 230
Bhaskar Ramappa Madar and others versus State of Karnataka (2009) 11 SCC 690
Vinod Kumar versus State of Punjab (2015) 3 SCC 220
Megha Singh versus State of Haryana (1996) 11 SCC 709
State versus V.Jayapaul (2004) 5 SCC 223
S. Jeevanantham versus Sate 2004 (5) SCC 230
Bhaskar Ramappa Madar and others versus State of Karnataka (2009) 11 SCC 690
Vinod Kumar Versus State of Punjab (2015) 3 SCC 220
State of H.P. versus Shesh Ram 2015 (2) HLR (DB) 720
State of H.P. versus Kurban Khan 2015(1) Criminal Court Case 598, (2015) Criminal Law Journal 183 H.P.
State versus Anil Kumar 2015 Criminal Court Case 300 HP.DB.
State versus N.S. Gnaneswaran (2013) 3 Supreme Court Cases 594
Shashi Kumar and another versus State of H.P. Latest HLJ 2015 (HP) 596
Gurmeet Singh versus State of H.P. 2015 (2) Him.L.R 766

For the appellant : Mr. M. A. Khan, Additional Advocate General.
For the respondent : None.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

The appellant-State has assailed acquittal of the respondent by filing present appeal challenging judgment dated 29.12.2015 passed in Sessions Trial No. 10 of 2015 by Special Judge, Chamba, Division Chamba, H.P. in case FIR No. 14 of 2015 dated 25.01.2015 registered under Section 20 of the of Narcotic Drugs and Psychotropic Substances Act, 1985 registered in Police Station Dalhousie, District Chamba, HP.

2. As per prosecution case, on 24.01.2015, Police Party consisting of Head Constable Kartar Singh HC Inder Singh, HHC Pritam Singh and HHC Mehar Singh had left Police Post Banikhet for patrolling at about 9.40 PM. In Banikhet Market they were talking with PW-1 Arun Kumar Rana and PW-10 Parth Sharma. At that time respondent had come from Bus Stand side, who on seeing police party, had frightened and gone to toilet at Bus Stand Banikhet but not come out for 7 minutes, therefore, he was called by HC. Kartar Singh. His name and address was inquired and after complying with provision of law his Pithu bag was checked from which 1.20 Kgs. charas was recovered. After completion of investigation challan was put in the Court. On conclusion of trial respondent was acquitted by trial Court.

3. We have heard learned Additional Advocate General and have gone through the record made available by him.

4. Acquitted of respondent by trial court is based on various grounds. Though we find that no interference is warranted in acquittal of respondent for reasons stated hereinafter however there are certain findings of trial court which are required to be interfered and/or clarified.

5. Learned trial Court has relied upon case 'State of H.P. Vs. Hanacho alias Stewert Latest HLJ 2004(HP) (DB) 642 in which joining of independent witness was considered to be

necessary to ensure fairness in conducting search and to corroborate version of searching officer about search and seizure. This judgment was not applicable in present case as in this case two independent witnesses PW-1 Arun Kumar Rana and PW-10 Parth Sharma were associated by Investigating Officer. It is separate issue that when independent witnesses do not support or desist from lending support to prosecution case, then it will attract fairness of investigation or not.

6. Learned trial Court relying upon judgment passed in case Bhagwan Singh versus State of Rajasthan reported in AIR 1976 S.C. 985 and judgment passed by this Court in case State of H.P. versus Shesh Ram reported in 2015(2) Him.L.R. (DB) 720 has held that grave miscarriage of justice has been caused to the accused in present case when entire material investigation was conducted by complainant HC Kartar Singh, himself. Learned trial Court has failed to take note of latest ratio of law on this point laid down by the Apex Court in cases State versus V. Jayapaul reported in (2004) 5 SCC 223, S. Jeevanantham versus Sate reported in (2004) (5) SCC 230, Bhaskar Ramappa Madar and others versus State of Karnataka reported in (2009) 11 SCC 690 and Vinod Kumar versus State of Punjab reported in (2015) 3 SCC 220.

7. Apex Court after distinguishing Bhagwan Singh's Case(AIR 1976 SC 985) referred mentioned supra alongwith another case titled as Megha Singh versus State of Haryana (1996) 11 SCC 709 in case titled as State versus V.Jayapaul reported in (2004) 5 SCC 223 has held as under:-

> *"4. We have no hesitation in holding that the approach of the High Court is erroneous and its conclusion legally unsustainable. There is nothing in the provisions of the Criminal Procedure Code which precluded the appellant (Inspector of Police, Vigilance) from taking up the investigation. The fact that the said police officer prepared the FIR on the basis of the information received by him and registered the suspected crime does not, in our view, disqualify him from taking up the investigation of the cognizable offence. A sup motu move on the part of the police officer to investigate a cognizable offence impelled by the information received from some sources is not outside the purview of the provisions contained in Sections 154 to 157 of the Code or any other provisions of the Code. The scheme of Sections 154, 156 and 157 was clarified thus by Subba Rao, J. speaking for the Court in State of U.P. v. Bhagwant Kishore Joshi (AIR p.223, para 8).*
>
> *"Section 154 of the Code prescribes the mode of recording the information received orally or in writing by an officer in charge of a police station in respect of the commission of a cognizable offence. Section 156 thereof authorizes such an officer to investigate any cognizable offence prescribed therein. Though ordinarily investigation is undertaken on information received by a police officer; the receipt of information is not a condition precedent for investigation. Section 157 prescribes the procedure in the matter of such an investigation which can be initiated either on information or otherwise. It is clear from the said provisions that an officer in charge of a police station can start investigation either on information or otherwise."*
>
> *"5. In fact, neither the High Court found nor any argument was addressed to the effect that there is a statutory bar against the police officer who registered the FIR on the basis of the information received taking up the investigation".*
>
> *"6. Though there is no such statutory bar the premise on which the High Court quashed the proceedings was that the investigation by the same officer who 'lodged' the FIR would prejudice the accused inasmuch as the investigating officer cannot be expected to act fairly and objectively. We find no principle or binding authority to hold that the moment the competent police officer, on the basis of information received, makes out an FIR incorporating his name as the informant, he forfeits his right to investigate. If at all, such investigation could only be assailed on the ground of bias or real likelihood of bias on the part of the investigating officer. The question of bias would depend on the facts and circumstances of each*

case and it is not proper to lay down a broad and unqualified proposition, in the manner in which it has been done by the High Court, that whenever a police officer proceeds to investigate after registering the FIR on his own, the investigation would necessarily be unfair or biased".

"7. There are two decisions of this Court from which support was drawn in this case and in some other referred to by the High Court. We would like to refer to these two decisions in some detail. The first one is the case of Bhagwan Singh v. State of Rajasthan. There, the Head Constable to whom the offer of bribe was allegedly made, seized the currency notes and gave the first information report. Thereafter, he himself took up the investigation. But, later on, when it came to his notice that he was not authorized to do so, he forwarded the papers to the Deputy Superintendent of Police. The DSP then reinvestigated the case and filed the charge sheet against the accused. The Head Constable and the accompanying Constables were the only witnesses in that case. This Court found several circumstances which cast a doubt on the veracity of the version of the Head Constable and his colleagues. This Court observed that "the entire story sounds unnatural". While so holding, this Court referred to "a rather disturbing feature of the case" and it was pointed out that: (SCC p. 18 para 5).

"Head Constable Ram Singh was the person to whom the offer of bribe was alleged to have been made by the appellant and he was the informant or complainant who lodged the first information report for taking action against the appellant. It is difficult to understand how in these circumstances, Head Constable Ram Singh could undertake investigation?..... This is an infirmity which is bound to reflect on the credibility of the prosecution case".

"8. It is not clear as to why the Court was called upon to make the comments against the propriety of the Head Constable--informant investigating the case when the reinvestigation was done by the Deputy Superintendent of Police. Be that as it may, it is possible to hold on the basis of the facts noted above, that the so called investigation by the Head Constable himself would be a mere ritual. The crime itself was directed towards the Head Constable which made him lodge the FIR. It is well nigh impossible to expect an objective and undetached investigation from the Head Constable who is called upon to check his own version on which the prosecution case solely rests. It was under those circumstances the Court observed that the said infirmity "is bound to reflect on the credibility of the prosecution case". There can be no doubt that the facts of the present case are entirely different and the dicta laid down therein does not fit into the facts of this case".

"9. Now, we may turn our attention to the case of Megha Singh v. State of Haryana on which reliance was placed by the High Court".

"10. In Megha Singh's case, PW3, the Head Constable, found a country-made pistol and live cartridges on search of the person of the accused. Then, he seized the articles, prepared a recovery memo and a 'rukka' on the basis of which FIR was recorded by the S.I. of police. However, PW.3 the Head Constable himself, for reasons unexplained, proceeded to investigate and record the statements of witnesses under Section 161 Cr.P.C. The substratum of the prosecution case was sought to be proved by the Head Constable. In the appeal against conviction under Section 25 of the Arms Act and Section 6(1) of the TADA Act, this Court found that the evidence of PWs 2 & 3 was discrepant and unreliable and in the absence of independent corroboration, the prosecution case cannot be believed. Towards the end, the Court noted "another disturbing feature in the case". The Court then observed: (SCC p.771 para 4).

> *PW 3. Siri Chand, Head Constable arrested the accused and on search being conducted by him a pistol and the cartridges were recovered from the*

accused. It was on his complaint a formal first information report was lodged and the case was initiated. He being complainant should not have proceeded with the investigation of the case. But it appears to us that he was not only the complainant in the case but he carried on with the investigation and examined witnesses under Section 161 Cr.P.C. Such practice, to say the least, should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation".

"11. The conviction was set aside by this Court for the above reasons".

"12. At first blush, the observations quoted above might convey the impression that the Court laid down a proposition that a Police Officer who in the course of discharge of his duties finds certain incriminating material to connect a person to the crime, shall not undertake further Investigation if the FIR was recorded on the basis of the information furnished by him. On closer analysis of the decision, we do not think that any such broad proposition was laid down in that case. While appreciating the evidence of the main witness, i.e., the Head Constable (PW-3), this Court referred to this additional factor--namely, the Head Constable turning out to be the investigator. In fact, there was no apparent reason why the Head Constable proceeded to investigate the case bypassing the Sub-Inspector who recorded the FIR. The fact situation in the present case is entirely different. The appellant--Inspector of Police, after receiving information from some sources, proceeded to investigate and unearth the crime. Before he did so, he did not have personal knowledge of the suspected offences nor did he participate in any operations connected with the offences. His role was that of investigator--pure and simple. That is the obvious distinction in this case. That apart, the question of testing the veracity of the evidence of any witness, as was done in Megha Singh's case, does not arise in the instant case as the trial is yet to take place. The High Court has quashed the proceedings even before the trial commenced".

"13. Viewed from any angle, we see no illegality in the process of investigation set in motion by the inspector of Police (appellant) and his action in submitting the final report to the Court of Special judge".

8. In another case titled as S. Jeevanantham versus Sate reported in 2004 (5) SCC 230, the Apex Court held as under:-

"3. In the instant case, PW-8 conducted the search and recovered the contraband article and registered the case and the article seized from the appellant was narcotic drug and the counsel for the appellant could not point out any circumstances by which the investigation caused prejudice or was biased against the appellant. PW-8 in his official capacity gave the information, registered the case as part of his official duty and later investigated the case and filed charge-sheet. He was not in any way personally interested in the case. We are unable to find any sort of bias in the process of investigation."

9. Similarly, in case titled as **Bhaskar Ramappa Madar and others versus State of Karnataka reported in (2009) 11 SCC 690,** the Apex Court held as under:-

"8 So far as the desirability of the complainant undertaking investigation is concerned there is no legal bar. The decisions of this Court in Bhagwan Singh versus State of Rajasthan (SCC at para-18) and Megha Singh versus State of Haryana (SCC at para-4) have to be confined to the facts of the said cases. Merely because the complainant conducted the investigation, that would not be sufficient to cast doubt on the prosecution version to hold that the same makes the prosecution version vulnerable. The matter has to be decided on a case-to-case basis without any universal generalization.

10. In latest judgment passed by Apex Court in case titled as **Vinod Kumar Versus State of Punjab reported in (2015) 3 SCC 220,** it has been held as under:-

"27. In this regard, it is useful to refer to the pronouncement in State vs. V. Jayapaul wherein the Court posed the question whether the High Court was justified in quashing the criminal proceedings on the ground that the police officer, who had lodged/recorded the FIR regarding the suspected commission of certain cognizable offence by the respondent should not have investigated the case. The case against the accused was that he was indulging in corrupt practices by extracting money from the drivers and owners of the motor-vehicles while conducting check of the vehicles and making use of certain bogus notice forms in the process. The charge-sheet was filed under Sections 420 and 201 I.P.C. and Section 13(2) read with Section 13(1)(d) of the Act. The Court referred to the decision in the State of U.P. V. Bhagwant Kishore Joshi, wherein it has been ruled thus: (Bhagwant Kishore Joshi case AIR 223, para 8).

"8……Section 154 of the Code prescribes the mode of recording the information received orally or in writing by an officer in charge of a police station in respect of the commission of a cognizable offence. Section 156 thereof authorises such an officer to investigate any cognizable offence prescribed therein. Though ordinarily investigation is undertaken on information received by a police officer, the receipt of information is not a condition precedent for investigation. Section 157 prescribes the procedure in the matter of such an investigation which can be initiated either on information or otherwise. It is clear from the said provisions that an officer in charge of a police station can start investigation either on information or otherwise." (V.Jayapaul case SCC pp. 226-27 para 4)".

28. After reproducing the said paragraph, the Court proceeded to state thus: (V.Jayapaul case SCC p. 227 para 6)".

"Though there is no such statutory bar, the premise on which the High Court quashed the proceedings was that the investigation by the same officer who "lodged" the FIR would prejudice the accused inasmuch as the investigating officer cannot be expected to act fairly and objectively. We find no principle or binding authority to hold that the moment the competent police officer, on the basis of information received, makes out an FIR incorporating his name as the informant, he forfeits his right to investigate. If at all, such investigation could only be assailed on the ground of bias or real likelihood of bias on the part of the investigating officer. The question of bias would depend on the facts and circumstances of each case and it is not proper to lay down a broad and unqualified proposition, in the manner in which it has been done by the High Court, that whenever a police officer proceeds to investigate after registering the FIR on his own, the investigation would necessarily be unfair or biased. In the present case, the police officer received certain discreet information, which, according to his assessment, warranted a probe and therefore made up his mind to investigate. The formality of preparing the FIR in which he records the factum of having received the information about the suspected commission of the offence and then taking up the investigation after registering the crime, does not, by any semblance of reasoning, vitiate the investigation on the ground of bias or the like factor. If the reason which weighed with the High Court could be a ground to quash the prosecution, the powers of investigation conferred on the police officers would be unduly hampered for no good reason. What is expected to be done by the police officers in the normal course of discharge of their official duties will then be vulnerable to attack."

Be it noted, the Court distinguished the decisions in Bhagwant Singh and Megha Singh)

"29. At this juncture, it would be fruitful to refer to S. Jeevanatham V. State In the said case, the appellant was found guilty under Section 8(c) read with Section 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985. One of the contentions that was canvassed was that PW-8, who lodged the FIR had himself conducted the investigation and hence, the entire investigation was vitiated. The Court referred to the decision in Jayapaul (supra) and opined thus: (S. Jeevanantham case SCC pp 231-32.

"In the instant case, PW 8 conducted the search and recovered the contraband article and registered the case and the article seized from the appellants was narcotic drug and the counsel for the appellants could not point out any circumstances by which the investigation caused prejudice or was biased against the appellants. PW 8 in his official capacity gave the information, registered the case and as part of his official duty later investigated the case and filed a charge-sheet. He was not in any way personally interested in the case. We are unable to find any sort of bias in the process of investigation."

"30. In the instant case, PW-8, who was a member of the raiding party had sent the report to the police station and thereafter carried the formal investigation. In fact, nothing has been put to him to elicit that he was anyway personally interested to get the appellant convicted. In our considered view, the decision in S. Jeevanatham (supra) would be squarely applicable to the present case and, accordingly, without any reservation we repel the submission so assiduously urged by Mr. Jain, learned senior counsel for the appellant".

11. At the time of passing judgment in case titled as **State of H.P. versus Shesh Ram reported in 2015 (2) HLR (DB) 720,** it appears that latest case law could not be noticed as Vinod Kumar's case was decided on 29.01.2015 by the Apex Court whereas judgment in Shesh Ram's case was rendered by Division Bench of this Court on 28.02.2015.

12. In present case PW-12 Head Constable Kartar Singh was heading police patrolling party. He inquired respondent and on checking recovered contraband in Pithu bag of respondent and after sending Rukka to Police Station he carried out further investigation. There is nothing on record to elucidate that he was personally interested to get the appellant convicted. Only suggestion put to him is that being a villager of accused, he was inimical to accused being his villager and due to enmity he had lodged false case against the accused which had been denied by HC Kartar Singh. It is also noticeable that accused is resident of village Bharni P.O. Tikrigarh Police Station Tissa, Tehsil Churah, District Chamba whereas PW-12 Kartar Singh is resident of village Kalhal Post Office and Tehsil Churah District Chamba and belonging from one Tehsil cannot be said belonging from same village. Moreover, even residence in same village cannot be a ground to draw inference that there was enmity between Investigating Officer and respondent. Something more to show enmity was required to be placed on record. Therefore, findings on this ground returned by ld. Sessions Judge are not sustainable.

13. After sealing contraband with seal 'V' the same was handed over to PW-1 Arun Kumar Rana but he had not produced the seal in the Court. Similarly, after resealing case property, PW-8 SHO Bhupender Singh had handed over seal 'A' to PW-6 Dharvinder Kumar. However, Dharvinder Kumar had also not produced the said seal in the Court for comparison. Relying upon the judgments in case titled as **State of H.P. versus Kurban Khan reported in 2015(1) Criminal Court Case 598, (2015) Criminal Law Journal 183 H.P. and State versus Anil Kumar 2015 Criminal Court Case 300 HP.DB.** (latest HLJ 2015 (HP) 341) trial Court has treated non-production of seals by prosecution witnesses fatal to prosecution case.

14. Hon'ble Supreme Court in case titled as **State versus N.S. Gnaneswaran reported in (2013) 3 Supreme Court Cases 594** has held as under:-

> *"12. The issue also requires to be examined on the touchstone of doctrine of prejudice. Thus, unless in a given situation, the aggrieved makes out a case of prejudice or injustice, some infraction of law would not vitiate the order/enquiry result. In judging a question of prejudice, the court must act with a broad vision and lock to the substance and not to technicalities (Vide: Jankinath Sarangi v. State of Orissa, State of U.P. v. Shatrughan Lal, State of A.P. v. Thakkidiram Reddy and Debotosh Pal Choudhury v. Punjab National Bank)".*
>
> *"13. In Dahari v. State of U.P., this `Court considered the prejudice in a trial where charges had not properly been taken care of. In the said case, the trial commenced against five accused under Section 302 read with Section 149 IPC and they stood convicted by the Sessions Court. The High Court though acquitted 3 persons but for the remaining accused conviction was maintained under Section 302 read with Section 149 IPC. This Court held that in such a factual situation, the High Court could most certainly have convicted the appellant under Section 302 read with Section 34 IPC and as no prejudice has been shown to have been caused to them, the question of interference cold not arise".*

15. The judgments relied upon by trial Court referred above had been rendered n the given facts and circumstances of those cases, which are not applicable in present case. In present case no prejudice has been caused for non production of seal in the court as there was sufficient evidence placed on record other than original seal for comparison of seal affixed on case property so as to link contraband recovered on spot with case property produced in the Court. There is nothing on record to suggest that non-production of seals had caused prejudice to the accused. Availability of other sufficient evidence renders non-production of original seal as a technical defect, which does not vitiate trial unless prejudice is caused

16. Purpose of production of original seal in the Court is to compare it with seal affixed on parcels of contraband and sample in the Court so as to prove that the parcels produced in the Court are the same which were prepared and sealed on the spot at the time of recovery from the accused and also to ensure that parcel sent for chemical examination and received back were the same which were seized and sealed on the spot. For that purpose in present case the Investigating Officers had prepared the sample seal on separate piece of cloth and had obtained signatures of independent witnesses on sample seal and the documents.

17. PW-1 Arun Kumar had admitted preparation of sample seal impression on piece of cloth and had admitted and identified his signatures on the said sample seal Ex. PW1/B. On production of parcels of recovered contraband Ex. P-1 he has identified his signatures on parcels Ex. P-1 and had also identified polythene Ex. P-2 & P-3, Charas Ex. P-4, which were recovered from accused and packed in parcel Ex. P-1 and he had also identified pithu bag Ex. P-5 recovered from accused. He has admitted that seal after use was handed over to him. Therefore, in present case it cannot be said that for non production of original seal in the court for comparison of seals appended on recovered contraband was not possible with seal on parcel sent to chemical analysis and parcels produced in the Court. It has been mentioned in the chemical analysis report as under:-

> **Description of parcel:** -One sealed cloth parcel baring four seals of "v" and four seals of "A". The seals were found intact and tallied with specimen seals sent by the forwarding authority and seals impression impressed on the forms NCB-1. The parcel was kept in safe custody of the Assistant Chemical Examiner till the report of the same was signed & dispatched.

18. It is evident from aforesaid that one sealed cloth parcel bearing four seals of "V" and four seals of "A" and seal impression impressed upon forms NCB-1 were received by the said FSL. Facsimile of seals appended on parcels were also taken on NCB forms, which was also found

same as in State FSL and when case property was produced in the Court. Therefore, non production of seals in present case was not fatal.

19. Trial Court relying judgments passed by this Court in case titled as **Shashi Kumar and another versus State of H.P. reported in Latest HLJ 2015 (HP) 596 and Gurmeet Singh versus State of H.P. reported in 2015 (2) Him.L.R 766,** has returned finding that perusal of abstract of Malkhana register Ex. PW-11/A indicated that there was no entry in the abstract of Malkhana register regarding production of the case property before trial Court and has held that said infirmity was also fatal to prosecution case. The judgments in the above referred cases were passed in the given facts and circumstances of those cases. As held by Hon'ble Apex Court in case State versus N.S. God reported in (2013) 3 SCC 594, unless prejudice is shown to be caused to the accused on account of procedural lapse on the part of prosecution, every lapse is not fatal to the prosecution case. Moreover, perusal of evidence in present case transpires that there is complete misreading of evidence by trial Court on this issue. Abstract of Malkhana register Ex. PW-11/A pertained to entry regarding depositing of case property by PW-8 SHO Bhupender Singh in Malkhana through PW-11 HC Deepak Kumar and not with regard to entry when case property was taken out from the Malkhana of production before Court. Ex. PW-11/A was with respect to entry at serial No. 74 dated 25.01.2015 whereas evidence in present case was recorded on 24.08.2015. Trial Court has also failed to notice that as and when case property was taken out from Malkhana for production in Court during recording of evidence, the same was duly entered in Malkhana register and was produced in Court through Malkhana Musharar. Before opening seal of case property in the court with permission of the court, the said fact was recorded during evidence which was duly attested and verified by learned Special Judge. After production in the Court the said case property was duly sealed with seal of the Court and was sent back through Malkhana Mushahar under the signature of Special Judge conducting trial. It is evident from evidence recorded in present case that case property was produced in Court thrice against entry at serial No. 17 dated 24.08.2015, entry No. 19 dated 25.08.2015, entry No. 45 dated 12.10.2015 which was duly recorded during the evidence before Court and every time case property was sent back to Malkhana under the seal of the Court. Therefore, findings returned by Sessions Judge on this issue are also not sustainable.

20. In present case independent witnesses have not supported prosecution case. PW-1 Arun Kumar Rana has not identified respondent to be the same person from whom charas was recovered. PW-10 Parth Sharma had denied recovery of charas from respondent. PW-1 had admitted signing of documents on the spot but on the contrary PW-10 Parth Sharma who was friend of PW-1 Arun Kumar Rana had denied the signing of documents on the spot and had stated that all documents were signed in the Police Post and no recovery was effected in his presence. It is settled law that testimony of hostile witnesses is not to be brushed aside only on the ground that such witnesses is declared hostile. Statements of hostile witnesses can be considered for benefit of prosuection or defence in case their statements or part of statements are corroborated by other evidence on record.

21. Conviction can also be based upon testimony of official witness in absence of support of independent witness subject to official only but their testimony is to be assessed with due care and caution particularly when independent witnesses were associated but had not supported prosecution case.

22. PW-2 HC Inder Singh, in his examination-in-Chief, has stated that after arrest of respondent, Memo Ex. PW-2/B of his personal search was prepared on the spot but in cross examination he has stated that no memo of personal search of respondent was prepared by Investigating Officer. This witness had also been cited as witness to Ex. PW-2/B.

23. PW-2 HC Inder Singh had stated that 10 minutes each were taken in preparation of consent memo and certificate of identification of contraband and it had taken four and half hours for completion of investigation on sport. Whereas PW-3 HHC Pritam Chand had stated that three-four minutes were taken to prepare certificate regarding identify of contraband and 5-7 minutes to prepare consent memo. Memo regarding search of Police party and witnesses were

prepared within 10-15 minutes thereafter and seizure memo and Rukka were prepared within 45 minutes meaning thereby that about one hour and 10 minutes were taken till preparation of 'Rukka' but at the same time had stated that he remained on spot for two hours whereas prosecution case was that on preparation of Rukka the same was handed over to this witness and he had left spot.

24. PW-4 HHC Mehar Singh has stated that he remained on the spot for two hours whereas this witness was also handed over copy of Rukka to be handed over to Superintendent of Police Chamba which was ready after about one hour.

25. PW-12 HC Kartar Singh had stated that he remained on the spot for 4-5 hours, whereas PW-1 Arun Kumar Rana had stated that he had stayed on spot for 25 minutes and police party had also left spot after 25 minutes.

26. PW-2 HC Inder Singh has stated that witnesses left the spot after one and half hours whereas PW-1 had stated that they left the spot after 25 minutes and PW-10 Parth Sharma had stated that he had signed documents in police post whereas case of prosecution was that investigation was carried on the spot.

27. It has also come in evidence of PW-4 HHC Mehar Singh that Police Post was at a distance of 500 metres from the spot. It is also neither feasible nor convincing that in a chilled night of December the Police party remained seating on the road in the market at a distance of 500 metres from Police Post for completing investigation for about 4-5 hours. It is unnatural conduct which creates doubt on prosecution story.

28. PW-12 HC Kartar Singh stated that after registration of FIR PW-2 HHC Pritam Singh had returned back to Police Post whereas PW-3 HHC Pritam Singh had stated that he had returned back on the spot at about 1.25 AM.

29. PW-12 HC Kartar Singh had also claimed that respondent was arrested in market at 1.30AM. His own statement is not reconcilable as he had stated that PW-3 had come back to Police Post and PW-3 had stated that he had reached back at 1.25 AM. Then for what reason PW-12 was in the market at 1.30 AM.

30. PW-3 HHC Pritam Chand had stated that he had taken lift from the spot to go to Police Station Dalhousie whereas, PW-4 HHC Mehar Singh had stated that PW-3 Pritam Chand had left spot on foot. PW-12 HC Kartar Singh had stated that he did not know how PW-3 HHC Pritam Singh had taken Rukka from spot.

31. All these contradictions and discrepancies may be insignificant in case story of prosecution is corroborated by independent witnesses but in a case where independent witnesses had demolished the case of prosecution, these contradictions are material and significant which are fatal to the prosecution case.

32. Therefore trial Court has rightly held that there are material contradictions and inconsistencies in prosecution case which have resulted into failure of prosecution to bring guilt of accused home beyond all reasonable doubts. From perusal and scrutiny of evidence, it cannot be said that on this count trial court has not appreciated the evidence correctly and completely and acquittal of the accused has resulted into travesty of justice or has caused mis-carriage of justice.

33. After considering arguments of respective counsel for parties and minutely examining testimonies of witnesses and other documentary evidence placed on record, we are of considered view that no case for interference in acquittal of respondent is made out.

34. The present appeal, devoid of any merit, is dismissed, but with reversal of finding on issues referred supra. Bail bonds, if any, furnished by the accused are discharged. Records of the Court below 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
Rayia Urav @ Ajay .....Respondent.

Cr. Appeal No. 120 of 2013
Decided on: 1st September, 2016

Indian Penal Code, 1860- Section 302 and 201- Accused had taken second floor of the house on rent from PW-1 and started residing there with his family- S informed PW-1 that number of house flies were seen in the room rented out to the accused- PW-1 came to the spot and found the room locked from outside – the room was open in the presence of PW-2- clothes and bedding were found scattered on the floor - when clothes and bedding were removed, a dead body was found on the floor beneath the mattress - dead body was identified to be that of wife of the accused – the cause of death was found to be head injury and probable duration of death was five days- the accused was arrested and he made disclosure statements leading to the recovery of blood stained shirt- human blood group B was found in the blood sample of the deceased and the shirt of the accused- the accused was tried and acquitted by the trial Court- held, in appeal that there is no direct witness to the incident- in a case of circumstantial evidence, chain of circumstances should point towards the guilt of the accused and not to any other possibility- PW-1 admitted in cross-examination that he had not checked that accused and deceased were husband and wife- no inquiry was made to verify the relationship- PW-7 admitted in cross-examination that one S was residing with the deceased in the capacity of her husband which makes the prosecution version doubtful – recovery of dead body from the house of the informant does not lead to the inference of the guilt- it was also not proved that accused was last seen with the deceased- therefore, the absence of the accused will not prove the guilt- disclosure statement regarding throwing of darat in the river was also not proved and it was not reduced into writing – similarly, disclosure statement leading to the shirt and consequent recovery were not proved- the prosecution version was not proved beyond reasonable doubt and the trial Court had rightly acquitted the accused- appeal dismissed. (Para- 10 to 20)

Cases referred:
Devinder Singh V. State of H.P. 1990 (1) Shim.L.C. 82
Akhilesh Halam V. State of Bihar 1995 Suppl.(3) S.C.C. 357

For the appellant: Mr. D.S. Nainta and Mr. Virender Verma, Addl. A.Gs.
For the respondent: Mr. Prashant Sharma, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

The State of Himachal Pradesh is in appeal before this Court. The complaint is that learned Additional Sessions Judge, Fast Track Court, Kullu vide judgment dated 28.06.2012 passed in Session Trial No. 37 of 2011 has acquitted the respondent (hereinafter referred to as the 'accused') of the charge under Section 302 and 201 of the Indian Penal Code in utter disregard to the cogent and reliable evidence produced by the prosecution to bring guilt home to the accused. The impugned judgment has thus been sought to be quashed and set aside and the accused convicted of the charge framed against him.

2. The prosecution case, as disclosed from the record in a nut-shell is that Vineet Kumar is owner of the house situate at village Tegubehar under the jurisdiction of Police Station, Bhunter, District Kullu. The accused had taken second floor of the said house on rent from PW-1 and started living there with his family. On 16.06.2011, another tenant Sheela Devi informed the complainant that number of houseflies are seen in the room rented out to the accused and room is also emitting foul smell. On this information, PW-1 who is residing in his house situated nearby came to the room which was rented out to the accused. He found the room bolted from outside and lock hanging on the bolt. He called Karam Chand (PW-2), Pradhan of local Gram Panchayat to the spot. When they opened the door, noticed clothes and beddings scattered on the floor. When they removed the clothes and beddings, they found a dead body lying on the floor beneath a mattress. PW-1 identified the dead body to be that of the wife of accused. On the same day, PW-1 informed the police of Police Station, Bhunter. His statement under Section 154 of the Code of Criminal Procedure was recorded by PW-7 Sub Inspector Narian Singh. On the basis thereof, FIR Ext. PW-1/A was registered in police station. After registration of the case, PW-1 rushed to the spot along with other police staff in official vehicle. PW-7 also opened the room taken on rent by the accused in presence of PW-2 Karam Chand, Pradhan of Gram Panchayat. The room was emitting foul smell. PW-7 photographed the dead body vide photographs Ext. P-1 to Ext. P-13 with official camera. He inspected the dead body and noticed that muggates were found on the head and whole dead body. There was mark of deep injuries on the head and right arm of deceased. The dead body was identified by the complainant and the Pradhan to be that of Anita Devi, the wife of accused. PW-7 has prepared the inquest report Ext. PW-7/A. He has also prepared the spot map Ext. PW-7/B on 16.06.2011 itself. He moved application Ext.PW-3/B for getting the post-mortem of the dead body conducted. The dead body was sent to the hospital under the supervision of Lady Constable Chandra Devi and Constable Sandeep Kumar for post-mortem. The post-mortem was conducted by PW-3 Dr. Rajesh Thakur on 17.06.2011. He issued the post-mortem report Ext. PW-3/A. In his opinion, the cause of death was head injury and probable period of death and post-mortem was more than five days. In his opinion, the injury found on the skull of the deceased could have been caused with a '*Darat*'.

3. On 17.06.2011, accused came to Tegubehar. One of the companions informed the Pradhan that accused has come back to Tegubehar. The Pradhan (PW-2), in turn has informed the police that accused had come back along with his son to Tegubehar. The accused was taken to Police Station by PW-7 and he was interrogated. While in custody, accused allegedly made a disclosure statement that after committing the murder of his wife, he had thrown the weapon of offence in river 'Beas'. The accused was arrested vide memo Ext. PW-7/A. The accused was taken to dead house in the hospital in the presence of PW-1, PW-2 and Chhering Dorje, Up-Pradhan of the Gram Panchayat. He had identified the dead-body to be that of his wife Anita Devi in the presence of doctor. He made another disclosure statement Ext. PW-1/B while in police custody in the presence of Cheering Dorje before the I.O. PW-7 that he had hidden the blood stained shirt, which he was wearing at the time of commission of offence and that it is only he, who alone can get the same recovered. The shirt Ext. P-2 was allegedly got recovered at the instance of accused and the same was taken into possession vide memo Ext. PW-1/C. The same was sealed in a parcel and taken into possession and sample seal Ext. PW-7/E was prepared separately. The spot map Ext. PW7/D of the place of recovery was also prepared.

4. On 17.06.2011, the case property was deposited by PW-7 with PW-6 Moherer Head Constable, Police Station, Bhunter vide entries Ext. PW-6/A in the malkhana register. On 21.06.2011, LHC Jinesh Kumar (PW-5) had deposited one vial containing blood sample of deceased Anita and one envelop sealed with seal CH addressed to RFSL, Gutkar, one parcel sealed with seal CH allegedly containing the clothes of deceased with MHC (PW6). PW-6 has entered the case property in the malkhana register, the extract whereof is Ext. PW-6/B. On 22.06.2011, the case property was sent by PW-6 through LHC Jinesh Kumar (PW-5) vide RC No. 117/11 to RFSL, however, the same was not received because sample of seal used by the doctor was not sent therewith, hence retuned to PW-5. PW-5 came to RH, Kullu and handed over the case property to the doctor PW-3. PW-3 has drawn the sample of seal he used and the same was

handed over to PW-5. PW-5 had again deposited the case property in the malkhana as per entries Ext. PW-6/C. PW-6 has again handed over the case property to LC Lata Devi(PW-4) vide RC Ext. PW-6/D and docket Ext. PW-6/E. She was directed to deposit the same in the laboratory at Gutkar. PW-4 has deposited the case property in the laboratory and handed over the receipt to PW-6 on her return to the police station. The dead body was handed over to Municipal Committee for cremation vide receipt Ext. PW-7/F. The minor son of the accused was handed over to Kullu-Manali Charitable Trust as per receipt Ext. PW-7/G. The statements of witnesses were recorded as per their version. The report of chemical examiner Ext. P-X was received. As per the same, human blood of group 'B' was found in the blood sample of deceased and the shirt of the accused. It is thereafter challan was prepared by PW-7 and presented in the Court.

5. Learned trial Judge on being satisfied that a case for the commission of offence under Sections 302 and 201 of the Indian Penal Code is *prima-facie* made out against the accused framed charge against him accordingly. The accused, however, not pleaded guilty to the charge. The prosecution has, therefore, examined seven witnesses in all in order to sustain the charge against the accused. The complainant is PW-1 Vineet Kumar, whereas, Karam Chand is the Pradhan of Gram Panchayat, Tegubehar. As a matter of fact, they both are the star prosecution witnesses. The remaining prosecution witnesses are doctor Rajesh Thakur (PW-3), who had conducted the autopsy on the dead body of the deceased. The remaining witnesses are police officials i.e. Lady Constable Lata Devi (PW-4), LHC Jinesh Kumar (PW-5), HC Tara Chand (PW-6) and SI Narian Singh, (PW-7), the SHO of Police Station, who has conducted the investigation of this case. The accused was also examined under Section 313 of the Code of Criminal Procedure, however, opted for not leading any defence evidence.

6. Learned trial Judge on appreciation of the evidence available on record and hearing learned Public Prosecutor as well as learned defence counsel has arrived at a conclusion that the prosecution has failed to bring guilt home to the accused with the help of cogent and reliable evidence. He has, therefore, been acquitted of the charge framed against him.

7. The legality and validity of the impugned judgment has been questioned on the grounds *inter-alia* that the evidence available on record has been appreciated in a slip shod and perfunctory manner. The reasoning given by learned trial Judge while acquitting the accused is manifestly unsustainable as there was no occasion to the trial Court to have discarded the cogent and reliable evidence produced by the prosecution on all material aspects of its case. The testimony of the prosecution witnesses is stated to be discarded for untenable reasons, particularly when there was no enmity of the prosecution witnesses with the accused. It has further been pointed that deceased Anita Devi was the wife of the accused. She was found dead in the house of the accused who was absconding after the occurrence leads to the only conclusion that it is he who has murdered her. No explanation is forth-coming as to why the accused has absconded and as being her husband he resided lastly with her, therefore, there is strong circumstance to connect him with the commission of the offence. The recovery of the blood stained shirt of the accused at his instance and the blood of the same group as that of deceased available thereon during the scientific investigation conducted in the matter is also stated to be erroneously ignored by learned trial Court. It has, therefore, been claimed that learned trial Judge has based the impugned judgment on conjecture, surmises and hypothesis. The same has, therefore, been sought to be quashed and set aside and the accused convicted.

8. Learned Additional Advocate General has argued with all vehemence that incriminating circumstances appearing in the prosecution case against the accused lead to the only conclusion that it is he who has murdered his wife, the deceased. It has, therefore, been urged that learned trial Judge has not appreciated the evidence available on record in its right perspective and has erroneously acquitted the accused of the charge.

9. Learned defence counsel while repelling the arguments addressed on behalf of the appellant-State has urged that what to speak of cogent and reliable evidence, the present is a case of no evidence and as such, the accused according to him, has rightly been acquitted of the charge. Learned defence counsel has pointed out that there is no evidence to show that deceased

was the wife of accused. One Suresh resident of Jharkhand was living with the deceased as her husband and this aspect of the matter came to the notice of the police during the course of investigation. However, said Suresh was not interrogated, and to the contrary, the accused has been implicated falsely in this case.

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
>
> AND
>
> 5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

11. It has also been held by the Hon'ble Apex Court in ***Akhilesh Halam*** V. ***State of Bihar 1995 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."

12. The guilt or innocence of the accused has to be determined in the light of the parameters laid down in the case law cited supra as well as the evidence available on record. In the case in hand, the oral as well as documentary evidence speaks about the following circumstances relied upon by the prosecution to establish the guilt of the accused:-

(i) Deceased Anita Devi was the wife of accused. One male issue was born to them out of this wedlock and the accused was residing in a room taken on rent from PW-1 Vineet Kumar at Tegubehar.

(ii) The dead body of Anita was found lying in the room when opened by PW-1 accompanied by PW-3, Pradhan of local Gram Panchayat on an information given Sheela Devi, another tenant that foul smell is emitting from the rooms and the houseflies are also flying in large number.

(iii) The accused was absconding from the house who was brought by one of his companions to PW-3 Karam Chand, Pradhan of Gram Panchayat and PW-3 handed over the accused to the police.

(iv) The disclosure statement made by the accused while in custody that he had thrown the weapon of offence i.e. Darat in river 'Beas'

(v) The disclosure statement Ext. PW-1/B made by the accused qua he having hided the blood stained shirt worn by him at the time when he killed the deceased and the recovery thereof vide memo Ext. PW-1/C.

13. It is now to be seen in the light of the evidence available on record as to whether chain of circumstances as appearing in the prosecution evidence and pressed in service against the accused is so complete as not to leave any reasonable ground for the conclusion consistent with his innocence and show in all probability that it is the accused alone who has murdered his wife, deceased Anita.

14. If coming to the first circumstance pressed in service by the prosecution against the accused, true it is that PW-1, the complainant has told deceased Anita to be the wife of accused in relation in his statement recorded by the police. However, in his cross-examination it is stated by him that he had not checked in the record that accused and deceased were husband and wife in relation. The prosecution has also not made an effort to investigate the case from this point of view that the deceased was legally wedded wife of the accused or not. Had the inquiry been got made in this regard at the native place of the accused or from the local Gram Panchayat or at the place of the deceased, the actual and factual position qua this aspect of the matter would have surfaced on record. Therefore, version of PW-1 in the FIR Ext. PW-1/A that accused was residing in the room taken on rent from this witness with his wife, the deceased, is not sufficient to discharge the onus qua this aspect of the matter upon the prosecution, that too, when the suggestion put to the I.O PW-7 in his cross-examination that during the investigation it transpired that one Suresh of Jharkhand was residing with the deceased in the capacity of her husband, casts a major dent in the prosecution story. Therefore, it is difficult for us to infer that deceased was legally wedded wife of the accused.

15. If coming to the prosecution story that the deceased had given birth to a son out of her wedlock with the accused, again cogent and reliable evidence is missing for the reason that no evidence qua parentage of the child so born to the accused and deceased has been collected by the investigating agency during the course of investigation. The age of the male child is also doubtful because as per testimony of PW-1, the complainant was 6-7 years old, whereas, as per version of the I.O. PW-7, in his cross-examination, the age of their son was 2½ years at that time. Therefore, it is also difficult to believe that a male child was born to the accused and deceased out of their wedlock. Similarly, besides the statement of PW-1, there is again no evidence cogent and reliable to show that it is the accused who had taken a room on rent from the said witness. PW-2 Karam Chand though is Pradhan of local Gram Panchayat, however, he has also not said that it is the accused who had taken the room on rent from PW-1. As per his version, rather one of the companions of accused had brought the accused to him and told that he is the person who has committed the murder of his wife and that he had now returned. Therefore, the first circumstance pressed in service by the prosecution against the accused is not at all proved, hence is hardly of any help to the prosecution case.

16. The 2nd circumstance as pressed in service by the prosecution carry substance, because Sheela Devi informed PW-1 about the foul smell emitting from one of the rooms and houseflies in large number are also flying. The said witness has called PW-2, Pradhan of Gram Panchayat to the spot and found dead body of Anita covered under a mattress and clothes

scattered on the floor. The dead body was photographed by the police vide photographs Ext. P-1 to Ext. P-13 in the room itself. It is, however, not proved that deceased was none else but the wife of the accused. Therefore, lying her dead body in the room also does not connect the accused with the commission of the offence.

17. The next circumstance pressed in service is abscondance of the accused form the scene of occurrence. Question of abscondance would have arisen had he been lastly seen in the company of the deceased in the rented accommodation. No evidence qua this aspect of the matter is forth-coming. The prosecution has made an effort to make out a case that the accused after the commission of offence had left Tegubehar and went to his native place at Jharkhand with his minor son. Had he been absconded as alleged by the prosecution, there was no question of his coming back to Tegubehar, that too only after 4-5 days. It is not known as to when Anita was murdered in the room. According to the doctor PW-3, probable duration between death and post-mortem was more than 5 days. If it was not 5 days or more than that, it was not expected from the accused to have come back from his native place, that too, in such a short span of time, had he been absconded after the commission of offence. When there is no evidence that he was lastly seen in the company of deceased, there was no question of his abscondance from the scene of occurrence. Therefore, this circumstance is also of no help to the prosecution case.

18. The forth circumstance pressed in service is the disclosure statement allegedly made by the accused while in custody that he has thrown darat used for the commission of offence in river 'Beas'. Such statement has, however, not been taken down in writing. The prosecution has failed to explain as to why statement, if any, made by the accused was not reduced into writing by the I.O. PW-1 remained associated in the investigation of the case. He, however, has not said anywhere that the disclosure qua throwing of darat by the accused in river 'Beas' was made by the accused before the police while in custody. A suggestion given to PW-2 that accused told him qua throwing of darat he used in the commission of offence in river 'Beas' was not answered by the said witness at the pretext that he did not remember any such disclosure having been made before him by the accused. Therefore, sole testimony of the I.O. PW-7 that the accused disclosed during his interrogation qua he having thrown 'darat' in river 'Beas' cannot be believed to be true. As a matter of fact, had any such disclosure statement been made by the accused, the same would have reduced into writing in the presence of the witnesses. Therefore, it cannot be said by any stretch of imagination that accused has made disclosure statement qua throwing of darat he used to murder Anita, in river 'Beas'.

19. The last circumstance is the recovery of blood stained shirt, Ext. P-2. As a matter of fact, it is this piece of evidence, which has been vehemently relied upon by the prosecution against the accused. Be it stated that the statement Ext. PW-1/B was made by the accused in the presence of PW-1 and one Cheering Dorje. Chering Dorje has not been examined, whereas, as per testimony of PW-1 in his examination-in-chief, the disclosure statement Ext. PW-1/B was made by the accused before the police and on the basis thereof, blood stained shirt was recovered from the bushes. However, when cross-examined, he has stated that no disclosure statement was made by the accused before the police in his presence. Such statement, according to him, was recorded in the police station. He was called to police station and told that accused wanted to effect some recovery. Chering Dorje and Karam Chand were also called there. He admits that many bushes were in existence in and around his house and up to the place from where shirt was recovered. Also that a common path was abutting such bushes from where recovery was made. If PW-2 Karam Chand was also called to the police station to witness the recovery of shirt, it is not understandable as to why any question is put to him by the prosecution in this regard while in the witness box. Interestingly enough, the body of the document Ext. PW-1/B reveals that the disclosure statement was made by the accused on 16.06.2011. When he as per the prosecution case was arrested on 17.06.2011 how he could have made disclosure statement before the police while in custody on 16.06.20111. The story of making disclosure statement and the recovery of shirt Ext. P-2 vide recovery memo Ext. PW-1/C pursuant to same is, therefore, highly doubtful. True it is that the chemical examiner after conducting the test has found the blood of group 'B on the shirt. Similar was the blood group of deceased. The

possibility of the shirt stained with blood has been fabricated by the police at its own as suggested to the I.O during his cross-examination cannot be ruled-out, particularly when the story qua disclosure statement made by the accused and recovery of the shirt pursuant to such statement is not at all proved from the evidence available on record. Therefore, this circumstance is also not substantiated on record, hence cannot be relied upon to bring guilt home to the accused.

20. The reappraisal of the evidence available on record, therefore, reveal that the present is not a case where it can be said that the chain of circumstances is so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and to show that in all probabilities it is the accused alone who has murdered the deceased. The charge against the accused is, therefore, not at all proved. He has rightly been acquitted by the trial Court.

21. In view of what has been said hereinabove, there is no force in this appeal and the same is accordingly dismissed. Personal bonds furnished by the accused shall stand cancelled and surety bonds discharged.

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

Uma Dutt ....Appellant
Versus
Goverdhan Dass ....Respondent

RSA No. 255/2008
Reserved on: 31.8.2016
Decided on: 1.9.2016

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for restraining the defendant from interfering with the suit land pleading that plaintiff had purchased the suit land to the extent of one biswa – defendant is interfering in the possession of the plaintiff without any right do so - suit was decreed by the trial Court-an appeal was preferred, which was allowed- held, in second appeal that defendant had categorically deposed that he had not encroached upon the land of the plaintiff- plaintiff stated that he had taken demarcation but no copy of the same was produced on record- plaintiff was required to prove the encroachment, which he had failed to do- Appellate Court had rightly appreciated the evidence- appeal dismissed. (Para-13 and 14)

For the appellant: Mr. Jeevesh Sharma, Advocate.
For the respondent: Mr. A.K. Vashisht, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

This regular second appeal is instituted against the impugned judgment and decree dated 1.3.2008 rendered by learned District Judge (Forest), Shimla, in Civil Appeal No. 41-S/13 of 07/05.

2 The key facts necessary for the adjudication of the appeal are that the appellant-plaintiff, Uma Dutt, (hereinafter referred to as the "plaintiff" for convenience sake) filed a suit for permanent prohibitory injunction against respondent-defendant, Goverdhan Dass (hereinafter referred to as the "defendant" for the convenience sake) restraining him from interfering in the

possession of the plaintiff and proforma defendant Anju Bala (deleted from array of the respondents by this Court vide order dated 21.4.2010) over the land comprised in Khata Khatauni No.128/241, Khasra No.1195/1158/6, total measuring 2-15 Bighas to the extent of 1 biswa and the land comprised in Khata Khatauni No.188/301, Khasra No.950/2, measuring 3 biswas, situated in Mohal Chamyana, Hadbast No.372, Tehsil and District Shimla, H.P. According to the averments made in the plaint, the plaintiff along with proforma defendant is owner in possession of the land and house comprised in Khata Khatauni No.128/241, Khasra No. 1195/1158/6 and Khata Khatauni No.188/301, Khasra No.950/2. The plaintiff had purchased the land comprised in Khasra No.950/2 along with structure vide registered sale deed dated 11.9.1995. He had also purchased the land to the extent of 1 biswa out of the land comprised in Khasra No.1195/1158/6 vide registered sale deed dated 14.12.1999. The mutation was also attested in his favour. The plaintiff is in possession of the suit land where he has raised structure and some part of it is still vacant. The defendant has no right, title or interest over the suit land. The defendant was trying to interfere in the possession of the plaintiff over the suit land.

3 The suit was contested by the defendant. According to him, the plaintiff is not in possession of any portion of land comprised in Khasra No.1195/1158/6 at the spot. The plaintiff has constructed his house on Khasra No.952/2. The plaintiff and proforma defendant are owners to the extent of 2 biswas of land comprised in Khasra No.950/2. Plaintiff has constructed his house in Khasra No.952/2 and he has encroached upon the land more than his share.

4 The replication was filed by the plaintiff. The learned trial court framed the issues on 6.1.2003 and decreed the suit vide judgment and decree dated 20.9.2005. The defendant feeling aggrieved with the judgment and decree dated 20.9.2005 preferred an appeal before the learned first appellate court, who allowed the same vide impugned judgment and decree dated 1.3.2008. Hence, this regular second appeal, which was admitted on following substantial questions of law on 19.6.2009:-

> 1. Whether the learned first appellate court below has jurisdiction to appoint a Local Commissioner *suo moto* if it is necessitated to elucidate the real matter in controversy including the interference of the defendant over the suit land?
>
> 2. Whether once it is admitted by the defendant/respondent that he has no right, title or interest over the suit land, is it necessary to demarcate the suit land?
>
> 3. Whether the learned first appellate court below has erred in law by refusing the prayer for injunction by not appreciating the jamabandi, Ext.PW1/A to Ext.PW1/C, which is proved and established that the respondent/defendant has no right, title or interest over the suit land?

5 Mr. Jeevesh Sharma, learned counsel appearing for the plaintiff, on the basis of the substantial questions of law framed, has vehemently argued that the first appellate court should have appointed Local Commissioner *suo moto* to finally adjudicate the controversy between the parties. He has also contended that the learned first appellate court has mis-construed the oral as well as documentary evidence.

6 Mr. Adarsh K. Vashisth, learned Advocate appearing for the defendant, has supported the impugned judgment and decree dated 1.3.2008 passed by the learned first appellate court.

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

8. Since both the substantial questions of law are interlinked and interconnected, the same are taken together for determination to avoid repetition of discussion of evidence.

9 The plaintiff has appeared as PW1. He has placed on record copies of jamabandies, Ext. PW1/A to Ext. PW1/C. He has also proved on record, Tatima, Mark A.

According to him, he has raised construction on the suit land and portion of it is vacant. The defendant started digging the suit land and interfering in his possession. The defendant has no right, title or interest over the suit land.

10. PW2, Bias Dev, has corroborated the statement of PW1, plaintiff. According to him, the plaintiff has purchased 1 biswa of land in Khasra No.1195/1158/6 from him, where he has raised his house and few portion of it is vacant.

11. The defendant appeared as DW1. According to him, he has purchased the land in Khasra No.252/2 measuring 4 biswas as per jamabandi, Ext. PW1/B. He has raised the house on the land. Neither he has encroached upon any land nor he has dug the land of the plaintiff. The plaintiff is not in possession of 1 biswa of land in Khasra No.1195/1158/6 on the spot. Khasra Nos. 952/2, 950/2 and 1195/1158/6 are separate.

12. DW2, Dhian Singh, Patwari, deposed that the plaintiff is owner of 2 biswas of land in Khasra No.952/2. According to spot, the plaintiff has raised the construction in 4 biswas of land. The boundaries of Khasra No.250/2 and Khasra No.1195/1158/6 do not touch the plot of the defendant.

13. The defendant has categorically deposed that he has not encroached upon the land of the plaintiff. He has raised construction over 4 biswas of land comprised in Khasra No.252/2. The plaintiff has neither got the land demarcated nor moved an application under Order XXVI Rule 9 of the Code of Civil Procedure for the appointment of Local Commissioner to ascertain whether the defendant has encroached upon his land or not. Rather, the plaintiff has testified that he has obtained the demarcation report, but he has failed to produce the same before the Court. In case he has got conducted the demarcation, he should have placed demarcation report on record. Thus, the learned first appellate court has rightly drawn adverse inference against the plaintiff. The burden to prove the fact that the defendant has encroached upon his land was on the plaintiff. It was not for the defendant to prove that he has not encroached upon the land of the plaintiff. The defendant was not required to lead negative evidence. The learned first appellate court has rightly appreciated the oral as well as documentary evidence.

14. Consequently, in view of analysis and discussion made hereinabove, there is no merit in the appeal and the same is dismissed. Pending application(s), if any also stands disposed of. No order as to costs.

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

Atma Ram .....Appellant.
Versus
Smt. Veena Kumari and others .....Respondents

FAO (MVA) No. 254 of 2011.
Date of decision: 2nd September, 2016

Motor Vehicles Act, 1988- Section 166- Tribunal held that accident was caused by Scooterist himself- an FIR was lodged against him- even Criminal Court had recorded the findings to the effect that accident was outcome of rash and negligent driving of the scooterist- no interference is called for- appeal dismissed. (Para-4 to 7)

For the appellant: Mr. J.S. Bagga, Advocate.
For the respondents: Mr. Jatinder Ranot, Advocate, for respondents No. 1 and 2.
Mr. Ratish Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral)*

This appeal is directed against the judgment and award dated 4.10.2010, made by the Motor Accident Claims Tribunal Bilaspur in MAC No. 58 of 2006, titled *Atma Ram versus Smt. Veena Kumari and others*, for short "the Tribunal", whereby claim petition filed by the claimant came to be dismissed, hereinafter referred to as "the impugned award", for short.

2. Claimant had filed the clam petition before the Tribunal for the grant of compensation as per the break-ups given in the claim petition which was resisted by the respondents and following issues came to be framed.

(i) Whether the petitioner has sustained injuries due to the rash and negligent driving of respondent no. 2 of Maruti Van No. 24-A-1257, as alleged? OPP

(ii) If issue No. 1 is proved in affirmative, to what amount of compensation, the petitioner is entitled to and from whom? OPP.

(iii) Whether the driver of the offending vehicle was not having a valid and effective driving licence at the time of accident, as alleged? OPR-3.

(iv) Whether the vehicle involved n the accident was being plied contrary to the provisions of the M.V. Act, if so, its effect? OPR-3.

(v) Whether the petition is not maintainable? OPRs.

(vi) Whether the petition is bad for non-joinder and misjoinder of necessary parties? OPRs.

(vii) Relief.

3. Respondents have specifically pleaded that the accident was outcome of rash and negligent driving by the claimant himself who was driving the scooter and not by respondent No.2 Suraj Parkash who was driving Maruti Van No. HP-24-A-1275.

4. The parties have led evidence. The Tribunal in paras 11, 12 and 14 to 17 of the impugned award held that the accident was caused by the scooterist himself and was responsible for the same. It is also proved that the FIR was lodged against him, has faced the trial before the Court of competent jurisdiction. The Tribunal after taking all these aspects in view held that the claimant has failed to prove that the accident was outcome of rash and negligent driving by driver Suraj Parkash who was driving Maruti Van No. HP-24-A-1275, but held that the accident was caused by scooterist, i.e., claimant himself, rashly and negligently.

5. At this stage, the learned counsel for the appellant has argued that the Tribunal has fallen into an error in recording the said findings, as the scooterist, who faced the trial, has been acquitted by the Trial Court. He has made available the copy of judgment dated 15.12.2011 in police Challan No. 227-II/2004 titled State of H.P. versus Atma Ram, across the Board, made part of the file. The Trial Court has also recorded the findings against the accused. It is apt to reproduce para 19 of the said judgment herein.

> *"19.Thus, though the factum of the accident is established on record, rashness and negligence on part of the accused in causing the accident has not been proved beyond all reasonable doubt and accordingly, my findings on this point are in negative and against the prosecution."*

6. The Trial Court has acquitted the accused on the ground that the prosecution has failed to prove the case beyond reasonable doubt but at the same time has recorded the findings to the effect that the accident was outcome of rash and negligent driving of the accused, i.e., scooterist.

7. Having said so, no interference is called for. The impugned award is upheld and appeal is dismissed.

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

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

Barfi Devi ...Appellant.

Versus

Lal Singh and others ...Respondents.

FAO No. 242 of 2010
Decided on: 02.09.2016

Motor Vehicles Act, 1988- Section 149- Driver was driving a Mahindra Pick Up- unladen weight of which is 1610 kilograms - it falls within the definition of 'light motor vehicle'- no endorsement of PSV was required- driver was competent to drive not only light motor vehicle but also the tractor, medium goods vehicle, medium passenger motor vehicle, heavy goods vehicle, heavy passenger motor vehicles, which shows that authority had issued certificate to him after noticing his competency and expertise- it was not proved that owner had knowledge that driver was not having requisite age to have the driving licence- licence was issued by the Competent Authority and cannot be said to be void- insurer was rightly held liable to satisfy the award- appeal dismissed. (Para-4 to 14)

Cases referred:

Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors., 2013 AIR SCW 2791

National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors., 2008 AIR SCW 906

Kulwant Singh & Ors. versus Oriental Insurance Company Ltd., JT 2014 (12) SC 110

For the appellant: Mr. Dinesh Thakur, Advocate.

For the respondents: Mr. Lovneesh Kanwar, Advocate, for respondents No. 1 and 2.
Mr. Praveen Kumar, Advocate, for respondent No. 3.
Mr. Jagdish Thakur, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

This appeal is directed against the award, dated 25th March, 2010, passed by the Motor Accident Claims Tribunal(I), Mandi (for short, "the Tribunal") in Claim Petition No.59 of 2008, titled as Lal Singh & another vs. Barfi Devi & others, whereby a sum of Rs.6,27,000/- with interest at the rate of 7.5% per annum from the date of filing of the petition till its realization came to be awarded as compensation in favour of the claimants and the insurer was saddled with the liability, with a right of recovery (for short the "impugned award").

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

3. The appellant-owner-insured has questioned the impugned award on the ground that the Tribunal has fallen in an error in granting right of recovery to the insurer. Thus, the only dispute involves in this appeal is vis-a-vis issue No.3.

4. Admittedly, the driver was driving the offending vehicle, i.e. Mahindra Pick Up, bearing registration No.HP-28-2612, at the relevant point of time, the unladen weight of which is 1610 kilograms, as per the Certificate of Registration, Ext.RW-4/B, which falls within the definition of 'light motor vehicle' in terms of Section 2(21) of the Motor Vehicles Act, 1988, for short 'the MV Act'.

5. A Division Bench of the High Court of Jammu and Kashmir at Srinagar, of which I (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **National Insurance Co. Ltd. versus Muhammad Sidiq Kuchey & ors.,** being **LPA No.180 of 2002,** decided on **27th September, 2007,** has discussed this issue and held that a driver having licence to drive "LMV" requires no "PSV" endorsement. It is apt to reproduce the relevant portion of the judgment herein:

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

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

> *"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi- trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial*

purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.

20. .....

21. .....

22. .....

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

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

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

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

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

9. .....

10. .....

11. .....

12. .....

13. .....

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

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

15. .....

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light

motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.

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

8. The Apex Court in the latest judgment in the case titled as **Kulwant Singh & Ors. versus Oriental Insurance Company Ltd.,** reported in **JT 2014 (12) SC 110,** held that PSV endorsement is not required.

9. The same principle has been laid down by this Court in a series of cases.

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

11. Learned counsel for the insurer argued that the driver of the offending vehicle was not competent to drive the vehicle in terms of the mandate of Section 4 of the MV Act because he had not crossed the age of twenty years at the time of issuance of the driving licence.

12. The copy of the driving licence is on the record as Mark-A, the perusal of which does disclose that the driver was competent to drive not only the light motor vehicle, but was also competent to drive the tractor, medium goods vehicle, medium passenger motor vehicle, heavy goods vehicle, heavy passenger motor vehicles. The competent authority, after noticing his expertise, has granted him the driving licence to drive the heavy motor vehicles, not to speak of light motor vehicle.

13. A person, who is eighteen years of age, is major and is eligible to have a driving licence and the competent authority issues the driving licence, if he qualifies the tests required as per the mandate of the MV Act and the Rules. Even otherwise, the insurer has not led any evidence to prove that the driver was not twenty years of age at the time of the issuance of the driving licence and that was the cause of the accident. Having said so, it is held that the driver was competent to drive the offending vehicle.

14. Further, the insurer has failed to plead and prove that it was within the knowledge of the owner-insured that the driver was not having the requisite age to have the driving licence to drive the offending vehicle. What the owner was supposed to examine at the time of engagement of the driver was whether the driver was having a valid driving licence. The driving licence, Mark-A, has been issued by the competent authority. Once the driving licence has been issued by the competent authority, it is valid, cannot be said to be void and holds the field till it is revoked by the competent authority. It was not the duty of the owner-insured to verify as to whether the driver was eligible for having that category of driving licence before the age of twenty years. He was supposed only to ascertain whether the driver was having a driving licence, which he has done. Thus, by no stretch of imagination it can be said that the owner-insured of the offending vehicle has committed any willful breach.

15. Viewed thus, the findings returned by the Tribunal on issue No.3 are set aside and it is held that the insurer has to satisfy the impugned award.

16. Having glance of the above discussions, the impugned award is modified, as indicated hereinabove, and the appeal is allowed.

17. The Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payees' account cheque or by depositing the same in their respective bank accounts.

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

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

Himachal Road Transport Corporation .....Appellant.

Versus

Varinder Singh Negi & others .....Respondents.

FAO (MVA) No. 1 of 2016.
Reserved on: 24.8.2016.
Decided on: 2.9.2016.

Motor Vehicles Act, 1988- Section 166- Deceased was riding a scooter, which was hit by HRTC bus- he sustained multiple injuries and succumbed to them- compensation of Rs. 23,69,736/- along with interest @ 6% per annum from the date of filing of the petition till realization was awarded by the MACT - claimants have duly proved that accident had taken place due to the negligence of the driver of the bus - deceased was 62 years of age at the time of accident and was drawing monthly pension of Rs. 37,782/-- multiplier of 7 was correctly applied- sum of Rs.1 lac was also awarded towards 'love and affection' in accordance with law- a sum of Rs. 25,000/- awarded towards funeral expenses cannot be termed as excessive- a sum of Rs.1 lac awarded towards consortium is also justified- compensation is just and reasonable. (Para-7 to 10)

For the appellant(s): Mr. G.S.Rathour, Advocate.
For the respondents: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the award dated 4.6.2015, rendered by the learned MACT, Kinnaur at Rampur Bushahr, Distt. Shimla, H.P. in MAC Petition No. 0100018 of 2013.

2. Key facts, necessary for the adjudication of this appeal are that respondents No. 1 & 2, namely, Virender Singh Negi and Smt. Bhag Manti have filed a claim petition under Section 166 of the Motor Vehicles Act, 1988 against the appellant as well as proforma respondent No. 3 Shyam Singh, for the grant of compensation of Rs. 35,00,000/- with interest @ 18% per annum. According to the averments contained in the claim petition, on 23.10.2012, the deceased was on his way from Dakolar to Shingla on scooter No. HR-01E-2791. At about 11:45 AM, when he reached near Shingla Helipad, he was hit by HRTC bus No. HP-42-0805 from opposite side, being driven by respondent No. 3, namely, Shyam Singh. The deceased sustained multiple injuries and was shifted to Khaneri hospital. Thereafter, he was referred to IGMC, Shimla and ultimately to PGI, Chandigarh. He remained indoor patient from 24.10.2012 to 30.10.2012 at PGI Chandigarh. He succumbed to injuries on 30.10.2012. His post mortem examination was conducted. FIR No. 180/2012 dated 23.10.2012 was registered under Sections 279 & 337 IPC at PS Rampur Bushahr. The deceased was retired Army Officer and drawing monthly pension of Rs. 59,970/-. He was also engaged in agriculture and horticulture pursuits.

3. The petition was contested by appellant and respondent Shyam Singh. On merits, it was submitted by the appellant that the accident took place due to rash and negligent driving of scooter by the deceased. FIR No. 180/2012 dated 23.10.2012 was registered under Sections 279 & 337 IPC at PS Rampur Bushahr. Since the accident took place due to the rash and negligent driving of the deceased, therefore, the petition was not maintainable. Respondent-Shyam Singh in his reply denied that the accident was the outcome of his rash and negligent driving of HRTC bus No. HP-42-0805. He submitted that the accident took place due to rash and negligent driving of scooter on the part of the deceased.

4. The issues were framed on 28.9.2013, by the learned MACT, Kinnaur at Rampur Bushahr. The learned MACT, Kinnaur at Rampur Bushahr, Distt. Shimla awarded compensation of Rs. 23,69,736/- alongwith interest @ 6% per annum from the date of filing of the petition till realization of entire amount along with litigation expenses quantified at Rs. 5,000/-.

5. Mr. G.S.Rathour, Advocate, for the appellant has vehemently argued that the accident took place due to the rash and negligent driving of scooter by the deceased. He then contended that the compensation awarded is on the higher side. He lastly contended that the multiplier of 7 could not be applied.

6. I have heard the learned Advocates and gone through the judgments and records of the case carefully.

7. Ext. PW-1/E is the copy of FIR No. 180/2012 dated 23.10.2012, registered under Sections 279 & 337 IPC at PS Rampur Bushahr. The FIR was registered on the basis of statement of Tej Pal Singh, driver of Auto. According to the averments made in the FIR, PW-2 Tej Pal Singh was on his way to village Shingla in his Auto. At about 11:45 AM, when he reached ahead of Shingla Helipad, HRTC bus No. HP-42-0805 crossed and thereafter, he heard the noise of collusion. He stopped his Auto and saw that the accident had taken place between HRTC bus No. HP-42-0805 and scooter No. HR-01E-2791. The scooter driver Bhagwant Dakesh Negi had sustained injuries and he was immediately shifted to Khaneri hospital. The accident took place due to the rash and negligent driving of scooter by its driver. However, when Tej Pal Singh appeared in the Court as PW-2, he tendered his evidence by filing affidavit Ext. PW-2/A. In his affidavit, he has categorically deposed that the accident took place due to the rash and negligent driving of HRTC bus No. HP-42-0805 by its driver.

8. Now, the Court will advert to the statement of PW-3 Dhani Ram, an eye witness of the accident. According to him, he was travelling in HRTC bus No. HP-42-0805. He boarded the bus at Nogidhar from Rampur. As per his affidavit Ext. PW-3/A, on 23.10.2012, at about 11:45 AM, the bus being driven by respondent-Shyam Singh reached near Shingla Helipad, which hit against scooter No. HR-01E-2791 coming from the opposite side. The scooter, after being hit by the bus, was thrown 30-35 feet on the opposite side. The bus was moving downhill and scooter was coming uphill. He was occupying seat No. 3 and witnessed the manner in which the accident took place.

9. PW-1 Virender Singh Negi is the son of deceased. According to him, the accident took place due the rash and negligent driving of HRTC bus by its driver Shyam Singh. He deposed that the appellant and respondent No. 3 Shyam Singh have got the FIR registered against his father in order to escape the criminal prosecution. His father sustained multiple injuries and his father succumbed to injuries on 30.10.2012. His father was 62 years of age at the time of accident.

10. The claimants have duly proved that the accident took place due to the rash and negligent driving of HRTC bus No. HP-42-0805 by its driver Shyam Singh. The deceased was 62 years of age at the time of the accident. His Pension Payment Order (PPO) is Ext. PW-4/A. According to Ext. PW-4/A, the monthly pension of the deceased was Rs. 37,782/-. The learned MACT, Kinnaur at Rampur Bushahr, Distt. Shimla has rightly applied the multiplier of 7 to calculate his total income on the basis of Ext. PW-4/A. A sum of Rs. 1,00,000/- awarded towards love and affection is also in accordance with law. A sum of Rs. 25,000/- awarded towards funeral expenses cannot be termed as excessive. Similarly, a sum of Rs. 1,00,000/- awarded towards consortium is also justifiable. The compensation awarded to the claimants/respondents No. 1 & 2 is just and reasonable.

11. Accordingly, in view of the discussion made hereinabove, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

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

Karam Chand .....Appellant.
Versus
Smt. Chanchla Devi and others .....Respondents

FAO (MVA) No. 226 of 2011.
Date of decision: 2nd September, 2016

Motor Vehicles Act, 1988- Section 166- In criminal cases proof beyond reasonable doubt is required while in motor accident cases prima facie proof is required- appeal dismissed. (Para-8 to 10)

Cases referred:
Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646
Oriental Insurance Co. versus Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81
Cholamandlan MS General Insurance Co. Ltd. Vs Smt. Jamna Devi and others, ILR 2015 (V) HP 207
Tulsi Ram versus Smt. Mena Devi and others, I L R 2015 (V) HP 557
Anil Kumar versus Nitim Kumar and others, I L R 2015 (IV) HP 445 (D.B.)
Kusum Kumari versus M.D. U.P Roadways and others, I L R 2014 (V) HP 1205

For the appellant: Mr. Bhupinder Ahuja, Advocate.
For the respondents: Ms. Anjali Soni Verma, Advocate, for respondents No. 1 to 5.
Nemo for respondent No.6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral)*

CMP No. 7190/2016.

This application has been moved by the learned counsel for respondents No. 1 to 5 for correcting the name of respondent No. 5 in the claim petition, impugned award and in the memo of parties of the appeal, on the grounds that inadvertently name of respondent No. 5 has been recorded as "Miss Priyanka Kumari" instead of Priya. While exercising powers under Sections 152, 153 and Order 41 of the Code of Civil Procedure, for short "CPC" read with Sections 173 and 176 of the Motor Vehicles Act, for short "the Act", the application is granted. The name of respondent No. 5 is ordered to be read as "Priya" instead of "Miss Priyanka Kumari", in the claim petition, impugned award and in the memo of parties of the present appeal. Amended memo of parties has been filed. Be taken on record. Registry to carry out necessary correction in the cause title. The application is accordingly, disposed of.

FAO No. 226 of 2011.

2. This appeal is directed against the judgment and award dated 28.2.2011, made by the Motor Accident Claims Tribunal-II, Kangra at Dharamshala in MACP No. 61-D of 2006, titled *Smt. Chanchla Devi and others versus Karam Chand and others*, for short "the Tribunal", whereby compensation to the tune of Rs.2,16,600/- alongwith interest @ 7 ½% per annum, came to be awarded in favour of the claimants and insured came to be saddled with the liability, hereinafter referred to as "the impugned award", for short.

3. Claimants, driver and insurer have not questioned the impugned award on any ground. Thus, the same has attained the finality so far as it relates to them.

4. The appellant/owner has questioned the impugned award on the grounds taken in the memo of appeal.

5. The learned counsel for the appellant argued that the Tribunal has fallen into an error in saddling the owner with the liability for the reason that the claimants have failed to prove that the driver has driven the offending vehicle rashly and negligently. The argument though attractive, is devoid of any force, for the following reasons.

6. The claimants have examined five witnesses and claimant No. 1 also appeared in the witness box as PW3. Respondents have also examined the five witnesses.

7. The Tribunal, after scanning the evidence held that the driver Raghubir Singh has driven the offending vehicle rashly and negligently and caused the accident. The driver has not questioned the said findings.

8. I have gone through the evidence on record. It is beaten law of the land that in civil cases, proof of preponderance of probabilities is required, in criminal cases, proof beyond reasonable doubt is required and in summary proceedings under Section 166 of the Motor Vehicles Act, 1988 for short "the Act", prima facie proof is required.

9. My this view is fortified by the judgment delivered by the apex court in ***Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another***, reported in ***(2013) 10 Supreme Court Cases 646,*** **and** ***Oriental Insurance Co. versus Mst. Zarifa and others*****,** reported in ***AIR 1995 Jammu and Kashmir 81.***

10. This Court has also laid down the similar principles of law in ***FAO No. 692 of 2008*** decided on 4.9.2015 titled ***Cholamandlan MS General Insurance Co. Ltd. Versus Smt. Jamna Devi and others***, ***FAO No. 287 of 2014*** along with connected matter, decided on 18.9.2015 titled ***Tulsi Ram versus Smt. Beena Devi and others***, ***FAO No. 72 of 2008*** along with connected matter decided on 10.7.2015 titled ***Anil Kumar versus Nitim Kumar and others*** and ***FAO No. 174 of 2013*** decided on 5.9.2014 titled ***Kusum Kumari versus M.D. U.P Roadways and others.***

11. Having said so, I am of the considered view that Tribunal has rightly made the discussion from paras 6 to 16 of the impugned award, needs no interference. However, the Tribunal has fallen into an error in deducting 1/3rd while 1/4th was to be deducted. The amount awarded is also meager, but the claimants have not questioned the same, the same is reluctantly upheld.

12. In view of the discussion made hereinabove, the impugned award merits to be upheld and the appeal merits to be dismissed. Accordingly, the impugned award is upheld and the appeal is dismissed.

13. The appellant is directed to deposit the amount within eight weeks from today. On deposit, the Registry is directed to release the awarded amount in favour of the claimants, through payees' cheque account or by depositing the same in their bank accounts.

14. At this stage, it is stated that an amount of Rs.1,50,000/- stands deposited in this Registry by the appellant. Registry is directed to release the same immediately in favour of the claimants, through payees' cheque account or by depositing the same in their bank accounts.

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

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

Kehar Singh ...Appellant.
Versus
Sh.Shamsher Singh and others ...Respondents.

FAO No. 108 of 2010
Decided on: 02.09.2016

Motor Vehicles Act, 1988- Section 166- Claimant had suffered fracture of ankle and leg- he remained admitted in the hospital with effect from 24th September, 2001 till 11th October, 2001- he suffered permanent disability to the extent of 6%- income of the claimant was taken as Rs. 3,000/- per month- Rs. 9,000/- awarded under the head 'loss of income for the period he remained admitted' - 'attendant charges' of Rs. 5,000/- per month, i.e. Rs. 15,000/- for the period of three months were also awarded- considering disability to be 6%, loss of income taken to be Rs. 500/- per month- multiplier of 13 was to be applied and the claimant is entitled to Rs. 500 x 12 x 13= Rs. 7,800/- under the head loss of future income, in addition to this Rs. 50,000/- awarded under the head 'pain and suffering' - Rs. 50,000/- awarded under the head ' loss of amenities of life' and Rs. 10,000/- awarded under the head future medical expenses- claimant held entitled to total compensation of Rs. 2,12,000/- along with interest @ 7.5% per annum from the date of claim petition till realization. (Para-10 to 20)

Cases referred:

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

Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085

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

Kavita versus Deepak and others, 2012 AIR SCW 4771

Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252

Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 Supreme Court Cases 121

Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

For the appellant:	Mr. Vinod Thakur, Advocate.
For the respondents:	Mr. H.S. Rana, Advocate, for respondent No. 1.
	Mr. Mukesh Thakur, Advocate, for respondent No. 2.
	Ms. Sunita Sharma, Advocate, for respondent No. 3.
	Mr. Jagdish Thakur, Advocate, for respondents No. 4 and 5.
	Mr. Hamender Chandel, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is award, dated 26th November, 2009, made by the Motor Accident Claims Tribunal (II), Mandi, H.P. (for short "the Tribunal") in Claim Petition No. 49 of 2002, titled as Kehar Singh versus Shri Shamsher Singh and others, whereby compensation to the tune of ₹73,240/- with interest @ 7½% per annum came to be awarded in favour of the claimant-injured and against the insurer (for short "the impugned award").

2. The respondents in the claim petition, i.e. the insurer, owner-insured and driver of the offending vehicle, have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The claimant-injured has questioned the impugned award only on the ground of adequacy of compensation.

4. Thus, the only question to be determined in this appeal is – whether the amount awarded is adequate? The answer is in negative for the reasons to be recorded hereinafter.

5. The claimant-injured invoked the jurisdiction of the Tribunal for grant of compensation to the tune of ₹ five lacs, as per the break-ups given in the claim petition on the ground that he became the victim of the motor vehicular accident, which was caused by the driver, namely Shri Arjun Singh, while driving oil tanker, bearing registration No. HR-37-A-2035,

rashly and negligently, on 24th September, 2001, at about 8.30 A.M. at place Pulgharat, Mandi Town, in which the claimant-injured sustained injuries, was taken to Zonal Hospital, Mandi, and remained admitted there till 11th October, 2001.

6. The perusal of the record does disclose that the claimant-injured suffered fracture of ankle and leg, remained admitted in the hospital with effect from 24th September, 2001 to 11th October, 2001. The disability certificate is also on the record as Ext. Ext. PW-5/A, in terms of which the claimant-injured has suffered permanent disability to the extent of 6%.

7. The Apex Court in **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787** and **Kavita versus Deepak and others, 2012 AIR SCW 4771,** has clearly laid down the principles as to how compensation has to be awarded in cases where the claimant has suffered permanent disability and how the assessment is to be made.

8. The Apex Court in its latest decision in the case titled as **Jakir Hussein vs. Sabir and others,** reported in **(2015) 7 SCC 252,** while discussing its earlier pronouncements, observed that in injury cases, the compensation would include not only the actual expenses incurred, but the compensation has to be assessed keeping in view the struggle which the injured has to face throughout his life due to the permanent disability and the amount likely to be incurred for future medical treatment, loss of amenities of life, pain and suffering to undergo for the whole life etc. It is apt to reproduce paragraphs 11 and 18 of the said decision hereunder:

> *"11. With regard to the pain, suffering and trauma which have been caused to the appellant due to his crushed hand, it is contended that the compensation awarded by the Tribunal was meagre and insufficient. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the courts to make a precise assessment of the pain and trauma suffered by a person whose arm got crushed and has suffered permanent disability due to the accident that occurred. The appellant will have to struggle and face different challenges as being handicapped permanently. Therefore, in all such cases, the Tribunals and the courts should make a broad estimate for the purpose of determining the amount of just and reasonable compensation under pecuniary loss. Admittedly, at the time of accident, the appellant was a young man of 33 years. For the rest of his life, the appellant will suffer from the trauma of not being able to do his normal work of his job as a driver. Therefore, it is submitted that to meet the ends of justice it would be just and proper to award him a sum of Rs.1,50,000/- towards pain, suffering and trauma caused to him and a further amount of Rs.1,50,000/- for the loss of amenities and enjoyment of life.*
>
> ....
>
> *18. Further, we refer to the case of Rekha Jain & Anr. v. National Insurance Co. Ltd., 2013 8 SCC 389 wherein this Court examined catena of cases and principles to be borne in mind while granting compensation under the heads of (i) pain, suffering and (ii) loss of amenities and so on. Therefore, as per the principles laid down in the case of Rekha Jain & Anr. and considering the suffering undergone by the appellant herein, and it will persist in future also and therefore, we are of the view to grant Rs.1,50,000/- towards the pain, suffering and trauma which will be undergone by the appellant throughout his life. Further, as he is not in a position to move freely, we additionally award Rs.1,50,000/- towards loss of amenities & enjoyment of life and happiness."*

9. The claim of the claimant-injured for enhancement has to be tested in view of the principles laid down by the Apex Court in the decisions supra.

10. The Tribunal, after discussing the pleadings and the evidence, has awarded a sum of ₹ 30,240/- under the head 'loss of future income', ₹ 10,000/- under the head 'expenses on medical treatment', ₹ 9,000/- under the head 'loss of earning for three months', ₹ 9,000/- under the head 'attendant charges', which amount, by no stretch of imagination, can be said to be just and appropriate.

11. The perusal of the disability certificate, Ext. PW-5/A, does disclose that the same was issued on 5th April, 2003, in terms of which the claimant-injured was suffering from 6% permanent disability, which has affected his earning capacity. He was attended upon by the attendant during the period he was in hospital, has undergone and has to undergo pain and sufferings.

12. The Tribunal, while taking the income of the claimant-injured to be ₹ 3,000/- per month, has awarded ₹ 9,000/- under the head 'loss of income for the period he remained admitted', is maintained.

13. The claimant-injured has placed on record the documents, i.e. Marks 1 to 26, which do disclose as to how much amount he has spent on his treatment. He remained on bed rest for more than three months and must have been attended upon by an attendant during the said period, thus, was entitled to compensation under the head 'attendant charges, which he has paid not less than ₹ 3,000/- plus other expenses, which can roughly be assessed at ₹ 5,000/- per month, i.e. ₹ 15,000/- for the period of three months.

14. The disability has also affected the future income of the claimant-injured to the extent of 6%. Thus, by guess work, it can be said that he has suffered loss of income to the tune of ₹ 500/- per month.

15. The Tribunal has fallen in an error in applying the multiplier of '14', '13' was to be applied while keeping in view the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which has been upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120,** read with the Second Schedule appended with the Motor Vehicles Act, 1988 (for short "MV Act").

16. Thus, the claimant is entitled to ₹ 500/- x 12 x 13 = ₹ 78,000/- under the head 'loss of future income'.

17. He has also undergone pain and sufferings during the said period and has to suffer throughout his life. Thus, at least, ₹ 50,000/- was to be awarded under the head 'pain and sufferings'.

18. The claimant-injured is also deprived of all comforts and amenities because of the injury sustained by him, thus, is entitled to ₹ 50,000/- under the head 'loss of amenities of life'.

19. The Tribunal has also fallen in an error in not granting any compensation under the head 'future medical expenses'. Thus, ₹ 10,000/- is awarded under this head.

20. Viewed thus, claimant-injured is held entitled to compensation to the tune of ₹ 9,000/- + ₹ 15,000/- + ₹ 78,000/- + ₹ 50,000/- + ₹ 50,000/- + ₹ 10,000/- = ₹ 2,12,000/- with interest @ 7.5% per annum from the date of the claim petition till its realization.

21. In view of the above, the amount of compensation is enhanced, impugned award is modified, as indicated hereinabove and the appeal is allowed.

22. The insurer is directed to deposit the enhanced awarded amount before the Registry within eight weeks. On deposition, the same be released in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in his bank account.

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

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, JUDGE

Mazid Deen ... Petitioner

Versus

State of Himachal Pradesh and others ...Respondents

CrMMO No. 196/2016
Reserved on: August 29, 2016
Decided on: September 2, 2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Sections 452, 307 and 34 of I.P.C- it was pleaded that matter has been settled between the parties- according to informant, FIR was got registered due to some misunderstanding but the matter has now been settled amicably- held, that petitioner is involved in heinous crime of putting respondent No. 3 on fire- FIR cannot be quashed, merely on the ground that parties have settled the matter- offence punishable under Section 307 of I.P.C. falls in the category of heinous and serious offences and is to be treated as crime against the society- possibility of putting pressure on respondent No. 3 to compromise the matter cannot be ruled out- petition dismissed. (Para-4 to 6)

Cases referred:
Gian Singh v. State of Punjab (2012) 10 SCC 303
Narinder Singh v. State Punjab (2014) 6 SCC 466

For the petitioner : Mr. Suresh Kumar Thakur, Advocate.
For the respondents : Mr. Neeraj K. Sharma, Deputy Advocate General, for respondent No. 1.
None for respondents No.2 and 3.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

Present petition has been filed under Section 482 CrPC seeking quashing of FIR bearing No. 427 of 2012 dated 21.12.2012 registered at Police Station Nurpur, District Kangra, Himachal Pradesh under Sections 452, 307 and 34 IPC.

2. "Key facts" necessary for adjudication of the present petition are that an FIR was registered by respondent No. 2 against the petitioner at Police Station Nurpur. According to the averments made in the FIR, petitioner used to torture the victim (respondent No.3) Maskeena Bibi. On 20.12.2012, petitioner poured kerosene oil on the victim and set her on fire. She was shifted to Civil Hospital Indora. Thereafter, she was shifted to Pathankot for treatment. Petitioner was arrested. According to the averments made in the petition, parties have amicably settled the matter on 6.6.2013. Affidavit of respondent No. 3 is also placed on record as annexure P-2. According to her, FIR was got registered due to some misunderstanding but the matter has now been settled amicably.

3. Shri Suresh Kumar Thakur, Advocate has also referred to judgment dated 17.9.2013 rendered in CrMP(M) No. 11370/2013, whereby the petitioner was enlarged on bail. However, fact of the matter is that the petitioner is involved in a heinous crime of putting respondent No. 3 on fire on 20.12.2012. He has been booked under Sections 452, 307 and 325 IPC. FIR can not be quashed merely on the ground that parties have settled the matter vide

annexure P-2. He has poured kerosene oil on the victim. Victim has received severe burn injuries. She was initially shifted to Indora and then to Pathankot.

4. Their Lordships of the Hon'ble Supreme Court in **Gian Singh v. State of Punjab** reported in (2012) 10 SCC 303, have held that power to quash criminal proceedings may be exercised where the parties have settled their dispute. It depends on facts and circumstances of each case. Before exercise of inherent quashment power under Section 482 CrPC, High Court must have due regard to nature and gravity of the crime and its societal impact. Their lordships have further held that heinous and serious offences of mental depravity, murder, rape, dacoity, etc. or under special statutes like Prevention of Corruption Act, 1988 or offences committed by public servants while working in their capacity as public servants, cannot be quashed even though victim or victim's family and offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Their lordships have further held that inherent power under Section 482 CrPC is of huge plentitude with no statutory limitation but it has to be exercised in accordance 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. Their lordships have held as under:

> "58. Where High Court quashes a criminal proceeding having regard to the fact that dispute between the offender and victim has been settled although offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrong doing that seriously endangers and threatens well-being of society and it is not safe to leave the crime- doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without permission of the Court. In respect of serious offences like murder, rape, dacoity, etc; or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like Prevention of Corruption Actor the offences committed by public servants while working in that capacity, the settlement between offender and victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to victim and the offender and victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or F.I.R if it is satisfied that on the face of such settlement, there is hardly any likelihood of offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard and fast category can be prescribed.
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> 61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute

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

5. Their Lordships of the Hon'ble Supreme Court in **Narinder Singh v. State Punjab** reported in (2014) 6 SCC 466, have held that offences alleged under S. 307 IPC fall in the category of heinous and serious offences and generally to be treated as crime against society. Their lordships have laid down following guidelines for the High Courts to take a view as to under what circumstances they should accept the settlement between the parties and quash the proceedings and under what circumstances, it should refrain from doing so. Their lordships have held as under:

"13. The question is as to whether offence under Section 307 IPC falls within the aforesaid parameters. First limb of this question is to reflect on the nature of the offence. The charge against the accused in such cases is that he had attempted to take the life of another person (victim). On this touchstone, should we treat it a crime of serious nature so as to fall in the category of heinous crime, is the poser. Finding an answer to this question becomes imperative as the philosophy and jurisprudence of sentencing is based thereupon. If it is heinous crime of serious nature then it has to be treated as a crime against the society and not against the individual alone. Then it becomes the solemn duty of the State to punish the crime doer. Even if there is a settlement/compromise between the perpetrator of crime and the victim, that is of no consequence.

14. Law prohibits certain acts and/or conduct and treats them as offences. Any person committing those acts is subject to penal consequences which may be of various kind. Mostly, punishment provided for committing offences is either imprisonment or monetary fine or both. Imprisonment can be rigorous or simple in nature. Why those persons who commit offences are subjected to such penal consequences? There are many philosophies behind such sentencing justifying these penal consequences. The philosophical/jurisprudential justification can be

retribution, incapacitation, specific deterrence, general deterrence, rehabilitation, or restoration. Any of the above or a combination thereof can be the goal of sentencing.

15. Whereas in various countries, sentencing guidelines are provided, statutorily or otherwise, which may guide Judges for awarding specific sentence, in India we do not have any such sentencing policy till date. The prevalence of such guidelines may not only aim at achieving consistencies in awarding sentences in different cases, such guidelines normally prescribe the sentencing policy as well namely whether the purpose of awarding punishment in a particular case is more of a deterrence or retribution or rehabilitation etc. In the absence of such guidelines in India, Courts go by their own perception about the philosophy behind the prescription of certain specified penal consequences for particular nature of crime. For some deterrence and/or vengeance becomes more important whereas another Judge may be more influenced by rehabilitation or restoration as the goal of sentencing. Sometimes, it would be a combination of both which would weigh in the mind of the Court in awarding a particular sentence. However, that may be question of quantum.

16. What follows from the discussion behind the purpose of sentencing is that if a particular crime is to be treated as crime against the society and/or heinous crime, then the deterrence theory as a rationale for punishing the offender becomes more relevant, to be applied in such cases. Therefore, in respect of such offences which are treated against the society, it becomes the duty of the State to punish the offender. Thus, even when there is a settlement between the offender and the victim, their will would not prevail as in such cases the matter is in public domain. Society demands that the individual offender should be punished in order to deter other effectively as it amounts to greatest good of the greatest number of persons in a society. It is in this context that we have to understand the scheme/philosophy behind Section 307 of the Code.

17. We would like to expand this principle in some more detail. We find, in practice and in reality, after recording the conviction and while awarding the sentence/punishment the Court is generally governed by any or all or combination of the aforesaid factors. Sometimes, it is the deterrence theory which prevails in the minds of the Court, particularly in those cases where the crimes committed are heinous in nature or depicts depravity, or lack morality. At times it is to satisfy the element of "emotion" in law and retribution/vengeance becomes the guiding factor. In any case, it cannot be denied that the purpose of punishment by law is deterrence, constrained by considerations of justice. What, then, is the role of mercy, forgiveness and compassion in law? These are by no means comfortable questions and even the answers may not be comforting. There may be certain cases which are too obvious namely cases involving heinous crime with element of criminality against the society and not parties inter-se. In such cases, the deterrence as purpose of punishment becomes paramount and even if the victim or his relatives have shown the virtue and gentility, agreeing to forgive the culprit, compassion of that private party would not move the court in accepting the same as larger and more important public policy of showing the iron hand of law to the wrongdoers, to reduce the commission of such offences, is more important. Cases of murder, rape, or other sexual offences etc. would clearly fall in this category. After all, justice requires long term vision. On the other hand, there may be, offences falling in the category where "correctional" objective of criminal law would have to be given more weightage in contrast with "deterrence" philosophy. Punishment, whatever else may be, must be fair and conducive to good rather than further evil. If in a particular case the Court is of the opinion that the settlement between the parties would lead to more good;

better relations between them; would prevent further occurrence of such encounters between the parties, it may hold settlement to be on a better pedestal. It is a delicate balance between the two inflicting interests which is to be achieved by the Court after examining all these parameters and then deciding as to which course of action it should take in a particular case.

18. We may comment, at this stage, that in so far as the judgment in the case of Bhandari is concerned, undoubtedly this Court observed that since offence under Section 307 is not compoundable in terms of Section 320(9) of the Cr.P.C., compounding of the offence was out of question. However, apart from this observation, this aspect is not discussed in detail. Moreover, on reading para 12 of the said judgment, it is clear that one finds that counsel for the appellant in that case had not contested the conviction of the appellant for the offence under Section 307 IPC, but had mainly pleaded for reduction of sentence by projecting mitigating circumstances.

19. However, we have some other cases decided by this Court commenting upon the nature of offence under Section 307 of IPC. In Dimpey Gujral case , FIR was lodged under sections 147,148,149,323,307,552 and 506 of the IPC. The matter was investigated and final report was presented to the Court under Section 173 of the Cr.P.C. The trial court had even framed the charges. At that stage, settlement was arrived at between parties. The court accepted the settlement and quashed the proceedings, relying upon the earlier judgment of this Court in Gian Singh vs. State of Punjab & Anr., 2012 AIR(SCW) 5333 wherein the court had observed that inherent powers under section 482 of the Code are of wide plentitude with no statutory limitation and the guiding factors are: (1) to secure the needs of justice, or (2) to prevent abuse of process of the court. While doing so, commenting upon the offences stated in the FIR, the court observed:

> "Since the offences involved in this case are of a personal nature and are not offences against the society, we had enquired with learned counsel appearing for the parties whether there is any possibility of a settlement. We are happy to note that due to efforts made by learned counsel, parties have seen reason and have entered into a compromise."

This Court, thus, treated such offences including one under section 307, IPC were of a personal nature and not offences against the society.

20. On the other hand, we have few judgments wherein this Court refused to quash the proceedings in FIR registered under section 307 IPC etc. on the ground that offence under section 307 was of serious nature and would fall in the category of heinous crime. In the case of Shiji vs. Radhika & Anr., 2011 10 SCC 705 the Court quashed the proceedings relating to an offence under section 354 IPC with the following observations:

> "We have heard learned counsel for the parties and perused the impugned order. Section 320 of the Cr.P.C. enlists offences that are compoundable with the permission of the Court before whom the prosecution is pending and those that can be compounded even without such permission. An offence punishable under Section 354 of the IPC is in terms of Section 320(2) of the Code compoundable at the instance of the woman against whom the offence is committed. To that extent, therefore, there is no difficulty in either quashing the proceedings or compounding the offence under Section 354, of which the appellants are accused, having regard to the fact that the alleged victim of the offence has settled the matter with the alleged assailants. An offence punishable under Section 394 IPC is not, however, compoundable with or without

the permission of the Court concerned. The question is whether the High Court could and ought to have exercised its power under section 482 the said provision in the light of the compromise that the parties have arrived at."

21. In a recent judgment in the case of State of Rajasthan vs. Shambhu Kewat & Ors., 2013 14 SCALE 235, this very Bench of the Court was faced with the situation where the High Court had accepted the settlement between the parties in an offence under Section 307 read with Section 34 IPC and set the accused at large by acquitting them. The settlement was arrived at during the pendency of appeal before the High Court against the order of conviction and sentence of the Sessions Judge holding the accused persons guilty of the offence under Section307/34 IPC. Some earlier cases of compounding of offence under Section 307 IPC were taken note of, noticing under certain circumstances, the Court had approved the compounding whereas in certain other cases such a course of action was not accepted. In that case, this Court took the view that High Court was not justified in accepting the compromise and setting aside the conviction. While doing so, following discussion ensued:

"12. We find, in this case, such a situation does not arise. In the instant case, the incident had occurred on 30.10.2008. The trial court held that the accused persons, with common intention, went to the shop of the injured Abdul Rashid on that day armed with iron rod and a strip of iron and, in furtherance of their common intention, had caused serious injuries on the body of Abdul Rashid, of which injury number 4 was on his head, which was of a serious nature.

13. Dr.Rakesh Sharma, PW5, had stated that out of the injuries caused to Abdul Rashid, injury No.4 was an injury on the head and that injury was "grievous and fatal for life". PW8, Dr. Uday Bhomik, also opined that a grievous injury was caused on the head of Abdul Rashid. DR. Uday conducted the operation on injuries of Abdul Rashid as a Neuro Surgeon and fully supported the opinion expressed by PW5 Dr. Rakesh Sharma that injury No.4 was "grievous and fatal for life".

14. We notice that the gravity of the injuries was taken note of by the Sessions Court and it had awarded the sentence of 10 years rigorous imprisonment for the offence punishable under Section 307 IPC, but not by the High Court. The High Court has completely overlooked the various principles laid down by this Court in Gian Singh , and has committed a mistake in taking the view that, the injuries were caused on the body of Abdul Rashid in a fight occurred at the spur and the heat of the moment. It has been categorically held by this Court in Gian Singh that the Court, while exercising the power under Section 482, must have "due regard to the nature and gravity of the crime" and "the social impact". Both these aspects were completely overlooked by the High Court. The High Court in a cursory manner, without application of mind, blindly accepted the statement of the parties that they had settled their disputes and differences and took the view that it was a crime against "an individual", rather than against "the society at large".

15. We are not prepared to say that the crime alleged to have been committed by the accused persons was a crime against an individual, on the other hand it was a crime against the society at large. Criminal law is designed as a mechanism for achieving social control and its purpose is the regulation of conduct and activities within the society. Why Section 307 IPC is held to be non-compoundable, because the Code has identified which conduct should be brought within the ambit of non-

compoundable offences. Such provisions are not meant, just to protect the individual, but the society as a whole. High Court was not right in thinking that it was only an injury to the person and since the accused persons had received the monetary compensation and settled the matter, the crime as against them was wiped off. Criminal justice system has a larger objective to achieve, that is safety and protection of the people at large and it would be a lesson not only to the offender, but to the individuals at large so that such crimes would not be committed by any one and money would not be a substitute for the crime committed against the society. Taking a lenient view on a serious offence like the present, will leave a wrong impression about the criminal justice system and will encourage further criminal acts, which will endanger the peaceful co-existence and welfare of the society at large."

22. Thus, we find that in certain circumstances, this Court has approved the quashing of proceedings under section 307,IPC whereas in some other cases, it is held that as the offence is of serious nature such proceedings cannot be quashed. Though in each of the aforesaid cases the view taken by this Court may be justified on its own facts, at the same time this Court owes an explanation as to why two different approaches are adopted in various cases. The law declared by this Court in the form of judgments becomes binding precedent for the High Courts and the subordinate courts, to follow under Article 141 of the Constitution of India. Stare Decisis is the fundamental principle of judicial decision making which requires 'certainty' too in law so that in a given set of facts the course of action which law shall take is discernable and predictable. Unless that is achieved, the very doctrine of stare decisis will lose its significance. The related objective of the doctrine of stare decisis is to put a curb on the personal preferences and priors of individual Judges. In a way, it achieves equality of treatment as well, inasmuch as two different persons faced with similar circumstances would be given identical treatment at the hands of law. It has, therefore, support from the human sense of justice as well. The force of precedent in the law is heightened, in the words of Karl Llewellyn, by "that curious, almost universal sense of justice which urges that all men are to be treated alike in like circumstances".

23. As there is a close relation between the equality and justice, it should be clearly discernible as to how the two prosecutions under Section 307 IPC are different in nature and therefore are given different treatment. With this ideal objective in mind, we are proceeding to discuss the subject at length. It is for this reason we deem it appropriate to lay down some distinct, definite and clear guidelines which can be kept in mind by the High Courts to take a view as to under what circumstances it should accept the settlement between the parties and quash the proceedings and under what circumstances it should refrain from doing so. We make it clear that though there would be a general discussion in this behalf as well, the matter is examined in the context of offences under Section 307 IPC.

24. The two rival parties have amicably settled the disputes between themselves and buried the hatchet. Not only this, they say that since they are neighbours, they want to live like good neighbours and that was the reason for restoring friendly ties. In such a scenario, should the court give its imprimatur to such a settlement. The answer depends on various incidental aspects which need serious discourse.

The Legislators has categorically recognized that those offences which are covered by the provisions of section 320 of the Code are concededly those not only do not fall within the category of heinous crime but also which are personal between the

parties. Therefore, this provision recognizes whereas there is a compromise between the parties the Court is to act at the said compromise and quash the proceedings. However, even in respect of such offences not covered within the four corners of Section 320 of the Code, High Court is given power under Section 482 of the Code to accept the compromise between the parties and quash the proceedings. The guiding factor is as to whether the ends of justice would justify such exercise of power, both the ultimate consequences may be acquittal or dismissal of indictment. This is so recognized in various judgments taken note of above.

25. In the case of Dimpey Gujral , observations of this Court to the effect that offences involved in that case were not offences against the society. It included charge under Section 307 IPC as well. However, apart from stating so, there is no detained discussion on this aspect. Moreover, it is the other factors which prevailed with the Court to accept the settlement and compound he offence, as noted above while discussing this case. On the other hand, in Shambhu Kewat , after referring to some other earlier judgments, this Court opined that commission of offence under Section 307 IPC would be crime against the society at large, and not a crime against an individual only. We find that in most of the cases, this view is taken. Even on first principle, we find that an attempt to take the life of another person has to be treated as a heinous crime and against the society.

26. Having said so, we would hasten to add that though it is a serious offence as the accused person(s) attempted to take the life of another person/victim, at the same time the court cannot be oblivious to hard realities that many times whenever there is a quarrel between the parties leading to physical commotion and sustaining of injury by either or both the parties, there is a tendency to give it a slant of an offence under Section 307 IPC as well. Therefore, only because FIR/Charge-sheet incorporates the provision of Section 307 IPC would not, by itself, be a ground to reject the petition under section 482 of the Code and refuse to accept the settlement between the parties. We are, therefore, of the opinion that while taking a call as to whether compromise in such cases should be effected or not, the High Court should go by the nature of injury sustained, the portion of the bodies where the injuries were inflicted (namely whether injuries are caused at the vital/delicate parts of the body) and the nature of weapons used etc. On that basis, if it is found that there is a strong possibility of proving the charge under Section 307 IPC, once the evidence to that effect is led and injuries proved, the Court should not accept settlement between the parties. On the other hand, on the basis of prima facie assessment of the aforesaid circumstances, if the High Court forms an opinion that provisions of Section 307 IPC were unnecessary included in the charge sheet, the Court can accept the plea of compounding of the offence based on settlement between the parties.

27. At this juncture, we would like also to add that the timing of settlement would also play a crucial role. If the settlement is arrived at immediately after the alleged commission of offence when the matter is still under investigation, the High Court may be somewhat liberal in accepting the settlement and quashing the proceedings/investigation. Of course, it would be after looking into the attendant circumstances as narrated in the previous para. Likewise, when challan is submitted but the charge has not been framed, the High Court may exercise its discretionary jurisdiction. However, at this stage, as mentioned above, since the report of the I.O. under Section 173,Cr.P.C. is also placed before the Court it would become the bounding duty of the Court to go into the said report and the evidence collected, particularly the medical evidence relating to

injury etc. sustained by the victim. This aspect, however, would be examined along with another important consideration, namely, in view of settlement between the parties, whether it would be unfair or contrary to interest of justice to continue with the criminal proceedings and whether possibility of conviction is remote and bleak. If the Court finds the answer to this question in affirmative, then also such a case would be a fit case for the High Court to give its stamp of approval to the compromise arrived at between the parties, inasmuch as in such cases no useful purpose would be served in carrying out the criminal proceedings which in all likelihood would end in acquittal, in any case.

28. We have found that in certain cases, the High Courts have accepted the compromise between the parties when the matter in appeal was pending before the High Court against the conviction recorded by the trial court. Obviously, such cases are those where the accused persons have been found guilty by the trial court, which means the serious charge of Section 307 IPC has been proved beyond reasonable doubt at the level of the trial court. There would not be any question of accepting compromise and acquitting the accused persons simply because the private parties have buried the hatchet.

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 the High Court is to form an opinion on either of the aforesaid two objectives.

29.3 Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4 On the other, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

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

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

29.7 While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime.

6. In the present case, the offence committed by the petitioner is a heinous and serious offence. He has poured kerosene oil on respondent No. 3. She has received burn injuries. Possibility of petitioner putting pressure on respondent No. 3 to compromise the matter can not be ruled out, in view of the observations made herein above.

7. Accordingly, there is no merit in the petition and the same is dismissed. Pending applications, if any, are also disposed of.

8. Before parting with the judgment, the police is directed to put up *Challan* before the competent court of law and trial Court is directed to conclude the trial itself within six months from the date of filing of the *Challan*.

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

FAO(MVA) NO.11 of 2011 &
CWP No.493 of 2011
Decided on: 02.09.2016

FAO No.11 of 2011

Mohan Lal and another .....Appellants

Versus

Urmila Devi and others ..... Respondents

CWP No.493 of 2011

National Insurance Co. Ltd. .....Petitioner

Versus

Urmila and others ..... Respondents

Motor Vehicles Act, 1988- Section 149- Tribunal saddled the insurer with liability with a right of recovery- vehicle was duly insured- deceased was third party and insurer was bound to indemnify the third party claim- - insurer has right to recover the amount from the owner in case of willful breach of the terms and conditions of the policy - appeal dismissed. (Para-5)

Case referred:

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

FAO No.11 of 2011

For the appellant: Mr.Pawan Gautam, Advocate.

For the respondents: Mr.Dheeraj Vashista, Advocate, for respondents No.1 and 2.
Mr.Jagdish Thakur, Advocate, for respondent No.3.
Ms.Sunita Sharma, Advocate, for respondent No.4.

CWP No.493 of 2011

For the petitioner: Ms.Sunita Sharma, Advocate.

For the respondents: Mr.Dheeraj Vashista, Advocate, for respondents No.1 and 2.
Mr.Jagdish Thakur, Advocate, for respondent No.3.
Mr.Pawan Gautam, Advocate, for respondents No.4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

Instant appeal as well as writ petition are directed against the award, dated 14th September, 2010, passed by the Motor Accident Claims Tribunal, Una, H.P., (for short, the Tribunal), whereby compensation to the tune of Rs.2,50,000/- with simple interest at the rate of 9%, from the date of filing of the claim petition till payment, and costs to the tune of Rs.3,000/-, came to be awarded in favour of the claimants and the insurer was saddled with the liability, with right of recovery, (for short the "impugned award").

2. Claimants have not questioned the impugned award on any count, thus, the same has attained finality so far as it relates to them.

3. Feeling aggrieved, the appellants i.e. respondents No.1 and 4 before the Tribunal, have questioned the impugned award by way of FAO No.11 of 2011, while the insurer has questioned the same by the medium of CWP No.493 of 2011.

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

5. The Tribunal has saddled the insurer with the liability, with right of recovery. I wonder why the insurer has filed the writ petition challenging the impugned award. Admittedly,

the offending vehicle was duly insured. The deceased was a third party and the insurer is bound to indemnify the third party claims. In case the insured commits willful breach of the terms and conditions of the insurance policy, the insurer has a right to recover the same from the owner.

6. The Apex Court in **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531** has laid down same principle.

7. Viewed thus, the writ petition filed by the petitioner deserves to be dismissed and the same is dismissed accordingly.

8. The appeal i.e. FAO No.11 of 2011 also merits to be dismissed for the reasons mentioned hereinbelow.

9. It has come on record that Raj Kumar, minor son of appellant Mohan Lal, was driving the offending scooter at the time of accident. The Tribunal in paragraph 10 has made discussion in detail and held that appellant No.2 Raj Kumar had driven the offending scooter rashly and negligently and had caused the accident, in which Parmod Kumar suffered injuries and succumbed to the same. The Tribunal has also categorically recorded that the police recorded FIR against appellant No.2 Raj Kumar.

10. Having said so, there is no merit in appeal and the same is dismissed.

11. The insurer is directed to deposit the entire amount, alongwith interest as awarded by the Tribunal, within a period of six weeks from today, if not already deposited, and the Registry is directed to release the same in favour of the claimants forthwith in terms of the impugned award, through the bank accounts of the claimants. The insurer is at liberty to file application for recovery before the Tribunal concerned.

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

National Insurance Co. .....Appellant.

Versus

Sh. Ajay Kumar and others .....Respondents

FAO (MVA) No. 311 of 2011.
Date of decision: 2nd September, 2016.

Motor Vehicles Act, 1988- Section 166- Deceased was earning. Rs. 44,132/- per month- total income of the deceased comes to Rs. 5,29,584/- per annum- Rs. 25,999/- was deducted as tax- net income of the deceased comes to Rs. 5,03,585/- per annum- claimants specifically pleaded that age of the deceased was 53 years at the time of accident- multiplier of 11 was applied, whereas, multiplier of 9 was applicable- claimants are 5 in number- 1/4th amount was to be deducted towards personal expenses- after deducting 1/4th amount, claimants have lost source of dependency of Rs. 3,77,689/- or say Rs. 3,78,000/-- claimants are entitled to Rs. 3,78,000 x 9= Rs. 34,02,000/-, in addition to this, Rs. 10,000/- each awarded under the heads ' loss of love and affection' , 'loss of estate', 'funeral expenses' and 'loss of consortium'- total compensation of Rs. 34,02,000/- + Rs. 40,000= Rs. 34,42,000/- awarded along with interest @ 7.5% per annum.

(Para-6 to 12)

Cases referred:

Sarla Verma and others versus Delhi Transport Corporation and another AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120.

For the appellant: Ms. Sunita Sharma, Advocate.
For the respondents: Nemo for respondents No. 1 to 4.

Respondent No. 5 stands deleted.
Mr. Naresh Verma, Advocate, for respondent No.6.
Mr. Dinesh Thakur, Advocate, for respondent No.7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, Oral.

This appeal is directed against the judgment and award dated 20.5.2011, made by the Motor Accident Claims Tribunal, Fast Track Court, Chamba, H.P. in MAC Petition No.12/2010, titled *Shri Ajay Kumar and others versus National Insurance Co. Ltd and others*, for short "the Tribunal", whereby the compensation to the tune of Rs.37,12,964/- alongwith interest @ 7.5% per annum, came to be awarded in favour of the claimants and insurer was saddled with the liability, hereinafter referred to as "the impugned award", for short.

2. Claimants, driver and owner have not questioned the impugned award on any ground. Thus, the same has attained the finality so far as it relates to them.

3. The insurer/appellant has questioned the impugned award on the ground of adequacy of the compensation, on the grounds taken in the memo of appeal.

4. The learned counsel for the appellant argued that the insurer has sought permission in terms of Section 170 of the Motor Vehicles Act, for short "the Act" and the appellant is within its right to question the impugned award

5. Thus, the only question to be determined in this appeal is whether the amount awarded award is adequate or otherwise.

6. The claimants being the victims of a vehicular accident, had filed claim petition before the Tribunal for the grant of compensation on account death of Maan Singh in a motor vehicle, caused by Gagan Singh while driving vehicle No. HP-44-1531 (Pick-up) in a rash and negligent manner on 13.1.2010 at about 9.50 A.M. near bus stand Bhanjararu. The deceased was working in National Hydro Power Corporation (NHPC), at Tissa Colony and drawing salary to the tune of Rs.44,132/- per month. The total income of the deceased comes to Rs.5,29,584/- per annum. The tax deducted on the said income comes to Rs.25,999/- Thus, the net income of the deceased comes to Rs.5,03,585/- per annum.

7. The claimants have specifically pleaded that the deceased was 53 years of age at the time of accident but the Tribunal has fallen into an error in recording the age of the deceased as 52 years. The Tribunal has also fallen into an error in applying the multiplier of "11" where as the multiplier applicable is "9", in view of the *2nd Schedule of the Act read with* ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***.

8. The Tribunal has fallen into an error in deducting 1/3rd, towards personal expenses of the deceased. The claimants are five in number and 1/4th was to be deducted in view of the para 30 of the judgment delivered in ***Sarla Verma,*** supra. It is apt to reproduce para 30 of ***Sarla Verma's*** judgment herein:

> *"30.Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra, the general practice is to apply standardized deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependant family members is 4 to 6, and one-fifth (1/5th) where the number of dependant family members exceed six."*

9. Thus, after deducting 1/4th, the claimants lost source of dependency to the tune of Rs.3,77,689/-, rounded off Rs.3,78,000/- per annum.

10. Accordingly, the claimants are entitled to compensation to the tune of Rs.3,78,000/-x9= Rs.34,02,000/-.

11. The claimants are also entitled to compensation under the four heads as under:

(i)	*loss of love and affection:*		*Rs.10,000/-*
(ii)	*Loss of estate*	*:*	*Rs.10,000/-*
(iii)	*Funeral expenses*	*:*	*Rs.10,000/-*
(iv)	*Loss of consortium*	*:*	*Rs.10,000/-*
			Total Rs.40,000/-

12. Having said so, the total compensation awarded in favour of the claimants comes to Rs.34,02,000/-+Rs.40,000/- =Rs.34,42,000/-, alongwith interest @ 7.5% per annum from the date of claim petition till its realization.

13. Learned counsel for respondent No. 7 stated that respondent No. 5 has died during the pendency of the appeal. Thus, the amount of compensation is payable in favour of four claimants in equal shares.

14. Viewed thus, the impugned award is modified, as indicated hereinabove.

15. The Registry is directed to release the awarded amount in favour of the claimants, through payees' cheque account or by depositing the same their bank accounts and excess amount, if any be released to the appellant.

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

17. Registry is directed to send intimation of this judgment to the claimants through the District Judge, Chamba, H.P.

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

National Insurance Company Ltd. ...Appellant.

Versus

Smt. Reena Sharma and others ...Respondents.

FAO No. 240 of 2010
Decided on: 02.09.2016

Motor Vehicles Act, 1988- Section 173- Tribunal questioned the award only on the ground of adequacy of compensation - insurer contested the claim petition on the grounds available to him under Section 149 of the Act- if he has to contest the petition on other grounds, he has to seek permission under Section 170 of the Act - such permission was not sought- therefore, appeal is not maintainable at the instance of the insurer- appeal dismissed. (Para-4 to 13)

Cases referred:

United India Insurance co. Ltd. Versus Shila Datta & Ors., 2011 AIR SCW 6541

Josphine James versus United India Insurance Co. Ltd. & Anr., 2013 AIR SCW 6633

For the appellant:	Mr. Bhupender Pathania, Advocate, vice Mr. I.N. Mehta, Advocate.
For the respondents:	Mr. Anup Rattan, Advocate, for respondent No. 1. Mr. Abhay Gupta, Advocate, for respondent No. 2. Nemo for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is judgment and award, dated 17th March, 2010, made by the Motor Accident Claims Tribunal (II), Kangra at Dharamshala, H.P. (for short "the Tribunal") in MACP No. 60/2005, titled as Reena Sharma versus The CTU Chandigarh and others, whereby compensation to the tune of ₹ 2,91,500/- with interest @ 7% per annum came to be awarded in favour of the claimant-injured and against the insurer (for short "the impugned award").

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

3. The insurer has questioned the impugned award only on the ground of adequacy of compensation.

4. The question is – whether the appeal is maintainable? The answer is in the negative for the following reasons:

5. In terms of the mandate of Sections 147 and 149 of the Motor Vehicles Act, 1988 (for short "MV Act") read with the terms and conditions contained in the insurance policy, the insurer has limited grounds available, but, it can contest the claim petition on other grounds provided permission in terms of Section 170 of the MV Act has been obtained.

6. It is apt to reproduce Section 170 of the MV Act herein:

> *"**170. Impleading insurer in certain cases.** - Where in the course of any inquiry, the claims Tribunal is satisfied that -*
>
> *(a) there is collusion between the person making the claim and the person against whom the claim is made, or*
>
> *(b) the person against whom the claim is made has failed to contest the claim,*
>
> *it may, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in sub-section (2) of section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made."*

7. The insurer can seek permission to contest the claim petition on all grounds available to it and in case permission has not been sought and granted, it is precluded from questioning the award on adequacy of compensation or any other ground, which is not otherwise available to it.

8. This question arose before the Apex Court in the case titled as **United India Insurance co. Ltd. Versus Shila Datta & Ors.,** reported in **2011 AIR SCW 6541,** and the matter was referred to the larger Bench.

9. The question again arose before the Apex Court in the case titled as **Josphine James versus United India Insurance Co. Ltd. & Anr.,** reported in **2013 AIR SCW 6633.** It is apt to reproduce paras 8, 17 and 18 of the judgment herein:

> *"8. Aggrieved by the impugned judgment and award passed by the High Court in MAC Appeal no. 433/2005 and the review petition, the present appeal is filed by the appellant urging certain grounds and assailing the impugned judgment in allowing the appeal of the Insurance Company without following the law laid down by this Court in Nicolletta Rohtagi's case and instead, placing reliance upon the Bhushan Sachdeva's case. Nicolletta Rohtagi's case was exhaustively discussed by a three judge bench in the case of United India Insurance Company Vs. Shila Datta, 2011 10*

SCC 509. Though the Court has expressed its reservations against the correctness of the legal position in Nicolletta Rohtagi decision on various aspects, the same has been referred to higher bench and has not been overruled as yet. Hence, the ratio of Nicolletta Rohtagi's case will be still applicable in the present case. The appellant claimed that interference by the High Court with the quantum of compensation awarded by the Tribunal in favour of appellant and considerably reducing the same by modifying the judgment of the Tribunal is vitiated in law. Therefore, the impugned judgments and awards are liable to be set aside.

9. to 16. .....

17. The said order was reviewed by the High Court at the instance of the appellant in view of the aforesaid decision on the question of maintainability of the appeal of the Insurance Company. The High Court, in the review petition, has further reduced the compensation to Rs. 4,20,000/- from Rs. 6,75,000/- which was earlier awarded by it. This approach is contrary to the facts and law laid down by this Court. The High Court, in reducing the quantum of compensation under the heading of loss of dependency of the appellant, was required to follow the decision rendered by three judge Bench of this Court in Nicolletta Rohtagi case (2002) 7 SCC 456 : AIR 2002 SC 3350 : 2002 AIR SCW 3899, and earlier decisions wherein this Court after interpreting Section 170 (b) of the M. V. Act, has rightly held that in the absence of permission obtained by the Insurance Company from the Tribunal to avail the defence of the insured, it is not permitted to contest the case on merits. The aforesaid legal principle is applicable to the fact situation in view of the three judge bench decision referred to though the correctness of the aforesaid decision is referred to larger bench. This important aspect of the matter has been overlooked by the High Court while passing the impugned judgment and the said approach is contrary to law laid down by this Court.

18. In view of the aforesaid reasons, the Insurance Company is not entitled to file appeal questioning the quantum of compensation awarded in favour of the appellant for the reasons stated supra. In the absence of the same, the Insurance Company had only limited defence to contest in the proceedings as provided under Section 149 (2) of the M.V. Act. Therefore, the impugned judgment passed by the High Court on 13.1.2012 reducing the compensation to 4,20,000/- under the heading of loss of dependency by deducting 50% from the monthly income of the deceased of Rs. 5,000/- and applying 14 multiplier, is factually and legally incorrect. The High Court has erroneously arrived at this amount by applying the principle of law laid down in Sarla Verma v. Delhi Transport Corporation, 2009 6 SCC 121 instead of applying the principle laid down in Baby Radhika Gupta's case regarding the multiplier applied to the fact situation and also contrary to the law applicable regarding the maintainability of appeal of the Insurance Company on the question of quantum of compensation in the absence of permission to be obtained by it from the Tribunal under Section 170 (b) of the M.V. Act. In view of the aforesaid reason, the High Court should not have allowed the appeal of the Insurance Company as it has got limited defence as provided under section 149(2) of the M.V. Act. Therefore, the impugned judgment and award is vitiated in law and hence, is liable to be set aside by allowing the appeal of the appellant."

10. Thus, the insurer can question the adequacy of compensation only if it has sought permission under Section 170 of the MV Act.

11. In the present case, it has to be seen whether the insurer has sought any such permission?

12. I have gone through the record, which does disclose that neither any such application was filed by the insurer nor such permission was granted. Mr. Bhupender Pathania,

learned proxy counsel appearing on behalf of the insurer, frankly conceded that no such permission was sought.

13. Having said so, the only ground of attack projected and urged is not available to the insurer. However, I have gone through the impugned award, it appears that the amount awarded is meagre. But, unfortunately, the claimant-injured has not questioned the adequacy of the compensation, thus, the same is upheld.

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

15. The Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in her bank account.

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

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

Oriental Insurance Company Limited ...Appellant.

Versus

Sh. Amar Singh and others ...Respondents.

FAO No. 282 of 2010
Decided on: 02.09.2016

Motor Vehicles Act, 1988- Section 166- Income of the deceased cannot be less than Rs. 4,000/- per month- deceased was bachelor – 50 % was to be deducted towards his personal expenses- claimant has lost source of dependency of Rs. 2,000/- per month- age of the deceased was 42 years- he was bachelor at the time of accident- multiplier of 16 was applied by the Tribunal, whereas, multiplier of 14 was to be applied- claimant is entitled to Rs. 2,000 x, 12 x 14= Rs. 3,36,000/- under the head 'loss of dependency'- Rs. 40,000/- awarded under the head 'funeral expenses' and Rs. 30,000/- awarded under the head 'loss of love and affection'- interest was awarded @ 12% per annum, which is improper and is reduced to 7.5% per annum. (Para-7 to 13)

Cases referred:

Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 Supreme Court Cases 121

Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281

Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892

Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 SCC 738

Savita versus Binder Singh & others, 2014 AIR SCW 2053

Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982

Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433

Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434

Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (IV) HP 1149

For the appellant: Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Ishan Thakur, Advocate.

For the respondents: Mr. Sanjay Jaswal, Advocate, for respondent No. 1.
Mr. Vijay Chaudhary, Advocate, for respondent No. 2.
Mr. Naveen K. Bhardwaj, Advocate, for respondent No. 3.
Nemo for respondents No. 4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is award, dated 3rd May, 2010, made by the Motor Accident Claims Tribunal, Chamba Division, Chamba (HP) (for short "the Tribunal") in MAC Petition No. 17 of 2009, titled as Amar Singh versus Sh. Virender Singh and others, whereby compensation to the tune of ₹ 4,54,000/- with interest @ 12% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimant and against the insurer (for short "the impugned award").

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

3. The insurer has questioned the impugned award only on the ground of adequacy of compensation.

4. Learned Senior Counsel appearing on behalf of the appellant-insurer was asked to show as to whether the appellant-insurer can question the impugned award on the ground of adequacy of compensation?

5. Learned Senior Counsel argued that the insurer has sought permission before the Tribunal under Section 170 of the Motor Vehicles Act, 1988 (for short "MV Act"), which was granted and the insurer has contested the claim petition on all the grounds. Learned counsel for the respondents also admitted the said factum. Perusal of the record does disclose that the insurer has sought permission and the same was granted.

6. In the given circumstances, the question is – whether the amount awarded is adequate? It appears that the Tribunal has fallen in an error in assessing the compensation. Thus, I deem it proper to assess the compensation herein by exercising the powers under Section 173 of the MV Act and Section 107 (2) of the Code of Civil Procedure (for short "CPC").

7. Admittedly, the deceased was 40 years of age and was bachelor at the time of the accident. Keeping in view the discussions made by the Tribunal in para 13 of the impugned award, it can be safely said and held that the deceased was earning not less than ₹ 4,000/- per month. As the deceased was a bachelor, 50% was to be deducted towards his personal expenses. Thus, the claimant has lost source of dependency to the tune of ₹ 2,000/- per month.

8. The Tribunal has fallen in an error in applying the multiplier of '16', multiplier of '14' was to be applied while keeping in view the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which has been upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120,** read with the Second Schedule appended with the MV Act.

9. Accordingly, it is held that the claimant is entitled to compensation to the tune of ₹ 2,000/- x 12 x 14 = ₹ 3,36,000/- under the head 'loss of income/dependency'.

10. The compensation awarded under other heads, i.e. ₹ 40,000/- under the head 'funeral expenses' and ₹ 30,000/- under the head 'loss of love and affection' has not been questioned, thus, is accordingly maintained.

11. The Tribunal has also committed a legal mistake while awarding interest @ 12% per annum, which was to be awarded as per the prevailing rates.

12. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as **United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,** reported in (**2002) 6 SCC 281; Santosh Devi versus National Insurance Company Ltd. and others,** reported in **2012 AIR SCW 2892**; **Amrit Bhanu Shali and others versus National**

Insurance Company Limited and others, reported in **(2012) 11 SCC 738; Smt. Savita versus Binder Singh & others**, reported in **2014 AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn.,** reported in **2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,** reported in **(2015) 4 SCC 433;** and **Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,** reported in **(2015) 4 SCC 434,** and discussed by this Court in a batch of FAOs, **FAO No. 256 of 2010, titled as Oriental Insurance Company versus Smt. Indiro and others,** being the lead case, decided on 19.06.2015.

13. Having said so, I deem it proper to reduce the rate of interest from 12% per annum to 7.5% per annum from the date of filing of the claim petition till its realization.

14. Having glance of the above discussions, the claimants are held entitled to compensation to the tune of ₹ 3,36,000/- + ₹ 40,000/- + ₹ 30,000/- = ₹ 4,06,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization.

14. In view of the above, the impugned award is modified, as indicated hereinabove and the appeal is disposed of.

15. The Registry is directed to release the awarded amount in favour of the claimant strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in his bank account.

16. Excess amount, if any, be released in favour of the appellant-insurer through payee's account cheque.

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

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

Oriental Insurance Company Limited ...Appellant.
Versus
Smt. Satya Devi and others ...Respondents.

FAO No. 249 of 2010
Decided on: 02.09.2016

Motor Vehicles Act, 1988- Section 166- Deceased was aged 34 years at the time of accident – Tribunal applied multiplier of '17', whereas, multiplier of 16 was to be applied- income of the deceased was Rs. 8,000/- per month- 1/3rd was rightly deducted towards personal expenses- loss of income comes to Rs. 4,000/- per annum- claimants are entitled to compensation of Rs. 64,000 x 16 = Rs. 10,24,000/- under the head 'loss of income'- interest was awarded @ 12% per annum which is reduced to 7.5% per annum. (Para-6 to 12)

Cases referred:

Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 SSC121
Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120
United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 SCC 738
Smt. Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433

Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (IV) HP 1149

For the appellant:	Mr. G.D. Sharma, Advocate.
For the respondents:	Mr. Vijay Chaudhary, Advocate, for respondents No. 1 to 5. Mr. Nimish Gupta, Advocate, for respondents No. 6 and 7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Challenge in this appeal is to judgment and award, dated 9th April, 2010, made by the Motor Accident Claims Tribunal, Chamba (HP) (for short "the Tribunal") in M.A.C. Petition No. 98/09, titled as Satya Devi and others versus Shri Chet Singh and others, whereby compensation to the tune of ₹ 11,88,000/- with interest @ 12% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants and against the insurer (for short "the impugned award").

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

3. The insurer has questioned the impugned award only on the ground of adequacy of compensation.

4. Learned counsel for the appellant-insurer was asked to show as to whether the appeal is maintainable. He stated at the Bar that though the permission has not been sought in terms of Section 170 of the Motor Vehicles Act, 1988 (for short "MV Act"), but, the amount awarded in terms of the impugned award, on the face of it, is excessive.

5. The argument appears to be forceful for the following reasons:

6. Admittedly, the deceased was 34 years of age at the time of the accident. The Tribunal has fallen in an error in applying the multiplier of '17', the multiplier of '16' was to be applied while keeping in view the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which has been upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120,** read with the Second Schedule appended with the MV Act.

7. The Tribunal, while assessing the income of the deceased at ₹ 8,000/- per month, has rightly deducted one third towards his personal expenses and held that the claimants have suffered loss of source of income/dependency to the tune of ₹ 64,000/- per annum.

8. Thus, it can be safely held that the claimants are entitled to compensation to the tune of ₹ 64,000 x 16 = ₹ 10,24,000/- under the head 'loss of income'.

9. The compensation awarded under other heads, i.e. 'loss of love and affection', loss of consortium' and 'expenditure on last rites' has not been questioned, thus, is accordingly maintained.

10. The Tribunal has also committed a legal mistake while awarding interest @ 12% per annum, which was to be awarded as per the prevailing rates.

11. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as **United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,** reported in (**2002) 6 SCC 281; Santosh Devi versus National Insurance Company Ltd. and others,** reported in **2012 AIR SCW 2892**; **Amrit Bhanu Shali and others versus National Insurance Company Limited and others,** reported in **(2012) 11 SCC 738; Smt. Savita versus**

Binder Singh & others, reported in **2014 AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn.,** reported in **2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,** reported in **(2015) 4 SCC 433;** and **Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,** reported in **(2015) 4 SCC 434,** and discussed by this Court in a batch of FAOs, **FAO No. 256 of 2010, titled as Oriental Insurance Company versus Smt. Indiro and others,** being the lead case, decided on 19.06.2015.

12. Having said so, I deem it proper to reduce the rate of interest from 12% per annum to 7.5% per annum from the date of filing of the claim petition till its realization.

13. Having glance of the above discussions, the claimants are held entitled to compensation to the tune of ₹ 10,24,000/- + ₹ 50,000/- + ₹ 40,000/- + ₹ 10,000/- = ₹ 11,24,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization.

14. In view of the above, the impugned award is modified, as indicated hereinabove and the appeal is disposed of.

15. The Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank accounts.

16. Excess amount, if any, be released in favour of the appellant-insurer through payee's account cheque.

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

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

FAOs (MVA) No.335 of 2011 & 376 of 2011.
Judgment reserved on 26.8.2016
Date of decision: 2nd September, 2016.

1. FAO No. 335 of 2011.
Oriental Insurance Company Ltd. ...Appellant.
Versus
Smt. Pushpa and others ...Respondents

2. FAO No. 376 of 2011.
Smt. Pushpa Devi and another ...Appellants.
Versus
Sh. Varinder Narwal and ...Respondents

Motor Vehicles Act, 1988- Section 166- Deceased was earning Rs. 9,490/-, or roughly Rs. 9,000/- per month - 1/3rd was to be deducted towards his personal expenses - claimants have lost source of dependency of Rs. 6,000/- per month- deceased was aged 40 years at the time of accident- multiplier of '12' is applicable- thus, loss of dependency was Rs. 6,000 x 12 x 12= Rs. 8,64,000/-, in addition to this, Rs. 10,000/- each awarded under the heads 'loss of love and affection', 'loss of estate', 'loss of funeral expenses' and 'loss of consortium'- thus, claimants are entitled to total compensation of Rs. 9,04,000/- along with interest @ 7.5% per annum from the date of filing of the claim petition till realization. (Para-28 to 33)

Cases referred:

Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 Supreme Court Cases 646

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

Oriental Insurance Co. versus Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81
Cholamandlan MS General Insurance Co. Ltd. Vs Smt. Jamna Devi and others, ILR 2015 (V) HP 207
Tulsi Ram versus Smt. Mena Devi and others, I L R 2015 (V) HP 557
Anil Kumar versus Nitim Kumar and others, I L R 2015 (IV) HP 445 (D.B.)
Kusum Kumari versus M.D. U.P Roadways and others, I L R 2014 (V) HP 1205
Sarla Verma and others versus Delhi Transport Corporation and another AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120
United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281
Satosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others versus National Insurance Company Limited and others (2012) 11 SCC 738
Savita versus Binder Singh & others, 2014, AIR SCW 2053
Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

For the appellant(s): Mr. Lalit K. Sharma, Advocate, for the appellant in FAO No. 335 of 2011 and Mr. Virender Sharma, Advocate, for the appellant in FAO No. 376 of 2011.

For the respondent(s): Mr. Virender Sharma, Advocate, for respondents No. 1 and 2 in FAO No. 335 of 2011.

Mr. Inderjit Singh Narwal, Advocate, for respondents No. 3 and 4 in FAO No.335 of 2011 and for respondents No. 1 and 2 in FAO No. 376 of 2011.

Mr. Lalit K. Sharma, Advocate, for respondent No. 3 in FAO No. 376 of 2011.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

These appeals are directed against the judgment and award dated 22.7.2011, made by the Motor Accident Claims Tribunal, Shimla, H.P. in MAC Petition No. 50-S/2 of 2008, titled *Smt. Pushpa Devi and another versus Sh. Varinder Narwal and others*, for short "the Tribunal", whereby compensation to the tune of Rs.5,76,000/- alongwith interest @ 8% and costs of Rs.3,000/- came to be awarded in favour of the claimants and insurer was saddled with the liability, hereinafter referred to as "the impugned award", for short.

2. Both these appeals are outcome of the common impugned award, thus, I deem it proper to determine both these appeals by this common judgment.

3. The insurer, by the medium of FAO No.335 of 2011 has questioned the impugned award, so far it relates to saddling it with the liability.

4. The claimants, by the medium of FAO No. 376/2011, have questioned the impugned award on the ground of adequacy of the compensation.

5. Owner and driver have not questioned the impugned award on any ground, has attained the finality so far as it relates to them.

6. The claimants being the victims of a vehicular accident had filed claim petition before the Tribunal for the grant of compensation to the tune of Rs.20,00,000/-, as per the break-ups given in the claim petition, on account of death of Shri Parkash Chand in the said accident,

caused by respondent No. 2, namely Ajay Thakur, on 11.10.2008 while driving Swaraj Mazda Truck No. HP-51-B-0921, in a rash and negligent manner in the area of Majnoo Mod at about 3:40 P.M., in which deceased sustained the injuries and succumbed to the same.

7. The claim petition was resisted by the respondents and following issues came to be framed by the Tribunal.

(i) Whether Sh. Parkash Chand died due to rash and negligent driving of truck Swaraj Mazda No. HP-51-B-0921 by respondent No.2? OPP.

(ii) If issue No. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled to and from whom? OPP

(iii) Whether the petition is not maintainable OPR-3.

(iv) Whether the vehicle in question was being driven in contravention of the terms and conditions of the insurance policy and the provisions of Motor Vehicles Act, 1988? OPR-3.

(v) Whether Sh. Parkash Chand was travelling as unauthorized and gratuitous passenger in the truck in question at the time of accident? OPR-3.

(vi) Whether the respondent No. 2 was not holding valid and effective driving licence to drive the vehicle in question at the time of accident? OPR-3.

(vii) Relief.

8. Claimants have examined six witnesses, namely, Ram Krishan (PW1), Bhagwan Dutt, LHC (PW2), Dr. Piyush Kapila (PW3), Pardeep Sharma, (PW4), Thakur Dass as (PW6) and claimant No. 1 Pushpa Devi also stepped into the witness-box as PW5.

9. Respondent-insurer examined RW1 Khem Chand, RW2 N.K. Hazari, RW3 Pritam Chandel and RW6, S.I. Anil Kumar.

10. Virender Pal Narwal owner of Truck and Ajay Kumar driver also stepped into the witness-box as RW 4 and RW5 respectively.

11. Parties have placed on record the documents, details of which have been given in Form-B, appended to the impugned award.

12. This Court is hearing the first appeal in terms of the mandate of Section 173 of the Motor Vehicles Act, for short "the Act" and is having the same powers alike Section 96 of the Code of Civil Procedure for short "CPC" and even otherwise, this Court has to exercise powers in terms of the mandate of Section 173 of the Act read with the provisions of the CPC.

13. The same principles of law have been laid down by the Apex Court in the case titled as **U.P.S.R.T.C. versus Km. Mamta and others,** reported in **AIR 2016 Supreme Court 948.** It is apt to reproduce para 24 of the judgment herein:

> *"24. An appeal under Section 173 of the M.V. act is essentially in the nature of first appeal alike Section 96 of the Code and, therefore, the High Court is equally under legal obligation to decide all issues arising in the case both on facts and law after appreciating the entire evidence. (See National Insurance Company Ltd. v. Naresh Kumar & Ors., ((2000) 10 SCC 198 and State of Punjab & Anr. v. Navdeep Kuur & Ors. (2004) 13 SCC 680]"*

14. Keeping in view the purpose of granting compensation read with the discussion made hereinabove, I deem it proper to determine all issues.

15. The claimants have examined the witnesses who stated that the deceased Parkash Chand was walking on the left side of the highway at Majnoo Mod at about 3:40 P.M., was hit by the offending vehicle which was being driven by respondent No.2, namely, Vijay Thakur, rashly and negligently.

16. PW4, namely, Pardeep Sharma, is the only eye witness, has stated that he was on his way to his house on the fateful day. The offending vehicle which was being driven by respondent No. 2 rashly and negligently, hit deceased Parkash Chand, who was walking on the left side of the highway. The driver managed to escape from the spot, has immediately informed the claimants about the death of Parkash Chand.

17. Learned counsel for the owner, driver and insurer have cross-examined this witness at length but have failed to demolish/shatter his statement.

18. The standard of proof in civil and criminal cases is totally different. While determining the criminal case and recording conviction, the prosecution has to prove the case beyond reasonable doubt for the reason that the accused is presumed to be innocent till the guilt is brought home. In civil cases, the parties have to prove their cases by preponderance of probabilities. In summary cases like granting of compensation, in terms of the mandate of Section 166, Chapter XII of the Act, summary procedure has to be adopted, without succumbing to the niceties and technicalities of procedure. It is beaten law of the land that technicalities or procedural wrangles and tangles have no role to play.

19. My this view is fortified by the judgment delivered by the apex court in ***Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another***, reported in ***(2013) 10 Supreme Court Cases 646, N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,*** reported in ***AIR 1980 Supreme Court 1354*** **and** ***Oriental Insurance Co. versus Mst. Zarifa and others,*** reported in ***AIR 1995 Jammu and Kashmir 81.***

20. This Court has also laid down the similar principles of law in ***FAO No. 692 of 2008*** decided on 4.9.2015 titled ***Cholamandlan MS General Insurance Co. Ltd. Versus Smt. Jamna Devi and others***, ***FAO No. 287 of 2014*** along with connected matter, decided on 18.9.2015 titled ***Tulsi Ram versus Smt. Beena Devi and others***, ***FAO No. 72 of 2008*** along with connected matter decided on 10.7.2015 titled ***Anil Kumar versus Nitim Kumar and others*** and ***FAO No. 174 of 2013*** decided on 5.9.2014 titled ***Kusum Kumari versus M.D. U.P Roadways and others.***

21. Having said so, the claimants have pleaded in the claim petition what was the cause of the accident and how the deceased had died. They have led evidence and have proved that deceased Parkash Chand died in a vehicular accident caused by respondent No. 2, while driving the offending vehicle rashly and negligently.

22. Viewed thus, it is held that the claimants have proved that respondent No. 2 had driven the offending vehicle rashly and negligently, hit the deceased, who sustained the injuries and succumbed to the injuries. Accordingly, issue No. 1 is decided in favour of the claimants and against the respondents.

23. Before I deal with issue No. 2, I deem it proper to determine issues No. 3 to 6.

24. It was for the insurer-respondent No. 3 in claim petition and appellant in FAO No. 335 of 2011 to discharge the onus, has failed to discharge the same. All issues have been decided against the insurer- respondent No. 3-appellant. Even learned counsel for the appellant has not advanced any argument viz-a-viz issues No. 3 and 6. Thus, the findings returned on issues No. 3 and 6 are upheld.

25. Learned counsel for the insurer-appellant argued that the insured/owner has committed willful breach of the terms and conditions of the insurance policy read with the mandate of Sections 147 and 149 of the Act and deceased was a gratuitous passenger. It was for the insurer to plead and prove that the owner had committed willful breach, has not led any evidence to show that owner had committed any willful breach, except trying to prove that the deceased was a gratuitous passenger, has failed to do so.

26. At the cost of repetition PW4 Pardeep Sharma, eye witness has specifically stated that the deceased was walking on the left side of the highway, in the given circumstances, the insurer has failed to discharge the onus. The findings returned on issues No. 4 and 5 are also upheld.

Issue No.2.

27. The factum of insurance is not in dispute. The Tribunal has rightly held that the vehicle was insured and saddled the insurer with the liability.

28. By the medium of FAO No. 376 of 2011, the claimants have disputed the adequacy of compensation. The deceased was working in Road and Buildings Department of Municipal Corporation and his monthly salary was Rs.9490/- as per salary certificate Ext. PW1/A. He was husband of claimant No. 1 and father of claimant No. 2. Claimant No. 1 Pushpa Devi has lost matrimonial life and source of dependency and claimant No. 2 has lost father, love and affection of father in addition to loss of source of dependency. The deceased was drawing salary of Rs.9490/- per month, roughly Rs.9000/-. 1/3rd was to be deducted towards his personal expenses, in view 2nd Schedule Act, read with the ratio laid down in ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***. Thus, it is held that the claimants have lost source of dependency to the tune of Rs.6000/- per month. The claimants have proved that the deceased was 40 years of age at the time of accident and the Tribunal has also held that the deceased was 40 years of age at the time of accident and applied the multiplier of "12", is just and appropriate multiplier applicable.

29. Having said so, it is held that the claimants have lost the source of dependency to the tune of Rs.6000x12x12= Rs.8,64,000/-.The claimants are also entitled to compensation under the four heads as under:

(i)	*Loss of love and affection:*		*Rs.10,000/-*
(ii)	*Loss of estate*	*:*	*Rs.10,000/-*
(iii)	*Funeral expenses*	*:*	*Rs.10,000/-*
(iv)	*Loss of consortium*	*:*	*Rs.10,000/-*
	Total		***Rs.40,000/-***

In all the claimants are entitled to Rs.9,04,000/- from the date of claim petition till its realization.

30. The Tribunal has awarded interest @ 8% per annum.

31. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as ***United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,*** *reported in (****2002) 6 SCC 281****;* ***Satosh Devi versus National Insurance Company Ltd. and others****, reported in* ***2012 AIR SCW 2892****;* ***Amrit Bhanu Shali and others versus National Insurance Company Limited and others*** *reported in* ***(2012) 11 SCC 738****;* ***Smt. Savita versus Binder Singh & others****, reported in* ***2014, AIR SCW 2053****;* ***Kalpanaraj & others versus Tamil Nadu State Transport Corpn****., reported in* ***2014 AIR SCW 2982****;* ***Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others****, reported* ***in (2015) 4 SCC 433****, and* ***Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another****, reported* ***in (2015) 4 SCC 434****,* and discussed by this Court in a batch of ***FAOs, FAO No. 256 of 2010***, titled as ***Oriental Insurance Company versus Smt. Indiro and others***, being the lead case, decided on 19.06.2015.

32. The claimants are entitled to interest at the rate of Rs.7.5% per annum from the date of filing the claim petition till its realization.

33. The insurer is directed to deposit the amount, within eight weeks from today before this Registry. On deposit, the entire amount be released to the claimants, strictly, in terms of the conditions contained in the impugned award, through payees' cheque account or by depositing the same in their bank accounts.

34. Viewed thus, the appeal (FAO No. 335 of 2011), filed by the insurer is dismissed and appeal (FAO No. 376 of 2011), filed by the claimants is allowed. The compensation is enhanced and impugned award is modified, as indicated hereinabove.

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

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

Oriental Insurance Company Ltd. ...Appellant.

Versus

Smt. Sakeena Devi and others ...Respondents.

FAO No. 293 of 2010
Decided on: 02.09.2016

Motor Vehicles Act, 1988- Section 166- Income of the deceased was Rs. 10,000/- per month- he was aged 32 years - 1/3rd is to be deducted towards personal expenses - claimants have lost source of income of Rs. 6,667/- per month, i.e. Rs. 80,000/- per annum- Tribunal had applied multiplier of 17, whereas, multiplier of 16 was to be applied- claimants are entitled to Rs. 80,000 x 16= Rs. 2,80,000/- under the head 'loss of income/dependency'- interest awarded @ 12% per annum, which is on the higher side and is reduced to 7.5% per annum. (Para-5 to 12)

Cases referred:

Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 SCC 121

Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281

Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892

Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 SCC 738

Savita versus Binder Singh & others, 2014 AIR SCW 2053

Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982

Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433

Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434

Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (IV) HP 1149

For the appellant: Mr. Deepak Bhasin, Advocate.

For the respondents: Ms. Poonam Gehlot, Advocate, vice Mr. Janesh Gupta, Advocate, for respondents No. 1 to 3.
Nemo for respondents No. 4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is judgment and award, dated 1st May, 2010, made by the Motor Accident Claims Tribunal, Chamba Division, Chamba (HP) (for short "the Tribunal")

in MAC Petition No. 79 of 2009, titled as Smt. Sakeena Devi and others versus The Oriental Insurance Company Limited and others, whereby compensation to the tune of ₹ 14,50,000/- with interest @ 12% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants and against the insurer (for short "the impugned award").

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

3. Learned counsel for the appellant-insurer vehemently argued that the only dispute involved in this appeal is relating to the adequacy of compensation, which, on the face of it, is on higher side. Further stated that the insurer has contested the claim petition on all grounds, thus, is within its rights to file the appeal.

4. I leave the question open as to whether the permission in terms of Section 170 of the Motor Vehicles Act, 1988 (for short "MV Act") was sought and granted or not. But it appears that the amount awarded in terms of the impugned award is on higher side for the following reasons:

5. Admittedly, the deceased was 32 years of age at the time of the accident and was a photographer and driver by profession. The claimants have examined one Shri P.S. Kanwar, Senior Assistant from the office of District Tourism Officer, Chamba, as PW-3, who has specifically stated that the deceased was registered with them as a photographer and was working at Khajiar, which is known as one of the famous tourist destinations in District Chamba throughout the world. Thus, it can be safely said and held that the deceased would have been earning not less than ₹ 10,000/- per month. However, the Tribunal has assessed the income of the deceased to be ₹ 10,000/-, which has not been questioned by the claimants, is accordingly maintained.

6. The Tribunal has rightly deducted one third towards his personal expenses in view of the judgment rendered by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which has been upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120,** and held that the claimants have lost source of income to the tune of ₹ 6,667/- per month, i.e. ₹ 80,000/- per annum.

7. However, the Tribunal has fallen in an error in applying the multiplier of '17', multiplier of '16' was to be applied while keeping in view the ratio laid down by the Apex Court in the case titled as **Sarla Verma's and Reshma Kumar's cases (supra)** read with the Second Schedule appended with the MV Act.

8. Accordingly, it is held that the claimants are entitled to compensation to the tune of ₹ 80,000/- x 16 = ₹ 12,80,000/- under the head 'loss of income/dependency'.

9. The compensation awarded under other heads, i.e. ₹ 40,000/- under the head 'loss of consortium', ₹ 40,000/- under the head 'loss of love and affection', and ₹ 10,000/- under the head 'funeral expenses etc.' has not been questioned, thus, is accordingly maintained.

10. The Tribunal has also committed a legal mistake while awarding interest @ 12% per annum, which was to be awarded as per the prevailing rates.

11. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as **United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,** reported in (**2002) 6 SCC 281; Santosh Devi versus National Insurance Company Ltd. and others,** reported in **2012 AIR SCW 2892**; **Amrit Bhanu Shali and others versus National Insurance Company Limited and others,** reported in **(2012) 11 SCC 738; Smt. Savita versus Binder Singh & others**, reported in **2014 AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn.,** reported in **2014 AIR SCW 2982; Amresh Kumari versus**

Niranjan Lal Jagdish Pd. Jain and others, reported in **(2015) 4 SCC 433;** and **Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,** reported in **(2015) 4 SCC 434,** and discussed by this Court in a batch of FAOs, **FAO No. 256 of 2010, titled as Oriental Insurance Company versus Smt. Indiro and others,** being the lead case, decided on 19.06.2015.

12. Having said so, I deem it proper to reduce the rate of interest from 12% per annum to 7.5% per annum from the date of filing of the claim petition till its realization.

13. Having glance of the above discussions, the claimants are held entitled to compensation to the tune of ₹ 12,80,000/- + ₹ 40,000/- + ₹ 40,000/- + ₹ 10,000/- = ₹ 13,70,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization.

14. In view of the above, the impugned award is modified, as indicated hereinabove and the appeal is disposed of.

15. The Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank account.

16. Excess amount, if any, be released in favour of the appellant-insurer through payee's account cheque.

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

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

Raj Kumar and others .....Appellants
Versus
Jal Kishan and others ..... Respondents

FAO(MVA) NO.425 of 2010
Decided on: 02.09.2016

Motor Vehicles Act, 1988- Section 149- Mahindra Pick Up was involved in an accident which is a Light Motor Vehicle- driver of the vehicle was having effective and valid driving licence to drive light motor vehicle- it was for the insurer to plead and prove that owner had committed willful breach but insurer had failed to prove it- insurer was rightly saddled with liability- appeal dismissed. (Para-5 and 6)

For the appellants: Mr.Sunil Mohan Goel, Advocate.
For the respondents: Mr.Sanjeev Sharma, Advocate for respondent No.1.
Mr.Jagdish Thakur, Advocate, for respondent No.2.
Nemo for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice(Oral)

Legal representatives of the owner/insured have invoked the jurisdiction of this Court under Section 173 of the Motor Vehicles Act, 1988 (for short, the Act), and questioned the award, dated 21st April, 2010, passed by the Motor Accident Claims Tribunal-I, Solan, H.P., (for short, the Tribunal), in Claim Petition No.15-S/2 of 2008, titled Jai Kishan versus Indu Singla and others, whereby the claim petition was allowed and compensation to the tune of Rs.57,000/- with interest at the rate of 7.5% per annum, from the date of filing of the claim petition till

deposit, came to be awarded in favour of the claimant and the insurer was saddled with the liability, with right of recovery, (for short the "impugned award").

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

3. Feeling aggrieved, the legal heirs of the owner/insured have questioned the impugned award on the ground that the Tribunal has not properly appreciated the evidence inasmuch the driver of the offending vehicle was having a valid and effective driving licence to drive the offending vehicle.

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

5. Admittedly, the vehicle involved in the accident was Mahindra Pick Up bearing No.HP-15B-0249, which is a Light Motor Vehicle, as has been held by this Court in FAO No.354 of 2006, titled National Insurance Co. Ltd. vs. Gopal Sahi and others, decided on 4th April, 2014, FAO No.396 of 2014, titled Gurmail Singh and another vs. Kamla Devi and others, decided on 6th November, 2015 and FAO No.229 of 2011, titled Sanjeev Kumar vs. Manmohan Singh and another, decided on 1st July, 2016, and various other judgments. The driver of the offending vehicle was having a valid and effective driving licence to drive a Light Motor Vehicle.

6. It was for the insurer to plead and prove that the insured/owner has committed willful breach, has failed to do so. Thus, it can safely be held that the owner was not in breach.

7. Having said so, the insurer is saddled with the liability. The insurer is directed to deposit the entire amount with interest as awarded by the Tribunal within a period of eight weeks from today and on deposit, the Registry is directed to release the same in favour of the claimant through his bank account. The statutory amount deposited by the appellants at the time of filing of the instant appeal is awarded as costs in favour of the claimant and the said amount be released in favour of the claimant forthwith.

8. The impugned award is modified, as indicated above and the appeal is allowed.

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

Rajinder Sharma .....Appellant

Versus

Haryana Roadways and others ..... Respondents

FAO(MVA) NO.440 of 2010
Decided on: 02.09.2016

Motor Vehicles Act, 1988- Section 166- claimant had sustained permanent disability to the extent of 80% - he had purchased medicines worth Rs. 3,07,077/- - claimant will not be in a position to perform his duty due to the disability- claimant was working as salesman and was stated to be earning Rs. 8,000/- per month- however, no proof of monthly income was filed- now a days, even a labourer does not earn less than Rs. 4,000/- per month- hence, income of the claimant can be taken as Rs. 4,500/- per month - age of the claimant was 45 years- Tribunal had applied multiplier of 13, whereas, multiplier of 12 was to be applied- thus, claimant is entitled to Rs. 4500 x 12 x 12= Rs. 6,48,000/- under the head 'loss of future income' – Tribunal had awarded Rs. 75,000/-, under the head 'pain and suffering', which is on the lower side- compensation enhanced to Rs. 1,50,000/- under the head 'pain and suffering'- claimant is also held entitled to Rs. 1,50,000/- under the head 'loss of amenities of life'- claimant remained admitted in the hospital- he was attended by a person for three months- hence, he is entitled to Rs. 5,000 x 3 = Rs. 15,000/- under the head 'attendant charges'- claimant would have spent at least Rs. 200/- per day i.e. Rs. 6,000/- per month under the head 'special diet' – claimant would have hired taxi for approaching the hospital- amount of Rs. 25,000/- awarded under the head

'transportation charges'- claimant may have to undergo medical check-ups/treatment and compensation of Rs. 50,000/- awarded under the head 'future medical treatment'- thus, total compensation of Rs. 13,63,077/- awarded along with interest @ 7.5% per annum from the date of passing of the order till deposit. (Para-23 to 33)

Cases referred:

U.P.S.R.T.C. vs. Km. Mamta and others, AIR 2016 SC 948
R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771
Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252
Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121
Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120

For the appellant: Mr.Pawan Gautam, Advocate.
For the respondents: Mr.Rakesh Dogra, Advocate, for respondents No.1 and 2.
Mr.Jagdish Thakur, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Subject matter of this appeal is the award, dated 29th May, 2010, passed by the Motor Accident Claims Tribunal-II, Kangra at Dharamshala, H.P., (for short, the Tribunal), in claim petition No.27/G/07/10, titled Rajinder Sharma vs. Haryana Roadways and others, whereby compensation to the tune of Rs.5,45,840/- with interest at the rate of 7% per annum, came to be awarded in favour of the claimant and respondents No.1 and 3 i.e. Haryana Roadways and ICICI Lombard General Insurance Co., respectively, were saddled with the liability, (for short the "impugned award").

2. Learned counsel for the insurer/respondent No.3 stated that the insurer has to satisfy its liability to the extent of Rs.5.00 lacs. Similar findings have been recorded by the Tribunal in the impugned award, which have not been challenged by the Haryana Roadways. Thus, in case the amount is to be enhanced, Haryana Roadways is to be saddled with the liability.

3. The Haryana Roadways, the ICICI Lombard and the driver have not questioned the impugned award on any count, thus, the same has attained finality so far as it relates to them.

4. Feeling aggrieved, the claimant has questioned the impugned award on the ground of adequacy of compensation.

5. Thus, the only question needs to be determined in this appeal is – Whether the amount awarded by the Tribunal is adequate?

6. To answer the above question, it is necessary to give a brief reference of the facts of the case.

7. The claimant filed the Claim Petition under Section 166 of the Motor Vehicles Act, 1988, (for short, the Act), for grant of compensation on account of injuries sustained by him in a vehicular accident, which had taken place on 2nd July, 2006 at about 4.40 a.m. It was averred in the claim petition that the claimant on the fateful day, boarded the bus bearing No.HR-38L-7817 from Delhi to his native place in District Kangra, H.P. The offending bus was being

driven by its driver, namely, Jai Kishan rashly and negligently and when the same reached at Ropar, it collided with a Truck Tralla bearing No.RJ-19GA-0058, as a result of which the claimant sustained injuries, was taken to Civil Hospital, Ropar fromwhere he was referred to PGI, Chandigarh. Hence, the claim petition filed by the claimant-injured for grant of compensation to the tune of Rs.25.00 lacs, as per the break-ups given in the same.

8. Respondents resisted the claim petition by filing replies.

9. On the pleadings of the parties, the following issues came to be framed:

"1. Whether the petitioner had suffered injuries on account of rash and negligent driving of Bus No.HP-38L-7817 by respondent No.2? OPP

2. If issue No.1 is proved, to what amount of compensation and from whom the petitioner is entitled? OPP

3. Whether the respondent No.2 had not been in possession of valid and effective Driving licence, if so to what effect? OPR-3

4. Whether the petitioner had suffered injuries on account of negligence of driver of Bus NO.RJ-19GA-0058, if so to what effect? OPR-1

5. Whether the claim petition is not maintainable against respondent No.6? OPR-6

6. Whether the vehicle NO.RJ-19GA-0058 was being plied in contravention of terms and conditions of Insurance Policy, if so to what effect? OPR-6

7. Relief."

10. Parties have led evidence. The Tribunal, after scanning the evidence, allowed the claim petition and awarded compensation in favour of the claimant, as detailed above.

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

12. The learned counsel for the appellant/claimant argued that the compensation awarded by the Tribunal is on the lower side and is required to be enhanced. It was submitted by the learned counsel for the appellant that the effect of 80% permanent disability suffered by the claimant has not been assessed by the Tribunal in its proper perspective and also has failed to award compensation under both heads i.e. pecuniary and non-pecuniary.

13. All the issues came to be decided against the respondents. They have not questioned the said findings. The claimant has also not questioned the same, except on the ground of adequacy of compensation, thus attained finality.

14. It is apt to record herein that an appeal under Section 173 of the Act is essentially similar to an appeal filed under Section 96 of the Code of Civil Procedure, (for short CPC). The Apex Court in its latest decision in case titled as **U.P.S.R.T.C. vs. Km. Mamta and others, AIR 2016 SC 948,** has held that an Appeal under Section 173 of the Act is essentially alike Section 96 of the CPC and, therefore, the Appellate Court is under legal obligation to decide all issues, after appreciating the entire evidence. It is apt to reproduce paragraph 24 of the said judgment hereunder:

"24. An appeal under Section 173 of the M.V. Act is essentially in the nature of first appeal alike Section 96 of the Code and, therefore, the High Court is equally under legal obligation to decide all issues arising in the case both on facts and law after appreciating the entire evidence. [See National Insurance Company Ltd. vs. Naresh Kumar & Ors., 2000 10 SCC 158 and State of Punjab & Anr. vs. Navdeep Kuur & Ors., (2004) 13 SCC 680]."

15. Thus, this Court has determined all issues in terms of the mandate of Section 173 of the Act.

16. Coming to the controversy of adequacy of compensation, it has been proved on record that the one leg of the claimant was amputated. Disability certificate has been proved on record as Ext.PW-1/F which shows that the claimant-injured sustained 80% disability, which is

permanent in nature. It has also been proved on record that the claimant remained under treatment for a pretty long time.

17. The Apex Court in **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787** and **Kavita versus Deepak and others, 2012 AIR SCW 4771,** has clearly laid down the principles as to how compensation has to be awarded in cases where the claimants have suffered permanent disability and how the assessment is to be made.

18. The Apex Court in its latest decision in **Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252,** while discussing its earlier pronouncements, observed that in injury cases, the compensation would include not only the actual expenses incurred, but the compensation has to be assessed keeping in view the struggle which the injured has to face throughout his life due to the permanent disability and the amount likely to be incurred for future medical treatment, loss of amenities of life, pain and suffering to undergo for the whole life etc. It is apt to reproduce paragraphs 11 and 18 of the said decision hereunder:

> *"11. With regard to the pain, suffering and trauma which have been caused to the appellant due to his crushed hand, it is contended that the compensation awarded by the Tribunal was meagre and insufficient. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the courts to make a precise assessment of the pain and trauma suffered by a person whose arm got crushed and has suffered permanent disability due to the accident that occurred. The appellant will have to struggle and face different challenges as being handicapped permanently. Therefore, in all such cases, the Tribunals and the courts should make a broad estimate for the purpose of determining the amount of just and reasonable compensation under pecuniary loss. Admittedly, at the time of accident, the appellant was a young man of 33 years. For the rest of his life, the appellant will suffer from the trauma of not being able to do his normal work of his job as a driver. Therefore, it is submitted that to meet the ends of justice it would be just and proper to award him a sum of Rs.1,50,000/- towards pain, suffering and trauma caused to him and a further amount of Rs.1,50,000/- for the loss of amenities and enjoyment of life.*
>
> ....
>
> *18. Further, we refer to the case of Rekha Jain & Anr. v. National Insurance Co. Ltd., 2013 8 SCC 389 wherein this Court examined catena of cases and principles to be borne in mind while granting compensation under the heads of (i) pain, suffering and (ii) loss of amenities and so on. Therefore, as per the principles laid down in the case of Rekha Jain & Anr. and considering the suffering undergone by the appellant herein, and it will persist in future also and therefore, we are of the view to grant Rs.1,50,000/- towards the pain, suffering and trauma which will be undergone by the appellant throughout his life. Further, as he is not in a position to move freely, we additionally award Rs.1,50,000/- towards loss of amenities & enjoyment of life and happiness."*

19. The claim of the appellant for enhancement has to be tested in view of the principles laid down by the Apex Court in the decisions supra.

20. Admittedly, the claimant suffered 80% permanent disability, remained admitted in PGI, Chandigarh and in Baraj Life-Care Hospital & Trauma Centre, Jalandhar. The claimant has proved on record bills in respect of the expenses incurred by him for purchase of medicines etc. as Exts.P-1 to P-63. As per these bills, the total expenditure incurred by the claimant on the purchase of medicines comes to Rs.3,07,077/-. The Tribunal has awarded only a sum of Rs.50,000/-, without taking into account the medical bills proved on record by the claimant, which amount is on the lower side.

21. In view of the above, a sum of Rs.3,07,077/- is awarded in favour of the claimant-injured under the head medical expenses incurred.

22. The next question to be determined is whether the permanent disability suffered by the claimant has affected his earning capacity. The claimant has specifically pleaded and proved that due to the accident, his one leg was amputated and that he had suffered 80% permanent disability, as is clear from Ext.PW-1/F i.e. disability certificate. Thus, it can safely be concluded that he would not be able to perform his job, and thus, the injury suffered by him has affected his earning capacity completely, leave apart distorting his physical frame.

23. It has been pleaded that the claimant was working as Salesman with Sai Baba Traders New Delhi and was earning Rs.8,000/- per month. Reliable evidence has not been led by the claimant in order to hold that the monthly income of the claimant, at the time of accident, was Rs.8,000/-, as was pleaded in the claim petition. Now-a-days, even a labourer does not earn less than Rs.4,500/- per month. Thus, the monthly income of the injured, by exercising guess work, can be said to be Rs.4,500/- per month.

24. In view of the above, the next question arises as to what is the just and appropriate multiplier applicable in the present case. It has been pleaded that, at the time of accident, the claimant was 45 years of age. The Tribunal has fallen into an error in applying the multiplier of 13. Having regard to the judgment of the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120** read with the 2nd Schedule attached with the Act, it is held that multiplier of '12' is just and appropriate, and is applied accordingly.

25. Having said so, the claimant is held entitled to Rs.4,500 x 12 x 12 = Rs. 6,48,000/- under the head 'loss of future income'.

26. Apart from the above, The Tribunal has awarded Rs.75,000/-, under the head 'pain and suffering', which, in the facts of the case, is on the lower side. The Tribunal has lost sight of the fact that because of the accident, the physical frame of the claimant has been shattered, the claimant suffered a lot, which is evident from the fact that one leg of the claimant was amputated. Not only this, because of the disability suffered by the claimant, he has to struggle throughout his life. In the given circumstances, read with the law laid down by the Apex Court, the claimant is held entitled to Rs.1,50,000/- under the head 'pain and sufferings'.

27. The claimant is also deprived of all comforts and amenities, thus, is entitled to Rs.1,50,000/- under the head 'loss of amenities of life'.

28. In view of the discussion made hereinabove, the claimant is also entitled to attendant charges at least for the period for which he remained admitted in the hospital. The Tribunal in paragraph 21 of the impugned award has noted that the claimant, who appeared as PW-1, had stated that his wife remained with him for three months during the period he remained admitted in the hospital. Accordingly, by guess work, it is held that the claimant would have spent Rs.5,000/- per month on attendant charges and accordingly, held entitled to Rs.5,000 x 3 = Rs.15,000/- under the head 'attendant charges'.

29. The claimant would have also spent at least 200/- per day i.e. Rs.6,000/- per month on account of special diet during the period of treatment. Accordingly, the claimant is held entitled to Rs.6,000/- x 3 = Rs.18,000/- under the head 'special diet'.

30. The Tribunal has not awarded anything under the head transportation charges. It is obvious that the claimant, to approach the hospital for treatment from time to time, would have hired taxi and would have spent a considerable amount on account of transportation. Therefore, I deem it proper to award Rs.25,000/- under the head 'transportation charges'.

31. In addition to above, the claimant may have to undergo medical check-ups/treatment, at intervals, throughout his life. I deem it proper to award Rs.50,000/- under the head 'future medical treatment'.

32. Having glance of the above discussion, the claimant is awarded Rs.13,63,077/-, under different heads, as under:

Sl.No.	***Heads***	***Amount***
1	*Medical expenses incurred*	*Rs.3,07,077/-*
2.	*Loss of future income*	*Rs.6,48,000/-*
3.	*Pain and sufferings*	*Rs.1,50,000/-*
4.	*Loss of amenities of life*	*Rs.1,50,000/-*
5.	*Attendant charges*	*Rs.15,000/-*
6.	*Special diet*	*Rs.18,000/-*
7.	*Transportation charges*	*Rs.25,000/-*
8.	*Future medical treatment*	*Rs.50,000/-*
	Total	Rs.13,63,077/-

33. The amount shall carry interest at the rate of 7.5% per annum from the date of passing of the impugned award, till deposit.

34. In view of the above discussion, the appeal is allowed and the amount of compensation is enhanced. As stated by the learned counsel for the insurer that the insurer has already deposited the amount to the extent of its liability, therefore, the Haryana Roadways i.e. respondent No.1 is directed to deposit the enhanced amount within a period of six weeks from today and on deposit, the Registry is directed to release the entire amount, alongwith interest, in favour of the claimant, through his bank account after proper identification.

35. The appeal stands disposed of accordingly.

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

FAO No. 456 of 2011 a/w
FAO No. 14 of 2012
Decided on : 02.09.2016.

FAO No. 456 of 2011

Ropesh Gupta .....Appellant

Versus

Guljinder Kaur & others ...Respondents

FAO No. 14 of 2012

State of Haryana through Secretary (Transport) and another .....Appellants

Versus

Ropesh Gupta & others ...Respondents

Motor Vehicles Act, 1988- Section 166- Claimant had sustained 80% permanent disability- monthly income of the claimant was Rs. 10,500/-- he had suffered loss of earning of Rs. 8,000/- per month- age of the claimant was 33 years at the time of accident- multiplier of 15 was rightly applied and compensation of Rs. 8,000 x 12 x 15= Rs. 14,40,000/- was rightly awarded under the head 'loss of future income- claimant is entitled to Rs. 1,50,000/- under the head 'pain and sufferings', Rs. 1,50,000/- under the head 'loss of amenities of life'- compensation of Rs. 2 lac

was rightly awarded under the head 'medical expenses'- Rs. 50,000/- awarded under the head 'expenses for future treatment'- thus, total compensation of Rs. 19,90,000/- awarded along with interest @ 7.5% per annum. (Para-18 to 30)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771,
Sarla Verma (Smt.) and others vs Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120
Munna Lal Jain & another versus Vipin Kumar Sharma & others, 2015 AIR SCW 3105
Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252

FAO No. 456 of 2011

For the Appellant : Mr. Anup Rattan, Advocate.
For the Respondents: Mr. Amrinder Singh Rana, Advocate, for respondents No. 1 & 2.
Mr. Ajay Sharma, Advocate, for respondents No. 3 & 4.

FAO No. 14 of 2012

For the Appellants : Mr. Ajay Sharma, Advocate.
For the Respondents: Mr. Anup Rattan, Advocate, for respondent No. 1.
Mr. Amrinder Singh Rana, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Both these appeals are outcome of the award dated 9th August, 2011, passed by the Motor Accident Claims Tribunal-I, Solan, District Solan, H.P. for short, 'the Tribunal', in Claim Petition No. 13-S/2 of 2008, titled Shri Ropesh Gupta versus Shri Balwinder Singh & others, whereby the claim petition was allowed and compensation to the tune of Rs.16,90,000/- with interest at the rate of 7.5% per annum, was granted in favour of the claimant and respondents No. 2 & 3 in the claim petition i.e. appellants in FAO No. 14 of 2012 were saddled with liability, for short 'the impugned award'.

2. The legal heirs of driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far it relates to them.

3. The owner, i.e. appellant in FAO 14 of 2012, has questioned the impugned award on the ground of adequacy of compensation and the other grounds taken in the memo of appeal.

4. The claimant, by the medium of FAO No. 456 of 2011, has questioned the impugned award on the ground of adequacy of compensation.

5. This judgment will determine both these appeals for the reason that the same are outcome of the one motor vehicular accident and the issue involved in these appeals is the same.

Brief Facts:

6. Claimant-injured Ropesh became victim of the motor vehicular accident, which was allegedly caused by driver, namely, Balwinder Singh, while driving bus bearing registration No. HR-37A-4958, belonging to respondents No. 2 & 3 in the claim petition, rashly and negligently, near HRTC workshop, Chambaghat at Solan on 20.11.2005, at about 8.40. FIR No. 300/2005, dated 20.11.2005, under Sections 279, 337 & 338 of the Indian Penal Code, for short

'IPC' and Section 187 of the Motor Vehicles Act, for short 'the Act' was registered against the driver.

7. The claimant-injured filed claim petition before the Tribunal for grant of compensation to the tune of 50,00,000/- as per the break-ups given in the claim petition.

8. It is stated in the claim petition the claimant was admitted in so many hospitals and finally, he was referred to PGI Chandigarh, where he remained admitted for a long time, has suffered permanent disability to the extent of 80%, which has shattered his physical frame and became dependant.

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

10. Following issues came to be framed by the Tribunal:

"1. *Whether the petitioner received injuries and thereafter ailment the accident caused due to rash and negligent driving of respondent No. 1? ……OPP*

1(a) Whether the petitioner has received injuries and suffered ailment which are connected with the accident in question and the petitioner is entitled to compensation on account of that also? …OPP

2. If issue No. 1 is proved in affirmative to what amount of compensation the petitioner is entitled and from whom? …OPP

3. Whether the petition is not maintainable against the respondents as no accident took place with the vehicle of the respondent on 20.11.2005 with bus No. HR-37-A-4958? …OPR

4. Relief."

11. The claimant-injured examined H.C. Yadav Chand (PW-1), Devender Sharma (PW-3), Naresh Kumar (PW-4), Madan Lal (PW-5), Ravi Kumar (PW-6), Dr. Ashish Sharma (PW-7), Dr. R.K. Sharma (PW-8), Sunil Garg (PW-9) and Manjeet Thakur (PW-10). The claimant-injured also appeared himself in the witness box as PW-2. On the other hand, respondents No. 2 & 3 in the claim petition, have examined Jai Raj as RW-1, who is their employee.

12. The Tribunal after scanning the evidence, oral as well as documentary, held that the claimant-injured has proved that driver, namely, Balwinder Singh, had driven the offending vehicle rashly and negligently and caused the accident, in which the claimant-injured sustained injuries.

Issue No. 1.

13. I have gone through the entire record. I am of the considered view that the claimant-injured has proved by leading cogent evidence that driver had driven the offending vehicle, rashly and negligently and caused the accident, in which the claimant injured sustained injuries. Accordingly, the findings returned by the Tribunal on Issue No. 1 are upheld.

14. Before dealing with Issues No. 1(a) and 2, I deem it proper to deal with Issue No. 3.

Issue No. 3.

15. It was for the respondents in the claim petition to plead and prove that the claim petition was not maintainable, have not led any evidence, thus have failed to discharge the onus. However, this issue is covered by the findings returned by the Tribunal on Issue No. 1. Accordingly, it is held that the Tribunal has rightly decided this issue in favour of the claimant-injured and against the respondents.

Issues No. 1(a) and 2

16. These issues are inter-connected, hence are taken up together for determination.

17. The Apex Court in **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787** and **Kavita versus Deepak and others, 2012 AIR SCW 4771,** has clearly laid down the principles as to how compensation has to be awarded in cases where the claimants have suffered permanent disability and how the assessment is to be made.

18. I have gone through the statements of Dr. Ashish Sharma (PW-7) and Dr. R.K. Sharma (PW-8), who have stated that the claimant-injured has sustained injuries, which resulted in permanent disability to the extent of 80%, was admitted in the hospital and also remained as an outdoor patient. They have also given details of the injuries suffered by the claimant-injured and the expenses incurred. The Tribunal has recorded findings in paras-8 to 11 of the impugned award.

19. I am of the considered view that 80% permanent disability has not only affected his income, but also shattered his physical frame.

20. The Tribunal has held that the monthly salary of the claimant-injured was Rs.10,500/- per month and he has suffered loss of earning to the tune of Rs.8,000/- per month.

21. Admittedly, the age of the claimant-injured was 33 years at the time of accident. The Tribunal has rightly applied the multiplier of '15', in view of the 2nd Schedule appended to the Motor Vehicles Act read with the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104,** upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120** read with the judgment rendered by the Apex Court in case titled as **Munna Lal Jain & another versus Vipin Kumar Sharma & others,** reported in **2015 AIR SCW 3105.**

22. The Tribunal has rightly awarded compensation to the tune of Rs.8,000/- x 12 x 15 = 14,40,000/- under the head 'loss of future income'**.**

23. The Apex Court in its latest decision in **Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252,** while discussing its earlier pronouncements, observed that in injury cases, the compensation would include not only the actual expenses incurred, but the compensation has to be assessed keeping in view the struggle which the injured has to face throughout his life due to the permanent disability and the amount likely to be incurred for future medical treatment, loss of amenities of life, pain and suffering to undergo for the whole life etc. It is apt to reproduce paragraphs 11 and 18 of the said decision hereunder:

> *"11. With regard to the pain, suffering and trauma which have been caused to the appellant due to his crushed hand, it is contended that the compensation awarded by the Tribunal was meagre and insufficient. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the courts to make a precise assessment of the pain and trauma suffered by a person whose arm got crushed and has suffered permanent disability due to the accident that occurred. The appellant will have to struggle and face different challenges as being handicapped permanently. Therefore, in all such cases, the Tribunals and the courts should make a broad estimate for the purpose of determining the amount of just and reasonable compensation under pecuniary loss. Admittedly, at the time of accident, the appellant was a young man of 33 years. For the rest of his life, the appellant will suffer from the trauma of not being able to do his normal work of his job as a driver. Therefore, it is submitted that to meet the ends of justice it would be just and proper to award him a sum of Rs.1,50,000/- towards pain, suffering and trauma caused to him and a further amount of Rs.1,50,000/- for the loss of amenities and enjoyment of life.*

....

18. Further, we refer to the case of Rekha Jain & Anr. v. National Insurance Co. Ltd., 2013 8 SCC 389 wherein this Court examined catena of cases and principles to be borne in mind while granting compensation under the heads of (i) pain, suffering and (ii) loss of amenities and so on. Therefore, as per the principles laid down in the case of Rekha Jain & Anr. and considering the suffering undergone by the appellant herein, and it will persist in future also and therefore, we are of the view to grant Rs.1,50,000/- towards the pain, suffering and trauma which will be undergone by the appellant throughout his life. Further, as he is not in a position to move freely, we additionally award Rs.1,50,000/- towards loss of amenities & enjoyment of life and happiness."

24. In view of the ratio laid down by the apex Court in the judgment, *supra,* I am of the considered view that the claimant-injured is entitled to compensation to the tune of Rs.1,50,000/- under the head 'pain and sufferings' and Rs.1,50,000/- under the head 'loss of amenities of life'.

25. The documents Ext. PW-2/B to Ext. PW-2/F, Ext. P-1 to Ext. P-108, Ext. P-109 to Ext. P-112, Ext. P-136 to Ext. P141, Ext. P-143 to Ext. P-152 do disclose that the claimant-injured had undergone surgical intervention.

26. It appears that the Tribunal after making guess work, has rightly granted compensation to the tune of Rs.2,00,000/- under the head 'medical expenses', is accordingly upheld.

27. The Tribunal has not granted compensation under the head 'expenses for future treatment'. I deem it proper to grant compensation to the tune of Rs.50,000/- under the head 'expenses for future treatment'.

28. The Tribunal has rightly awarded interest at the rate of 7.5% per annum from the date of filing of the claim petition, is accordingly upheld.

29. Accordingly, the claimant-injured is held entitled to compensation with 7.5 % interest per annum from the date of filing of the claim petition, under the various heads as follows:

(i) loss of future income :	Rs.14,40,000/-
(ii) pain and sufferings:	Rs. 1,50,000/-
(iii) loss of amenities of life:	Rs.1,50,000/-
(iv) medical expenses:	Rs.2,00,000/-
(v) expenses for future treatment:	Rs. 50,000/-
Total:	Rs.**19,90,000/-**

30. Viewed thus, the amount of compensation is enhanced and the impugned award is modified, as indicated above.

31. The award amount stands deposited before the Registry. The Registry is directed to release the award amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' account cheque or by depositing the same in his account.

32. The enhanced amount be deposited within eight weeks. On deposit, the Registry is directed to release the same in favour of the claimant.

33. Accordingly, FAO No. 456 of 2011 filed by the claimant-injured is allowed and FAO No. 14 of 2012 is dismissed.

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

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

Shri Roshan Lal .....Appellant.

Versus

Smt. Shetu Devi and others .....Respondents

FAO (MVA) No. 196 of 2011.
Date of decision: 2nd September, 2016

Motor Vehicles Act, 1988- Section 149- Claimants pleaded that deceased was travelling in the vehicle along with goods- owner and driver admitted that deceased was travelling in the vehicle with goods- insurer has not led any evidence to prove that deceased was gratuitous passenger- hence, insurer was rightly held liable. (Para-5)

For the appellant: Mr.Ajay Sharma, Advocate.

For the respondents: Mr. Rajiv Rai, Advocate, for respondents No. 1 and 2.
Respondents No. 3 and 4 already ex parte.
Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, (Oral)

This appeal is directed against the judgment and award dated 23.3.2011, made by the Motor Accident Claims Tribunal, Kinnaur Civil Division, at Rampur Bushahr, H.P. in MAC Petition No. 35 of 2006, titled Smt. Shetu Devi and others versus The Oriental Insurance Co. Ltd. and another, for short "the Tribunal", whereby compensation to the tune of Rs.7,90,500/- alongwith interest @ 7.5% per annum, came to be awarded in favour of the claimants and insured came to be saddled with the liability, hereinafter referred to as "the impugned award", for short.

2. Claimants had sought compensation by the medium of claim petition before the Tribunal, which was later on amended.

3. Respondents filed the replies to the amended claim petition and following issues came to be framed.

(i) Whether the deceased Raj Kumar died on 24.3.2006 at Battly Nallah near Ranabagh due to rash and negligent driving of the driver of vehicle No. HP-63-0674, as alleged? OPP.

(ii) Whether the petitioners are entitled for compensation, if so, what amount of and from whom? OPP.

(iii) Whether the deceased was travelling as gratuitous passenger ion the vehicle and whole liability is not covered nor any premium has been charged in respect of gratuitous/unauthorized passengers as per the insurance policy and thus respondent NO. 1 is not liable to indemnify the insured OPR-1.

(iv) Whether the driver of the offending vehicle was not possessing a valid and effective driving license at the time of the accident and respondent NO. 1 is not liable to pay any claim OPR-1.

(v) Whether respondent NO. 1 is not liable to indemnify insured as there was violation of the mandatory terms and conditions of the insurance policy OPR-1.

(vi) Whether the petition is not maintainable on behalf of the petitioners as the petitioners are not the legal heirs of the deceased OPR-2.

(vii) Relief.

4. There is no dispute viz-a-viz issues No. 1 and 2, except "from whom" and issue No. 6. The only dispute revolves around issues No. 3 to 5. The Tribunal has fallen in an error in deciding issue No. 3 for the following reasons.

5. It is the specific case of the claimants that the deceased was travelling in the offending vehicle alongwith the goods. Owner and driver while filing replies have admitted that the deceased was travelling in the offending vehicle with the goods. The claimants have led evidence and have proved that the deceased was travelling in the offending vehicle as owner of the goods. However, the insurer has not led any evidence to prove that the deceased was a gratuitous passenger. Accordingly, it is held that the deceased was not a gratuitous passenger but was travelling in the offending vehicle alongwith goods.

Issue No.4.

6. The insurer has not questioned the findings returned by the Tribunal on issue No. 4. However, I have gone through the record. It is proved that the driver was having a valid and effective driving licence. Thus, the owner has not committed any willful breach. Accordingly, the findings returned by the Tribunal on this issue are upheld.

Issue No.5.

7. The Tribunal has recorded the findings on this issue in favour of the owner/insured but has stated that since the finings on issue No. 3 are against the owner thus, issue No. 5 was also decided against the insured which is not legally correct. The positive findings of the Tribunal are in para 18, perusal whereof does reveal that the owner has not committed any willful breach. Viewed thus, the findings recorded in concluding para 18 of the impugned award are set aside and issue No. 5 is decided against the insurer.

8. The factum of insurance is admitted and the insurer is saddled with the liability.

9. The insurer is directed to deposit the amount within eight weeks from today. On deposit, the Registry is directed to release the awarded amount in favour of the claimant, through payees' cheque account or by depositing the same in their bank accounts.

10. Out of the entire amount of compensation, Rs.1,50,000/- be released in favour of claimant No.1 and rest of the amount be released in favour of claimants No. 2 to 4 in equal shares.

11. The statutory amount of Rs.25,000/- deposited by the appellant is paid as cost in favour of the claimants.

12. Viewed thus, the appeal is allowed and the impugned award is modified, as indicated hereinabove.

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

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

Sandeep Kumar Thakur ....Petitioner

Versus

Madhubala ....Respondent

Cr.MMO No. 206/2016
Reserved on: 2.8.2016
Decided on: 2.9.2016

Protection of Women from Domestic Violence Act, 2005- Section 21- Marriage between the parties was solemnized as per Hindu Rites and Custom- a male child was born – wife filed an application against the husband- husband filed an application seeking permission to meet his minor son, which was allowed- wife filed an appeal, which was dismissed- held, that Court can grant temporary custody of any child or children to the aggrieved person, i.e. mother or the

person making an application on her behalf- custody of child was already with mother- father had sought visitation right to see his son, which right was granted to him by the Magistrate- in case of denial of visitation right to father, child would be deprived of father's love and affection- father cannot be forced to seek remedy under Guardians and Wards Act or Hindu Minority and Guardianship Act, because it would lead to multiplicity of proceedings- the endeavour of the Court should be to cut-short the litigation- petition allowed- order passed by Sessions Judge quashed and order passed by Judicial Magistrate restored. (Para-6 to 8)

For the petitioner: Mr. Subhash Sharma, Advocate.
For the respondent: Mr. Pankaj Chauhan, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

This petition is instituted against the impugned order dated 23.3.2016 rendered by learned Sessions Judge, Una, H.P., in Criminal Appeal Nos. 70/2015 and 71/2015.

2 The key facts necessary for the adjudication of the petition are that the marriage between the parties was solemnized as per Hindu rites and customs and out of the wedlock, a male child was born. The respondent filed an application under Sections 12, 17, 18, 19, 20, 22 and 23 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the "Act" for brevity sake) against the petitioner and his mother, Rupindera Devi. The application was contested by the petitioner. During the pendency of the aforesaid application, the petitioner also filed an application seeking permission to meet his minor son, Ayudeep, who was in the custody of respondent. The application was contested by the respondent. The learned Judicial Magistrate, 1st Class allowed the application vide order dated 26.10.2015. Feeling aggrieved with the order dated, 26.10.2015, the respondent filed an appeal (Cr. Appeal No.70/2015), whereas the petitioner also filed an appeal (Cr.Appeal No.71/2015). The learned Sessions Judge while allowing the appeal preferred by the respondent dismissed the appeal preferred by the petitioner vide order dated 23.3.2016. Hence, this petition.

3 Mr. Subhash Sharma, learned Advocate appearing for the petitioner, has vehemently argued that the appeal was maintainable under Section 21 of the Act.

4 Mr. Pankaj Chauhan, learned Advocate appearing for the respondent, has supported the impugned order dated 23.3.2016 passed by the learned Sessions Judge.

5 I have heard learned counsel for the parties and have also gone through the orders dated 26.10.2015 and 23.3.2016 carefully.

6 Section 2(d) of the Act defines "custody order" an order granted in terms of Section 21. Section 2(a) defines "aggrieved person" to mean any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent. Section 2(q) defines "respondent" to mean any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act. Section 21 reads as under:-

> **"Custody orders-** Notwithstanding anything contained in any other law for the time being in force, the Magistrate may, at any stage of hearing of the application for protection order or for any other relief under this Act, grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf and specify, if necessary, the arrangements for visit of such child or children by the respondent."

7. Section 21 starts with *non obstante* clause. It is evident from the plain language employed in Section 21 that the Court may, at any stage of hearing of the application for protection order or for any other relief under this Act, grant temporary custody of any child or

children to the aggrieved person, i.e. mother or the person making an application on her behalf and specify, if necessary, the arrangements for visit of such child or children by the respondent i.e. father can also be ordered. The proviso attached to Section 21 stipulates that if the Magistrate is of the opinion that any visit of the respondent may be harmful to the interests of the child or children, the Magistrate shall refuse to allow such visit.

8. In the instant case, custody of the child is already with her mother. The respondent has not asked for custody of the child for the simple reason that the child is already in her custody. It is the respondent, i.e. father, who has sought merely visitation rights to see his son, which right was granted to him by the learned Judicial Magistrate, 1st Class vide order dated 26.10.2015, that too, on limited days, i.e. 2nd and 4th Saturday of each month between 3.00 P.M. to 5.00 P.M. In case the visitation right is not given to the petitioner, minor child would be deprived of father's love and affection. The paramount consideration is welfare of the child. The petitioner could not be forced to seek remedy either under Guardians and Wards Act, 1890 and Hindu Minority and Guardianship Act, 1956, as observed by the learned Sessions Judge because it would lead to multiplicity of litigation. The Act is a self-contained code. The endeavour of the Court should be to cut-short the litigation and to ensure that the child gets love and affection of both parents, i.e. mother and father. The approach of the Court should be practical to workout the modalities in a practical manner by evolving the process, whereby the child suffers minimum trauma. The interpretation of statute should be purposive.

9. Consequently, in view of analysis and discussion made hereinabove, the petition is allowed and the impugned orders dated 23.3.2016 rendered by learned Sessions Judge, Una, H.P., in Criminal Appeal Nos. 70/2015 and 71/2015 are quashed and set aside. The order, dated 26.10.2015 passed by the learned Judicial Magistrate, 1st Class, Court No.1, Una in application No.362-I-14 is restored. Pending application(s), if any also stands 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 CHANDER BHUSAN BAROWALIA, J.

Shyamli Thakur .....Petitioner.

Versus

Himachal Pradesh Technical University & anr. .....Respondents.

CWP No.2106 of 2016.
Date of Decision: 02.09.2016.

Constitution of India, 1950- Article 226- Petitioner filed an application seeking admission in B. Tech three years course under Lateral Entry Scheme- she was called for counseling – however, she was not given admission- it was contended that seat falling vacant in general (IRDP) category was wrongly allotted to respondent No. 2 and that seat should have been allotted to the petitioner- held, that when the seat allotted to General (IRDP) Category was abandoned, the counseling for candidates belonging to General (main) category was in progress- respondent No. 2 was next in merit and he had obtained the seat, which had fallen vacant- petitioner is next in the merit in the General (Main) Category and in case any seat falls vacant, claim may be considered for admission against that seat- petition dismissed. (Para-3 to 6)

For the petitioner Mr. B.M. Chauhan, Advocate.
For the respondents Mr. Surinder Sharma, Advocate, for respondent No.1.
Mr. Ajay Kumar Dhiman, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (oral).

The petitioner after doing her matriculation, passed three years diploma course in Civil Engineering from Government Polytechnic College, Sundernagar, District Mandi, H.P. In Engineering Colleges in the State, a person holding diploma in any Engineering stream is eligible to seek admission in B. Tech three years course under Lateral Entry Scheme. The petitioner being eligible for seeking admission in B. Tech course under the scheme had submitted her Admission Form online to the first respondent from main General category. Her candidature was considered and she called for counseling schedule to be held on 25th July, 2016 for General Category (Main) and its sub-reserved category, such as Defence, Freedom Fighter, Physically Challenged, IRDP, Sports and Backward classes.

2. In terms of **Clause-n** of Item No.6, "Admission Procedure", at pages 10-11, in the Admission Brochure, (Annexure P-1), counseling of the candidates belonging to sub-reserved categories before that of General (Main) Category candidate was required to be conducted. The seat (s), if any, left vacant in such sub-reserved categories were thereafter to be transferred to General (Main) category at the end of last round of counseling of the concerned category. Accordingly, on 25th July, 2016, counseling for sub-reserved categories of General category was conducted first.

3. We are concerned in this Writ Petition qua the admission against three seats reserved for General (IRDP) sub-category. Against these three seats Ms. Preetika Chauhan, Shri Manish Thakur and Shri Rajender Kumar, being on merits were offered admission. However, during the course of counseling conducted simultaneously and on the same day of the candidates belonging to General (Main) category, Shri Manish Thakur, aforesaid, who was offered admission against one of the seats in the sub-category General (IRDP) had also secured position on merit in General (Main), and as such opted for a seat in another Engineering College of his choice from this category and abandoned the seat of sub-reserved category General (IRDP) against which he was already offered admission in a college perhaps not of his choice. Against the seat abandoned in General (IRDP) category by Shri Manish Thakur, aforesaid, respondent No.2, who was next in merit in that category, opted for that seat there and then and he has been granted admission against the said seat.

4. The petitioner, who was next in merit in General (Main), claims that since the counseling for General (IRDP) category was over, therefore, in terms of **Clause-n** of "Admission Procedure" referred to hereinabove, the seat in sub-reserved category General (IRDP) fallen vacant on account of Shri Manish Thakur aforesaid having abandoned the same should have been given to the candidate next in merit in General (Main) category.

5. Learned counsel representing the petitioner has forcefully contended that the seat fallen vacant in General (IRDP) category has wrongly been offered to respondent No.2 next in merit in that category, as according to him the counseling for sub-reserved categories of General (Main) was already over. We are afraid that any such interpretation to the provision contained under the "Admission Brochure" can be given for the reason that admission for General category including its sub categories was scheduled to be held on 25th July, 2016. When Shri Manish Thakur, aforesaid has abandoned the seat offered to him in General (IRDP) category, the counseling for candidates belonging to General (Main) category, was in progress at that time. Since, his name falls in merit in General (Main) category also, therefore, with a view to opt a better College of his choice, he abandoned the seat in General (IRDP) category and opted the seat in General (Main) on merits. Respondent No.2 was next in merit from General (IRDP) category and as the admission for sub-reserved General category and General (Main) being conducted simultaneously and on the same day was in progress, therefore, he opted for the seat fallen vacant in sub-category General (IRDP) and has rightly been offered the admission in the Course. The seat in General (IRDP) could have only been given to a candidate belonging to General (Main) category had there been no other eligible candidate available in General (IRDP) category. Since in

that category respondent No. 2 not only in merit but was present also, therefore, it cannot be said by any stretch of imagination that admission of the said respondent in the Course is contrary to the provisions contained under the Admission Brochure.

6. The petitioner no doubt is next in merit in General (Main) category. We hope and trust that in case any seat under Lateral Entry Scheme in any Government College is available and if she can be considered for admission against any such seat, of course, in terms of the provisions under the "Admission Brochure", respondent No. 1 may consider her for admission against such seat. In the event of the admission, if granted to the petitioner, however, shall not be treated, as a precedent in future. The petitioner to produce a copy of this judgment before respondent No.1, for the needful.

7. The writ petition is however, dismissed, with the above observations, so also the pending application (s), if any. ***Copy dasti.***

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

State of Himachal Pradesh ... Appellant

Versus

Ram Singh ... Respondent

Cr. Appeal No. 194 of 2012
Reserved on: 16.08.2016
Date of decision: 02.09.2016

N.D.P.S. Act, 1985- Section 18- Police party was present at Dogla Nullah- accused got down from the bus and tried to run away on seeing the police- he was apprehended and his search was conducted during which 800 grams opium was found from his possession - accused was tried and acquitted by the trial Court- held, in appeal that no efforts were made by the police to associate any independent witness- plea that there was no inhabitation in the vicinity was not established- testimonies of prosecution witnesses are contradictory and inconsistent- prosecution version was shrouded in suspicion – trial Court had rightly acquitted the accused in view of the contradictions - prosecution version was not proved beyond reasonable doubt- appeal dismissed. (Para-8 to 22)

For the appellant: Mr. V.S. Chauhan, Additional Advocate General, Mr. Vikram Thakur, Deputy Advocate General and Mr. J.S. Guleria, Assistant Advocate General.

For the respondent: Mr. Sanjay Jaswal, Advocate.

Ajay Mohan Goel, J.:

By way of this appeal, State has challenged the judgment passed by the Court of learned Special Judge (II), Kinnaur at Rampur, in case RBT No. 10-AR/3 of 2008/2011 dated 05.09.2011, vide which, learned trial Court has acquitted the accused for commission of offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985

2. The case of the prosecution was that on 21.04.2008, a police party headed by HC Pune Ram and comprising of HHC Kashmi Ram, HHC Santosh Kumar and Constable Ishwari Ram, were present at Dogla Nullah in connection with Naka Bandi and general patrol duty. At around 6.45 A.M., one HRTC bus stopped 100 meters behind Dogla Nullah from which the accused got down. Thereafter, he started coming on foot towards Nagaan. When he saw the police party, he tried to escape, but he was apprehended by the police officials. On suspicion, that the said person (hereinafter referred to as the accused) was in possession of some narcotic

substance, HC Pune Ram PW-9 obtained option of the accused as per the provision of Section 50 of the NDPS Act and thereafter, he conducted search of the bag of the accused and recovered 800 grams opium from the same. Two samples each weighing 25 grams were separated and the samples as well as bulk were converted into three separate parcels which were sealed with seal impression 'T'. NCB form was filled in triplicate and sample of seal was drawn and seal was handed over to PW-6 Kashmi Ram. Vide seizure Memo Ext. PW6/D, case property was also taken into possession. Rukka Ext. PW2/A was drawn and sent to the Police Station on the basis of which FIR Ext. PW2/B was reregistered. Case property was presented before PW-1 Rajinder Singh who resealed the same with seal impression 'X' and the same was thereafter deposited in the Malkhana. Special report was prepared on 22.04.2008 by HC Pune Ram and the same was sent to SDPO, Ani. On 23.04.2008 PW-1 HC Rajinder Singh sent one part of sample to FSL, Kandaghat and Chemical Examiner vide report Ext. PA opined that the contents of the sample were that of opium.

3. After completion of investigation, challan was filed and as a prima facie case was found as against the accused, accordingly he was charged for commission of offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985, to which he pleaded not guilty and claimed trial.

4. Learned trial Court on the basis of material produced on record by the prosecution concluded that the prosecution had failed to establish the recovery of the opium from the exclusive and conscious possession of the accused beyond reasonable doubt and on these basis, the accused was acquitted by learned trial Court.

5. Mr. V.S. Chauhan, learned Additional Advocate General, argued that the judgment of acquittal passed by learned trial Court is perverse and the findings returned by learned trial Court were not sustainable either on facts or law. He submitted that learned trial Court failed to appreciate the prosecution evidence in the correct perspective and the reasonings returned by learned trial Court were manifestly unreasonable. According to Mr. Chauhan, learned trial Court had discarded the well reasoned and consistent testimony of the prosecution witnesses on material points without any cogent justification. He also submitted that learned trial Court took into consideration minor contradictions without appreciating that the evidence produced on record by the prosecution both ocular as well as documentary on material points was cogent and reliable. On these basis, it was submitted by Mr. Chauhan that the judgment of acquittal returned by learned trial Court required reversal and the accused be convicted for commission of offence punishable under Section 18 of the NDPS Act.

6. Mr. Sanjay Jaswal, learned counsel appearing for the respondent argued that the judgment passed by learned trial Court was neither perverse nor it could be said that the findings returned by learned trial Court in favour of the respondent were not sustainable either on facts or on law. According to Mr. Jaswal, judgment passed by learned trial court was a reasoned judgment, perusal of which demonstrated that learned trial Court after due appreciation of the entire material produced on record by the prosecution had come to the conclusion, and rightly so, that the prosecution had not been able to establish the guilt of the accused beyond reasonable doubt. It was further argued by Mr. Jaswal that the respondent in fact was falsely implicated in the case and he had not committed the alleged offence for which was tried. As per him, the case putforth by the prosecution was highly improbable and this was evident from the fact that neither any independent witness was associated by the police at the time of search and seizure nor the prosecution could prove its case beyond reasonable doubt, as was held by learned trial Court. On these basis, he argued that the findings of acquittal returned by learned trial Court warranted no interference.

7. We have heard learned counsel for the parties and we have also gone through the records of the case as well as the judgment passed by learned trial Court.

8. A perusal of the record of the case demonstrates that no independent witness has been associated by the police at the time of search and seizure of the alleged contraband

from the accused. Search and seizure of opium has been made vide Memo Ext. PW6/D by Investigating Officer Pune Ram which is witnessed by HHC Kashmi Ram and Constable Ishwari Ram. Investigating Officer HC Pune Ram entered the witness box as PW-9 and Constable Kashmi Ram entered the witness box as PW-6. Constable Ishwari Ram has not been examined by the prosecution.

9. In his statement PW-9 HC Pune Ram has stated that on 21.04.2008 at around 6.45 AM he alongwith HHC Kashmi Ram, HHC Santosh Kumar and Constable Ishwari Ram, were present at Dogla Nullah in connection with Nakabandi and general patrol duty. In the meantime one HRTC bus came and stopped 100 meters behind Dogla Nullah from which accused alighted and he started coming on foot towards Nagaan. He also stated that the said HRTC bus which was coming from Karana to Delhi was checked by them but no incriminating article was recovered from the bus. Thereafter, he deposed that the accused who had got down from the bus reached near the police party and when he saw the police party, he tried to escape but he was overpowered and apprehended by the police and as there was no habitation nearby nor any other person was present, accordingly, he joined HHC Kashmi Ram and Constable Ishwari Ram as witnesses and thereafter, he informed the accused person that he suspected the accused to be in possession of some narcotic substance. He thereafter informed the accused that his personal search was intended to be taken and accordingly, the accused was made aware about his legal right as to whether he wanted to be searched either in the presence of a Magistrate or a Gazetted Officer. Accused opted to be searched by the police on the spot. This witness further deposed that vide Memo Ext. PW6/B search of the polythene bag being carried by the accused revealed 800 grams of opium which was recovered. Thereafter, this witness stated that two samples each weighing 25 grams were separated and made into parcels which were sealed with seal impression 'T' and the remaining bulk opium was put back into the same parcel and sealed with seal impression 'T'. NCB form Ext.PW1/B was filled in triplicate and specimen of seal was obtained and the seal was handed over to HHC Kashmi Ram. After preparation of search and seizure, Rukka was prepared and sent to Police Station Ani through HHC Santosh Kuma. Site plan was also prepared and statements of the witnesses were recorded. He also deposed that after returning back to the Police Station, the case property was presented before MHC Rajinder Singh alongwith NCB form and sample of seal. Next day, he prepared special report which was sent to SDPO, Ani. In his cross-examination, he stated that before leaving the Police Station he had asked Luder Singh to make entry in the daily diary about their departure. He further stated that they had left Police station on foot as there was no vehicle. He also deposed that when they were at Nagaan one bus came from Ani side at 5.45 A.M. which was checked by them. They had laid Naka on the spot where they had reached 10-15 minutes before Karana Delhi bus reached there. He also stated that they checked the passengers and their luggage in the bus. According to him, accused person reached the spot 5-10 minutes after the bus had left the spot. He also stated that Dogla Nullah was situated at a distance of about 1 K.M. from Navypul. He denied the suggestion that there were 4-5 houses situated above Navypul. He stated that it took them about 10 minutes to check the bus. He also stated that the personal search of the accused person was not conducted before search of his bag. He also stated that the weights and balance which he was carrying with him was his personal property. He stated that he had seized the opium at around 8.00 A.M. and thereafter, he had prepared the Rukka. He further stated that they left the spot at 12.30 P.M. He denied the suggestion that the polythene containing opium was recovered from inside the bus next to a person belonging to Soidhar, who was an Electrician and this fact was pointed out by the accused. He also denied the suggestion that the accused was falsely implicated in the case at the instance of person belonging to Soidhar.

10. PW-6 Kashmi Ram stated on oath that on 21.04.2008 he alonghwith HC Pune Ram, HHC Santosh Kumar and Constable Ishwari Ram were present at Dogla Nullah in connection with general patrol duty and detection of criminal cases. As per him, at around 6.45 A.M. one bus stopped at about 100 meters behind Dogla Nullah from which accused alighted and started walking towards Nagaan. The said bus was going from Tarana to Delhi. The bus was

checked by the police party but nothing incriminating was found. When the accused reached near the police party, he was holding a polythene bag in his hand and he tried to escape but he was overpowered and apprehended by the police. As per this witness, there was no habitation nearby nor any person was available and, therefore, HC Pune Ram joined him and Constable Ishwari Ram as witnesses and thereafter, conducted search and seizure of the contraband. In his cross-examination, this witness has stated that they left the Police Station at 3.00 A.M. for Nagaan on foot which was situated at a distance of 5 KMs from Police Station to Dogla Nullah, which was situated at a distance of 400-500 meters from Navypul. According to him, when the police party left Police Station, rapat was recorded in the daily diary. He further stated that they were present at the spot for about 30 minutes before the bus had stopped at Dogla Nullah. He also stated that the place where they ha laid Naka road was visible upto a distance of 100 meters. This witness further deposed that first they saw the bus stop at Dogla Nullah and thereafter they saw the accused person getting down from the bus. There were 10-15 passengers present in the bus and they checked the passengers and their luggage in the bus. This witness further stated in his cross-examination that after the bus left the spot the accused person was found coming at a distance of 10-15 meters. This witness admitted that there were 4-5 houses situated above Navypul and that there were 2-3 shops near Navypul but the shops were closed at that time. He further deposed that NCB form was filled up by HC Pune Ram. He also stated that opium was taken into possession after about one hour from the time when the accused was overpowered.

11. The other witness of search and seizure Constable Ishwari Ram has not been examined by the prosecution and was given up.

12. PW-7 HHC Santosh Kumar, who was also member of the police party, deposed that while they had laid Naka one HRTC bus came from Swad side which stopped 100 meters behind Dogla Nullah and from which one person alighted and started walking towards Nagaan. This witness has further stated that bus was going from Tarana to Delhi and the same was checked by the police party. According to him, the accused tried to escape but was overpowered by the police party and there was no habitation nearby nor any independent witness was available. In his cross-examination, this witness has stated that they were present at the spot for 5-10 minutes when Karana-Delhi bus came. He expressed his ignorance about the fact that the there were 4-5 houses situated above Navypul. This witness further deposed that he left the spot for the Police Station on foot but after walking for some distance he got lift in a private vehicle. As per him, he handed over the case file to the Investigating Officer on the spot at 10.00 A.M. and they left the spot at 12.30 P.M. and went to Shawad and reached there at 3.00 or 3.30 P.M.

13. HC Anup Kumar entered the witness box as PW-10 and stated that at the relevant time he was posted as MHC in Police Station Ani and on 03.09.2010 he sent the case property alongwith the sample and seal to FSL Junga.

14. PW-6, PW-7 and PW-9 in our considered view are the key witnesses keeping in view the fact that no independent witness has been associated by the police during the search and seizure. It is incumbent upon us to closely scrutinize the statements of these three witnesses in order to satisfy ourselves as to whether the judgment of acquittal returned by learned trial Court is sustainable or whether learned trial Court has erred in not convicting the accused.

15. The justification which has been given by the prosecution witnesses for not associating any independent witness with search and seizure is that the site of occurrence was secluded as there was neither habitation nearby nor any person was present. It is apparent and evident from the testimony of PW-6, PW-7 and PW-9 that in fact no effort was made by PW-9 to join any independent witness with the search and seizure of the contraband allegedly recovered from the accused. The stand of PW-7 and PW-9 that there was no habitation nearby and therefore, no independent witness could be associated is belied from the testimony of PW-6 Kashmi Ram, who in his cross-examination has admitted that Dogla Nullah is situated at a

distance of 400-500 meters from Navypul and that there were 4-5 houses situated above Navypul and 2-3 shops were also there near Navypul but those shops were closed at that time. It is not the case of the Investigating Officer that though he made attempt to associate independent witness but he could not do so. Therefore, in the teeth of the testimony of PW-6 that there were 4-5 houses situated above Navypul and 2-3 shops were there near Navypul though the same were closed, the act of the Investigating Officer of not making any effort to associate any independent witness with the search and seizure, creates a doubt over the veracity of the story of the prosecution. It is settled law that the reason as to why independent witnesses are associated with the search and seizure is to ensure that on one hand it acts as a protector of the right of the accused and on the other hand, it gives veracity also to the case of the prosecution.

16. In the present case, there are other inconsistencies and contradictions in the testimony of the prosecute witnesses. As per PW-7 and PW-9, the police party had reached the place where Naka was laid about 5-10 minutes before the HRTC bus came there, whereas as per PW-6, the police party had reached the spot about 30 minutes before the bus came. PW-9 in his cross-examination has stated that when they were at Nagaan one bus came from Ani side at 5.45 A.M. which was checked by them, however, this fact has not been deposed either by PW-6 or PW-7.

17. Now comes the most incriminating factor as far as the case putforth by the prosecution is concerned. PW-6, PW-7 and PW-9 in unison have stated that the bus in issue came at around 6.45 A.M. and it stopped 100 meters behind Dogla Nullah and the accused alighted from the bus and started walking towards Nagaan. According to all these witnesses, when accused saw the police party, he tried to escape but he was overpowered by the police party. All these witnesses have also stated that the HRTC bus in issue was checked by the police party in which 10-15 passengers were traveling and nothing incriminating were found from the said passengers. If the version of these witnesses is to be believed then the police party searched HRTC bus in which the accused was also travelling but nothing incriminating was found by the police party from the passengers of the said bus which also included the accused. If this version of the prosecution is to be believed then the story being putforth by the prosecution to the effect that the bus stopped 100 meters behind Dogla Nullah and from the said bus accused alighted and when he saw the police party he tried to escape is false and incorrect. This is for the reason that if this version of the prosecution is correct then its other version that the police party checked the bus is falsified. It cannot be that firstly the police party checked the bus and thereafter it returned back to the Naka and thereafter accused alighted from the bus and when he again saw the same police party which had earlier checked him in the bus he tried to run away but was over powered. There is no explanation given by the prosecution that if the police party had in fact checked the bus in which the accused was also travelling then why polythene bag was not recovered by the police party during the course of said checking. None of the said witnesses have deposed that when the bus stopped about 100 meters from Dogla Nullah, they immediately searched the bus and they did not allow any person to get down from the bus till the time the search was over. On the other hand, all these three witnesses in unison had stated that immediately after the bus stopped about 100 meters from Dogla Nullah, the accused got down from the bus.

18. In our considered view, had it been a case that after the bus stopped at Dogla Nullah the police party had in fact really checked the bus and the accused was carrying the contraband alongwith him then nothing stopped the police from having recovered the contraband from the accused during the search of the said bus. Further, if the accused had in fact alighted from the bus immediately when it stopped and the police party had in fact checked the bus as is the case of the prosecution, then obviously the accused had ample time to run away from the spot. The factum of the bus having been checked by the police party on 21.04.2008 at 6.45 A.M. and the accused travelling in the said bus has not been proved by the prosecution by bringing into the witness box either the driver or conductor of the said bus or any other

passenger especially when route of the bus was known to the prosecution and it is matter of record that the bus belonged to Himachal Road Transport Corporation.

19. All these facts in our considered view shroud the case of the prosecution with suspicion and it cannot be said that the prosecution has proved its case beyond reasonable doubt that the search and seizure in fact took place in the mode as has been projected by the prosecution or that the contraband in fact was recovered from the exclusive possession of the accused as per the case putforth by the prosecution.

20. Besides this, another important aspect of the matter is that whereas PW-6 and PW-7 have deposed that the accused reached the site after he alighted from the bus in a couple of minutes, as per PW-9 it took the accused 5-10 minutes to reach the spot after getting down from the bus. This seems highly improbable because as per the case of the prosecution the accused had deboarded the bus 100 meters from the place where Naka was laid down by the police party. This also creates serious doubt about the veracity of the case of the prosecution because it will not take a person normally 5 to 10 minutes to cover 100 metera distance.

21. PW-9 has stated on oath that he seized opium at around 8.00 A.M. As per the testimony of PW-6, case property was seized one hour after the accused was apprehended by the police party. However, a perusal of the entries made in NCB form Ext. PW1/B demonstrates that the case property was seized at 6.45 A.M. Thus, the entry in the NCB form is not in harmony with the testimony of PW-6 and PW-9. Ext. PW1/D is daily diary report dated 21.04.2008 as per which the departure of HC Pune Ram, HHC Kashmi Ram, HHC Santosh Kumar and Constable Ishwari Ram for the purpose of Nakabandi is mentioned at "***Samay Teen Baje Din Darj Hai***". This belies as has been putforth by the prosecution and as has been stated by PW-6, PW-7 and PW-9 that they had left Police Station for the purpose of Naka after making necessary entries in the daily diary register at 3.00 A.M. HC Pune Ram PW-9 also stated that he presented the case property alongwith NCB form before PW-1 HC Rajinder Singh who resealed it and thereafter the same was deposited in the Malkhana. However, HC Rajinder Singh who entered the witness box as PW-1, in his cross-examination has admitted that there is no entry about the deposit of NCB form in the Malkhana register.

22. From all that has been discussed above, it cannot be said that on the basis of material produced on record by the prosecution, it stood proved beyond reasonable doubt that the accused was guilty of commission of offence punishable under Section 18 of the NDPS Act. We have also perused the judgment passed by learned trial Court and according to us, learned trial Court after taking into consideration the entire material produced on record by the prosecution and after appreciating the same has rightly concluded that the prosecution in fact had failed to prove beyond reasonable doubt that the contraband in fact was found from the exclusive and conscious possession of the accused. We concur with the findings which has been so arrived at by learned trial Court. There is neither any perversity nor any infirmity with the findings so recorded by learned trial Court and, therefore, while upholding the judgment passed by learned trial Court, we dismiss the present appeal being devoid of any merit. Bail bonds, if any, furnished by the accused are discharged.

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BEFOREHON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

The New India Assurance Company .....Appellant

Versus

Smt. Indu Bala & others .....Respondents

FAO No. 312 of 2011
Decided on : 02.09.2016.

Motor Vehicles Act, 1988- Section 173- Insurer questioned the award on the ground that compensation amount is excessive- held, that insurer cannot question the award on the ground

of adequacy of compensation, unless permission has been obtained under Section 170 of the Act- no such permission was obtained- appeal dismissed. (Para-15 to 23)

Cases referred:
United India Insurance co. Ltd. Versus Shila Datta & Ors., 2011 AIR SCW 6541
Josphine James versus United India Insurance Co. Ltd. & Anr., 2013 AIR SCW 6633

For the Appellant :	Mr. B.M. Chauhan, Advocate.
For the Respondents:	Mr. Lakshay Thakur, Advocate, for respondents No. 1 & 2. Respondent No. 3 already ex-parte. Nemo for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject matter of this appeal is the award dated 16th June, 2011, made by the Motor Accident Claims Tribunal, Fast Track Court, Mandi, District Mandi, H.P. (hereinafter referred to as 'the Tribunal') in Claim Petition No. 6 of 2003, 109/05, titled as **Smt. Indu Bala & others versus M/s Techni Bharthi Ltd. & others,** whereby compensation to the tune of 15,56,840/- with interest at the rate of 9% per annum from the date of filing of the claim petition, came to be granted in favour of the claimants and the insurer was saddled with liability (for short, "the impugned award").

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

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

4. Thus, the only question to be determined in this appeal is –whether the Tribunal has rightly saddled the insurer with the liability. The answer is in the affirmative for the following reasons.

5. Deceased Balbir Singh was the victim of the motor vehicular accident, which was caused by driver, namely, Mohammad Sabir, while driving the vehicle-Truck/Tipper bearing registration No. SK-03-1657, rashly and negligently, on 27.04.2002, at about 9.15 a.m. at Techni Bharthi, Dipudara, Makha Road, P.S. Sangtam, East Sikkim.

6. The claimants invoked the jurisdiction of the Tribunal for grant of compensation to the tune of Rs.30,00,000/- as per the break-ups given in the claim petition.

7. The claim petition was resisted by the respondents on the grounds taken in their memo of objections.

8. Following issues came to be framed by the Tribunal:

"1. Whether the deceased Balbir Singh Verma died due to the injuries received in the motor vehicle accident on 27-4-4-2002 due to the rash and negligent driving of the vehicle bearing registration No.SK-03-1657 by the respondent No. 2, as alleged?....OPP

2. If issue no. 1 is proved in affirmative, whether the petitioners are entitled for the award of compensation, if so, to what amount and from whom?...OPP

3. Whether the driver of the vehicle was not holding any valid and effective driving licence to drive the vehicle at the time of the accident, as alleged? ...OPR-3

4. Whether the alleged vehicle was being plied in violation of the route permit and in violation of the terms and conditions of the route permits, as alleged? ...OPR-3

5. *Whether there has been breach of specific terms and conditions of the policy, if so, its effect? …OPR-3*

6. *Whether the respondent No. 3 has not issued any policy of insurance insuring or contracting to indemnify the insured against any loss or risk as alleged? …OPR-3*

7. *Relief."*

9. It is apt to record herein that the respondents have not led any evidence.

Issue No. 1.

10. There is no dispute regarding issue No. 1. Thus, the findings returned by the Tribunal on issue No. 1 are upheld.

11. Before dealing with issue No. 2, I deem it proper to deal with issues No. 3 to 6.

Issues No. 3 to 6.

12. It was for the insurer to prove issues No. 3 to 6, has failed to do so, thus has failed to discharge the onus.

13. It was also for the insurer to plead and prove that the insured-owner has committed willful breach or the accident was not outcome of the rash and negligent driving of the driver, has failed to do so, thus has failed to discharge the onus. Accordingly, the findings returned by the Tribunal on Issues No. 3 to 6 are upheld.

Issue No. 2.

14. Learned Counsel for the insurer argued that the compensation amount is excessive.

15. The insurer cannot question the impugned award on the ground of adequacy of compensation for the following reasons.

16. In terms of the mandate of Sections 147 and 149 of the Motor Vehicles Act, 1988 (for short "MV Act") read with the terms and conditions contained in the insurance policy, the insurer has limited grounds available, but, it can contest the claim petition on other grounds provided permission in terms of Section 170 of the MV Act has been obtained.

17. It is apt to reproduce Section 170 of the MV Act herein:

> *"**170. Impleading insurer in certain cases.** - Where in the course of any inquiry, the claims Tribunal is satisfied that -*
>
> *(a) there is collusion between the person making the claim and the person against whom the claim is made, or*
>
> *(b) the person against whom the claim is made has failed to contest the claim,*
>
> *it may, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in sub-section (2) of section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made."*

18. The insurer can seek permission to contest the claim petition on all grounds available to it and in case permission has not been sought and granted, it is precluded from questioning the award on adequacy of compensation or any other ground, which is not otherwise available to it.

19. This question arose before the Apex Court in the case titled as **United India Insurance co. Ltd. Versus Shila Datta & Ors.,** reported in **2011 AIR SCW 6541,** and the matter was referred to the larger Bench.

20. The question again arose before the Apex Court in the case titled as **Josphine James versus United India Insurance Co. Ltd. & Anr.,** reported in **2013 AIR SCW 6633.** It is apt to reproduce paras 8, 17 and 18 of the judgment herein:

> *"8. Aggrieved by the impugned judgment and award passed by the High Court in MAC Appeal no. 433/2005 and the review petition, the present appeal is filed by the appellant urging certain grounds and assailing the impugned judgment in allowing the appeal of the Insurance Company without following the law laid down by this Court in Nicolletta Rohtagi's case and instead, placing reliance upon the Bhushan Sachdeva's case. Nicolletta Rohtagi's case was exhaustively discussed by a three judge bench in the case of United India Insurance Company Vs. Shila Datta, 2011 10 SCC 509. Though the Court has expressed its reservations against the correctness of the legal position in Nicolletta Rohtagi decision on various aspects, the same has been referred to higher bench and has not been overruled as yet. Hence, the ratio of Nicolletta Rohtagi's case will be still applicable in the present case. The appellant claimed that interference by the High Court with the quantum of compensation awarded by the Tribunal in favour of appellant and considerably reducing the same by modifying the judgment of the Tribunal is vitiated in law. Therefore, the impugned judgments and awards are liable to be set aside.*
>
> *9. to 16. .....*
>
> *17. The said order was reviewed by the High Court at the instance of the appellant in view of the aforesaid decision on the question of maintainability of the appeal of the Insurance Company. The High Court, in the review petition, has further reduced the compensation to Rs. 4,20,000/- from Rs. 6,75,000/- which was earlier awarded by it. This approach is contrary to the facts and law laid down by this Court. The High Court, in reducing the quantum of compensation under the heading of loss of dependency of the appellant, was required to follow the decision rendered by three judge Bench of this Court in Nicolletta Rohtagi case (2002) 7 SCC 456 : AIR 2002 SC 3350 : 2002 AIR SCW 3899, and earlier decisions wherein this Court after interpreting Section 170 (b) of the M. V. Act, has rightly held that in the absence of permission obtained by the Insurance Company from the Tribunal to avail the defence of the insured, it is not permitted to contest the case on merits. The aforesaid legal principle is applicable to the fact situation in view of the three judge bench decision referred to though the correctness of the aforesaid decision is referred to larger bench. This important aspect of the matter has been overlooked by the High Court while passing the impugned judgment and the said approach is contrary to law laid down by this Court.*
>
> *18. In view of the aforesaid reasons, the Insurance Company is not entitled to file appeal questioning the quantum of compensation awarded in favour of the appellant for the reasons stated supra. In the absence of the same, the Insurance Company had only limited defence to contest in the proceedings as provided under Section 149 (2) of the M.V. Act. Therefore, the impugned judgment passed by the High Court on 13.1.2012 reducing the compensation to 4,20,000/- under the heading of loss of dependency by deducting 50% from the monthly income of the deceased of Rs. 5,000/- and applying 14 multiplier, is factually and legally incorrect. The High Court has erroneously arrived at this amount by applying the principle of law laid down in Sarla Verma v. Delhi Transport Corporation, 2009 6 SCC 121 instead of applying the principle laid down in Baby Radhika Gupta's case regarding the multiplier applied to the fact situation and also contrary to the law applicable regarding the maintainability of appeal of the Insurance Company on the question of quantum of compensation in the absence of permission to be obtained by it from the Tribunal under Section 170 (b) of the M.V. Act. In view of the aforesaid reason, the High Court should not have allowed the appeal of the Insurance Company as it has got limited defence as provided under section 149(2) of the M.V. Act. Therefore, the impugned judgment and award is vitiated in law and hence, is liable to be set aside by allowing the appeal of the appellant."*

21. Viewed thus, the insurer can question the adequacy of compensation only if it has sought permission under Section 170 of the MV Act.

22. In the present case, it has to be seen whether the insurer has sought any such permission?

23. I have gone through the record, which does disclose that neither any such application was filed by the insurer nor such permission was granted.

24. It appears that the amount awarded is meager. But, unfortunately, the claimants have not questioned the adequacy of the compensation, thus, the same is upheld.

25. It is apt to record herein that the mother of the deceased has died during the pendency of the appeal. Thus, the remaining claimants are held entitled to compensation in equal shares.

26. The Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their bank accounts.

27. Accordingly, the impugned award is upheld and the appeal is dismissed.

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

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Asha Tiwari ....Petitioner.

Versus

Manoj Kumar Kansara ...Respondent.

Civil Revision No.122 of 2007
Reserved on : 4.8.2016
Date of Decision: September 5, 2016

H.P. Urban Rent Control Act, 1987- Section 14- Rent Controller ordered the eviction of the tenant- an appeal was preferred, which was allowed and the judgment of Rent Controller was reversed- tenant claimed that his family consists of himself, his wife, two children, father, mother, brother and his wife and two children- burden to prove that his brother and brother's family were ordinarily residing and were dependent upon him was on the tenant, which was not discharged - Rent Controller had rightly held that it was necessary for the tenant to place on record the ration card indicating that entire family was living jointly as a single unit- newly acquired premises consists of three rooms, one kitchen, one bathroom, one balcony, one terrace and attic, whereas, premises in question consists of two rooms, one kitchen, one bath-cum-latrine – thus, newly acquired premises is sufficient for meeting the requirement of the tenant and his family- Appellate Authority had wrongly reversed the judgment of the trial court- judgment of the Appellate Authority set aside while that of the Rent Controller restored. (Para-5 to 24)

Cases referred:

Joginder Pal v. Naval Kishore Behal, (2002) 5 SCC 397
Dwarkaprasad v. Niranjan and another, (2003) 4 SCC 549
Kailash Chand and another v. Dharam Dass, (2005) 5 SCC 375
S.N.D.P. Union v. Vamana Naik, 1994(1) RCR 157
Ganpat Ram Sharma and others v. Smt. Gayatri Devi, (1987) 3 SCC 576
Hindustan Petroleum Corporation Limited vs. Dilbahar Singh, (2014) 9 SCC 78

For the Petitioner : Mr. Neeraj Gupta, Advocate.
For the Respondents : Mr. Ashok Sood, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Finding tenant-respondent Manoj Kumar Kansara, hereinafter referred to as the tenant, to have acquired an alternate vacant possession, the Rent Controller, in terms of order dated 29.12.2004, passed in Case No.23/2 of 2001, titled as *Asha Tiwari v. Manoj Kumar Kansara*, allowed the petition filed by landlady-petitioner Asha Tiwari, hereinafter referred to as the landlady, directed eviction of the tenant from the tenanted premises.

2. Such order and findings of fact, came to be reversed by the Appellate Authority, in terms of order dated 27.6.2007, passed in Civil Misc. Appeal No.55-S/14 of 2006/05, titled as *Manoj Kumar Kansara v. Asha Tiwari*.

3. The Rent Controller found the tenant not to have produced the ration card, indicating the extent of his family, whereas the Appellate Authority, by taking note of the Voters' List, has held the extended family to be the family of the tenant.

4. For the purpose of ready reference, relevant provision of the H.P. Urban Rent Control Act, 1987 (hereinafter referred to as the Act), entitling the landlord to seek ejectment of the tenant, at the time of filing of the present petition, was as under:

> "14(3)(a)(iv). The tenant has, whether before or after the commencement of this Act built or acquired vacant possession of or been allotted, a residence reasonably sufficient for his requirement."(Emphasis supplied)

5. Certain facts are not in dispute. Tenanted premises consist of two rooms, kitchen, bath-cum-latrine, comprising Set No.5, Himachali Bhawan, Sanjauli, Shimla-6.

6. Concurrently, the authorities below have held the tenant to have purchased premises within the municipal limits, comprising of three rooms, one kitchen, one store, one bathroom, one balcony and terrace of the top floor alongwith attic, in a building, commonly known as Gaurav Niwas.

7. According to the tenant, both the tenanted as also the newly acquired premises were already in use and occupation by him, including his "family" and only during its occupancy, these premises in Gaurav Niwas, came to be acquired by way of ownership.

8. Record reveals that tenant examined four witnesses. Now significantly, there is nothing on record to establish, by way of documentary evidence, that the premises in Gaurav Niwas were also under tenancy, that of the tenant or his family members. On this issue, ocular evidence cannot be said to be inspiring in confidence, for except for bald assertion, relevant facts pertaining to such tenancy are conspicuously absent. Also, prior to its acquisition, there is nothing to establish the tenant's possession in these premises.

9. Significantly, the erstwhile owner of the newly acquired premises has not stepped into the witness box. There is nothing on record to establish that the tenant or his brother was ever residing there, either as a tenant or otherwise. In the response filed to the petition, tenant admits that his family as also his brother's family have been jointly residing in both the premises. But, he is conspicuously silent as to when he came into possession of the newly acquired premises. Hence, such plea, so made before this Court, is palpably false.

10. The Act, defines "family" as "parents and such relation(s) of the landlord as ordinarily reside with him and is/are dependent upon him".

11. The definition would, in equal measure, apply also to a tenant, for there is no separate provision defining the "family" of a tenant.

12. What is a "family" is no longer integra. It has to be liberally and broadly construed, so as to include near relations of the head of the family. Dependent for the purposes of residence or economic consideration, whose responsibility is accepted by the landlord, would

be a member of the family. (*Joginder Pal v. Naval Kishore Behal,* (2002) 5 SCC 397; *Dwarkaprasad v. Niranjan and another,* (2003) 4 SCC 549; and *Kailash Chand and another v. Dharam Dass,* (2005) 5 SCC 375).

13. According to the tenant, his family consists of himself, his wife, two children, father, mother and brother Mukesh, his wife and two children. In all there are ten members in the family.

14. Onus to establish as to whether Mukesh and his family were ordinarily residing and were dependent upon him or not, was on the tenant, which in the instant case, remains unestablished/unproven on record. The Rent Controller rightly observed that it was necessary for the tenant to have placed on record the ration card, indicating that the entire family was living jointly as a single unit.

15. What weighed with the lower Appellate Authority in dismissing the petition was the Voters' List (Ex.RW-2/A) and photocopy of the Voter Identify Cards. Document (Ex.RW-2/B), so prepared on 28.9.2001, subsequent to the filing of the petition (26.6.2001), is not reflective of complete family of the tenant. Names of children are missing. Perhaps they may be minor, but then, the tenant ought to have lent some explanation. Preparation of the document for the sake of convenience cannot be ruled out. Attention is invited to the Voters' Identity Card (Ex.RW-4/A) issued by the Election Commission of India, but then this document pertains to the year 1995 and it has not come on record that thereafter, both the brothers have been residing together, as a single unit, in the tenanted premises, which address is so indicated in the said document.

16. This Court has already held the tenant's plea of simultaneously being in possession of both the tenanted as well as the newly acquired premises not to have been proven on record.

17. In *Kailash Chand (supra)*, the apex Court held as under:

> "26. Undoubtedly, the Himachal Pradesh urban Rent Control Act, 1987 has been enacted for the purpose of providing for the control of rents and evictions because of paucity of accommodation in urban areas. The Rent Control Legislations, generally aim at preventing rack-renting and resorting to evictions by unscrupulous and greedy landlords, who take advantage of the shortage in availability of accommodations in cities and dictate their terms to the tenants and if they do not follow the dictates, subject them to eviction. The Rent Control legislations are generally heavily loaded in favour of the tenants and the provision dealing with which the courts at times lean in favour of the landlords is the one which permits the landlord to seek eviction of the tenant on the ground of requirement for his own occupation, residential or non-residential. There are weak amongst the tenants as also amongst the landlords. (See *Joginder Pal v. Naval Kishore Behal,* (2002) 5 SCC 397). Take the case of a landlord knocking the doors of the court seeking its assistance for a roof over his head or for a reasonably comfortable living, when he is himself either in a rented accommodation or squeezing himself and his family members in a limited space, while the tenant protected by the Rent Control law is comfortably occupying the premises of the landlord or a part thereof……"

18. Further, assuming hypothetically that the tenant's brother and his family have been living together as a single unit in the tenanted premises, even then one finds that the newly acquired premises are sufficient enough for meeting the requirement of the tenant and his family. Such conclusion is clearly deducible when the premises in question are compared with the tenanted premises. As against two rooms, one kitchen and one bath-cum-latrine, tenant has acquired possession of three rooms, one kitchen, one bath, one balcony, one terrace and attic.

19. The expression "reasonably sufficient for his requirement" is of relative amplitude. Its application differs from case to case. Sufficiency of the building for a man's

requirement is reasonable sufficiency. Courts have to objectively decide the same. (*S.N.D.P. Union v. Vamana Naik,* 1994(1) RCR 157).

20. It is a settled principle of law that it is essential that the ingredients must be pleaded by the landlord who seeks eviction but after the landlord has proved or stated that the tenant has built, acquired vacant possession or has been allotted a residence, whether it is suitable or not, and whether the same can be really an alternative accommodation for the tenant or not, are within the special knowledge of the tenant and he must prove and establish those facts. (*Ganpat Ram Sharma and others v. Smt. Gayatri Devi,* (1987) 3 SCC 576). In the instant case, it is not so done.

21. The onus to establish that the alternate premises are reasonably sufficient for the requirement of the tenant is on the landlord, (*Kunhiraman v. Kumaran,* 2004(2) RCR 528; and *Quiet Corner India, Bangalore v. Hameedulla Khan and another,* 2004(1) RCR 310), which, in the instant case, one finds it to have been established.

22. What is perversity, illegality and impropriety is now well settled. The principles stand elucidated by this Court in Civil Revision No. 154 of 2004, titled as *Yog Raj Sood v. Sunita Kaushal & another*, decided on 1.6.2016, by relying upon a decision of the apex Court in *Hindustan Petroleum Corporation Limited vs. Dilbahar Singh*, (2014) 9 SCC 78.

23. Hence, the lower Appellate Authority erred in correctly and completely appreciating the material on record.

24. In view of the aforesaid discussion, the present petition is allowed and the findings returned by the lower Appellate Authority, vide order dated 27.6.2007, passed in Civil Misc. Appeal No.55-S/14 of 2006/05, titled as *Manoj Kumar Kansara v. Asha Tiwari*, being perverse, illegal and improper, not based on correct appreciation of material on record, are set aside. However, findings returned by the Rent Controller, vide order dated 29.12.2004, passed in Case No.23/2 of 2001, titled as *Asha Tiwari v. Manoj Kumar Kansara*, are upheld.

Present Revision Petition stands disposed of, so also pending application(s), if any.

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

Sh.Bal Krishan Rawat s/o Sh. Kewal Ram .....Petitioner/Accused

Versus

Sh. Mohan Lal s/o Sh. Shyama Nand and another .....Non-petitioners

Cr.MMO No. 212 of 2014
Order Reserved on 29.06.2016
Date of Order 05.09.2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the accused pleading that accused had forged the blank cheque and had wrongly filled the amount of Rs 5 lacs- police filed a cancellation report- objections were filed- Court accepted the objection and sent the case for re-investigation- again a cancellation report was filed- complaint was treated as a private complaint- accused was summoned on the basis of the evidence- petition has been filed for cancellation of the summoning order and order framing charge- held, that merely because second appeal is pending before High Court is no ground to quash the proceeding as Civil and Criminal proceedings can continue simultaneously – offences punishable under Section 138 of Negotiable Instruments Act and Sections 420, 467, 468, 471 and 474 of I.P.C. are separate and the proceedings cannot be quashed on the ground of pendency of criminal proceedings- innocence or guilt cannot be determined at this stage- petition dismissed. (Para-6 to 13)

Cases referred:

State of Bombay Vs. S.L. Apte, AIR 1961 SC 578

Sangeetaben Mahendrabhai Patel Vs. State of Gujarat and another, 2012 (7) SCC 621

State of NCT of Delhi Vs. Sanjay, AIR 2015 SC 75
S.A. Venkataraman Vs. Union of India, AIR 1954 SC 375
Maqbool Hussain Vs. State of Bombay, AIR 1953 SC 325
Mohd. Akbar Dar & Others Vs. State of J & K and others, AIR 1981 SC 1548
State of Orissa Vs. Debendra Nath Padhi, AIR 2005 SC 359
Supdt. & Remembrancer of Legal Affairs Vs. Anil Kumar Bhunja, AIR 1980 SC 52
State of Bihar Vs. Ramesh Singh, AIR 1977 SC 2018
State of Delhi Vs. Gyan Devi & Others, AIR 2001 SC 40
State of M.P. Vs. Johari & Others, AIR 2000 SC 665
State of Maharashtra Vs. Priya Sharan Maharaj & Others, AIR 1997 SC 2041

For petitioner : Mr. Janesh Gupta, Advocate
For non-petitioner No.1 : Mr. Vinay Thakur, Advocate
For non-petitioner No.2 : Mr. M. L. Chauhan, Addl. A. G. and Mr. R.K. Sharma, Dy. A.G.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present petition is filed under Section 482 Code of Criminal Procedure 1973 to quash orders dated 20.05.2014 and 03.09.2014 passed by learned Judicial Magistrate 1st Class Jubbal Distt. Shimla (H.P.) in case No.23/2 of 2014 title Mohan Lal Vs. Bal Krishan Rawat relating to FIR No. 46/2005 dated 28.06.2005 registered under Sections 420, 467, 468, 471 & 474 IPC in Police Station Jubbal Distt. Shimla (H.P.).

Brief facts of the case:

2. Sh. Mohan Lal complainant filed FIR No. 46/2005 dated 28.06.2005 against accused Bal Krishan Rawat alleging that accused person used to work as commission agent for selling of apple crop at Delhi and complainant used to send apple crop to accused. It is alleged that complainant was liable to pay Rs.42,428/- (Forty two thousand four hundred twenty eight) to accused and accused took blank cheque No.561552 from complainant as security. It is alleged that accused also filed civil suit No.130/1 of 2005/2002 for recovery of Rs.3,33,365/- (Three lac thirty three thousand three hundred sixty five) before learned Civil Judge (Sr. Division) Shimla whereby learned Civil Judge (Sr. Division) Shimla partly decreed the suit in favour of accused for recovery of Rs.1,61,843/- (One lac sixty one thousand eight hundred forty three) with interest @9% per annum from 20.01.1999 till institution of suit and @6% per annum from the date of filing of suit till realization of amount. It is alleged that thereafter civil appeal No.51-S/13 of 2007 title Mohan Lal Vs. Bal Krishan was filed and same was decided by learned Addl. District Judge Shimla (H.P.) on dated 10.04.2008. It is alleged that learned Addl. District Judge Shimla (H.P.) partly allowed the appeal and reduced the recovery amount to the tune of Rs.42,428/- only. It is alleged that accused committed cheating and forgery in blank cheque No. 561552 and entered amount to the tune of Rs.5 lacs. It is alleged that thereafter accused Bal Krishan filed complaint under Section 138 of Negotiable Instruments Act vide case No.7/3 of 2005 which was decided by Judicial Magistrate Jubbal Distt. Shimla (H.P.) on 12.10.2007 relating to cheque No. 561552 and Sh.Mohan Lal was convicted under Section 138 of Negotiable Instruments Act and was sentenced to undergo simple imprisonment for three months and to pay complainant to the tune of Rs.5,00,000/- (Five lac). It is alleged that appeal against judgment and sentence passed by Judicial Magistrate in case No.7/3 of 2005 is pending before competent authority of law.

3. Investigation was conducted and cancellation report filed by investigating agency. Thereafter complainant Mohan Lal filed objections relating to cancellation report filed by investigating agency and learned Judicial Magistrate 1st Class Jubbal Distt. Shimla (H.P.) in the month of April 2007 accepted the objections filed by complainant Mohan Lal and learned Judicial Magistrate 1st Class did not concur with the cancellation report and case was sent back to Police

Station Jubbal for fresh investigation in accordance with law. Thereafter again fresh cancellation report was submitted before learned Judicial Magistrate 1st Class Jubbal Distt. Shimla (H.P.) by the investigating agency and again objections filed by complainant Mohan Lal before learned Judicial Magistrate 1st Class relating to investigation report submitted by investigating agency under Section 173 Cr.P.C. Complainant Mohan Lal requested that present case be tried as private complaint and thereafter learned Judicial Magistrate 1st Class converted the complaint into private complaint and listed the case for preliminary evidence. Thereafter learned Judicial Magistrate 1st Class Jubbal Distt. Shimla (H.P.) recorded preliminary evidence in private complaint and held on dated 20.05.2014 that there are sufficient reasons to proceed against accused and thereafter accused was summoned under Sections 420, 467, 468, 471 & 474 IPC. Thereafter learned Judicial Magistrate 1st Class recorded pre-charge evidence and thereafter learned Judicial Magistrate 1st Class on dated 03.09.2014 held that prima facie case under Sections 420, 467, 468, 471 & 474 IPC is made out against accused person and thereafter charge was framed against accused person on 03.09.2014. Accused has challenged summon order and charge framing order by learned Judicial Magistrate in present petition.

4. Court heard learned Advocate appearing on behalf of petitioner and learned Advocate appearing on behalf of non-petitioner No.1 and learned Additional Advocate General appearing on behalf of non-petitioner No.2 and Court also perused the entire record carefully.

5. Following points arise for determination:

1) Whether petition filed under Section 482 Code of Criminal Procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of petition?

2) Final order.

Findings upon Point No.1 with reasons.

6. CW-1 Sh. Mohan Lal has stated that accused obtained blank cheque No. 561552 from him in the year 1996 as security. He has stated that accused kept blank cheque in his custody w.e.f. 1996 to 2005. He has further stated that he demanded blank cheque No. 561552 from the accused in the year 1998 but accused did not return back blank cheque No. 561552 and told that he has handed over blank cheque No. 561552 to C.T. Delhi and told that now there is no dispute inter se parties relating to money and account matter has been settled. He has stated that he also issued notice Ext.CW1/A to accused and accused replied notice Ext.DX. He has stated that accused has committed cheating and forgery with him and accused be punished in accordance with law. In cross-examination he has denied suggestion that complainant was liable to pay Rs.80,660/- on dated 06.12.1996. He has denied suggestion that on dated 13.08.1987 amount due to accused was Rs.1,07,837/- (One lac seven thousand eight hundred thirty seven). He has denied suggestion that in the month of October 1988 amount due was Rs.10,74,162/- (Ten lac seventy four thousand one hundred sixty two). He has admitted that civil suit for recovery was filed by Sh. Bal Krishan against him. He has admitted that civil appeal is pending before Hon'ble High Court of Himachal Pradesh. He has admitted that accused filed complaint under Section 138 of Negotiable Instruments Act against him. He has admitted that he was convicted and appeal is pending before learned Sessions Judge. He has denied suggestion that he is liable to pay amount of Rs.3,33,000/- (Three lac thirty three thousand). He has also denied suggestion that he took Rs.5 lac from accused and told that he would send the apples. He has denied suggestion that he did not send the apples. He has denied suggestion that he issued cheque No. 561552 on dated 02.01.2005 in favour of accused. Self stated that blank cheque was used by accused against him after ten years.

7. CW-2 Sh. Bali Ram has stated that complainant and accused are known to him. He has stated that in his presence complainant requested the accused to return his blank cheque which was received by accused in the year 1996. He has stated that accused kept blank cheque for ten years in his custody. He has stated that accused had told in the year 1998 in his presence that he has sent the cheque to C.T. firm and same would not be used against complainant. In

cross-examination he has admitted that Sh. Bal Krishan has filed a case against him. He has denied suggestion that he is not familiar with factual position of present case.

8. CW-3 Sh. Brij Lal has stated that parties are known to him. He has stated that in the year 1998 complainant demanded blank cheque from accused. He has stated that accused told him that he has sent the cheque to C.T. firm and he has no concern with blank cheque. He has admitted that Sh.Bal Krishan has filed a case against him. He has admitted that he has paid Rs.5 lac to accused when he was convicted. He has admitted that he has paid Rs.5 lac to accused by way of compromised proceedings.

9. Submission of learned Advocate appearing on behalf of petitioner that RSA No.492/2008 is pending before Hon'ble High Court of Himachal Pradesh relating to same facts and relating to same cheque No. 561552 and present private criminal complaint under Sections 420, 467, 468, 471 & 474 IPC is not maintainable is rejected being devoid of any force for reasons hereinafter mentioned. Court is of the opinion that jurisdiction of civil Courts and jurisdiction of criminal Courts are entirely different and independent. Court is of the opinion that independent criminal complaint before judicial Court is not barred simply on the ground that civil litigation is pending before competent Court of civil law relating to same facts. It is well settled law that civil Court cannot decide criminal offence committed under Indian Penal Code 1860. It is well settled law that criminal offences committed under Indian Penal Code are always decided by criminal Courts.

10. Submission of learned Advocate appearing on behalf of petitioner that petitioner also filed complaint under Section 138 of Negotiable Instruments Act relating to cheque in dispute and complainant was convicted by learned Trial Court and thereafter appeal is pending before learned Sessions Judge and on this ground petition be allowed is also rejected being devoid of any force for reasons hereinafter mentioned. Court is of the opinion that offence under Section 138 of Negotiable Instruments Act 1881 and offence under Sections 420, 467, 468, 471 & 474 IPC are distinct and different offence. It is well settled law that parallel proceedings relating to distinct and different offence relating to same facts can be continued. See AIR 1961 SC 578 title **State of Bombay Vs. S.L. Apte**.

11. Submission of learned Advocate appearing on behalf of petitioner that two parallel proceedings relating to offence under Section 138 of Negotiable Instruments Act 1881 and relating to offence under Sections 420, 467, 468, 471 & 474 IPC could continue relating to same facts on the concept of double jeopardy is also rejected being devoid of any force for reasons hereinafter mentioned. It is well settled law that no one should be punished twice for one offence on the concept of *nemo debet bis punire pro uno delicto*. It is well settled law that if two offences are distinct offences then notwithstanding the fact that allegations of facts in two offences are substantially similar benefit of double jeopardy could not be invoked. It is well settled law that concept of double jeopardy will apply only when offences are same. See 2012 (7) SCC 621 title **Sangeetaben Mahendrabhai Patel Vs. State of Gujarat and another**. See AIR 2015 SC 75 title **State of NCT of Delhi** Vs. **Sanjay**. See AIR 1954 SC 375 title **S.A. Venkataraman Vs. Union of India.** See AIR 1953 SC 325 title **Maqbool Hussain** Vs. **State of Bombay.**

12. Submission of learned Advocate appearing on behalf of petitioner that petitioner did not commit any criminal offence under Sections 420, 467, 468, 471 & 474 Indian Penal Code 1860 and on this ground petition be allowed is also rejected being devoid of any force for reasons hereinafter mentioned. Court has carefully perused the testimonies of CW-1, CW-2 and CW-3. All the witnesses have specifically stated that accused had stated in their presence on dated 8.9.1998 that cheque No. 561552 was sent to C.T. firm and he was not in possession of cheque No. 561552 but it is prima facie proved on record that in the year 2005 cheque No. 561552 was used for proceedings under Section 138 of Negotiable Instruments Act 1881. Judicial findings whether accused has committed cheating and forgery or not cannot be given at this stage of case because same facts are complicated issue of facts and judicial findings relating to complicated issue of facts cannot be given at this stage of case. Judicial findings relating to complicated issue of facts will be given by learned Trial Court after giving due opportunity to both parties to lead

evidence in support of their case. It is well settled law that at the time of framing of charge meticulous consideration of evidence and material should not be considered. It is well settled law that at the stage of framing charge Court has to prima facie consider whether there are sufficient grounds to proceed against accused. See AIR 1981 SC 1548 title **Mohd. Akbar Dar & Others Vs. State of J & K and others.** See AIR 2005 SC 359 title **State of Orissa** Vs. **Debendra Nath Padhi**. See AIR 1980 SC 52 title **Supdt. & Remembrancer of Legal Affairs** Vs. **Anil Kumar Bhunja.** See AIR 1977 SC 2018 title **State of Bihar** Vs. **Ramesh Singh.** See AIR 2001 SC 40 title **State of Delhi** Vs. **Gyan Devi & Others.** See AIR 2000 SC 665 title **State of M.P.** Vs. **Johari & Others.** See AIR 1997 SC 2041 title **State of Maharashtra** Vs. **Priya Sharan Maharaj & Others.** It is held that it is not expedient in the ends of justice to give judicial findings relating to absence of *mens rea* or *actus reus* at this stage of the case. It is held that judicial findings relating to absence of *mens rea* or *actus reus* would be given by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case. It is held that there is no illegality in the orders of learned Trial Court dated 20.05.2014 and 03.09.2014. In view of above stated facts point No.1 is answered in negative.

Point No.2 (Final order).

13. In view of my findings on point No.1 above petition filed under Section 482 Code of Criminal Procedure 1973 is dismissed. File of learned Trial Court alongwith certified copy of this order be sent back forthwith. Observations will not effect merits of case in any manner and will be strictly confined for disposal of present petition. Parties are directed to appear before learned Trial Court on **26.09.2016.** Cr.MMO No.212/2014 is disposed of. Pending applications if any also disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

CWPIL No. 15 of 2014 a/w CWP No. 3428 of 2015.
Date of decision: 5th September, 2016.

CWPIL No.15 of 2014.

Court on its own motion .....Petitioner
Versus
State of HP and others .....Respondents.

CWP No.3428 of 2015.

S.K. Shad .....Petitioner
Versus
State of HP and others .....Respondents.

Constitution of India, 1950- Article 226- It was stated that laws, Rules, Regulations, and Notifications, are occupying the field - Ghandal came under the Special Area Development Authority (SADA) and the Town and Country Planning Act- it is ordered that construction will be raised in and around Ghandal in view of Law, Rules and Regulation, Notifications, occupying the field. (Para-5 to 7)

CWPIL No. 15 of 2014.

For the petitioner: Mr. J.L. Bhardwaj, Advocate, as Amicus Curiae.

For the respondents: Mr. Shrawan Dogra, Advocate General with M/s Romesh Verma, Anup Rattan, and Varun Chandel, Additional Advocate Generals, with Mr. Kush Sharma, Deputy Advocate General, for the respondents-State.

Mr. Hamender Chandel, Advocate, for respondent No.8.

Ms. Jyotsna Rewal Dua, Sr. Advocate with Ms. Charu Bhatnagar, Advocate, for respondent No.9.

Mr. Hemant Vaid, Central Government Counsel, for respondent No. 13 and 14.
Mr. Anand Sharma, Advocate, for respondent No.16.

CWP No. 3428/2015.

Nemo for the petitioner.
Mr. Shrawan Dogra, Advocate General with M/s Romesh Verma, Anup Rattan, and Mr. Varun Chandel, Additional Advocate Generals, with Mr. Kush Sharma, Deputy Advocate General, for the respondents-State.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

In terms of order dated 8th August,2016, Shri Kharaiti Lal Anand was arrayed as party respondent No. 16 in this petition. Mr. Anand Sharma, Advocate, has put in appearance on his behalf. The said respondent has not filed the reply so far, is directed to file the same by or before the next date.

2. In terms of para 12 of the order dated 8th August, 2016, the authorities concerned were directed to explain as to why prosecution/contempt proceedings and proceedings under Prevention of Corruption Act be not initiated against them for not drawing action right from 28th October, 2015, have not filed the status reports/response till today.

3. Respondent No. 5 has filed the details of the concerned persons, who are raising construction in and around Ghandal.

4. Deputy Commissioner, Superintendent of Police, Solan, and the National Highway Authority of India, have not filed the status reports.

5. The State Authorities, particularly the Chief Secretary, was requested to prepare a Scheme, so that, the construction in and around Ghandal is raised, in terms of the previous order. The learned Advocate General stated at the Bar that the State has already made the laws, Rules, Regulations, and Notifications, are occupying the field and there is no need to have a fresh Scheme in place. Also stated that the area comes under the Special Area Development Authority (SADA) and the Town and Country Planning Act. His statement is taken on record.

6. Accordingly, directions contained in para 19 of the order dated 8th August, 2016, are modified and it is provided that the construction to be raised in and around Ghandal, shall be strictly in terms of the Laws, Rules, Regulations and Notifications, occupying the field.

7. All the respondents are directed to comply with the directions passed by this Court from time to time and to remove encroachments, as directed from time to time and file status reports.

8. All the respondents to appear in person before this Court on *19th September, 2016*, and in the meantime, to file the status reports, as directed from time to time.

9. All other directions to remain in force till further orders.

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

Deepak Bhatia ....Petitioner
Versus
Komal Bhatia & others. ....Respondents.

CMPMO No. 251 of 2014
Date of Decision: 5.9.2016

Code of Civil Procedure, 1908- Order 6 Rule 17- Different wills were set up by the parties- however, plaintiff had not given the detail of the property in the plaint- hence, application for impleadment of the plaint was filed- application was allowed by the trial Court- held, that detail of the property would be essential for passing the judgment and the same is clarificatory in nature- it does not alter the nature, construction or complexion of the pleadings- therefore, application was rightly allowed- petition dismissed. (Para-3 to 7)

For the petitioner:	Mr. Suneet Goel, Advocate.
For the Respondents:	Mr. K.D Sood, Sr. Advocate with Mr. Dhananjay, Advocate, for respondents No. 1, 3 and 4. None for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

Both the petitioner and the respondent had set up rival wills qua the suit property of their common predecessor-in-interest. The plaintiff/respondent herein (for short the "plaintiff") had initially in the plaint omitted to graphically display therein qua the property alienated to him under a testamentary disposition of his predecessor-in-interest standing comprised in 7 shops besides other residential accommodation. However the plaintiff by moving an application under Order 6 Rule 17 CPC sought leave of the Court to overcome the aforesaid defect qua the descriptions of the corpus of the property alienated to him under a testamentary disposition made in his favour by his predecessor-in-interest.

2. The application stood contested by the defendant/petitioner herein before the learned trial Court. However the learned trial Court had ordered for incorporation in the plaint of the apposite amendments manifested in paragraph 2 of the apposite application under Order 6 Rule 17 CPC as stood preferred therebefore by the plaintiff.

3. The learned counsel for the petitioner/defendant had made a vociferous address qua the factum of according of relief to the plaintiff/respondent herein by the learned trial Court whereby he stood permitted to incorporate in the plaint the afore-stated amendments being grossly astray from the enjoined tenets governing the exercise of jurisdiction by it while standing seized with an application under Order 6 Rule 17 CPC significantly with the plaintiff despite his holding knowledge qua the graphic descriptions of the corpus of the suit property his at the outset omitting to aver the apposite narrations qua it in the plaint whereupon he contends of his omissions aforesaid constituting an embargo against the plaintiff qua his belatedly asking for its standing added in the relevant paragraphs of the plaint. Moreso when he despite knowledge qua the aforesaid facet omitted at the outset to seek its incorporation in the plaint renders him amenable for his standing construed to be indiligent whereas only on evidence displaying qua despite his initially exercising due diligence, his apposite lack of concert thereat warranting its standing condoned by this Court besides giving leverage to him to belatedly seek its incorporation**.** He proceeds to contend of the application warranting dismissal also he contends of the impugned order meriting interference.

4. Though the learned counsel for the petitioner/defendant herein holds leverage to contend of with the plaintiff at the stage of his instituting the suit his holding a testamentary disposition whereupon an inference ensues of his imminently holding knowledge qua the graphic descriptions of the corpus of the property alienated in his favour under a testamentary disposition recorded in his favour by his predecessor-in-interest. Also he holds leverage to contend of at the outset hence the plaintiff standing enjoined to unravel its descriptions by casting apposite averments in the plaint. However even if the aforesaid contentions do constrain this Court, of the plaintiff despite his at the outset holding knowledge qua the facet aforesaid his yet derelicting to embody it in the plaint not empowering him to coax this Court qua despite at

the outset exercising due diligence his standing disabled to unearth the relevant facet/facets whereupon he may espouse qua given his at this stage unearthing the aforesaid facets, this Court exercising indulgence in his favour qua permitting him to incorporate in the plaint.

5. Dehors the aforesaid facet of may be the plaintiff standing disabled to at this stage seek their incorporation in the plaint yet with the plaintiff in his relevant application explicating qua the necessity of their incorporation also only when despite his exercising due diligence at the outset he was unable to unravel the aforesaid facets which now stands unearthed would empower this Court to exercise indulgence in his favour qua permitting him to incorporate it in the plaint whereas for the reasons aforesaid given his evidently holding knowledge qua the aforesaid facets he cannot for reiteration contend qua despite his exercising due diligence at the outset his standing disabled to disinter the relevant facts nor this Court would hence be constrained to exercise indulgence vis-à-vis the respondent herein. Consequently given the dire necessity of its incorporation therein renders it to be clarificatory also when it prima-facie is in commensuration with the corpus of the property alienated to the plaintiff under a testamentary disposition qua it, executed by the deceased testator besides hence on its concluding the trite factum qua its standing unflinchingly proven to be validly and duly executed would ultimately facilitate the rendition by the learned trial Court of an executable decree in commensuration thereof qua it . In face thereof, as a corollary for facilitating the aforesaid, it is deemed fit to order for their incorporation in the relevant paragraph of the plaint, theirs being merely clarificatory also when the relevant amendments, if permitted to be incorporated would not substantially alter the nature, complexion and structure of the plaint.

6. Also the learned counsel for the petitioner herein has contended of the plaintiff belatedly asking for incorporation in paragraph 5 of the plaint, the amendments cast in his application under Order 6 Rule 17 CPC. He also contends of the permission as sought for by him from the learned trial Court besides its rendition in affirmation thereto warranting interference. The aforesaid submission also warrants it standing discountenanced, as the plaintiff is concerting to negate the valid and due execution of a testamentary disposition executed by the deceased qua the suit property vis-à-vis the defendant. In case the plaintiff succeeds in the aforesaid concert, the inevitable consequence thereto would be of the mutation in consonance thereto as stands attested by the revenue officer also falling apart. Moreover, when the defendant can on the anvil of the afore-stated averments ask for an apposite issue of estoppel being struck for barring the plaintiff qua his challenging the relevant testamentary disposition of the deceased testator. Consequently since the defendant may ask for the striking of the aforesaid issue also when the defendant would be permitted to adduce evidence thereto, the factum of its standing permitted to be incorporated in the plaint otherwise also when the validity of the relevant mutation rests upon the learned trial Court pronouncing upon the factum of the testamentary disposition standing efficaciously proven or not proven to be validly and duly executed, any belated permission for its incorporation in the plaint is also clarificatory also does not alter the nature, construction or complexion of the pleadings rather is facilitative to the defendant to on anvil thereof stake a claim qua striking of an apposite issue of estoppal qua it vis-à-vis the plaintiff also is facilitative for begetting concurrence in the relevant judicial verdict vis-à-vis it and the trite factum of proof of valid and due execution of the relevant testamentary execution propounded by him.

7. There is no merit in this petition, the same is accordingly dismissed. All pending applications stand disposed of accordingly. Impugned order stands maintained and affirmed. The parties through their learned counsel are directed to appear before the learned trial Court on 28.9.2016.

8. The learned trial Court is directed to decide the suit within a period of one year.

9. Any observation made hereinabove 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 RAJIV SHARMA, J.

Madan Gopal Sharma ....Appellant
Versus
Himachal Pradesh Housing Board and anr. ....Respondents

RSA No. 331/2007
Reserved on: 24.8.2016
Decided on: 5.9.2016

Code of Civil Procedure, 1908- Section 100- Suit for recovery was filed pleading that work was awarded to the defendant- defendant executed a part of the work and had not completed the same- sum of Rs.1,64,124/- was recoverable from the defendant- defendant denied the claim of the plaintiffs and stated that plaintiffs had failed to make regular monthly payments- defendant was prevented from executing the work by the acts, conduct, omission and commission of the plaintiffs- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that Clause 2 of the agreement provided that defendant will ensure good progress during the execution of the work – site was handed over the site on 11.12.1996 and work was to be completed by 10.6.1997, but he failed to do so- defendant was informed that he was nothing to pay compensation for failure to complete the work in accordance with the time schedule – plaintiffs called the defendant before the Superintending Engineer before determination of compensation- however, he had chosen remain absent and was rightly held liable to pay compensation- appeal dismissed. (Para-9 to 13)

Cases referred:
State of Karnataka vs. Rameshwara Rice Mills, AIR 1987 SC 1359
Vishwanath Sood vs. Union of India, AIR 1989 SC 952

For the appellant: Mr. J.S.Bhogal, Senior Advocate, with Mr. Suneet Goel, Advocate.
For the respondents: Mr. C.N. Singh, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

This regular second appeal is instituted against the impugned judgment and decree dated 25.4.2007 rendered by learned Additional District Judge, Shimla, in Civil Appeal No. 105-S/13 of 2005.

2 The key facts necessary for the adjudication of the appeal are that the respondents/plaintiffs (hereinafter referred to as the "plaintiffs" for convenience sake) filed a suit for recovery of Rs.1,64,124/- @ 18% per annum on the averments that plaintiff No.2, i.e. Executive Engineer, H.P. Housing Board invited the tenders for construction of approach road, retaining walls and cutting work on 8.11.1996 for Social Housing Colony, Shoghi. The appellant/defendant (hereinafter referred to as the "defendant" for convenience sake) participated in the tendering process. The defendant's tender was accepted and he was issued award letter dated 11.12.1996. He was asked to start the work at once. The date of commencement of the work was to be reckoned from 15th day after the issuance of award letter or actual date of commencement, whichever was earlier. The date of commencement of work was latest by 11.12.1996 and date of completion of the work was fixed on 10.6.1997. The plaintiffs and defendant entered into an agreement within fifteen days of issuance of award letter. The defendant acknowledged and accepted all the terms and conditions of the agreement. The site was handed over to the defendant on 11.12.1996. As per clause 2 of the agreement, the defendant was to execute 1/8th of the entire work before completion of 1/4th of the time fixed, but the defendant only executed the work valuing Rs.1,94,942.40 paise before completion of 1/4th of

the time fixed against the total value of work Rs.19,84,885.55 paise, whereas he was required to execute the work valuing Rs.2,48,110/- within 1/4th of time fixed. The defendant was time and again requested by plaintiff No.2 to accelerate the work, but he failed to do so. The notice was issued to the defendant by plaintiff No.2 on 10.2.1997 to accelerate the work. The defendant was again issued notice on 11.6.1997 vide which he was asked to restart the work at the site. He was again issued a letter dated 26.6.1997. The defendant did not care and miserably failed to restart the work at the site. He was again asked to accelerate the progress of work and ensure its entire completion before 31.7.1997, but he failed to do so. Thereafter, the plaintiffs were constrained to rescind the agreement. The plaintiffs imposed the compensation of Rs.1,98,488.55 paise upon the defendant and after final billing, a sum of Rs.1,64,124/- was still recoverable from the defendant.

3 The suit was contested by the defendant. He admitted that the agreement was entered into between the parties and the stipulated time to complete the work was six months. It was denied that the site was handed over to him by the plaintiffs on 11.12.1996. According to him, the plaintiffs failed to make regular monthly payments. Therefore, he was prevented from executing the work by the acts, conduct, omission and commission of the plaintiffs.

4 The replication was filed by the plaintiffs. The learned trial court framed the issues on 4.4.2001 and decreed the suit of the plaintiffs vide judgment and decree dated 16.11.2004. The defendant feeling aggrieved with the judgment and decree dated 16.11.2004 preferred an appeal before the learned first Appellate Court, who dismissed the same vide impugned judgment and decree dated 25.4.2007. Hence, this regular second appeal, which was admitted on following substantial questions of law on 17.12.2007:-

1. Whether the impugned decree can be sustained on the basis of Exhibit PW3/K when the said decision of the Superintending Engineer did not fall within the definition of considered decision in terms of the judgment of the Hon'ble Supreme Court of India in AIR 1989 SC 952?

2. Whether the impugned decree as passed by the ld. Courts below be sustained especially in the peculiar facts and circumstances of the case when the respondents/plaintiffs have become judge of their own cause and determined the compensation?

5 Mr. J.S. Bhogal, learned Senior Advocate appearing for the defendant, on the basis of the substantial questions of law framed, has vehemently argued that judgments and decrees passed by the learned courts below are against the ratio laid down by Hon'ble Supreme Court in AIR 1989 SC 952. He has also contended that the plaintiffs had become judge of their own cause while determining the compensation and his client (defendant) could not be made liable to pay compensation under clause 2 of the agreement.

6 Mr. C.N.Singh, learned Advocate appearing for the plaintiffs, has supported the judgments and decrees passed by both the learned courts below.

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

8. Since both the substantial questions of law are interlinked and interconnected, the same are taken up together for determination to avoid repetition of discussion of evidence.

9. PW1, H.S. Negi testified that site was handed over to the defendant in time. He admitted that the cement was not supplied to the defendant because he had not dug up the foundation. PW2, S.K. Sharma and PW3, S.C. Sood proved the documents on record. PW4, Vipin Kaul also stated that the site was handed over to the plaintiff on 11.12.1996, however, the defendant did not complete the work. The plaintiffs have also proved first notice dated 10.2.1997, Ext.PW3/C, second notice dated 11.6.1997 Ext.PW3/D, third notice dated 10.7.1997 Ext.PW3/E, letter Ext. PW3/F vide which hearing under clause 2 of the agreement was afforded, letter Ext.PW3/G vide which another opportunity of hearing was given to the defendant under clause 2 of the agreement, letter Ext.PW3/J vide which the defendant was afforded final opportunity of

being heard and also approval of the Superintending Engineer under clause 2 of the agreement, Ext.PW3/L. The defendant while appearing in the witness box as DW1 though has denied the receipt of notices and letters, but has admitted that the agreement was entered into between the parties and the stipulated time to complete the work was six months. Clause 2 of the agreement reads as under:-

> "The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be deemed to be the essence of the contract on the part of the contractor and shall be reckoned from the fifteenth day after the date on which the order to commence the work is issued to the contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the contractor shall pay as compensation an amount equal to one percent of such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the amount of the tendered cost of the whole work as shown in the tender for every day that the work remains un-commenced or unfinished, after the proper dates. And further, to ensure good progress during the execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceeds one month save for special jobs to complete one-eighth of the whole of the work before one-fourth of the whole time allowed under the contract has elapsed, three-eighth of the work of the work, before one-half of such time has elapsed and three-fourth of the work, before three-fourth of such time as elapsed.
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> However, for special jobs if a time-schedule has been submitted by the contractor and the same has been accepted by Engineer-in-charge, the contractor shall comply with the said time-schedule. In the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation an amount equal to one percent of such smaller amount as the Superintending Engineer (whose decision in writing shall be final), may decide on the said tendered cost of the whole work for every day that the due quantity of work remains incomplete, provided always that the entire amount of compensation to be paid under the provisions of this clause shall not exceed ten percent, on the tendered cost of the work as shown in the tender."

10. According to clause 2 of the agreement, the defendant was required to ensure good progress during the execution of the work and he was bound in all cases in which the time allowed for any work exceeded one month save for special jobs to complete one-eighth of the whole of the work before one-fourth of the whole time allowed under the contract elapsed, three-eighth of the work, before one-half of such time elapsed and three-fourth of the work, before three-fourth of such time elapsed. He was handed over the site on 11.12.1996 and he was required to complete the work latest by 10.6.1997, but he failed to do so. It is in these circumstances, the agreement was rescinded.

11. The Executive Engineer had sent the communication to the Superintending Engineer on 28.7.1997, Ext. PW3/F seeking permission to accord necessary approval to levy compensation for the delay under clause 2 of the agreement, so that compensation could be levied upon the defendant if he did not complete the work by 31.7.1997. The Superintending Engineer vide communication dated 31.7.1997, Ext.PW3/G informed the Executive Engineer that hearing under clause 2 of the agreement in respect of the award work was fixed for 7.8.1997 at 11.00 A.M. A copy of this communication was also sent to the defendant. The Executive Engineer vide communication dated 4.8.1997, Ext.PW3/H requested the defendant to make himself available on 7.8.1997 at 11.00 A.M. for hearing under clause 2 of the agreement. The defendant did not attend the hearing on 7.8.1997. The Superintending Engineer again sent a communication dated 19.8.1997, Ext.PW3/J giving defendant a final opportunity to attend the hearing on 22.8.1997 at 3.00 P.M. The defendant again chose not to appear before the Superintending Engineer. The Executive Engineer vide communication dated 23.10.1997, Ext.PW3/L informed the defendant that since he had failed to execute the work as per the

agreement, he was liable to pay compensation under clause 2 of the agreement amounting to Rs.1,98,488.55 paise only on the tendered amount of Rs.19,84,885.55 paise. The defendant was liable to pay compensation for non-completion of the work as agreed and it cannot be said that the plaintiffs have become judge of their own cause. The ratio laid down by Hon'ble Supreme Court in ***AIR 1987 SC 1359, State of Karnataka vs. Rameshwara Rice Mills*** is not applicable in the present case.

12 Their Lordships of Hon'ble Supreme Court in **Vishwanath Sood vs. Union of India, AIR 1989 SC 952** have held that the compensation clause contains a complete machinery for determination of the compensation which can be claimed by the Government on the ground of delay on the part of the contractor in completing the contract as per the time schedule agreed to between the parties. The decision of the Superintending Engineer, is in the nature of a considered decision which he has to arrive at after considering the various mitigating circumstances that may be pleaded by the contractor or his plea that he is not liable to pay compensation at all under this clause. Their Lordships have held as under:-

> "[8] We have gone through the judgment of the Division Bench of the High Court and we have also considered the arguments advanced on both sides. With great respect, we find ourselves unable to agree with the interpretation placed by the Division Bench on the terms of the contract. Clause 2 of the contract makes the time specified for the performance of the contract a matter of essence and emphasises the need on the part of the contractor to scrupulously adhere to the time schedule approved by the Engineer-in-charge. With a view to compel the contractor to adhere to this time schedule, this clause provides a kind of penalty in the form of a compensation to the Department for default in adhering to the time schedule. The clause envisages an amount of compensation calculated as a percentage of the estimated cost of the whole work on the basis of the number of days for which the work remains uncommenced or unfinished to the prescribed extent on the relevant dates. We do not agree with the counsel for the respondent that this is in the nature of an automatic levy to be made by the Engineer in-charge based on the number of days of delay and the estimated amount of work. Firstly the reference in the clause to the requirement that the work shall throughout the stipulated period of the contract be proceededwith due diligenceand the reference in the latter part of the clause that the compensation has to be paid "in the event of the contractor failingto comply with" the prescribed time schedule make it clear that the levy of compensation is conditioned on some default or negligence on the part of the contractor. Secondly, while the clause fixes the rate of compensation at 1per cent for every day of default it takes care to prescribe the maximum compensation of 10 per cent on this ground and it also provides for a discretion to the Superintending Engineer to reduce the rate of penalty from 1 per cent. Though the clause does not specifically say so, it is clear that any moderation that may be done by the Superintending Engineer would depend upon the circumstances, the nature and period of default and the degree of negligence or default that could be attributed to the contractor. This means that the Superintending Engineer, in determining the rate of compensation chargeable, will have to go into all the aspects and determine whether there is any negligence on the part of the contractor or not. Where there has been no negligence on the part of the contractor or where on account of various extraneous circumstances referred to by the Division Bench such as vis major or default on the part of the Government or some other unexpected circumstance which does not justify penalising the contractor, the Superintending Engineer will be entitled and bound to reduce or even waive the compensation. It is true that the clause does not in terms provide for any notice to the contractor by the Superintending Engineer. But it will be appreciated that in practice the amount of compensation will be initially levied by the Engineer-in-charge and the Superintending Engineer comes into the picture only as some sort of revisional or appellate authority to whom the contractor appeals for redress. As we see, it, clause 2 contains a complete machinery for determination of the compensation which can be claimed by the

Government on the ground of delay on the part of the contractor in completing the contract as per the time schedule agreed to between the parties. The decision of the Superintending Engineer, it seems to us, is in the nature of a considered decision which he has to arrive at after considering the various mitigating circumstances that may be pleaded by the contractor or his plea that he is not liable to pay compensation at all under this clause. In our opinion the question regarding the amount of compensation leviable under clause, 2 has to be decided only by the Superintending Engineer and no one else."

13. As discussed above, the plaintiffs had called upon the defendant by issuing various letters to appear before the Superintending Engineer before determination of compensation; however, he had chosen not to appear before him. The defendant was rightly made liable to pay the compensation for non-completion of the work, as per schedule provided for in the agreement. Both the substantial questions of law are answered accordingly.

14. Consequently, in view of analysis and discussion made hereinabove, there is no merit in the appeal and the same is dismissed. Pending application(s), if any also stands disposed of. No order as to costs.

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

Shri Mohd. Tariq .....Petitioner
Versus
Jaspal Singh and others .....Respondents

CrMMO No. 254/2016
Dismissed on: September 5, 2016

Code of Criminal Procedure, 1973- Section 311- Application for recalling PW-6 was filed on the ground that he had given statement contradictory to what was stated by him before Learned District Judge, Shimla - application was opposed on the ground that complainant had no locus standi to file the application- application was dismissed by the trial Court- held, that PW-6 was examined by Learned Public Prosecutor and was cross examined on behalf of the accused- application has not been signed by Public Prosecutor- mere change of counsel cannot be a ground for recalling a witness- witnesses cannot be expected to face the ordeal of appearing in the Court repeatedly- there is no perversity or illegality in the order passed by the trial Court- petition dismissed. (Para-4 to 9)

Cases referred:
Rajaram Prasad Yadav v. State of Bihar (2013)14 SCC 461
Mannan Shaikh v. State of W.B. (2014)13 SCC 59
State (NCT of Delhi) vs. Shiv Kumar Yadav and another (2016)2 SCC 402

For the petitioner : Mr. Deepak Gupta, Advocate.
For the respondents : None for respondents No.1 to 7
Ms. Parmod Thakur, Additional Advocate General, for respondent No.8-State.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge (oral**)**

This petition is directed against Order dated 21.6.2016 rendered by the learned Chief Judicial Magistrate, Shimla in Case No. 87-2 of 2012.

2. "Key facts" necessary for the adjudication of the present petition are that FIR No. 231/2011 dated 31.10.2011 under sections 448 and 342 IPC was registered. *Challan* was presented and the Court took cognizance of the offence and summoned the accused persons. Accused were also charged. Prosecution examined the complainant alongwith other witnesses. Statement of Kutub Deen son of Kalamdeen was also recorded. Petitioner filed an application under Section 311 CrPC for recalling Kutub Deen, who was examined as PW-6, for re-examination. According to the averments made in the application, he has given the statement contradictory to the statement made by him before the Court of learned District Judge, Shimla in case titled, Himachal Pradesh Wakf Board vs. Jaspal Singh and others, wherein he was examined as PW-2. He has deposed that Mohd. Tariq and Mohd. Mossin were in possession of the property as sub-tenants under the accused, who had subletted the premises to them. However, while appearing as PW-6 in case No. 87-2/2012, he has resiled from his previous statement which was made by him on 19.11.2014. He has given false statement, intentionally and deliberately, while appearing as PW-6. Thereafter, complainant engaged another counsel of his choice to assist the learned Public Prosecutor and instructed him to file an application for re-examination of the witness to confront him with his earlier statement.

3. Application was contested by the accused. According to the averments made in the reply, applicant has no locus standi to file the application. Learned District Attorney has not authorised him to file the application. PW-6 Kutub Deen has not made any contradictory statement.

4. Kutub Deen was examined as PW-6 on 13.3.2015. He was examined by the learned Public Prosecutor. He was, thereafter, cross-examined on behalf of the accused. Application has also not been signed by the learned Public Prosecutor. Learned trial Court has rightly come to the conclusion that no ground has been made out to recall the witness. Merely, that the complainant has changed his counsel, can not be a ground to recall a witness. In the application, it is not even stated that what statement was made by him before the learned District Judge in case titled HP Wakf Board vs. Jaspal Singh and others. What has been stated is that he has intentionally and deliberately led false evidence in connivance with the accused.

5. Their Lordships of the Hon'ble Supreme Court in **Rajaram Prasad Yadav v. State of Bihar** reported in (2013)14 SCC 461 have explained the nature and scope of Section 311 CrPC. Their lordships have held that the power can be exercised at any stage as per the principles laid down thereunder. The paramount consideration should be for just decision of the case. Their lordships have held as under:

> "14. A conspicuous reading of Section 311 Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Cr.P.C. and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just

decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

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

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

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

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

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

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

17.6The wide discretionary power should be exercised judiciously and not arbitrarily.

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

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

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

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

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

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

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

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

6. Their Lordships of the Hon'ble Supreme Court in **Mannan Shaikh v. State of W.B.** reported in (2014)13 SCC 59 have held that the wide power to recall the witness is to be exercised with circumspection and only with the object of arriving at a just decision of the case and the same should not prejudice the accused and should not permit to fill up the lacuna by the prosecution. Their lordships have held as under:

"[12] The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the case recall or re-examination of the witness is necessary. Since the power is wide it's exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammeled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine."

7. Their Lordships of the Hon'ble Supreme Court in **State (NCT of Delhi) vs. Shiv Kumar Yadav and another** reported in (2016)2 SCC 402 have held that plea of recalling a witness has to be bonafide and mere change of a counsel, can not be a ground for recalling a witness. Their lordships have held as under:

"11. It is further well settled that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and

the society. In the name of fair trial, the system cannot be held to ransom. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross- examine the prosecution witnesses and to lead evidence in his defence. The object of provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. The power available with the court to prevent injustice has to be exercised only if the Court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised. It is not possible to lay down precise situations when such power can be exercised. The Legislature in its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. The guidance for the purpose is available in several decisions relied upon by the parties. It will be sufficient to refer to only some of the decisions for the principles laid down which are relevant for this case.

12. In Rajaram case, the complainant was examined but he did not support the prosecution case. On account of subsequent events he changed his mind and applied for recall under Section 311 Cr.P.C. which was declined by the trial court but allowed by the High Court. This Court held such a course to be impermissible, it was observed :

> "13. .. In order to appreciate the stand of the appellant it will be worthwhile to refer to Section 311 CrPC, as well as Section 138 of the Evidence Act. The same are extracted hereunder:
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> Section 311, Code of Criminal Procedure "311. Power to summon material witness, or examine person present.—Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case." * * *
>
> Section 138, Evidence Act "138. Order of examinations.—Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.
>
> The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.
>
> Direction of re-examination.—The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter."
>
> 14. A conspicuous reading of Section 311 CrPC would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a prefix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling

for such a witness so desired for such re- examination. Therefore, a reading of Section 311 CrPC and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 CrPC. It is, therefore, imperative that the invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re- examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution."

13. After referring to earlier decisions on the point, the Court culled out following principles to be borne in mind :

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

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

17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.

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

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

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

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

17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment

without it, but because there would be a failure of justice without such evidence being considered.

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

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

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

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

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

14. In Hoffman Andreas case, the counsel who was conducting the case was ill and died during the progress of the trial. The new counsel sought recall on the ground that the witnesses could not be cross-examined on account of illness of the counsel. This prayer was allowed in peculiar circumstances with the observation that normally a closed trial could not be reopened but illness and death of the counsel was in the facts and circumstances considered to be a valid ground for recall of witnesses. It was observed :

"6. Normally, at this late stage, we would be disinclined to open up a closed trial once again. But we are persuaded to consider it in this case on account of the unfortunate development that took place during trial i.e. the passing away of the defence counsel midway of the trial. The counsel who was engaged for defending the appellant had cross-examined the witnesses but he could not complete the trial because of his death. When the new counsel took up the matter he would certainly be under the disadvantage that he could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects. In such circumstances, if the new counsel thought to have the material witnesses further examined the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible."

15. The above observations cannot be read as laying down any inflexible rule to routinely permit a recall on the ground that cross-examination was not proper for reasons attributable to a counsel. While advancement of justice remains the

prime object of law, it cannot be understood that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. Witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination.

8. In the present case also, one of the grounds for recalling the witness is change of counsel. It is not permissible. Witness can not be expected to face the ordeal of appearing in the Court repeatedly. No acceptable grounds have been made out for recalling the witness. There is neither any perversity nor any illegality in the order passed by the learned trial Court.

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

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

Nipun Jain & others .....Petitioners

Versus

State of H.P & others. .....Respondents.

Cr.MMO No. 48 of 2015
Reserved on : 17.8.2016
Decided on : 05.9.2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Sections 341, 392, 323, 324, 504, 506, 149 and 120-B of I.P.C.- car was purchased on a hire purchase basis- possession was taken in accordance with the terms and conditions of the agreement- complainant filed a private complaint, in which a cancellation report was filed - objections were made to the cancellation report, which were accepted- further investigation was conducted and another cancellation report was filed- Court rejected the cancellation report and ordered the issuance of summons - petition was filed for quashing the order- held, that hire purchase agreement shows that complainant had not acquired absolute title over the vehicle- financer had right to retake the possession, in case of default- however, financer cannot take forcible possession on the basis of this condition- petition dismissed. (Para-6 to 10)

For the petitioners: Mr. Vijay K Verma, Advocate.
For the Respondents: Mr. R.S Thakur, Additional Advocate General for respondents No.1 & 2.
Respondents No. 3 and 4 ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

Through the instant petition, the petitioners ventilate a relief for quashing of summoning order of 6.1.2015 pronounced by the Court of the learned Judicial Magistrate, 1st Class, Court No.II Dehra. They also pray for quashing of proceedings pending therebefore in pursuance to the lodging of an FIR No. 79 of 24.5.2007 constituting therein commission of offences by the petitioners/accused under Sections 341, 392, 323, 324, 504,506, 149 and 120-B of Indian Penal Code.

2. The complainant Sh. Suman Kumar Sharma on finance standing purveyed to him by the ICCI Bank Ltd, Branch Office, Mandi purchased Innova car bearing registration No. HP-21A-2321. However, he omitted to adhere to the apposite schedule qua his defraying to it the relevant loan installments, schedule whereof stood embodied in a hire purchase agreement recorded inter-se him and the financer. The vehicle aforesaid which stood purchased by him on finance standing purveyed to him by the financer was hence the subject of a hypothecation deed drawn inter-se him and the financer. Uncontrovertedly the vehicle aforesaid stood purchased by him on a hire purchase basis also a condition stood incorporated in the relevant hypothecation deed/hire purchase agreement whereunder finance stood purveyed to the complainant by the financer, whereunder an authorization stood foisted in the financer to, on purported occurrence of default by the loanee in payment of loan installments qua it, take possession of the hypothecated asset(s). The relevant condition of the agreement foisting the aforesaid empowerment in the financer to retake possession of the relevant vehicle on occurrence of default by the loanee in the relevant payment of the apposite loan installments qua it, stands extracted hereinafter:-

> *"On the happening of any of the events of default, ICICI Bank may by a notice in writing to the Borrower/s and without prejudice to the rights and remedies available to ICICI Bank under the Loan Terms or any other Transaction Document or otherwise: (a) call upon the Borrower/s to pay all the Borrowers/s Dues in respect of the facility and otherwise, and/or (b declare the security, if any, created in terms of pursuant to he Loan Terms and/or the other Transaction Documents to be enforceable, and ICICI Bank, its representative and/or such other person in favour of whom such security or any part thereof is created shall have, inter alia, the following rights (notwithstanding anything to the contrary in the loan terms and /or the other Transaction Documents and irrespective of whether the entire facility or Borrowers/s Dues has/have been recalled) namely:*
>
> *I . to enter upon and take possession of the Asset(s) in accordance with the provisions of the Loan Terms: and/or*
>
> *ii. to transfer or deal with the asset(s) by way of lease, leave and license, sale or otherwise in accordance with the provisions of the loan terms.."*

3. On anchorage of the aforesaid authorization bestowed upon the financer, it, on purported occurrence of default on the part of the loanee/complainant to defray loan installments to it, proceeded to on 26.4.2007 through the accused named in the FIR forcibly retake possession of the relevant vehicle from the complainant. Also during the course of theirs re-taking forcible possession of the relevant vehicle from the complainant they allegedly committed offences constituted under Sections 341,392,323,324,504,506 readwith Section 149,120-B of I.P.C. In sequel thereto the complainant reported the matter to Police Station, Jawalamukhi vide DDR No. 6 of 27.4.2007. The complainant re-approached the police station, concerned on 30.4.2007 and on 1.5.2007 qua the action initiated by it on his DDR aforesaid. However no cognizance stood taken by the police on his apposite DDR instituted therebefore. Thereafter, the complainant filed an application under Section 156(3) Cr.P.C before the Court of the learned Judicial Magistrate, Ist Class, Dehra, who under its pronouncement made on 23.5.2007 directed for registration of an FIR whereupon FIR No. 79/2007 of 24.5.2007 stood registered at police Station, Jawalamukhi. On conclusion of investigations held by the Investigating Officer, a "Cancellation Report" was instituted before the Court concerned. The complainant raised objections qua the acceptance by the Court concerned of the "Cancellation Report" preferred therebefore by the Investigating Officer. The learned Judicial Magistrate concerned rendered an adjudication on "Cancellation Report" preferred therebefore by the Investigating Officer holding therein a proposal for a verdict being rendered for closure of the inculpatory role constituted in the FIR vis-à-vis the accused. Also it rendered an adjudication upon the objections raised by the complainant against its acceptance by it.

4. A perusal of the verdict rendered thereupon by the learned Judicial Magistrate concerned makes an evident display of the Court rejecting the preferment therebefore of a "Cancellation Report" of the FIR concerned rather it directed the Investigating Officer concerned to reinvestigate the case.

5. The investigating Officer on holding further investigations qua the offences constituted against the accused in the relevant FIR concluded of no penal offences standing constituted therein against the accused whereupon he reinstituted a "Cancellation Report" qua it before the learned Judicial Magistrate concerned. The complainant raised objections qua it before the Magistrate concerned whereupon the Judicial Magistrate concerned recorded a verdict in dis-concurrence with the apposite cancellation report preferred therebefore by the Investigating officer rather she held concurrence with the apt objections qua its acceptance reared therebefore by the complainant. The learned judicial Magistrate directed for further investigations being conducted by the Investigating Officer. In sequel thereto the learned Judicial Magistrate concerned ordered for issuance of summons upon the accused, orders whereof stand prayed to be quashed and set aside.

6. The drawing up of the relevant hire purchase agreement/hypothecation deed inter-se the complainant and the finance-company was a precursor to the purchase of the relevant vehicle by the former. The prima donna factum of the relevant transaction standing sequelled by drawing of a hire purchase agreement/hypothecation deed vis-à-vis the financer and the complainant renders amenable an inference of the complainant not in quick promptitude to his purchasing it, acquiring absolute dominium thereon rather his standing bestowed with an absolute dominium thereon only on his liquidating the relevant entire loan liability towards the financer. In coming to the aforesaid view this Court finds support from a judgment of the Hon'ble Apex Court rendered in AIR 1966 Supreme Court 1178 *(Sundaram Finance Ltd* vs. *State of Kerala*, relevant paragraph 10 whereof stands extracted hereinafter.

> "(10) In the present case the transactions were admittedly hire-purchase agreements. The financier purchased the cars for the amounts required to be paid to the dealer and entered into specific hire-purchase agreements with the customers. They contained all the usual terms that are found in a hire-purchase agreement. Neither the fact that the agreements were entered into because the customers had no funds to purchase the motor-cars nor the circumstances that part of the consideration was already paid to the dealer affects the nature of the transaction. The fact that the customer executed a promissory note for the money advanced by the financier does not affect the question, for that was merged in the hire-purchase transaction. If the said terms were not carried out, the customers could not claim any rights under the agreements and the financier continued to be the owner freed from any obligation created under the agreements. Can the financier thereafter enforce the promissory note? I think he cannot. As I have stated earlier, the transactions purported to be hire-purchase agreements and they must be treated as such, as the common intention of the parties was to enter into such transactions. A deeper scrutiny of the transactions shows that the dealer and the financier were closely connected companies and for their own reasons they have split up the business of hire-purchase between them. In effect and in substance, the dealer without receiving the whole money put the customers in possession of the cars under the hire-purchase agreements."

7. While carrying forward the inference aforesaid drawn hereinabove of till the loanee liquidating the entire relevant loan liability vis-à-vis the financer, his not thereupto standing foisted with absolute dominion qua the relevant vehicle purchased by him under the relevant hire purchase agreement/hypothecation deed drawn qua it inter-se him and the financer, contrarily vestment of absolute dominion thereto occurring only on his liquidating the entire loan liability towards the financer, leads this Court to allude to the relevant condition embodied in the relevant agreement whereunder a preemptory right stands foisted in the financer to retake its possession on occurrence of omission(s) of the loanee to liquidate his loan liability

qua it. The bestowment of an empowerment in the financer to retake its possession on occurrence of default on the part of the loanee to liquidate his loan liability qua it also stands mandated by the Hon'ble Apex Court in (2001) 7 SCC 417 (*Charanjit Singh Chadha and others* versus *Sudhir Mehra*) to hold validation.

8. In the judgment aforestated the Hon'ble Apex Court has made a pronouncement qua retaking of possession of the vehicle by the financer from the hirer/loanee on anvil of satiation standing begotten qua the apposite condition embodied in the hire purchase agreement which stood struck inter-se both standing bereft of any penally inculpable mens rea. Consequently it discountenanced the grievance ventilated by the loanee in his complaint instituted before the relevant police agency qua the forcible retaking of the apposite vehicle by the financer constituting a penally inculpable offence rather it concluded qua galvanizing of the criminal machinery by the complainant tantamounting to his abusing the process of law also his harassing besides humiliating the agent(s) deployed by the finance-company to retake its possession from him preponderantly given the relevant retaking of its possession by its agents standing anvilled upon the relevant condition embodied in the hire purchase agreement whereupon the financer stood empowered to through its agents retake its possession, on occurrence of default on the part of the loanee to liquidate his loan liability qua the financer. The learned counsel appearing for the petitioners/accused would succeed in espousing herebefore qua the ratio decidendi propounded by the Hon'ble Apex Court in its verdict aforesaid holding apt aplomb application hereat only on evident occurrence of both concurrence besides alignment inter-se the factual matrix manifested in the judgment supra of the Hon'ble apex Court vis-à-vis the factual scenario prevalent hereat. Conspicuously when the relevant trite factual scenario embodied in the judgment of the Hon'ble apex Court supra is of occurrence of default on the part of the loanee in liquidating his loan installment qua the financer actuating the latter to terminate the hire purchase agreement recorded inter-se both wherein the relevant vehicle stood constituted as its corpus. Also a perusal of the judgment supra of the Hon'ble Apex Court unveils the factum of the loanee therein issuing to the financer a cheque constituted in a sum of Rs.84,000/- towards the relevant defrayment by him of the apposite loan installments qua the relevant vehicle, cheque whereof stood dishonoured, constraining the financer to institute a criminal complaint against the loanee therein under Section 138 of NI Act. With this Court culling from the rendition of the Hon'ble Apex Court in AIR 1966 Supreme Court 1178 qua the essential rubric ingraining a hire purchase agreement standing constituted in the factum of the financer, till the occurrence of liquidation by the loanee of the entire component of the relevant loan liability qua it, it continuing to hold dominium besides title qua the relevant asset(s) also contrarily the loanee till his not defraying the entire sum of loan vis-à-vis his financer his not holding any title qua the relevant assets rather his acquisition of absolute dominium thereon standing deferred besides postponed till his liquidating his entire loan liability vis-à-vis the financer, has a telling effect upon the embodiment of a condition in the relevant hypothecation/hire purchase agreement drawn inter-se the loanee with the financer wherewithin a leverage stands foisted upon the financer to through its agents retake its possession on occurrence of default by the loanee in liquidating his entire component of loan qua it. Also thereupon any acquisition of possession by it of the relevant vehicle acquires legitimacy also its, planking its relevant act thereupon acquires the mantel of validation. However before mete-ing deference thereto qua the factual matrix hereat, the visible stark contradistinctivity therein vis-à-vis the factual scenario prevailing hereat, occurs in the relevant germane fact embodied therewithin of the financer therein on occurrence of default by the loanee in liquidating his entire component of loan vis-à-vis the financer, it standing goaded to terminate the relevant hire purchase agreement also occurs in the visible fact of the loanee therein issuing a cheque constituting therewithin a part of his loan liability qua the relevant asset(s), cheque whereof stood dishonoured whereupon the financer stood actuated to institute a complaint under Section 138 of the Negotiable Instruments Act, hence leans this Court to hold significantly when in digression thereof hereat the relevant hire purchase agreement drawn inter-se the financer and the loanee/complainant stands un-rescinded also with 54 postdated cheques standing issued by the loanee/complainant to the financer holding therewithin his loan liability vis-à-vis the financer,

standing not proven to be dishonoured nor proof standing adduced by the financer hereat qua on theirs standing purportedly dishonoured, its instituting a complaint against the loanee under Section 138 of the Negotiable Instruments Act, renders the ratio decidendi held in the judgment of the Hon'ble Apex Court to hence stand un-attracted hereat. With the relevant hire purchase agreement qua the relevant asset(s) recorded inter-se the loanee/complainant hereat vis-à-vis the financer hereat remaining un-rescinded hence when it remains alive besides with none of the cheques issued by the loanee/complainant to his financer evidently standing not dishonoured nor any complaint standing instituted against the complainant by the financer under Section 138 of the Negotiable Instruments Act, constitutes the action of the financer to through its agents retake its forcible possession from the complainant to be ridden with a vice of its standing initiated in a posthaste manner bereft of thorough application of mind by it qua the loanee/ complainant infracting the mandate of the apposite schedule of repaying his loan qua it rather hence its standing actuated by its pedantically on the plank of the relevant condition embodied in the hire purchase agreement whereupon it on purported occurrence of default by the latter in liquidating his loan liability stood foisted with an empowerment to retake its possession, conspicuously when any imputation of validation to its relevant act of retaking its possession from the complainant on anvil of occurrence of default by the loanee in liquidating his loan liability qua it enjoins occurrence herebefore of prima-facie evidence qua preceding thereto its ensuring of the loanee/complainant being an obdurate besides a recalcitrant defaulter, evidence whereof for reasons afore-stated stands un-adduced, renders the act of the financer to plank, its act of retaking its possession from the loanee, on the relevant condition afore-stated embodied in the hire purchase agreement, to hence hold no validation in law. Also with deferment of vestment of title in the loanee/complainant continuing till his liquidating the entire component of the relevant loan vis-à-vis the financer contrarily also with the relevant financer thereupto holding title qua the relevant asset(s) would not yet underpin in it any indefeasible right to retake its possession on the plank of the relevant condition embodied therewithin nor also on occurrence of any minimal default on the part of the loanee in liquidating the relevant loan liability towards it would foist in it a vested right to retake its possession from him unless he evidently committed with persevering obduracy a gross default in defraying the relevant loan installments to it also unless preceding thereto the financer had put the loanee/ complainant to notice, calling upon him to defray the apposite loan installments, notice whereof remaining dis-affirmatively responded to by the complainant hence personifying his obduracy to honor his financial commitments towards it qua his defraying the relevant loan installments to it, whereupon alone legitimacy would stand foisted to the act of the financer to retake its possession on the plank of the relevant condition. However none of the aforesaid facets stand provenly sustained by the financer. In aftermath the mere making by the financer a resort to the relevant condition embodied in the hire purchase agreement, shorn off evidence displaying of the loanee being a recalcitrant besides an obdurate defaulter in liquidating his entire component of loan qua it, contrarily when for the reasons aforesaid the relevant postdated cheques held by the financer hold therewithin the component of loan advanced by the financer to the loanee, cheques whereof stand not proven to be dishonorued besides with the relevant hire purchase agreement standing un-rescinded whereupon also the financer has hence yet left latitude to the loanee/complainant to liquidate his entire loan liability qua it whereat he would hence acquire absolute dominion qua the relevant asset(s) also makes amenable to deprecation its act of its hence prematurely besides at an inchoate stage retaking its possession from the loanee whereupon the loanee/complainant stood deprived to defray to it the relevant loan installments also when he on their liquidation qua the financer stood forestalled to acquire absolute dominion thereto. In aftermath, the effect of the aforesaid marked distinctvities in the factual matrix prevalent in the judgment supra vis-à-vis the factual matrix hereat, is of the relevant ratio decidendi propounded therein not warranting its application with aplomb vis-à-vis the facts hereat.

9. Be that as it may the strong-arm tactics, as resorted to by the financer to retake forcible possession of the relevant asset(s) from the complainant on anvil of the relevant condition occurring in the relevant hire purchase agreement whereupon it stood authorized to through its agents retake its possession from the loanee on purported occurrence of default on the part of the

latter in liquidating the entire complement of the relevant loan vis-à-vis it, warrants theirs being stridently denounced. Besides needless to say when the mechanisms other than the one which stood resorted to by the financer were available to it to secure repayment of loan installments from the loanee/complainant qua the relevant asset(s) wherewith a hypothecation deed stands drawn inter-se it and the complainant, its short-circuiting the apt civil remedies encapsulated in the relevant statutes specifically in the CPC besides in the Hire Purchase Act, 1972, renders its relevant Act to stand ingrained with a penally inculpable mens rea dehors the embodiment therein of the relevant condition also when the financer in planking its relevant act on the relevant condition embodied in the hire purchase agreement, stood, preceding its making a resort thereto enjoined to inform the police station concerned besides may also could seek lawful restoration of its possession, by constituting an apposite application before the Court/Magistrate concerned exercising jurisdiction within the domain of the area wherewithin it stands registered. Palpably it has omitted to resort to the aforesaid legal mechanisms. Consequently its retaking its possession by deploying strong-arm tactics merely in the garb of the afore-stated condition embodied in the relevant hire purchase agreement/hypothecation deed recorded inter-se it and the loanee without preceding thereto its provenly concerting to seek liquidation of its loan liability from him prods this Court to discountenance its act, prominently when the indefeasible legal tenet for reasons aforesaid for validating its act stands un-satiated.

10. In view of the above, the present petition stands dismissed. All pending applications stand disposed of accordingly.

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 SURESHWAR THAKUR, JUDGE.

State of H.P. .....Appellant.

Versus

Arun Kumar & another .....Respondents.

Cr. Appeal No. 262 of 2007
Decided on : 05.09.2016

Indian Penal Code, 1860- Section 341, 323 and 325 read with Section 34- Informant had gone to drop her daughter and was returning thereafter- accused attacked her- she raised cries on which her daughters came to spot- accused also gave beatings to both the daughters of the informant- they sustained injuries- accused were tried and acquitted by the trial Court- held, in appeal that FIR was received late from which an inference can be drawn that it was lodged belatedly- prosecution witnesses deposed contrary to each other- recovery was effected after one month and the evidence to support the same is not satisfactory- trial Court had rightly acquitted the accused- appeal dismissed. (Para-9 to 13)

For the Appellant: Mr. Vivek Singh Attri, Deputy Advocate General.
For the Respondents: Mr. Nimish Gupta, Advocate vice Mr.S.D Vasudeva, Advocate.
Mr. Sanjay Jaswal, Advocate, for the complainant.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the impugned judgment of 25.4.2007 rendered by the learned Judicial Magistrate, Ist Class (I), Dharamshala in Crl. Case No. 9-

II/2006, whereby the learned trial Court acquitted the respondents (for short "accused") for the offences charged.

2. Brief facts of the case are that in the morning of 17.12.2005 complainant Nirmala Devi had gone to drop her daughter Renu, who was studying in B.A in College. At about 5.25 a.m. when the complainant had been returning to her house after her daughter had boarded the bus for Dharamshala, accused persons without any reason attacked her. When she raised cries, her daughters Sonu and Sanju came to the spot for rescuing her from the clutches of the accused. Both the accused also gave beatings to both of the daughters of the complainant. As a result of beatings having been given by the accused to the complainant and to her daughters, they sustained injuries on their person. The complainant reported the matter to police on which FIR came to be registered. All the injured were medically examined. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. The accused stood charged by the learned trial Court qua theirs committing offences punishable under Sections 341,323 and 325 readwith Section 34 of the Indian Penal Code, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 9 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded in which they pleaded innocence and claimed false implication. However, they did not choose to lead any evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of acquittal qua the accused.

6. The learned 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 vice counsel appearing for the respondents/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. In an incident which allegedly occurred on 17.12.2005, the injured/victims as portrayed by their respective MLCs comprised in Ex.PW-6/B to PW-6/D attained as pronounced therein injuries on their respective persons. On anvil of the aforesaid personifications occurring in the afore-referred exhibits, the learned Deputy Advocate General contends of the prosecution succeeding in connecting the accused/respondents in the alleged occurrence qua which an FIR Ex.PW-8/A stood lodged with the police station concerned. He also proceeds to contend qua the recovery of Dandas Ex.P-1 and P-2 under recovery memo Ex.PW-2/A befittingly connecting the accused in the commission of the offences alleged. Consequently, he contends of the findings of the acquittal recorded by the Magistrate concerned qua the accused/respondents warranting interference by this Court. However the mere occurrence of personification in the apposite MLCs comprised in Ex.PW-6/B to PW-6/D qua the injured/victims sustaining injuries in the alleged assault which stood perpetrated on their person by the accused would not ipso facto render truthful the ocular account purveyed thereto by the injured witnesses, significantly when the FIR qua the occurrence as manifested by the endorsement made thereon by the Magistrate concerned unravels qua its standing received by him on 31.1.2006 whereupon an inference stands begotten of its standing belatedly lodged by the injured/victims. Also since it was enjoined upon the Investigating Officer to, on the apposite FIR qua the occurrence standing lodged transmit it with

utmost promptitude to the Magistrate concerned whereupon an inference would stand garnered of it containing truthful recitals qua an incident whereto a prompt information stood purveyed by the injured/complainant, contrarily with the Investigating Officer concerned though standing enjoined, to, on the apposite FIR standing lodged before the police station concerned, transmit it with utmost promptitude to the Magistrate concerned. Evidently when he has omitted to do so also when no vivid display occurs of the Magistrate concerned while making the apposite endorsement his making any pronouncement qua the Investigating Officer concerned despite the FIR standing lodged in quick sequel to the occurrence his derelicting with utmost promptitude in dispatching it to the Illaka Magistrate, concomitantly hence begets an inference of the incident of 17.12.2005 standing reported not on the date aforesaid by the injured/complainant rather information qua it standing purveyed by the injured/complainant in proximity to the Illaqa Magistrate receiving the apposite FIR comprised in Ex.PW-8/A on 31.1.2006 whereupon an inference stands galvanized of the injured/complainant belatedly lodging before the police station concerned an apposite FIR qua the occurrence also it begets a sequel of the narrations qua the incident embodied therewithin being concocted besides premeditated especially when the inference aforesaid would stand negated by its prompt lodging whereas it for the reasons aforesaid stands impromptly lodged, does enhance a derivative of the injured/complainant while belatedly lodging it, hers introducing therewithin a premeditated and concocted version qua the occurrence, whereupon no credibility is fastenable.

10. The effect of the aforesaid conclusion formed by this Court of the version qua the occurrence embodied in FIR Ex. PW-8/A standing ridden with a taint of concoction besides premeditation, negates the effect of the MLCs aforesaid also benumbs the efficacy of the recovery of Dandas under memo Ex.PW-2/A conspicuously given their recovery standing effectuated on a month elapsing since the occurrence. The further erosion qua efficacy of recovery of dandas under memo Ex.PW-2/A is gathered from the factum of the complainant in the apposite FIR comprised in Ex.PW-8/A omitting to narrate therein the trite factum of the accused wielding dandas at the time contemporaneous to theirs perpetrating an assault upon the person of injured/victims.

11. Moreover with PW-2 (C. Surjeet Singh) a witness to recovery of dandas testifying qua theirs standing produced in the police station concerned whereat the injured persons were also present, testification whereof of PW-2 contradicts the revelations occurring in Ex.PW-2/A qua recovery of dandas standing effectuated by the Investigating Officer on 12.1.2006. The aforesaid contradiction acquires aggravation from the factum of the other witnesses to recovery memo one Budhi Singh standing un-examined by the prosecution whereas he was an independent witness to recovery memo contrarily when PW-2 is an official working under the Investigating Officer who too has not supported the narration qua the recovery of danda occurring in Ex.PW-2/A is a vivid pronouncement of the recitals occurring in Ex.PW-2/A holding no efficacy also thereupon an inference is erected of the prosecution not connecting their user by the accused.

12. Be that as it may further inroads qua the veracity of the prosecution version embodied in Ex.PW-8/A upsurges from the factum of a purported independent witness to the occurrence, one Subhash Chand (PW-5), a close relative of the injured/complainant not supporting the prosecution case. His omission to lend support to the prosecution case despite his enjoying proximity in relation with the injured/complainant does disprove the version qua the occurrence testified by the injured/complainant. Also an aura of incredibility surrounds the version qua the occurrence testified by the injured/complainant given the communication made by her in her cross-examination of the Investigating Officer not making an inquiry from her qua the incident nor the Investigating Officer recording her version qua the occurrence, contrarily she testifies of the Investigating Officer recording the statement of her daughter. All the aforesaid communications are in blatant contradiction vis-à-vis the trite factum of the apposite FIR holding recitals therein of the injured/complainant purveying a narrative qua the occurrence to the Investigating Officer. The aforesaid contradiction inter-se the afore-referred communications occurring in her cross-examination significantly vis-à-vis the trite factum of Ex.PW-8/A holding a

disclosure qua its standing lodged by her disables her to truthfully testify qua the genesis of the prosecution case as stands manifested in Ex.PW-8/A. Consequently her testification qua the occurrence as an informant cannot be fastened any virtue of credibility significantly when in her cross-examination she disowns the narratives qua the occurrence held therewithin.

13. A wholesome analysis of evidence on record portrays that the appreciation of evidence as done by the learned trial Court does not suffer from any perversity and absurdity nor it can be said that the learned trial Court in recording findings of acquittal has committed 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 that the findings of acquittal recorded by the learned trial Court merit interference.

14. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment of the learned trial Court is maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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

State of H.P. .....Appellant.
Versus
Shri Vikas Sood and another .....Respondents.

Cr. Appeal No. 185 of 2008.
Date of Decision: 5th September, 2016.

Indian Penal Code, 1860- Section 353, 332 and 506 read with Section 34- Informant was plying bus- when bus reached near Ghora Hospital Cart Road, one of the accused appeared on a motorcycle- he was signaled by the police to stop the same- informant stopped his bus but the accused failed to stop the motorcycle and fell in front of the bus- accused came to the driver window and tried to pull out the driver and gave beatings to him- friend of the accused also tore the shirt of the informant- informant was saved by the conductor and passengers- accused were tried and acquitted by the trial Court- held, in appeal that prosecution witnesses had consistently deposed about the incident - their testimonies are corroborated by site plan and MLC- suggestions given to PW-3 in cross-examination show the role of the accused and their presence- Court had not appreciated the evidence properly- appeal allowed- accused convicted for the commission of offences punishable under Sections 332 and 506 of the IPC read with Section 34 of the IPC. (Para- 9 to 13)

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondents: Mr. Lovneeesh Kanwar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral).

The instant appeal stands directed by the State of H.P. against the judgment of the learned Chief Judicial Magistrate, Shimla, District Shimla, Himachal Pradesh, rendered on 28.12.2007 in Criminal Case No. 127/2 of 04/2000, whereby, the latter Court acquitted the accused/respondents for offences punishable under Sections 353, 332 and 506 read with Section 34 of the Indian Penal Code.

2. The facts relevant to decide the instant case are that on 3.7.2001 Rajinder Singh had been plying bus No. HP-07-3045 from bus stand to Kasumpti colony and had been discharging duties as public servant. At about 1.20 p.m., when bus reached at Ghora Hospital Cart Road, one of the accused Vivek Sood appeared in a motorcycle bearing No. CH-01S-8830

from Sabji Mandi side. He was signaled by the police official to stop the same. After having seen the motor cycle coming to the main road, the complainant stopped his bus but despite thereof, the motorcyclist failed to stop the motorcycle and fell in front of the bus. Meanwhile, co-accused Vikas Sood joined accused Vivek Sood and both in furtherance of common intention of each other came to the driver window, tried to put out the complainant. Not only this, both the accused in furtherance of common intention of other voluntarily caused simple hurt to the complainant with intention to deter or prevent him from discharging his duties as public servant. The shirt of the complainant was also torn. Complainant was saved from the wraths of the accused by passengers of the bus as also Dhayan Singh conductor and Shiv Sharan driver. Accused criminally intimidated the complainant and fled away leaving behind the motorcycle. The Investigating Officer on reaching spot, recorded statement of the complainant Ex.PW2/A which was sent to police station on the basis of which FIR was registered against the accused. Thereafter the police completed all the codal formalities in accordance with law.

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

4. The accused were charged by the learned trial Court for theirs committing offences punishable under Sections 332, 506 and read with Section 34 of the IPC. In proof of the prosecution case, the prosecution examined 10 witnesses. On conclusion of recording of the prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded by the trial Court, in which the accused claimed innocence and pleaded false implication in the case.

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

6. The State of H.P. stands aggrieved by the judgment of acquittal recorded by the learned trial Court. 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 the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of acquittal be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of conviction.

7. On the other hand, the learned defence counsel has with considerable force and vigour, contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and do not necessitate 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 factum probandum of the accused holding at the relevant site of occurrence the apposite mensrea for committing the actus reus of attempting to pull the complainant from the driver's seat of the bus, seat whereof stood occupied by him at the relevant time also of theirs inflicting simple injuries upon him, stands proven by the testimonies of PW-1, PW-3 and PW-5, all ocular witnesses qua the occurrence. All the ocular witnesses, in their respective ocular testifications qua the occurrence have deposed qua it with mutual intra se corroboration. Their ocular testifications qua the occurrence stand lent corroboration by Ex.PW6/A, the apposite MLC prepared by the doctor concerned on subjecting the complainant to medical examination. Since, Ex.PW6/A holds manifestations therein in tandem with the ocular account qua the occurrence rendered by the ocular witnesses thereto tersely of the accused subjecting the complainant/injured to an assault whereupon simple injuries pronounced therein stood entailed upon his person beget a natural consequence of the prosecution succeeding in adducing clinching ocular evidence holding congruity with the apposite MLC vis-a-vis the complainant. In aftermath, apposite reverence thereto stood enjoined to be meted by the learned trial Court.

Contrarily its omitting to mete reverence thereto hence has committed a gross error in undermining its tenacity. Even though the effect of apposite vivid pronouncements occurring in the ocular testifications qua the occurrence rendered by PW-1, PW-3 and PW-5 is qua theirs vividly echoing the inculpatory role of the accused, nonetheless, the learned trial Court proceeded to record an order of acquittal vis-a-vis the accused on the anvil of a stray acquiescence by PW3 to a suggestion put to him in his cross-examination wherein he exculpated the inculpatory role of the accused in the occurrence. However, with PW-3 in his cross-examination exculpating the inculpatory role of the accused also his belittling the entire ocular testifications qua the occurrence embodied in his examination-in-chief wherewithin he inculpated the accused, would not in its entirety negate the prosecution case. The learned trial Court was enjoined to read the testimony of PW-3 comprised in his examination-in-chief conjointly with his testimony embodied in his cross-examination besides was enjoined to construe the impact of the ocular testifications qua the occurrence rendered by PW-1 and PW-5 wherein firm echoings occur qua the inculpatory role of the accused/respondents also when the testification qua the occurrence embodied in the examination-in-chief of PW-3 holds therewithin an ascription of an incriminatory role vis-a-vis the accused-respondents whereupon hence credence was imputable, contrarily its meteing deference to an isolated communication occurring in the deposition of PW-3 wherein he exculpates the inculpatory role of the accused has, sequelled a gross error qua its undermining the impact of consistent credible ocular testifications qua the occurrence rendered by PW-1 and PW-5 also has entailed an ill consequence of its eroding the effect of ascription of an inculpatory role qua them even by PW-3 in his examination-in-chief. Furthermore, the deference as meted by it to the isolated exculpatory communications qua the accused, communications whereof occur in the cross-examination of PW-3, has sequelled an ill consequence qua its negating the impact of efficacious credible ocular testifications of other ocular witnesses to the occurrence whereas on theirs standing read with intra se coagulation vis-a-vis the testifications of PW-3 embodied in his examination-in-chief unravel qua theirs holding intra se congruity, whereupon hence no inference than of the inculpatory role of the accused/respondents vividly surgingforth stands awakened.

10. The learned trial court also has overlooked the factum of Ex.PW6/A manifesting therein in concurrence with the ocular rendition qua the occurrence by ocular witnesses thereto, of simple injuries standing sustained by the complainant/accused, in sequel, of his standing belaboured by the accused/respondents also has undermined the vigour of efficacious apt manifestations occurring in Ex.PW6/A whereas theirs holding concurrence with the testifications qua the occurrence embodied in the examination-in-chief of PW-3, warranted deference standing meted thereto by it, contrarily, it has inaptly imputed sanctity to PW-3 in his cross-examination negating the inculpatory role of the accused. Consequently, Ex.PW6/A scores off the effect, if any, of the communication made by PW-3 in his cross-examination wherein he exculpates the guilt of the accused, necessarily, hence his testifications in his examination-in-chief when also hold concurrence with the ocular testifications qua it rendered by PW-1 besides by PW-5, constrains this Court to conclude of the learned trial court in omitting to construe the testimonies of the aforesaid witnesses in a wholesome manner has committed a gross error in mis-appreciating their probative worth.

11. Be that as it may, the learned trial Court has faulted the investigations on the score of the Investigating Officer not making or concerting to establish the identity of the accused. However, the factum of the Investigating Officer not adducing cogent proof qua the identity of the accused would not give leverage to the accused/respondents to contend of theirs holding no connectivity in the alleged occurrence. Contrarily, when the learned defence counsel while holding PW-3 to cross-examination has put apposite suggestion to him visibly portraying qua the accused/respondent recording their presence at the site of occurrence, suggestion whereof sequelled an answer in the affirmative from PW-3 also when the nuance of the suggestion put by the learned defence counsel to PW-3 while holding him to cross-examination devolves upon the factum of the accused making an inquiry from him qua the reason for the happenings at the relevant site of occurrence also when the effect of a suggestion put to PW-3

holds pronouncement therein qua the role of the accused in the occurrence whereupon PW-3 purveyed an answer exculpating the role of the accused/respondents, cumulative effect whereof of the aforesaid pronouncements for reasons aforestated stands answered against the accused/respondents rather also does hence portray of the accused/respondents, acquiescing to the trite factum of theirs recording their presence at the site of occurrence rendering unworthwhile any concert by the Investigating Officer to establish by adducing cogent evidence qua their identity besides their connectivity in the occurrence .

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below 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 perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

13. Consequently, the instant appeal preferred by the State of H.P. is allowed. The accused/respondents are convicted for theirs committing offences punishable under Sections 332 and 506 of the IPC read with Section 34 of the IPC. Accused/Convicts be heard on quantum of sentence on 21st September, 2016.

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

State of Himachal Pradesh ..... Appellant
Versus
Jai Bhagwan and others ..... Respondents

Cr. Appeal No. 341/2012
Reserved on: September 2, 2016
Decided on: September 5, 2016

N.D.P.S. Act, 1985- Section 20- Car was stopped and searched- 14.5 kg. charas was recovered- accused were tried and acquitted by the trial Court- held, in appeal that accused were travelling the car- charas was recovered from below the seat- all the codal formalities were completed on the spot- case property was produced before PW-3 who had resealed the same- mere fact that independent witnesses had not supported the prosecution version is not sufficient to doubt the prosecution version when they had admitted their signatures on the seizure memo - there are no major contradictions in the statements of official witnesses- statements of officials witnesses are inspiring confidence and are trustworthy - presumption that person acts honestly applies as much in favour of police personnel as in favour of any other persons- trial Court had erred in giving undue importance to the fact that no personal belongings of accused were found in the car- it was not necessary for the prosecution to prove that accused were travelling with their personal belongings- ownership of the car was also not proved- accused were travelling in the same car and they hail from the same District- possession of charas was duly proved and the trial Court had wrongly acquitted the accused- appeal allowed and accused convicted of the commission of offence punishable under Section 20 of N.D.P.S. Act. (Para-17 to 21)

Case referred:
Karamjit Singh vs. State (Delhi Administration), AIR 2003 SC 1311

For the appellant : Mr. M.A. Khan, Additional Advocate General.
For the respondents : Mr. Manoj Pathak, Advocate for respondents No.1, 3 and 4.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against judgment dated 29.3.2012 rendered by the learned Special Judge, Kinnaur Sessions Division at Rampur Bushahr in NDPS Case No. 26 of 2010, whereby respondent-accused (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), have been acquitted by the learned trial Court.

2. Prosecution case, in a nutshell, is that on 15.5.2010, PW-10 Gurbachan Singh alongwith HC Tain Singh, HHC Kashmi Ram, Constable Lal Singh, Constable Harbans and Constable Tikkar Ram was present at Bus Stand Ani, where a *Naka* had been laid for traffic checking. At about 9 PM, when complainant was talking to Rajesh Kumar and Lal Singh, who had come to see him, in the meantime, a white coloured car came from Shamsher side which was on its way towards Ani. It was signalled to stop. Car was Tata Indigo having registration No. HR-16H-6420. Driver disclosed his name as Satish Kumar. Person sitting in the front seat disclosed his name as Jai Bhagwan. Persons sitting in the rear seats disclosed their names as Karan Singh and Rajinder Singh. They belonged to the State of Haryana. Car was searched. Black coloured and round shaped substance was found from beneath the rear seat. It was found to be *Charas*. It weighed 14.5 Kg. It was put in a bag, which was sealed with seal impressions of ''C', 12 in number, NCB form in triplicate was filled in and seal impression was taken separately on a cloth. Recovered *Charas* alongwith car and its keys was taken into possession. *Rukka* was prepared. It was sent to the Police Station through HHC Kashmi Ram. Case property was produced before Parver Thakur, probationer Dy.SP, who resealed the same with three seal impressions of 'X'. Spot map was also prepared. It was sent to FSL Junga. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as ten witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. They pleaded innocence. Accused were acquitted as noticed above. Hence, this appeal by the State.

4. During the pendency of the appeal before this Court, respondent No.2, Rajinder Singh expired on 18.5.2015. As such appeal against him stood abated.

5. Mr. M.A. Khan, Additional Advocate General has vehemently argued that the prosecution has proved its case against the accused.

6. Mr. Manoj Pathak, Advocate, has supported Judgment dated 29.3.2012.

7. We have heard the learned counsel for the parties and also gone through the Judgment and record carefully.

8. PW-1 Lal Singh testified that on 15.5.2010, he was in *Dhaba* at Bus Stand Ani. It was day-time. A motorcycle was parked on which three bags were found. Police personnel took the same to the Police Station. He was declared hostile and cross-examined by the learned Public Prosecutor. He has admitted his signatures on Marks PA, PB, PC, PD, PE, PF, PG, PH, PJ, PK and PL.

9. Similarly, PW-2 Rajesh Kumar was also declared hostile and cross-examined by the learned Public Prosecutor. He has also admitted his signatures on Marks PA, PB, PC, PD, PE, PF, PG, PH, PJ, PK and PL.

10. PW-3 Parver Thakur Probationar Dy.SP testified that he remained posted as SHO Police Station Ani from May, 2010 to June, 2010. On 15.5.2010, HHC Kashmi Ram had brought *Rukka* mark Z to the Police Station on the basis of which FIR Ext. PW-3/A was registered. On the same day i.e. 15.5.2010 at about 11.45 PM, SI Gurbachan Singh had produced case property sealed with seal impressions of ' C' before him alongwith NCB form in triplicate and sample seals.

He resealed the same with seal impression 'X' (three in number). Seal impression was taken vide Ext. PW-3/C. He filled in columns No. 7 to 11 of the NCB form Ext. PW-3/D. He also appended seal impression.

11. PW-5 HC Anup Kumar testified that on 15.5.2010, probationer Dy.SP posted as SHO Police Station Ani deposited with him one parcel sealed with 12 seal impressions of seal 'C', resealed with three seal impressions of seal 'X', alongwith sample seals 'C' and 'X', NCB form in triplicate, regarding which he made entry in the relevant register at Sr. No. 243. He proved the extract of register Ext. PW-5/A. He sent the sealed parcel alongwith documents, NCB form seal impressions to FSL Junga through Constable Puran Chand vide RC No. 24/10, who, after delivering the same at Junga, returned the receipt to him. He did not tamper with the case property, in any manner, when it remained in his custody.

12. PW-6 Constable Puran Chand testified that on 17.5.2010, MHC Anup Kumar handed over to him case property in a parcel sealed with seal impressions 'C' and 'X' alongwith sample seals and connected documents vide RC No. 24/2010 dated 17.5.2010 in FIR No. 40/2010 for handing over the same at FSL Junga. He deposited the same at FSL Junga on the same day and obtained receipt on the RC itself and handed over the same to MHC.

13. PW-7 Constable Harbans Lal has deposed that he was associated in the investigation of the case by SHO.

14. PW-8 HHC Kashmi Ram testified the manner in which vehicle bearing No. HR-16H-6420, was intercepted. Accused gave their consent that they wanted to be searched before the police. Vehicle was searched. *Charas* was recovered. It weighed 14.5 Kg. All the codal formalities were completed on the spot. *Rukka* was handed over to him. He handed over the same to SHO Parver Thakur. In his cross-examination, he deposed that during 20-25 minutes no vehicle came at the spot and as such no vehicle was stopped or checked. Rajesh and Lal Singh came to them since they were known to him and other police officials. He did not know who had written Ext. PC on the spot. According to him, there was no space under the rear seat of the vehicle bearing No. HR-16H-6420. Motorcycle was also taken into possession. He did not remember whether any belonging of any of the accused was recovered from the vehicle.

15. PW-9 HC Tain Singh has also deposed the manner in which vehicle bearing registration No. HR-16H-6420 was intercepted. All the codal formalities were completed on the spot. According to him (in the cross-examination), there was space of 1 ½ -2 feet under the rear seat of the Indigo vehicle. It took 1 ½ hours to complete the proceedings like seizing the contraband, preparing memos etc. No personal belongings of accused were found in the vehicle.

16. PW-10 SI Gurbachan Singh has also deposed the manner in which vehicle was intercepted and all the codal formalities were completed at the spot. He prepared *Rukka*. It was sent to the Police Station, on the basis of which FIR was registered. He produced the case property before SHO Parver Thakur alongwith connected documents. In his cross-examination, he has deposed that there was no space beneath the rear seat of Indigo car. However, if the seat was folded, space could be created, which could be about 6-7 inches.

17. What emerges from the appraisal of the evidence is that the accused were found travelling in a car bearing registration No. HR-16H-6420. *Charas* was recovered from below the seat. All the codal formalities were completed on the spot. Case property was produced before PW-3 Parver Thakur, who resealed the same with three seal impressions of 'X'. Case property was sent to FSL Junga. Though, according to HHC Kashmi Ram, there was no space under rear seat of the vehicle, PW-9 Tain Singh has specifically deposed that there was space of 1 ½ -2 feet under the rear seat of the Indigo vehicle, which was involved in the case. Similarly, PW-10 Gurbachan Singh, in his cross-examination, has deposed that if seat was folded, space would be created and it would be 6-7 inches. *Charas* was recovered from beneath the rear seat of the vehicle with the help of search light. Though PW-1 Lal Singh and PW-2 Rajesh Kumar have not supported the prosecution case, but they have categorically admitted their signatures on Marks PA, PB, PC, PD, PE, PF, PG, PH, PJ, PK and PL. Official witnesses have categorically testified that the *Charas* was

recovered in their presence from the car. There are no major contradictions in the statements of the official witnesses. Minor contradictions are bound to occur especially when statements are recorded after a considerable gap of time.

18. Statements of the officials witnesses are confidence inspiring and trustworthy. Their lordships of the Hon'ble Supreme Court in the case of **Karamjit Singh vs. State (Delhi Administration)**, reported in AIR 2003 SC 1311, have held that there is no principle of law that without corroboration by independent witnesses statements of official witnesses cannot be relied upon. Presumption that person acts honestly applies as much in favour of police personnel as of other persons. It has been held as follows:

> " 8. Shri Sinha, learned senior counsel for the appellant, has vehemently urged that all the witnesses of recovery examined by the prosecution are police personnel and in absence of any public witness, their testimony alone should not be held sufficient for sustaining the conviction of the appellant. In our opinion the contention raised is too broadly stated and cannot be accepted. The testimony of police personnel should be treated in the same manner as testimony of any other witness and there is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon. The presumption that a person acts honestly applies as much in favour of police personnel as of other persons and it is not a proper judicial approach to distrust and suspect them without good grounds. It will all depend upon the facts and circumstances of each case and no principle of general application can be laid down. PW11 Pratap Singh has clearly stated in the opening part of his examination-in-chief that ACP Shakti Singh asked some public witnesses to accompany them but they showed their unwillingness. PW10 Rajinder Prasad, SI has given similar statement and has deposed that despite their best efforts no one from public was willing to join the raiding party due to the fear of the terrorists. Exactly similar statement has been given by PW9 R.D. Pandey. We should not forget that the incident took place in November 1990, when terrorism was at its peak in Punjab and neighbouring areas. The ground realities cannot be lost sight of that even in normal circumstances members of public are very reluctant to accompany a police party which is going to arrest a criminal or is embarking upon search of some premises. At the time when the terrorism was at its peak, it is quite natural for members of public to have avoided getting involved in a police operation for search or arrest of a person having links with terrorists. It is noteworthy that during the course of the cross- examination of the witness the defence did not even give any suggestion as to why they were falsely deposing against the appellant. There is absolutely no material or evidence on record to show that the prosecution witnesses had any reason to falsely implicate the appellant who was none else but a colleague of theirs being a member of the same police force. Therefore, the contention raised by Shri Sinha that on account of non-examination of a public witness, the testimony of the prosecution witnesses who are police personnel, should not be relied upon has hardly any substance and cannot be accepted."

19. There is no merit in the contention of Mr. Manoj Pathak, Advocate that the accused were brought down from the bus. Prosecution has duly proved that the accused were travelling in car bearing registration No. HR-16H-6420 and were found in exclusive and conscious possession of the contraband. Learned trial Court has erred in law by giving undue importance to the fact that no personal belongings of accused were found in the car. It was not necessary for the prosecution to prove that accused were travelling with their personal belongings. Similarly, it was also not necessary for the prosecution to prove the record from Samiti Guest House. Prosecution was only required to prove that the accused were travelling in the car bearing registration No. HR-16H-6420 and were found in conscious and exclusive possession of the contraband. It was also not necessary for the prosecution to prove the ownership of the car

though desirable. Car was brought to the area by driver Satish Kumar. PW-7 Harbans Lal has deposed that he was associated in the investigation of the case by SHO. It was not necessary for him to state that he had come on the spot with SHO. The accused were travelling in same car and they hail from District Jind, Haryana, and presumption would be that they knew each other. It is reiterated that the *Charas* was recovered from the car and not from the abandoned motorcycle as argued by Mr. Manoj Pathak, Advocate. Prosecution has proved that accused were found in possession of the contraband band. Case property remained intact from its seizure till its production in the Court. Since *Charas* was recovered from the vehicle, personal search was not necessary. However, fact of the matter is that despite that accused have given their consent to be searched before a Magistrate or a Gazetted Officer. Thus, Section 50 of the Act has also been complied with.

20. Prosecution has proved beyond reasonable doubt that the contraband was recovered from the conscious and exclusive possession of the accused.

21. Accordingly, the appeal is allowed. Judgment dated 29.3.2012 rendered by the learned Special Judge, Kinnaur Sessions Division at Rampur Bushahr in NDPS Case No. 26 of 2010 is set aside. The accused No.1, 3 and 4 are convicted for the commission of offence punishable under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985. Accused be produced to be heard on quantum of sentence on September 13, 2016.

22. Registry is directed to prepare and send the production warrant to the quarter concerned.

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

State of Himachal Pradesh ...Appellant

Versus

Parvesh Kumar and others ...Respondents

Criminal Appeal No. 372 of 2010
Judgment reserved on: 27.07.2016
Date of Decision: 5.09.2016

Indian Penal Code, 1860- Section 148, 324/149 & 307/149- PW-4, PW-10 and PW-11 were going towards the house of PW-4- two vehicles were parked on the road side on the way- when the car crossed these vehicles, one of the occupants of the vehicles called PW-4- PW-4 stopped his vehicle and started moving towards the parked vehicle- accused attacked PW-10 with sword and Khukhari and other accused ran away from the spot- accused were tried and acquitted by the trial Court- held, in appeal that PW-4 had not identified the accused in the Court- PW-10 was contradicted with reference to his previous testimony - PW-11 was declared hostile- motorcycle was recovered from the spot falsifying the prosecution version that accused had fled away from the spot- statement of PW-10 was not recorded by the police- there was delay in recording the FIR- PW-10 admitted that exchange of hot words had taken place between PW-4, PW-10 and PW-11 and accused V and S- there are material contradictions and improvements in the statement of PW-10 – true version was not placed before the Court- Trial Court had rightly held that prosecution version was not proved beyond reasonable doubt- appeal dismissed. (Para-6 to 27)

For the appellant : Mr. V.S. Chauhan, Additional Advocate General with Mr. Vikram Thakur, Mr. Puneet Rajta, and Deputy Advocate Generals.

For the respondent No. 1. : Mr. Naresh Verma, Advocate.

For the respondents No. 2 to 6 : Mr. S.M. Goel, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

Aggrieved by acquittal of respondent-accused vide judgment dated 11.03.2010, passed by the learned Additional Sessions Judge (Fast Track Court), Kangra, at Dharamshala, in RBT Sessions Case No. 35-D/VII/07, in case FIR No. 14/05, dated 21.01.2005, registered under Sections 148, 324/149 & 307/149 of the Indian Penal Code in Police Station, Dharamshala District Kangra, H.P., the State has preferred present appeal with prayer to set aside impugned judgment and to convict respondent-accused under Sections 148, 324/149 & 307/149 of the Indian Penal Code

2. Mr. V.S. Chauhan learned Additional Advocate General for the appellant-State has advanced arguments that there is sufficient circumstantial evidence on record to prove the guilt of respondent-accused and prayed for allowing the appeal to punish respondent-accused whereas Mr. Naresh Verma and Mr. S. M. Goel, learned counsel for respondents-accused have strenuously argued that prosecution has failed to prove the case beyond reasonable doubt and there is no circumstance incriminating respondent-accused and have sought dismissal of the appeal.

3. As per prosecution case PW-4 Hitesh Kumar made a statement under Section 154 Cr.PC., stating that on 21.01.2005 at about 8.45 PM, PW-10 Pankaj Thakur alongwith his friends PW-4 Hitesh Kumar and PW-11 Amit Kumar was going in his car from his hotel Himalyan Wonder to his house. On the way near Midway Resorts, two vehicles i.e. one Mahindra Utility and one motorcycle were parked on the road side and the moment car of PW-10 Pankaj Thakur crossed these vehicles respondent Sanjiv, one of the occupants of these vehicles, called him to come out, upon which he stopped his vehicle and started moving towards the parked vehicles. Occupants of those two vehicles alighted quickly and firstly respondents namely Vinay alias Guzar, Sanjiv Kumar, Munish alias Gadhu and later on all respondents attacked Pankaj with swords and khukaries with common intention to kill him. PW-10 Pankaj Thakur received injuries on his head, arms and other parts of body. Thereafter, within few minutes, they fled away from the spot in their vehicles, by taking advantage of darkness. Name of other persons were not known to Hitesh Kumar. However, he had noticed registration number of vehicles. Because of severe bleedings PW-10 Pankaj Thakur was brought the Zonal to hospital, Dharamshala immediately by PW-4 Hitesh Kumar and PW-11 Amit Kumar.

4. After registration of FIR (Ex. PX) at Police Station, Dharamshala, on the basis of statement Ex.PW-4/A investigation was carried on and after its completion challan was put in the Court.

5. Prosecution has examined 17 witnesses and statement of respondents under Section 313 Cr.PC wee recorded and respondents have chosen not to lead any defence evidence. After conclusion of trial, respondents stand acquitted by trial Court.

6. Whole case of prosecution depends upon statements of injured PW-10 Pankaj Thakur and his eye witness friends PW-4 Hitesh Kumar, PW-11 Amit Kumar and other witnesses are doctors who have performed their duties of medically examining and giving treatment to the injured PW-10 Pankaj Thakur and police officials who have performed their part for conclusion of investigation.

7. On the day of alleged incident, police had reached in the hospital, on the basis of information received from hospital, at 9.30 PM. As per prosecution case at that time, injured PW-10 Pankaj Thakur was not fit to give statement. However, at about 11.30 PM, the statement of PW-4 Hitesh Kumar (Ex. PW-4/A) was recorded under Section 154 Cr.P.C.

8. On deposition in Court, in examination-in-chief, PW-4 Hitesh Kumar has stated that he had seen six persons on the spot but has shown his inability to identify them after a lapse of four years. He has further stated that he can identify Vinay, Sanjay, Munish and Parvesh and

remaining accused are known to him only by face. He has stated that accused had run away in Mahindra Pick-up. He was declared hostile for resiling from his previous statement recorded by police and was subjected to cross-examination by learned Public Prosecutor. During cross-examination, he has admitted suggestions put up by learned Public Prosecutor and also statement made by him before Police and has explained that due to lapse of time, he had forgotten these facts. In his cross-examination by defence counsel, he has admitted that there was dark on the spot at the time of incident. There were lights of Hotel Midway Resorts and lights of vehicles were also on. He has stated that he had not disclosed names of Awasthi and Piada in his statement which has been found contrary to his earlier statement made before police. He has admitted that police had not carried out identification parade of respondents accused in his presence.

9. PW-10 Pankaj Thakur has reiterated the manner of occurrence of incident, qualifying further that respondent Sanjeev called him and when he had started moving towards him all of a sudden respondents attacked him with swords and khukharies and thereafter they went towards Kangra in the vehicle. As per him, he had lost his consciousness which he regained in the hospital at Dharamshala. In cross-examination, he has denied that Doctors had obtained his consent before medical examination. He has stated that he had disclosed the names of all six accused persons present in the Court to the police but said fact has been found contrary to record. He has admitted that on the same day at about 4.00 PM, PW-11 Amit Kumar and PW-4 Hitesh Kumar had gone to Kotwali Bazaar, Dharamshala where hot words were exchanged with Vinay and Sanjay in Bedi's Office.

10. PW-11 Amit Kumar had also not lent any support in favour of prosecution and was declared hostile and was subjected to cross-examination by the Public Prosecutor. In cross-examination also he has not supported the prosecution case. He has stated that he did not remember that the day of incident was 21.01.2005 He has denied that in his presence respondents Sanjeev had called PW-10 Pankaj Thakur. He has also stated it to be incorrect that Sanjeev Kumar was already known to him. He has stated that he did not know whether all the accused fled towards Kangra after beating Pankaj Thakur. Further in cross-examination he states that due to darkness on the spot he could not see anything.

11. PW-11 Amit Kumar has stated that due to darkness, he could not recognize the boys and later on he came to know that PW-10 Pankaj was called by them. He has disclosed the names of Sanjeev, Vinay etc. to the Police. He has stated that it was incorrect that the aforementioned persons had beaten Pankaj Thakur in his presence.

12. As per statement Ex.PW-4/A, respondents had fled away from the spot in their vehicles. However, as per PW-8 ASI Bansi Lal, Investigating Officer, motorcycle was taken into possession from Nallah nearby the Midway Resorts vide recovery memo. Ex.PW-7/A. Recovery of motorcycle from the Nallah adjacent to alleged place of occurrence falsifies the fact narrated in statement Ex.PW-4/A on the basis of which the case was investigated and registered.

13. PW-4 Hitesh Kumar and PW-11 Amit Kumar, friends of PW-10 Pankaj Thakur, who were claimed to be with him at the time of incident, did not go with him (PW-10) and remained sitting in the car, when he was allegedly beaten up by the respondents. As such conduct of these witnesses renders their veracity doubtful.

14. PW-2 Dr. Atul Gupta who medically examined PW-10 Pankaj Thakur in General Hospital, Dharamshala, had admitted in his cross examination that he has nowhere mentioned in MLC that the patient was unconscious. He has further stated that he had personally asked the patient whether he was ready for his medical examination and had also taken his consent. He has further admitted that injured had not disclosed names of accused whereas as per Investigating Officer he (PW-10) was not in a position to give his statement and certificate to this effect was also issued by the Doctor and due to inability of his injured. Statement of PW-4 Hitesh Kumar was recorded.

15. In case patient was unconscious, there was no question of his consenting for medical examination for Doctor and in case he was conscious then there was no impediment to police to record his statement under Section 154 Cr.P.C. immediately on arrival of police in the hospital. In case PW-10 Pankaj Thakur was really not in a position to make statement then also statement PW-4 Hitesh Kumar should have been recorded immediately but the statement of PW-4 Hitesh Kumar had been recorded at 11.45 PM reflecting that before making statement Ex. PW-4/A, of evidence due deliberation and consultations were going on, particularly, for the reason that PW-10 Pankaj Thakur had received injuries in the manner other than purported to be reflected by prosecution. It took three hours for recording statement under Section 154 Cr.PC despite the fact that police had arrived in the hospital at 9.30 PM and alleged eye witness were available in the hospital.

16. It is also admitted by PW-10 Pankaj Thakur that on the same day PW-4, PW-10 and PW-11 had gone to Kotwali Bazaar Dharamshala and exchange of hot words took place between them and respondents Vinay and Sanjeev. Therefore, it is unbelievable that despite such incident on calling of Sanjeev, PW-10 Pankaj Thakur had stopped his car and had started moving towards him and further car of PW-10 was not stopped by respondent but he had stopped the car on his own.

17. PW-11 Amit Thakur has stated that PW-10 Pankaj Thakur had driven his vehicle to the hospital. It is again major discrepancy to the effect that PW-10 Pankaj Thakur was able to drive the vehicle and to give consent to Doctor for his medical examination but was not able to make statement to the police.

18. There are material contradictions and major improvements in the statement of PW-10 Pankaj Thakur which cast doubt on his trustworthiness. Firstly he had his statement was recorded by Police on 31.01.2005 but again stated that it was recorded on 22.01.2005 and second time it was recorded on 31.01.2005. He has stated that on 22.10.2005 he had disclosed the names of four accused persons namely Vinay, Sanjeev, Manish and Parvesh to the police whereas in his statement (Mark X) recorded by Police on 22nd January,2005 such names were not disclosed. He has stated that he had disclosed the names of all six accused persons present in the Court to the Police. This statement was also found contrary to record. He has further stated that he had disclosed to police the description of weapon carried by respective accused-respondents but said statement was found incorrect. His claim of telling police regarding action of each accused attacking him, with description of weapon, was also found incorrect. He has admitted that at the time of incident, it was dark but lights of hotels and vehicles were on at that time. He has stated that by the time his companion came out of the car, the accused persons had already run away but the said statement was not corroborated by statements of PW-4 and PW-11.

19. Investigating Officer has admitted that there were other persons also present in the hospital accompanying Pankaj Thakur and it is very strange that none of the companions of PW-10 Pankaj Thakur had approached police after the incident which also creates doubt of credibility of PW-10 Pankaj Thakur and his companions, particularly, when even after arrival of police in Hospital at 9.30 PM, there is a considerable delay in making statement under Section 154 of Cr.PC.

20. The defence of respondents is that it was the complainants and his companions who had attacked Vinay and Sanjeev with Khukari and had thrown motorcycle of accused in the khad. It was also suggested that sword was also taken into possession by Kangra Police from PW-10 Pankaj Thakur in another case registered against him. These suggestions have been denied by PW-10 but it has come in the statement of Investigating Officer PW-8 Bansi Lal that motorcycle was taken into possession by the police from Nullah vide recovery memo Ex.PW-7/A. There is nothing on record to show reasons for the motorcycle to be in the Nullah, especially, when it was claimed by PW-4 Hitesh Kumar in his statement that respondent had fled away from spot in Mahindra Utility and motorcycle.

21. Scrutiny of evidence of PW-4, PW-10, PW-11 and PW-8 Investigating Officer, ASI Bansi Lal indicates true version of the incident which was not placed before the trial Court and occurrence, if any, had taken place in a manner other than as is being posed by prosecution witnesses.

22. PW-15 Prem Lal Thakur has also admitted that he had taken into possession one Khukri in case No.15/5 on 09.02.2005. There is no other reference or detail in the evidence of prosecution w.r.t. case No.15 of 2005. It creates doubt on the fairness of investigation conducted by police. All these facts probablise the defence taken by respondents.

23. Therefore, in present case, there is no cogent reliable and trustworthy evidence on record to prove the guilt of respondents, rather, there is material on record probablising the defence plea raised by respondents.

24. In view of the above contradictions and discrepancies, testimonies of PW-10 Pankaj Thakur, PW-4 Hitesh Kumar and PW-11 Amit Thakur are not reliable and trustworthy for convicting respondents and therefore rest of the evidence is not necessary to be discussed.

25. It is evident from the aforesaid discussion that evidence to prove the guilt of accused beyond reasonable doubt, is not sufficient. Thus, having perused the testimonies of prosecution witnesses on record, it cannot be said that prosecution has been able to prove its case that accused-respondents have committed offence under Sections 148, 324/149 & 307/149 of the Indian Penal Code. It cannot be said that the trial court has appreciated the evidence correctly and completely and acquittal of the accused has resulted into travesty of justice or has caused mis-carriage of justice.

26. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. The accused has been acquitted by the trial Court. No case for interference is made out.

27. The present appeal, devoid of any merit, is dismissed, so also pending applications, if any. Bail bonds, if any, furnished by the accused are discharged. Records of the Court below be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Dalip Kumar ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Criminal Appeal No. 495 of 2015
Date of Decision : September 6, 2016

Indian Penal Code, 1860- Section 376- Informant had engaged the services of the accused for painting her house – accused found the prosecutrix alone at home and raped her - accused was tried and convicted by the trial Court- held, in appeal, Medical Officer stated that no signs of struggle or violence were found on the body of the prosecutrix- it was not possible for Medical Officer to ascertain whether any act of sexual intercourse was committed or not - Chemical examiner found human semen on the vaginal swabs/slides- Doctor opined after the report of chemical examiner that the possibility of sexual intercourse could not be ruled out- DNA examination was not conducted to link the semen with the accused- prosecutrix was found to be having the mental age of 12 years and 6 months- however, Doctor had found the victim to be capable of understanding and responding to the queries- prosecution witnesses also stated that prosecutrix was a normal person- Court had also found her to be a competent witness - prosecutrix had not supported the prosecution version in cross-examination- she was not re-examined/cross-examined by the public prosecutor - there was delay in reporting the matter to

the police- prosecution version was not proved beyond reasonable doubt and the Court had wrongly convicted the accused- appeal allowed and accused convicted of the commission of offence punishable under Section 376 of I.P.C. (Para-12 to 24)

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 60

For the appellant	:	Mr. Virbahadur Verma, Legal Aid Counsel, for the appellant.
For the respondent	:	Mr. V. S. Chauhan, Addl. Advocate General and Mr. Puneet Rajta, Dy. A.G. for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J. (oral)

Assailing the judgment dated 28.2.2015/2.3.2015, passed by the learned Addl. Sessions Judge, Guumarwin, District Bilaspur, H.P. (Camp at Bilaspur), in Sessions Trial No. 19/7 of 2014, titled as *State of Himachal Pradesh vs. Dalip Kumar*, whereby the appellant-accused has been convicted for having committed an offence punishable under the provisions of Section 376 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of seven years and pay fine of `20,000/- and in default thereof to further undergo simple imprisonment for a period of six months, he has filed the present appeal under the provisions of Section 374(2) of the Code of Criminal Procedure, 1973.

2. The correctness of the findings and the legality of the impugned judgment is subject matter of challenge in the present appeal so filed by the convict through Sh. Virbahadur Verma, learned legal aid counsel.

3. In short, it is the case of prosecution that Krishna Devi (PW-1) had engaged the services of the accused for painting her house. On 12.3.2014, finding the prosecutrix to be alone at home, accused subjected her to sexual assault. Krishna Devi learnt about the incident late in the evening and the following day i.e. 13.3.2014 she reported the incident to the police when F.I.R. No. 21/2014, dated 13.3.2014 (Ext. PW-13/A) came to be registered against the accused under the provisions of Section 376 IPC at Police Station Bharari, Distt. Bilaspur, H.P. Prosecutrix was got medically examined through Dr. Manjula Sharma (PW-14) who issued MLC (Ext. PW-13/C). Prima facie, finding the accused to have committed the alleged crime, challan came to be presented against him in the Court for trial.

4. Accused was charged for having committed an offence punishable under the provisions of Section 376 of the Indian Penal Code, to which he did not plead guilty and claimed trial.

5. In order to establish its case, prosecution examined as many as 15 witnesses and the statement of the accused under Section 313 of the Code of Criminal Procedure was also recorded, in which he took plea of innocence and false implication. No evidence in defence was led by the accused.

6. Appreciating the material placed on record by the prosecution, trial Court convicted the accused for the charged offence and sentenced as aforesaid. Hence the present appeal.

7. The conviction is primarily based upon the testimonies of prosecutrix (PW-12), her mother-in-law Krishna Devi (PW-1) and Dr. Manjula Sharma (PW-14) who has proved on record the M.L.C. (Ext.PW-13/C) of the prosecutrix. Statement of the prosecutrix recorded under Section 164 Cr.P.C. before the Judicial Magistrate, 1st Class (Ext. PW-13/D) is also on record.

Also what weighed with the trial Court in convicting the appellant-accused, was the retarded mental growth of the prosecutrix.

8. Having heard learned counsel for the parties as also perused the record, I am of the considered view that the reasoning adopted by the trial Court is perverse and is not based on correct and complete appreciation of testimonies of the witnesses. Judgment in question is not based on correct and complete appreciation of evidence and the material placed on record, hence causing serious prejudice to the accused, resulting into miscarriage of justice.

9. In *Shivaji Sahabrao Bobade and another Versus State of Maharashtra,* (1973) 2 SCC 793, the apex Court, has held that:

> ".....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)

10. 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.

11. Also it is 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.

12. It is a matter of record that on 13.3.2014, prosecutrix was got medically examined from Dr. Manjula Sharma (PW-14) who in court has categorically deposed that no signs of struggle or violence were found on the body of the prosecutrix. Also there were no abrasions, contusions or fresh injury. From local examination, it was not possible for her to ascertain as to whether any act of sexual intercourse was committed or not. Only on the basis of report of the chemical examiner (Ext. PW-4/A), wherein human semen was detected from the vaginal swabs/slides of the prosecutrix, the Doctor opined that "the possibility of sexual intercourse" could not be ruled out. At this juncture, it be only observed that from the report of the Forensic Science Laboratory (Ext.PW-4/A) it is not discernible as to whether the semen found on the clothes of the prosecutrix; her vaginal slides, was definitely that of the accused. Hence, with certainty, medical evidence or for that matter evidence of the expert, does not establish the offence of sexual assault.

13. Dr. Manjula Sharma (PW-14) does state that she had recommended the prosecutrix for ascertaining her mental age. Dr. Shatrughan Singh (PW-10) who examined the prosecutrix issued psychological report (Ext. PW-10/B & 10/C), certifying the mental age to be 12 years and 6 months. However, the doctor is certain that the test conducted by him is based on Social Science which is not definite in nature. Crucially Dr. Manjula Sharma (PW-14) found the victim to be "capable of understanding and responding to the queries".

14. With regard to the mental age of the prosecutrix, one finds that there is no whisper about such fact in the testimonies of her mother-in-law Krishna Devi (PW-1) and brother-in-law Pawan Kumar (PW-15). For them prosecutrix was a normal person, with proper working faculties, save and except that Krishna Devi wants the Court to believe that prosecutrix was suffering from epilepsy. But then there is no proof with regard thereto. Be that as it may, one finds that the Court had found the prosecutrix to be a competent witness. It was observed by the Court that "witness appears to be having a clear understanding and adequate intellectual capacity to give evidence" and as such was examined. Hence it cannot be said that with certainty that prosecutrix was of low mental aptitude or growth.

15. In recording the testimony of the prosecutrix trial Court had made certain observations. As such, her statement as recorded by the Court is reproduced as under:-

"(Since PW-10 Dr.Shatrughan Singh Clinical Psychologist, C.R.C., Sunder Nagar, District Mandi, H.P. after conducting the I.Q. test of this witness has opined her mental age as per his report Ext. PW-10/C to be 12 years and 6 months, a preliminary investigation under Section 118 read with Section 4 proviso of the Oaths Act is required to be held).

Q. Where do you live and with whom?

Ans. I live at Village Bhapral with my mother-in-law.

Q. What do you do?

Ans. I cut grass and collect fuel wood.

Q. Who cooks food?

Ans. My mother-in-law.

Q. Which season is it these days?

Ans. Winter season.

Q. Whether one should tell truth or lie?

Ans. Truth.

Q. Do you know the meaning of oath?

Ans. No.

(Certified that after holding a preliminary examination by putting the aforesaid questions, the witness appears to be having a clear understanding and adequate intellectual capacity to give evidence).

Without Oath
2.1.2015

I have two brothers-in-law, who both are in service. They live with their families at their places of their posting. At home I and my mother-in-law reside. In the month of March, the accused had done a wrong act with me at home. On that day my mother-in-law was not at home. She had gone to Bharari. The wife of accused was with him. The accused was painting our house. When the accused did the wrong act with me his wife had gone out of the house. I had disclosed the incident to my mother-in-law on her return back home. I was taken to the hospital by my mother-in-law and thereafter to the Police Station. I was got medically examined by the police. I had put my thumb impressions on some documents. I was also got examined at Sunder Nagar and Shimla. The accused is present in the Court today.

Xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

It is correct that for 2-3 months the accused had done the labour work at our house. It is correct that the work had been completed by the accused in the month of February. It is correct that thereafter the accused had never come to our house. It is correct that the entire story was cooked up by my mother-in-law. It is correct that earlier also on my behalf such like reports had been lodged by my mother-in-law. It is correct that all the reports were compromised after taking money."

16. Bare perusal of the testimony of this witness reveals that she has not supported the prosecution at all, yet she was not cross examined by the Public Prosecutor. She is categorical that in the month of March when accused had come to her house, he was not alone. His wife accompanied him. She tried to explain that when accused committed the wrong act, his wife went out of the house. But this is not what is initially reported to the police. Crucially in cross examination she admits that work already stood completed in the month of February, where after

accused never came to her house. Thus, she has contradicted her earlier version with regard to the presence of the accused on the spot. Most significantly, she admits it to be correct that "the entire story was cooked up by" her "mother-in-law" and that "earlier also on my behalf such like reports had been lodged by" her "mother-in- law" which came to be compromised after taking money.

17. One finds version of Krishna Devi (PW-1) to have been contradicted by the prosecutrix. Krishna Devi wants the Court to believe that accused had come alone unlike the prosecutrix who states that he had come with his wife.

18. Be that as it may, one finds the mother-in-law to have deposed that prior to lodging of FIR, she had taken the prosecutrix to a Doctor for examination, whereafter prosecutrix was brought home and only the following day i.e. 13.3.2014 at about 2.30 p.m., matter came to be reported to the police. Now who is this Doctor? and what all was done? remains a mystery. It is not that either the prosecutrix or this witness were threatened, intimidated or overawed by the accused. If the mother-in- law could have taken the prosecutrix for medical examination, record whereof in any case stands concealed from the Court, she could have conveniently lodged the report with the police, neighbours or anyone in the village/neighbourhood which was not so done. Hence, delay of more than 20 hours in lodging the report, in the instant case, cannot be said to have been sufficiently explained. Not only that, and most significantly, even this witness admits that prior to the incident in question, complaints of sexual abuse came to be lodged against other persons from the village.

19. Significantly Manorma Devi (PW-2), a public representative, i.e. Ward Member of the concerned Gram Panchayat, was also associated by the police during investigation. Her testimony does not reveal that the matter came to be reported to her by anyone. Only on 14.3.2014 police associated her. On the question of mental ailment or retardness or the prosecutrix suffering from epilepsy, this witness has materially contradicted the testimony of Krishana Devi (PW-1) by stating that prosecutrix is not suffering from epilepsy and generally behaves well.

20. The witnesses so examined by the prosecution, in no manner, conclusively establish the charged offence. Prosecutrix and her mother-in-law cannot be said to be reliable witnesses or their testimonies to be inspiring in confidence. The alleged act never came to be resisted. Delay in the instant case is fatal. The incident appears to have been cooked up. There was no resistance to the alleged act. The Judicial Magistrate, 1st Class, was never examined in Court.

21. Hence, from the material placed on record, prosecution has failed to establish that the accused is guilty of having committed the offence, he stands charged for. The circumstances cannot be said to have been proven by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused does not stand proved beyond reasonable doubt to the hilt.

22. Thus, 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 stands wrongly convicted for the charged offence.

23. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence dated 28.2.2015/2.3.2015, passed by the learned Addl. Sessions Judge, Guumarwin, District Bilaspur, H.P. (Camp at Bilaspur), in Sessions Trial No. 19/7 of 2014, titled as *State of Himachal Pradesh vs. Dalip Kumar* dated, is set aside and the accused is acquitted of the charged offence. He be released from jail, if not required in any other case. Amount of fine, if deposited by the accused, be refunded to him. Release warrants be prepared accordingly. Registrar (Judicial) to ensure prompt compliance.

24. Efforts put in by Mr. Virbahadur Verma, learned Legal Aid Counsel, in rendering valuable assistance to the Court are highly appreciable.

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

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, .

Jai Shankar ..... Appellant
Versus
State of Himachal Pradesh ..... Respondent

Cr. Appeal No. 576/2015
Reserved on: September 5, 2016
Decided on: September 6, 2016

N.D.P.S. Act, 1985- Section 15- A Bulker was signalled to stop- it was found to be containing 2.190 kg poppy straw- accused was tried and convicted by the trial Court- held, in appeal that statements of PW-4 and PW-5 were corroborated by PW-9 who deposed about the recovery of carry bag of poppy straw – defence version was not probable and testimony of DW-1 does not inspire confidence – case property was sent to FSL, Junga and reached there intact - contraband was found to be poppy straw on analysis - recovery was effected from the vehicle and no compliance of Section 50 was to be made- prosecution version was proved beyond reasonable doubt and the accused was rightly convicted by the trial Court- appeal dismissed. (Para-14 to 18)

For the appellant : Mr. Rajeev Rai, Advocate
For the respondent : Mr. Parmod Thakur, Additional Advocate General

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

The instant appeal has been filed against Judgment dated 7.12.2015 rendered by the learned Special Judge, Ghumarwin, District Bilaspur, Himachal Pradesh in Sessions Trial No. 8/3 of 2014, whereby appellant-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Section 15 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), has been convicted and sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.10,000/-, and in default of payment of fine, to further undergo simple imprisonment for a period of three months, for the offence punishable under Section 15 (b) of the Narcotic Drugs & Psychotropic Substances Act, 1985.

2. Case of the prosecution, in a nutshell, is that on 26.11.2013, Inspector Lakhbir Singh (PW-9) alongwith HC Dev Raj (PW-4), Constable Rajinder Singh (PW-5) and Constable Subhash Chand was on patrolling duty in official vehicle bearing No. HP-59A-0130 on National Highway at *Kainchi Mor*. They had set up a *Naka* at Nalian. At about 9.30 PM, a *Bulker* bearing registration No. HP-69-0852 came from *Kainchi Mor* side. It was signalled to stop. Driver was brought down for breath test. He disclosed his name as Jai Shankar. Accused got perplexed. On suspicion, Inspector Lakhbir Singh climbed onto the *Bulker* and on opening the rear lid on top of the vehicle, a carry bag (Ext. P2), black and white in colour was found with "Kids Fashion", written on it. Inside the bag, six black coloured polythene packets (Ext. P-3 to Ext. P-8) were found, each of them having a white coloured polythene packet (Ext. P-9 to Ext. P-14). All these packets were found to be sealed. They were suspected to be containing poppy straw. Packets were opened and weighed with the help of scale. Packets containing poppy straw (Ext. P-15) were 2.190 kg in weight. Packets were put back in the same black coloured polythene bag and

thereafter in the carry bag. Carry bag was sealed in a cloth parcel (Ext. P-1) with nine seal impressions of 'B'. Parcel was signed by HHC Dev Raj and Constable Subhash Chand and accused. NCB form was filled in. sample seal was taken on separate piece of cloth. Seal impression was put on NCB form and seal was handed over to witness HHC Dev Raj. Seizure memo Ext. PW-4/B was prepared. *Rukka* Ext. PW-5/A was prepared and handed over to Constable Rajinder Singh with a direction to carry it to Police Station, Swarghat for registration of FIR. Constable Rajinder Singh handed over the *Rukka* to MHC, who registered FIR (Ext. PW-5/B) and sent the case file to the spot. Case property was handed over to HC Gian Chand, who made entry to this effect in the Malkhana Register at Sr. No. 40. HC Gian Chand handed over the articles to Constable Desh Raj with a direction to carry them to SFSL Junga vide RC no. 101/13 (Ext. PW-8/B). Constable Desh Raj carried all the articles to SFSL Junga and deposited them in safe condition. Investigation was completed. Challan was put up in the Court after completing all the codal formalities.

3. Prosecution has examined as many as nine witnesses. Accused was also examined under Section 313 CrPC. He pleaded innocence. One witness was examined by the defence. Learned trial Court convicted the accused as noticed above. Hence, this appeal.

4. Mr. Rajeev Rai, Advocate has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. Parmod Thakur, Additional Advocate General, has supported Judgment dated 7.12.2015.

6. PW-3 Sanjeev Kumar deposed that he was working as Manager with Chaman Enterprises, Bilaspur since 2002. On 7.12.2013, Rakesh Kumar authorized signatory of Chaman Enterprises had given certificate Ext. PW-3/A to the police to the effect that Jai Shankar son of Shri Roop Lal had worked as a Driver on vehicle No. HP-69-0852 belonging to Chaman Enterprises.

7. PW-4 HHC Dev Raj, testified that on 26.11.2013, he alongwith Constable Subhash Chand, Constable Rajinder Singh and SI/SHO Lakhbir Singh was on patrolling duty in an official vehicle bearing No. HP-69A-0130 on NH No. 205. They started from the Police Station at about 8.25 PM. On NH-205 at Nalian, they had set up a *Naka* and had checked 10-12 vehicles. At about 9.30 PM, a *Bulker* bearing registration No. HP-69-0852 came from the side of *Kainchi Mor*. It was signalled to stop. Accused was perplexed. On inquiry, he divulged his name as Jai Shankar son of Shri Roop Lal. On suspicion, *Bulker* was checked and from the rear side of the body, a carry bag, black and white in colour, having "kids fashion" written on it, was found. It was found to be containing six black coloured polythene packets. Each black coloured polythene packet was found to be containing another plastic packet, which was suspected to be containing poppy straw. All the packets were opened and weighed with the help of scale lying in the IO kit. Packets were found to be 2.190 kg in weight. Packets were put back in the same black coloured packets and thereafter in the carry bag. Carry bag was sealed in a cloth parcel with nine seal impressions of 'B'. NCB form in triplicate was filled in by the IO. Specimen of seal was taken on a piece of cloth. All the codal formalities were completed on the spot. No public witness was present being a lonely place. It was dark. In his cross-examination, he deposed that no *Dhaba* or any other shop including petrol pump in between Swarghat and Nalian were checked. No vehicle was challaned. Firstly, the cabin of the *Bulker* was searched by IO. They kept standing outside the vehicle. Personal search of accused was not taken. He denied the suggestion that the accused was picked up from *Dhaba*. He also admitted that vehicles in line move on NH-205. They had only carried the IO kit with them from the Police Station. He denied the suggestion that entire proceedings have been carried out in the Police Station. White coloured polythene packets were sealed. Contents of the packets were not tasted and smelt.

8. PW-5 Constable Rajinder Singh No. 248 has corroborated the statement of PW-4 Dev Raj, about the manner in which contraband was recovered from the vehicle being driven by the accused. *Rukka* Ext. PW-5/A was drawn by the IO and handed over to him at 10.45 PM with

a direction to carry it to the Police Station. On reaching the Police Station, he had handed *Rukka* to MHC who registered FIR, Ext. PW-5/B. He has categorically stated in his examination-in-chief that all the packets were opened and weighed with the help of scale lying in IO kit. In his cross-examination, he has admitted that all the white packets were sealed.

9. PW-6 Constable Desh Raj, deposed that on 28.11.2013, MHC Gian Chand had handed over to him parcel (Ext. P1) duly sealed with nine seal impressions of seal 'B', copy of recovery memo, copy of FIR, specimen of seal and NCB form in triplicate vide RC No. 101/13 for depositing at SFSL Junga. On the same day, he deposited the articles safely and on his return to the Police Station, he handed over receipt to the MHC.

10. PW-7 Constable Sumer Chand testified that on 9.12.2013, he had been deputed to bring back the case property and the report of the chemical examiner from SFSL Junga. He had brought the case property and report of chemical examiner. He handed over the report and parcel to the MHC safely on his return to the Police Station.

11. PW-8 HC Gian Chand deposed that on 26.11.2013, at about 11.55 PM, Inspector Lakhbir Singh deposited with him a parcel duly sealed with nine seal impressions of 'B', NCB form in triplicate and sample seal. Parcel was stated to be containing 2.190 Kg poppy straw. He made entry in the Malkhana Register at Sr. No. 40 and thereafter safely deposited the articles in Malkhana. He has proved the abstract of Malkhana Register Ext. PW-8/A. On 28.12.2013, the case property was sent to SFSL Junga for analysis through Constable Desh Raj vide RC No. 101/13. He, after depositing the same safely there, handed over the receipt to him on his return to the Police Station.

12. PW-9 Inspector Lakhbir Singh has deposed the manner in which contraband was recovered from the vehicle of the accused. He climbed on the *Bulker* and had opened the rear lid on the top of the vehicle and found a carry bag. It was containing six black coloured polythene packets. Each black coloured polythene packet contained another white coloured plastic packet. These packets were sealed and suspected to be containing poppy straw. All the packets were opened and weighed with the help of scale lying in IO kit. Packets were found to be 2.190 kg in weight. Packets were sealed with nine seal impressions of 'B'. NCB form in triplicate was filled in. Specimen of seal was taken on a separate cloth. In his cross-examination, he deposed that the personal search of the accused was not conducted. It took them 10 minutes to search the cabin. He has not stopped any vehicle to associate public witnesses in the case when the alleged bag was found. Volunteered that at that time no vehicle passed by. He has also deposed that no person came forward to become a witness. Six white coloured packets were sealed with rubber bands and then put in black packets. He has not tasted the packets. Volunteered that with the experience he found that the same was poppy straw.

13. PW-4 HHC Dev Raj has categorically deposed that the place where the vehicle was stopped, it was a lonely place. It was dark. PW-9 Lakhbir Singh has also deposed that no vehicle had crossed the *Naka* when the vehicle of the accused was intercepted. PW-4 HHC Dev Raj has categorically deposed in his examination-in-chief that carry bag having 'kids fashion', was found. It was checked. It was containing six black coloured packets. Each packet was found to be containing another plastic packet, which was suspected to be containing poppy straw. Similarly, PW-5 Constable Rajinder Singh has also deposed that on suspicion, *Bulker* was checked. From rear side, carry bag Ext. P2 was recovered. It contained six black coloured polythene packets, each polythene packet was found to be containing another white coloured plastic packet. These were sealed. Packets were opened and weighed with the scale lying in the IO kit.

14. Statements of PW-4 HHC Dev Raj, and PW-5 Constable Rajinder Singh, have been duly corroborated by PW-9 Lakhbir Singh. He also deposed that carry bag was recovered. It was found to be containing six black coloured packets. Each black coloured packet contained another white coloured plastic packet. PW-9 Lakhbir Singh has also deposed categorically that though he has not tasted the packets, but with the experience he found that it was poppy straw.

15. DW-1 Jaswinder Singh testified that on 26.11.2013 at about 9/10 PM, when some truck drivers were taking their meals at his hotel, in the meantime, two police officials came in his hotel and asked about the driver of the Bulker. They took him out of the hotel alongwith another person towards Bilaspur. After 2-3 days, he came to know from newspaper that the accused had been arrested in a case. Nalian is a big village, where there are a number of houses, timber depot, school etc. and shops. In his cross-examination, he admitted that Nalian was at a distance of half a kilometre towards Bilaspur. He also admitted that the timber depot closes after sunset. Accused was known to him for the last abut 2 years. He did not know what was recovered from the Bulker. He admitted that no proceedings took place in his presence. He has not gone to the spot. Thus, the statement of DW-1 does not inspire confidence.

16. Case property was sent to FSL Junga. It reached FSL intact. Report of the FSL is Ext. PW-9/D. Contraband was found to be poppy straw. All the seals were intact when case property was produced before the Court while examining PW-4 HHC Dev Raj.

17. Since recovery was made from the vehicle, no personal search of accused was required to be conducted either before a Gazetted Officer or a Magistrate.

18. Prosecution has proved its case against the accused beyond doubt.

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

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

Kalyan Singh ..... Appellant.
Vs.
Raghubir Singh and others ..... Respondents.

Cr. Appeal No. 371 of 2014
Judgment Reserved on : 1.7.2016
Date of decision: 6.9.2016

Indian Penal Code, 1860- Section 302 and 380- Son of the informant noticed a trespasser in motor shed of Tube well of his uncle- he informed his father- informant armed with iron rod and his son armed with drat rushed to catch the trespasser but he ran away- informant and his son chased and apprehended him – injury was inflicted on his arm with darat- trespasser ran away after stabbing son of the informant- son of the informant succumbed to the injury on the way to the Hospital- M was apprehended as assailant - informant made representation against R - however, challan was presented against M- an application for impleading R was filed during trial- supplementary challan was presented against R- accused were tried and acquitted by the trial Court- held, in appeal that M was not implicated even by the informant- recovery was not proved as witnesses had not supported the prosecution version- no blood was found on the clothes and knife of M- it was stated that M had stolen bicycle from the house of S but this fact was also not established- foot print impression was lifted from spot but the report regarding foot print was not placed on record- case of the prosecution was not proved beyond reasonable doubt- accused were rightly acquitted by the trial Court. (Para-14 to 33)

For the Appellant: Mr. Ashok Kumar Tyagi, Advocate.
For the Respondents: Mr. Vinod Thakur, Advocate for respondent No.1.
Mr. N.S. Chandel, Advocate, for respondent No.2.
M.A. Khan, Additional with Mr. P.M. Negi, Deputy Advocate, General, for respondent-State.

The following judgment of the Court was delivered:

Per Vivek Singh Thakur,J

Instant appeal, assailing judgment dated 31.3.2014 passed in Sessions Trial No.4-N/7 of 2008 by learned Additional Sessions Judge, Sirmaur, District at Nahan, vide which respondents were acquitted in case FIR No.241/2007 dated 14.7.2007 under Sections 380, 302 of Indian Penal Code registered at Police Station, Paonta Sahib, District Sirmaur, H.P., has been filed by complainant Kalyan Singh.

2. We have heard learned counsel for appellant as well as learned counsel for respondents and have also gone through the material placed on record.

3. According to complainant PW-12 Kalyan Singh, on 14.7.2007 at about 3.30 a.m. his son Pritam Singh came out from his house for urinating and noticed some trespasser in motor shed of Tube well of his uncle Amrit Singh. He came inside and wake up his father (complainant) informing that someone was taking away motor from tube well of uncle. Complainant armed with iron rod and his son Pritam Singh with drat rushed to catch trespasser but that person ran away from the spot. Complainant and his son chased that person. Complainant was following his son. Trespasser stuck with barbed wire fencing and was caught by his son. Scuffle took place and trespasser skipped but in this process his son had inflicted injury on his arm with drat. His son again caught trespasser in field of Mela Ram but that person ran away after stabbing his son. Two other persons were also accompanying trespasser. Complainant brought his injured son to home. Police was informed. His injured son succumbed to injuries on the way to hospital.

4. On receiving information, PW-24 Harjeet Singh, Incharge Police Post, Singhpura recorded Rapat No.l8 Ex.PW-24/L and reached on the spot and recorded statement of complainant PW-12 Kalyan Singh under Section 154 Cr.P.C. On the basis of this statement FIR Ex.PW23/A was registered in Police Station, Paonta Sahib and investigation was carried on.

5. During investigation, police had arrested respondent No.2 Mam Raj as assailant. However, complainant Kalyan Singh had refused to accept the said conclusion of investigating Officer and had represented to various authorities, stating that it was respondent Raghubir Singh and others who were trespasser and Raghubir Singh had stabbed his son deceased Pritam Singh. After two days of incident i.e. on 16.07.2007, on the basis of corresponding injuries on his body, Raghubir Singh was also identified by complainant. Superintendent of Police, Nahan had constituted an Investigating Team comprising of PW-34 Dy. Superintendent of Police Narveer Singh, PW-33 Inspector Gurdeep Singh SHO, Police Station Paonta Sahib and PW-24 ASI Harjeet Singh Incharge Police Post, Singhpura. However, rejecting plea of complainant, challan was presented in Court against respondent No.2 Mam Raj.

6. During trial complainant had appeared as PW-12 on 18.9.2012 and in his statement he had alleged that investigation was not carried on in a fair and proper manner and it was not Mam Raj but Raghubir Singh who was real culprit in present case, but despite having sufficient evidence against Raghubir Singh, he had been let free by police. Complainant (PW-12) had also filed an application under Section 319 Cr.P.C. for impleading respondent Raghubir Singh as an accused. Trial Court had allowed that application vide order dated 3.10.2012 and Raghubir Singh was directed to be impleaded as an accused. On consistent persuasion of complainant, further investigation was conducted by Additional Superintendent of Police, PW-50 Bhagat Singh. On the basis of said investigation supplementary challan was also filed by police against respondent Raghubir Singh under Section 380, 302 IPC. Accordingly, respondent Raghubir Singh was also charge-sheeted under Section 380 and 302 IPC alongwith Mam Raj.

7. Witnesses examined prior to impleading Raghubir Singh as accused were recalled for re-examination by Public Prosecutor and cross-examination on behalf of respondents. Thereafter remaining witnesses as well as witnesses cited in supplementary challan were examined and statements of respondents under Section 313 Cr.P.C. were recorded. Respondent

Raghubir Singh also examined three defence witnesses. On conclusion of trial, respondents were acquitted by trial Court.

8. Initially, as per challan presented in the Court, respondent Mam Raj was assailant and Investigating Officer had placed his disclosure statement Ex.PW-7/A under Section 27 of the Indian Evidence Act on record alleging that the said statement was followed by recovery of knife i.e. weapon of offence vide recovery memos Ex.PW-4/A. Production of his clothes by Mam Raj, stated to be worn by him at the time of committing offence, vide memo Ex.PW-4/A was also relied upon by police against him.

9. On the day of occurrence a bicycle alongwith Umbrella, empty cement bags and sleepers was also found near place of incident. It was prosecution case that Mam Raj had stolen bicycle from the house of Sahdev a brother of Raghubir Singh and used the said bicycle for committing offence. There was no other evidence against Mam Raj even PW-12 complainant had not implicated respondent Mam Raj in his statement. He only stated that Mam Raj might have been party in committing offence but it was Raghubir Singh who was caught on the spot, however, had succeeded in fleeing from the spot but with injuries on his body and after stabbing his son deceased Pritam Singh.

10. So far as recovery of knife at the instance of respondent Mam Raj is concerned, the same had not been proved on record. PW-4 Prem Singh and PW-5 Narender Kumar are the witnesses in whose presence, respondent Mam Raj was stated to have produced knife from Almirah kept in his house. Both of them had not supported prosecution case and they after declaring hostile were subjected to cross-examination by learned Public Prosecutor but nothing incriminatory material implicating Mam Raj could be elucidated from statements of these witnesses. Both of them stated that knife was not recovered in their presence and police had shown them a knife telling that the same was recovered from the house of respondent Mam Raj but Mam Raj was sitting quiet. Therefore, recovery of knife as claimed by prosecution is under suspicion.

11. Disclosure statement under Section 27 of the Indian Evidence Act was reduced into writing vide memo Ex.PW-7/A. PW-6 Ram Pal was only independent witness to this disclosure statement whereas other two witnesses PW-7 constable Navinder Singh and PW-13 HC Dalip Singh were police officials. However, in his deposition in the Court, PW-6 Ram Pal was completely silent about disclosure statement. Though, PW-7 constable Navinder Singh and PW-13 HC Dalip Singh had deposed that in their presence alongwith Ram Pal, respondent Mam Raj had made disclosure statement Ex.PW-7/A. Silence of PW-6 on this issue cast doubt on veracity on these witnesses. Moreover, recovery on the basis of this statement was not proved beyond suspicion. Therefore, this statement cannot be relied upon against respondent Mam Raj.

12. It is the case of prosecution that respondent Mam Raj had also produced clothes worn by him in presence of PW-1 Attar Singh and PW-2 Gulsher Ahmed but production of clothes by respondent Mam Raj in presence of these witnesses was not admitted by them in their deposition in the Court. Both of them stated that police had shown them clothes and obtained their signatures on Ex.PW-1/A.

13. Clothes and knife were sent for chemical examination to SFSL, Junga but blood was not found on these articles as evident from Chemical Analysis Report Ex.PW-34/A to Ex.PW34-D.

14. It is case of prosecution that PW-8 Ram Kumar, a relative of Sahdev was owner of bicycle and Mam Raj had stolen bicycle from the house of Sahdev and Sahdev was brother of respondent Raghubir Singh. Prosecution has relied upon memo of identification of spot from where bicycle was stolen by respondent Mam Raj. This memo was witnessed by PW-1 Attar Singh and PW-3 Smt. Swarnoo Devi wife of Sahdev. PW-1 Attar Singh had not lent support to prosecution story and denied even visiting to house of Sehdev with police and respondent Mam Raj. Deposition of PW-3 Swarnoo Devi is also not credible as she stated that no body was accompanying the police at the time of visit to their house. In latter part, she stated that

Pardhan Attar Singh was present with the police. Thereafter she stated that respondent Mam Raj had identified the spot who was accompanying the police. Her statement is not trustworthy. Moreover, she was relative (Bhabhi) of another respondent Raghubir Singh who was being accused by complainant and others as real assailant.

15. Story of theft of bicycle is also not above the board as no complaint about theft of bicycle was made to police despite claim of PW-8 Ram Kumar that he had purchased bicycle for Rs.2,000/- in the month of July, 2007.

16. PW-12 Kalyan Singh in his deposition in the Court had specifically stated that it was Raghubir Singh who was assailant and not Mam Raj and Mam Raj may be accomplice with Raghubir Singh. Numerous complaints had been placed on record, which were submitted by PW-12 to various authorities with regard to investigation carried out by police and also with regard to persons who were being suspected to have committed the offence. None of these applications, PW-12 Kalyan Singh found mention name of Mam Raj since the very first day. PW-12 Kalyan Singh had named respondent Raghubir Singh as main assailant and two other persons as accomplice. In view of above evidence on record, respondent Mam Raj was rightly acquitted by learned trial Court.

17. So far as guilt of respondent Raghubir Singh was concerned, PW-12 Kalyan Singh had stated that during scuffle his son deceased Pritam Singh had given drat blow on arm of assailant and the assailant had also received injuries with barbed wire fencing when he was trying to flee from the spot and therefore, assailant was having injuries on his forehead and arm. Respondent Raghubir Singh was noticed with injuries on his forehead and left arm and it was informed to the police and thereafter Raghubir Singh was interrogated by the police. Raghubir Singh had explained that he received injuries on his arm with a Farata fan. Farata fan was also taken in possession by police. Raghubir Singh was subjected to medical examination and as per his MLC Ex.PW-38/B issued on 21.7.2007, there was an infected wound of 3 cm x 0.5 cm x 0.5 cm on left lateral side of the wrist. This injury was found 5 to 10 days old.

18 PW-12 Kalyan Singh had also produced drat to the police during investigation. Drat, Farata fan, and MLC of Raghubir Singh were sent to Department of Forensic Medicine, IGMC, Shimla for opinion. After examining material placed before team of doctors, they opined that injury in question could not have been sustained by running fan blade accidentally as the expected outcome in that case would have been multiple injuries and much deeper injuries and also the alleged part hit by the fan is wrist, which was at approximately 20 cms behind the last point of the hand. The accidental injury by a running fan was expected to be in more distal parts. The injury was also found of the same duration as old was alleged offence and possibility of such injury being inflicted by a drat could not be ruled out. Report of team of Forensic Medicine, IGMC, Shimla was placed on record as Ex.PW-49/B. PW-49 Dr. Piyush Kapila also stated that injury present on the left wrist of Raghubir Singh was possible with drat Ex.P-22.

19. On the day of incident, fields were wet and foot prints of assailant(s) were also found in the fields. The investigating Officer had picked up one clear left foot print from the field. During investigation foot print impressions, of suspected persons namely Ramesh S/o Mam Raj, Sher Khan S/o Gulsher Ahmad, Raghubir Singh S/o Raju Ram, Mam Raj S/o Nathu Ram, Naresh Kumar S/o Basant Ram, Madan Lal S/o Girdhari Lal, Jai Singh S/o Surat Singh and Ifran S/o Khalil Ahmad were taken and sent to State Forensic Science, Laboratory, Junga. As per report of SFSL Ex. PW-34/B, foot print impressions of unknown person was of the left foot whereas Investigating Team had sent right foot impressions of suspected persons. However, on the basis of physical features, it was found that there was potential of matching of left foot impression of Raghubir Singh and Jai Singh with that of unknown person. Therefore, left foot impression of these two persons was requested to be sent again for laboratory examination.

20. PW-34 Dy. S.P. Narveer Singh stated that he had taken sample of foot mold of Raghubir Singh and Jai Singh on 20.10.2007 but he had prepared challan on 1.11.2007 and as

such he was not able to say anything about the report of SFSL of the said foot print which was taken by him.

21. As per challan presented by PW-34 Dy. S.P. Narveer Singh, Mam Raj was real culprit whereas as per supplementary challan presented by PW-50 Bhagat Singh, Addl. S.P. , Raghubir Singh was main culprit and Mam Raj might have been as accomplice.

22. During further investigation PW-50 had also taken foot prints of respondent Raghubir Singh. PW-39 HC Kalyan Singh and HHC Sandeep Kumar witnessed taking of foot print impressions of Raghubir Singh and Jai Singh on 14.7.2013 and signed memos Ex.PW39/A and Ex.PW-39/B in this regard which were also signed by Raghubir Singh and Jai Singh. This fact was not disputed by respondents. As per PW-50 Bhagat Singh, these foot prints were sent for chemical analysis to SFSL, Junga. But no report from SFSL qua those foot prints was placed on record.

23. On first day, complainant Kalyan Singh had not identified the assailant due to darkness but on the basis of injury he had suspected that Raghubir Singh might be assailant. Explanation in defence by Raghubir Singh with respect to this injury was found false as his plea that this injury was suffered by him one day before the incident with Farata fan was negated by medical experts.

24. The bicycle recovered on spot on the day of incident was also found to be owned by PW-8 Ram Kumar who was relative of Sahdev and Sahdev is a real brother of Raghubir Singh. It has come in evidence that PW-9 Jagdish Chand, father of PW-8 Ram Kumar went to village Mehruwala to meet his brother-in-law Sahdev (brother of Raghubir Singh) and parked bicycle in question in veranda of Sahdev. On 14.7.2007, in the morning bicycle was not found on that place. Bicycle (Ex.P-6) found on the spot was identified by PW-8 Ram Kumar as his own bicycle. House of Raghubir Singh was adjoining to house of Sahdev. The story of prosecution of stealing bicycle by respondent Mam Raj was found doubtful.

25. Belonging of bicycle to relative of respondent Raghubir Singh which was parked in veranda of his brother in the night of 13.7.2007 and injuries on his left wrist and also falsehood of his explanation with respect to cause of injury created strong suspicion towards in culpability of Raghubir Singh indicating that he might have been assailant but result of comparison by State FSL of left foot print impression of Raghubir Singh with foot print impression lifted from spot was withheld by prosecution which was an important pieces of evidence to complete the chain or for proving innocence of Raghubir Singh.

26. Suspicion, however, strong cannot take place of proof. Withholding of a material piece of evidence is fatal for case of the prosecution, therefore, it cannot be said with certainty that it was Raghubir Singh who had assaulted deceased Pritam Singh on fateful day.

27. It is evident from the aforesaid discussion that prosecution evidence cannot be treated as cogent, reliable, credible and sufficient to prove the guilt of the accused-respondents beyond reasonable doubt.

28. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused and to dislodge the same, onus heavily lies upon the prosecution. Respondents have been acquitted by the trial Court.

29. From perusal and scrutiny of evidence, it cannot be said that the learned trial court has not appreciated the evidence correctly and completely and acquittal of the accused persons has resulted into travesty of justice or has caused mis-carriage of justice.

30. It is shocking of state of affairs that the investigation was carried out by officer of rank of Deputy Superintendent of Police and Addl. Superintendent of Police and both of them have failed to place result of examination of comparison of foot prints by SFSL on record, which was a material piece of evidence for deciding the fate of prosecution case. Sending right foot print impressions of suspects to compare with left foot print of assailant is also a serious lapse

particularly, when investigating team was headed by Deputy Superintendent of Police and thus deserves to be addressed

31. It has also come on record that complainant was agitating since beginning that it was not Mam Raj but Raghubir Singh who was assailant but officer investigating the case in the beginning as well as investigating team constituted by Superintendent of Police later on, had adamantly ignored plea of complainant as well as evidence available against the persons being named by the complainant. Later on, Addl. Superintendent of Police in his further investigation had found that it was not respondent Mam Raj but respondent Raghubir Singh who was main assailant. Evidence collected and relied upon by Addl. Superintendent of Police appeared to be ignored in order to save respondent Raghubir Singh from facing trial which amounts dereliction of duty.

32. Director General of Police is directed to seek explanation from the members of the Investigating Team, whether in service or retired, and to take appropriate action for lapse on their part. Compliance affidavit, be filed by Director General of Police, within two months from the date of this judgment.

33. After considering arguments of respective counsel for the parties and minutely examining the testimonies of the witnesses and other documentary evidence placed on record, we are of the considered view that no case for interference is made out. Consequently, present appeal, devoid of any merit, is dismissed, as also pending applications, if any. Bail bonds, if any, furnished by the accused persons are discharged. Records of the Court below be sent back immediately.

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

Manoj Kumar son of Shri Roop Singh & others ....Appellants

Versus

State of Himachal Pradesh ....Respondent

Cr. Appeal No. 4247 of 2013
Judgment Reserved on 5th September 2016
Date of Judgment 6th September, 2016

Indian Penal Code, 1860- Section 498-A and 306- Deceased was married to the accused M as per Hindu Rites and Custom – she was subjected to maltreatment, harassment and cruelty - she was not allowed to contact her parents telephonically – she was also not allowed to visit her relatives during family function and festival- accused R tried to molest the deceased- accused also demanded dowry- a compromise was effected but accused continued to maltreat the deceased – she committed suicide by pouring kerosene oil on her- she was taken to Hospital but she succumbed to her injuries- accused were tried and convicted by the trial Court- held, in appeal that father of the deceased has supported the prosecution version and stated that deceased had told him about the harassment and torture in her matrimonial home- his testimony was corroborated by PW- 2 and PW-3 - PW-13 also stated that deceased had committed suicide as she was fed up with the act and conduct of the accused – she had made a dying declaration, in which she deposed about attempt to molest her and demand of dowry – these circumstances clearly established the cruelty on the part of the accused- acts of the accused had led the deceased to commit suicide- minor contradictions are bound to come with the passage of time – testimonies of prosecution witnesses corroborated each other and are corroborated by dying declaration- however, name of accused N did not figure in the dying declaration or in the statements of witnesses- hence, appeal partly allowed- accused N acquitted of the commission of offence punishable under Sections 498-A and 306 of I.P.C- appeal dismissed regarding rest of the accused. (Para-11 to 22)

Cases referred:
Balram Prasad vs. State of Bihar, (1977)9 SCC 338
Arun Vyas and others vs. Anita Vyas, (1994)4 SCC 690
Arvind vs. State of Bihar (2001)6 SCC 407
Sushil Kumar vs. Union of India, (2005)6 SCC 281
Mohd. Hussain vs. State of A.P. (2002)7 SCC 4141
Gananath Patnaik vs. State of Orissa (2002)2 SCC 619
Gurbachan Singh vs. Satpal Singh AIR 1990 SC 209
Brij Lal vs. Prem Chand, AIR 1989 SC 1661
Gajanan Dassrath Kharate vs. State of Maharashtra, JT (2016)2 SC 459
C. Muniappan and others vs. State of Tamil Nadu, (2010)9 SCC 567
Sohrab and another vs. The State of Madhya Pradesh, AIR 1972 SC 2020
State of U.P. vs. M.K. Anthony, AIR 1985 SC 48
Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat, AIR 1983 SC 753
State of Rajasthan vs. Om Parkash, AIR 2007 SC 2257
Prithu alias Prithi Chand and another vs. State of Himachal Pradesh, (2009)11 SCC 588
State of Uttar Pradesh vs. Santosh Kumar and others, (2009)9 SCC 626
Appabhai and another vs. State of Gujarat, AIR 1988 SC 696
Rammi alias Rameshwar vs. State of Madhya Pradesh, AIR 1999 SC 3544
State of H.P. vs. Lekh Raj and another, (2000)1 SCC 247
Laxman Singh vs. Poonam Singh and others, (2004) 10 SCC 94
Kuriya and another vs. State of Rajasthan, (2012)10 SCC 433
Bipin Kumar Mondal vs. State of West Bengal, AIR 2010 SCW 4470
Sadhu Saran vs. State of U.P., AIR 2016 SCW 1160
Lakhan vs. State of M.P. (2000)8 SCC 514
Munnawar and others vs. State of U.P. (2010)5 SCC 451
Saya alias Sultan Begum vs. State of Maharashtra, (2007)12 SCC 562
Paras Yadav vs. State of Bihar, (1992)2 SCC 126
Paniben vs. State of Gujarat, AIR 1992 SC 1817
State of H.P. vs. Ram Sagar Yadav, AIR 1985 SC 416
Ramavati vs. State of Bihar, AIR 1983 SC 164
Suraj Deo Oza and others vs. State of Bihar, AIR 1979 SC 1505

For the Appellants: Mr. Anup Chitkara Advocate with Ms.Neha Scott, Advocate
For the Respondent: Mr. M.L. Chauhan Additional Advocate General and Mr.R.K.Sharma Deputy Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

Present appeal is filed against the judgment and sentence passed by learned Additional Sessions Judge Hamirpur in Sessions trial No. 18 of 2012 title State of H.P. vs. Manoj Kumar and others.

Brief facts of the case

2. It is alleged that deceased Meenakshi Devi aged 23 years was married with co-accused Manoj Kumar on dated 9.12.2009 as per Hindu rites and customs. It is alleged that deceased was kept nicely in her matrimonial house for about two months after marriage and thereafter deceased Meenakshi was subjected to maltreatment, harassment and cruelty in her

matrimonial house. It is alleged that accused persons did not allow deceased Meenakshi to contact with her parents and relatives by way of telephone and it is further alleged that accused persons also did not allow the deceased to visit her parents and relatives during family functions and festivals. It is alleged by prosecution that on dated 18.2.2010 co-accused Roop Singh father-in-law of deceased also tried to molest the deceased by way of putting off the lights of house. It is alleged by prosecution that accused persons also demanded dowry from deceased in her matrimonial house. It is alleged by prosecution that family compromise was also executed between deceased and accused persons but despite family compromise accused persons maltreated deceased Meenakshi. It is alleged by prosecution that deceased was also beaten by accused persons. It is alleged by prosecution that deceased committed suicide in her matrimonial house on dated 4.12.2011 at 1.30 PM by way of burning herself with kerosene oil. It is alleged that deceased sustained 91% burn injuries upon her body as per MLC Ext.PW12.B. It is alleged by prosecution that information was given to police officials. It is alleged by prosecution that investigating officials filed application before medical officer for issuance of MLC. It is alleged by prosecution that statement of Meenakshi deceased was recorded in presence of medical officer. It is alleged by prosecution that thereafter deceased Meenakshi was referred to PGI Chandigarh for medical treatment. It is alleged by prosecution that investigating agency recorded statements of prosecution witnesses as per their versions and prepared spot map and obtained photographs. It is alleged by prosecution that burn clothes of deceased and one plastic canny of five litres took into possession and sealed in parcel. It is alleged by prosecution that on 7.12.2011 Meenakshi died due to burn injuries at PGI Chandigarh. It is alleged by prosecution that investigating agency filed application for post mortem of deceased and obtained post mortem report of deceased. It is alleged that call details of deceased Meenakshi also obtained. It is alleged by prosecution that report from FSL Mandi Ext.PW11/A was also obtained.

3. Prosecution filed charge sheet against accused persons under Section 498-A IPC and under Section 306 IPC. Learned Trial Court framed charge against accused persons on 29.10.2012 under Sections 498-A and 306 IPC. Accused did not plead guilty and claimed trial. Prosecution examined twenty four oral witnesses in all and also tendered documentaries evidence.

4. Learned Trial Court convicted accused persons under Sections 306 and 498-A IPC on 30.11.2013. Learned Trial Court sentenced accused persons to undergo rigorous imprisonment for a term of seven years and to pay fine of Rs.10000/- each for offence punishable under Section 306 IPC and learned Trial Court further directed that in default of payment of fine convict would undergo simple imprisonment for a term of six months. Learned Trial Court also sentenced the convicts to undergo rigorous imprisonment for a period of two years and to pay fine of Rs.5000/- each for offence punishable under Section 498-A IPC. Learned Trial Court further directed that in default of payment of fine convicts would further undergo simple imprisonment for a term of six months. Learned Trial Court also directed that all sentences would run concurrently and also directed that period of detention undergone by convicts during investigation and trial would be set off.

5. Feelling aggrieved against the judgment and sentence of learned Trial Court appellants filed present appeal.

6. Court heard learned Advocate appearing on behalf of appellants and learned Additional Advocate General appearing on behalf of the State and also perused the entire record carefully.

7. Following points arise for determination in present appeal:-

Point No.1

Whether judgment and sentence passed by learned Trial Court are perverse and based upon non-appreciation of oral and documentaries evidence properly as mentioned in memorandum of grounds of appeal?

Point No.2

Final Order.

8. Findings upon Point No.1 with reasons

8.1. PW1 Bidhi Chand has stated that he is posted as Patwari at Patwar Circle Gondpur Banhera Tehsil Amb District Una H.P. He has stated that in the year 2011 he was posted at Patwar Circle Dyoli Tehsil Amb District Una. He has stated that he has five children i.e. four daughters and one son. He has stated that out of four daughters two daughters are twins. He has stated that one of twins daughter was Meenakshi. He has stated that deceased was married with co-accused Manoj Kumar on 9.12.2009. He has stated that accused persons kept the deceased nicely for two months after marriage and thereafter started harassing the deceased. He has stated that deceased was not allowed to talk with her parents on telephone and she was not permitted to visit her parents house. He has stated that his daughter disclosed him directly that she was harassed and maltreated by accused persons in her matrimonial house. He has stated that he told the deceased to come to her parental house but deceased showed her inability. He has stated that once his wife fell ill and his wife was admitted in government hospital Una he tried to contact his deceased daughter but she was not allowed to talk with him. He has stated that whenever his daughter fell ill medicines were not provided by accused persons to her. He has stated that his deceased daughter came to her maternal house at village Chameti and spent 15-16 days. He has stated that he contacted co-accused Manoj Kumar by way of telephone but co-accused Manoj Kumar always avoided to speak with him. He has stated that thereafter he contacted co-accused Roop Singh and Nirmala Devi and requested them to amicably resolve the matter with help of elders. He has stated that in the month of September 2010 accused persons along with 15-20 persons came to village Chameti and deliberation took place. He has stated that during deliberation accused persons started fighting with him but on intervention of elder persons matter was amicably resolved and his deceased daughter returned back to matrimonial house with assurance that she would be kept properly in her matrimonial house. He has stated that thereafter he purchased a cell phone with SIM No. 94186-00251 and gave the same to his deceased daughter. He has stated that on 22.2.2010 he organised a function at village Nehriyan Tehsil Amb District Una and invited his daughter and accused persons to attend the function. He has stated that on 22.2.2010 his daughter and his son-in-law co-accused Manoj Kumar came at about 1.30 PM for lunch and stayed in night. He has stated that on the eve of Karwa Chauth he went to the house of accused to give gifts and other articles to his daughter but accused persons did not behave properly with him. He has stated that accused persons kept harassing and maltreating his deceased daughter in her matrimonial house. He has stated that on one occasion he had given Rs.5000/- (Rupees five thousand) to accused persons through his daughter for repayment of loan amount because they had received a bank notice. He has stated that on 4.12.2011 he was in his office and at about 11 AM he received a missed call from his daughter. He has stated that he immediately called his daughter and found that deceased was disturbed and she wanted to talk with her mother. He has stated that thereafter he called his wife and told her to call deceased Meenakshi on her cell phone. He has stated that later he received telephone call from his wife disclosing that deceased Meenakshi was in deep trouble. He has stated that thereafter he told his wife to contact Pardhan and Up-Pardhan of Panchayat and to meet him at Nehriyan. He has stated that when he was coming from his office to Nehriyan on way he received a telephone call from Sarla Devi Pardhan G.P. Kamlah disclosing that his deceased daughter had sustained burn injuries upon her body. He has also stated that at Nehriyan he met Gurdyal Pardhan, Satish Kumar Up-Pardhan and Kashmir Chand Ward Member, his wife, his daughters Seema and Rakhi and went together to village Galol in a private vehicle. He has stated that deceased was brought to Nadaun hospital in Ambulance and thereafter deceased was rushed to PGI Chandigarh. He has stated that his deceased daughter remained admitted in PGI Chandigarh w.e.f. 4.12.2011 to 7.12.2011. He has stated that on night of 7.12.2011 his daughter died due to burn injuries. He has stated that his statement was recorded by police officials which is Ext.PW1/A. He has stated that his deceased daughter committed suicide because she was fed up with cruelty and atrocities given by accused persons. He has stated that deceased was compelled to put an end to her life by accused persons. He identified accused persons in Court. He has

denied suggestion that deceased was always provided with medical aid whenever medical aid was required by deceased. He has denied suggestion that co-accused Manoj Kumar was taking care of deceased by providing necessities and money. He has denied suggestion that co-accused Manoj Kumar used to talk with him on telephone frequently. He has denied suggestion that accused persons did not subject the deceased to mental or physical harassment and cruelty. He has denied suggestion that no demand of any kind was made by accused persons after marriage.

8.2 PW2 Parveen Kumari has stated that deceased Meenakshi was her twin daughter and she was brought up by her parents at village Chameti. She has stated that on 9.12.2009 deceased was married with co-accused Manoj Kumar. She has stated that accused persons kept the deceased properly for about two months after marriage and thereafter accused persons started harassing the deceased. She has stated that accused persons used to beat the deceased. She has stated that deceased was not provided with maintenance and was not provided with any medical treatment. She has stated that accused persons prevented the deceased to contact her parents by way of telephone. She has stated that deceased was not allowed to visit her parents house on functions. She has stated that she remained hospitalised at District Hospital Una and accused persons did not allow them to talk with deceased and deceased was also not allowed to visit hospital. She has stated that in the month of February 2010 there was a function in her house and accused persons and her deceased daughter were invited to attend the function. She has stated that deceased came to attend the function along with co-accused Manoj Kumar at about 1.30 PM. She has stated that deceased disclosed her personally that co-accused Roop Singh had acted indecently with deceased. She has stated that accused persons sent the deceased to her parents house when they received a bank notice with demand of money and her husband paid Rs.5000/- (Rupees five thousand). She has stated that her daughter had some problem in her stomach and accused persons did not treat the deceased. She has stated that deceased was harassed for not giving birth to child. She has stated that in order to resolve the dispute her husband sought assistance of Pardhan and Up-Pardhan of G.P. Kamlah. She has stated that her daughter came to village Chameti and after 15-20 days of her stay accused persons came along with 15-20 persons for amicable settlement. She has stated that her daughter returned to her matrimonial house along with accused persons on assurance that she would be kept properly. She has stated that behaviour of accused persons remained cordial for few days and thereafter they again started harassing the deceased. She has stated that on 4.12.2011 her deceased daughter called her husband in morning. She has stated that her husband was in office and her husband called her and told to contact Meenakshi and to inquire about her well being. She has stated that deceased did not receive her call and thereafter her daughter called back on landline number 263345 but she was very disturbed and was shouting Bachao-Bachao (Save save). She has stated that thereafter she called her husband and told her husband that deceased was not well. She has stated that her husband asked her to contact Pardhan and Up-Pardhan and also directed her to meet him at Nehriyan. She has stated that she met her husband at Nehriyan and thereafter she went to Nadaun hospital along with Pardhan, Up-Pardhan, Ward Member and other relatives. She has stated that deceased Meenakshi was brought in Ambulance 108 after 15-20 minutes and when she saw the deceased she observed burn injuries upon the body of her daughter. She has stated that deceased was brought to medical officer and thereafter she was referred to PGI Chandigarh. She has stated that her daughter died at PGI Chandigarh on 7.12.2011. She has stated that her deceased daughter committed suicide because she was physically and mentally harassed by accused persons. She identified accused persons in Court. She has denied suggestion that her relatives assaulted co-accused Manoj Kumar and co-accused Nirmala. She has denied suggestion that deceased used to frequently visit her parents house at village Chameti. She has denied suggestion that deceased was short tempered. She has denied suggestion that accused persons did not harass the deceased in any manner. She has denied suggestion that she has deposed falsely against accused persons on account of hostile animus due to death of her daughter.

8.3 PW3 Ishwar Dass has stated that he is posted as Workshop Instructor at Government Polytechnic Kangra and on 4.12.2011 he came to his house. He has stated that at

about 1 PM he received a tephone call from deceased Meenakshi. He has stated that deceased Meenakshi was related to his wife. He has stated that his village is situated at about 20 K.m. from village of accused persons. He has stated that deceased Meenakshi was crying and told that she was beaten by accused persons. He has stated that deceased informed that accused persons were demanding money from her parents for her medical treatment. He has stated that after receiving telephone call he went to see deceased along with his wife at village Galol. He has stated that when he and his wife reached at village Galol he found that Meenakshi was lying injured in burn condition in a room. He has stated that he inquired from accused persons as to why the deceased was not taken to hospital for medical treatment but accused persons were not interested in providing medical assistance to deceased and thereafter he called 108 Ambulance from his cell number and took deceased to CHC Nadaun. He has stated that when they reached hospital parents and other relatives of deceased have already reached there. He has stated that Meenakshi was taken to medical officer and thereafter she was referred to PGI Chandigarh. He has stated that later Meenakshi expired at Chandigarh. He has denied suggestion that when he reached at house of accused persons they were already prepared to shift the deceased Meenakshi to hospital. He has denied suggestion that he is deposing falsely because he is in close relation with deceased.

8.4 PW4 Gurdyal Singh Pardhan has stated that father of deceased Bidhi Chand is resident of his village and he is personally known to him. He has stated that on 04.12.2011 at about 1.30 PM Bidhi Chand came to his shop and requested him to accompany him to village Galol as his daughter was very serious. He has stated that they immediately went to village Galol and on way Bidhi Chand received message that his daughter was shifted to Nadaun hospital. He has stated that thereafter they straightway went to CHC Hospital Nadaun and reached at 2.30 PM. He has stated that injured Meenakshi was brought in 108 Ambulance with burn injuries and her condition was serious. He has stated that injured was in her senses. He has stated that statement of Meenakshi was recorded by police officials in his presence and in presence of Pardhan G.P. Kamlah. He has stated that statement Ext.PW4/A bears his signatures in red encircle. He has stated that statement Ext.PW4/A was recorded in presence of medical officer. He has stated that statement was thumb marked by Meenakshi. He has stated that Meenakshi could not sign because of burn injuries. He has stated that after recording her statement Meenakshi was referred to PGI Chandigarh for her medical treatment. He has stated that father of injured and other relatives took the injured to PGI Chandigarh in vehicle and he accompanied them upto Nehriyan and further stated that injured was in her senses and was talking till the time he travelled with injured. He has denied suggestion that statement of deceased Meenakshi was not recorded. He has stated that statement of deceased was recorded in his presence and thereafter he signed the same and affixed his stamp. He has stated that deceased reached hospital at 2.50 PM and thereafter it took about 15-20 minutes to complete the proceedings to record statement of deceased Meenakashi. He has denied suggestion that when statement of deceased Meenakshi was recorded at that time her parents and sisters were present. He has denied suggestion that Meenakshi was not in position to give deying declaration Ext.PW4/A. He has denied suggestion that no dying declaration of deceased was recorded in his presence. He has denied suggestion that he had signed dying declaration Ext.PW4/A at the instance of parents of deceased.

8.5 PW5 Sarla Devi has stated that she is Pardhan of G.P. Kamlah Tehsil Nadaun District Hamirpur H.P. She has stated that accused persons reside in her Panchayat. She has stated that deceased Meenakshi was married with co-accused Manoj Kumar and was daughter-in-law of other accused persons. She has stated that on 4.12.2011 she came to village Galol to inspect the under construction work which was undertaken by MNREGA. She has stated that co-accused Roop Lal was also working in construction work. She has stated that after inspecting the work she returned to her village and at 12.45 PM she received telephone call from co-accused Manoj Kumar. She has stated that she also talked with deceased Meenakshi. She has stated that deceased Meenakshi told her that she has set herself on fire and requested her to save her. She has stated that on receiving the communication call she called Up-Pardhan Ashok Kumar to immediately rush to spot. She has stated that thereafter she informed the police officials at P.S.

Nadaun. She has stated that she telephoned the father of girl. She has stated that she went to house of accused along with her husband and met the police officials on way. She has stated that Meenakshi was shifted to hospital in ambulance and thereafter she came to CHC Nadaun along with police officials. She has stated that after reaching the hospital first aid was given to deceased and thereafter her statement was recorded. She has stated that statement was recorded by SHO in her presence. She has stated that after recording her statement Ext.PW4/A she also signed the same as a witness. She has stated that statement was recorded by police officials in presence of her parents. She has stated that parents and sisters of girl compelled her to depose that co-accused Roop Singh committed indecent assault and also demanded Rs.5000/-(Rupees five thousand). She has stated that she objected to facts being written by police at the instance of parents of deceased. She has stated that police took her signatures on statement. She has stated that father of girl never complained to her that deceased was harassed by accused persons. Witness was declared hostile and was cross examined by prosecution. She has denied suggestion that when statement Ext.PW4/A was recorded at that time parents and sisters of deceased were not present. She has denied suggestion that statement Ext.PW4/A was recorded as per version given by deceased Meenakshi. She has denied suggestion that when statement was recorded then medical officer was also present. She has stated that she does not know that Gurdyal Singh Pardhan G.P. Nehri was present. She has stated that before signing the statement she did not refuse to sign. She has stated that she also did not make any endorsement. She has stated that she did not make any complaint against police officials to the effect that police officials did not write the statement as per version of deceased. She has denied suggestion that father of deceased met her in her house and complained about harassment of deceased in her matrimonial house. She has denied suggestion that she has resiled from her previous statement in order to help the accused persons as they are her voters. She has stated that deceased Meenakshi did not disclose to her any incident which took place on 4.12.2011 compelling her to set herself on fire. She has stated that deceased did not make any complaint against the act and conduct of accused persons.

8.6 PW6 Ashok Kumar has stated that he was posted as Vice President of G.P. Kamlah. He has stated that on 4.12.2011 at about 1/1.30 PM he received telephone call from Smt. Sarla Pardhan that wife of co-accused Manoj Kumar had set herself on fire and had sustained burn injuries. He has stated that he was asked by Pardhan to visit spot, He has stated that he went to house of accused persons but none was present there as injured was took to hospital. He has stated that police officials during investigation inspected room of deceased Meenakshi and took into possession pieces of burn clothes i.e. shirt Ext.P2, salwar Ext.P3, scarf Ext.P4, underwear Ext.P5 and bra Ext.P6. He has stated that room was smelling of kerosene oil. He has stated that police also recovered one plastic canny containing 5 litres of kerosene oil. He has stated that burn clothes were packed in cloth parcel and sealed. He has stated that sealed kerosene canny took into possession vide seizure memo Ext.PW6/A in his presence and in presence of Leela Devi. He identified the signatures on seizure memo Ext.PW6/A red encircled. He has stated that shirt Ext.P2, salwar Ext.P3, scarf Ext.P3, underwear Ext.P5 and bra Ext.P6 are same which were took into possession by police officials in his presence. He has stated that plastic container was also took into possession in his presence. He has stated that in the month of January 2011 he visited the house of accused persons for thanks after the election. He has stated that police officials were present at the house of accused and further stated that statement Mark E was recorded in his presence.

8.7 PW7 Sukhdev Sharma has stated that he is Vice President of G.P. Kotla Chillian Tehsil Nadaun District Hamirpur and on 5.12.2011 he was associated by police during course of investigation. He has stated that he went with police to house of accused at 4.30 PM during which police searched attachi, almirah and bed and recovered following documents. (1) Carbon copy of statement of Meenakshi Devi dated 9.1.2011. (2) One undated paper slip written and signed by Meenakshi Devi. (3) One undated suicide note written by Meenakshi Devi. (4) OPD slip dated 20.8.2011, X-ray form, ultrasound report comprising six leaves. He has stated that all

these documents took into possession vide seizure memo Ext.PW7/A in his presence and in presence of Bidhi Chand. He identified his signatures on memo.

8.8 PW8 Jaswant Singh has stated that he is posted as Secretary G.P. Kamlah Tehsil Nadaun District Hamirpur since 2008 and on 8.12.2011 police filed application Ext.PW8/A requesting to issue copy of family Register of Roop Singh. He has stated that on request of police he issued copy of family Register Ext.PW8/B which is correct as per original family register.

8.9 PW9 Raj Lal has stated that on 30.12.2011 he remained associated with police during investigation and on request of police Khushi Lal son of Dagroo Ram handed over following articles in his presence to police. (1) One paper written by deceased Meenakshi when she was in fifth class of the year 1999 Ext.PW9/A. (2) Two outer cardboard cover of photo album containing writings of deceased Ext.PW9/B and Ext.PW9/C. He has stated that above mentioned articles were handed over to police which were took into possession by police vide seizure memo Ext.PW9/D and he identified his signatures on memo.

8.10 PW10 Dr. Meenakshi Mahajan has stated that she joined State Forensic Science Laboratory H.P. as Assistant Director on 13.6.2000 and further stated that after joining the service she received trainings in various aspects of forensic document examination from National Institutes of country. She has stated that she examined number of cases comprising of thousand of exhibits and submitted the report. She has also stated that she appeared as an expert witness in various courts of State of H.P. and since November 2011 she has been posted at RFSL Dharamshala. She has stated that she examined the documents carefully with scientific aid. She has stated that documents are written by one and same person. She has stated that she did not find any fundamental difference between writing characteristics of questioned and standard items. She has stated that report is Ext.PW10/D.

8.11 PW11 Dr.B.R. Rawat has stated that he has qualified Ph.D in Chemistry and examined about 25 cases pertaining to poison etc. He has proved report Ext.PW11/A. PW11 identified clothes shirt Ext.P2, salwar Ext.P3, scarf Ext.P4, underwear Ext.P5 and bra Ext.P6.

8.12 PW12 Dr. Savita Rana has stated that she is posted as medical officer at CHC Nadaun since 1996. She has stated that on 4.12.2011 at about 2.50 PM injured Meenakshi wife of Manoj Kumar resident of village Chillian, P.O. Karot Tehsil Nadaun District Hamirpur was brought to her with alleged history of quarrel at home followed by burn by kerosene oil. She has stated that police officials filed request application Ext.PW12/A for medical examination of injured and also sought opinion whether injured was fit to give statement. She has stated that on general examination she found that injured was well conscious, oriented to time place and person with BP 140/80 Pulse 76 per minute. She has stated that she observed following injuries. (1) Burn on both upper arms, (2) Thorax both sides. (3) Abdomen both sides. (4) Left leg both sides with thigh both sides. (5) Right thigh both sides and leg one side. (6) Perineum burnt. She has stated that Meenakshi had sustained 91% burn injuries. She has stated that duration of injuries was within three hours and she issued MLC Ext.PW12/B which is in her hand and bears her signatures. She has stated that after examining Meenakashi she found that Meenakshi was fit for making statement. She has stated that dying declaration of Meenakshi Ext.PW4/A was recorded by police officials in her presence. She has stated that statement was read over to Meenakshi Devi who later put her thumb impression. She has stated that injured on account of her burn injuries was not in a position to sign and she attested dying declaration Ext.PW4/A. She identified her signatures over dying declaration Ext.PW4/A. She has stated that in view of nature of injuries sustained by injured patient was referred to PGI Chandigarh for further medical treatment. She has denied suggestion that dying declaration Ext.PW4/A was not recorded in her presence. She has denied suggestion that she had attested and sign dying declaration Ext.PW4/A on mere asking of police officials.

8.13 PW13 Khushi Ram has stated that deceased Meenakshi was his granddaughter. He has stated that deceased Meenakshi after her birth resided with him and his family at village Chameti. He has stated that she was brought up, educated and married by him. He has stated

that deceased was married to co-accused Manoj Kumar on 9.12.2009. He has stated that after period of two months of marriage accused persons started troubling the deceased for trivial matters and accused persons started demanding money. He has stated that on 4.12.2011 deceased committed suicide by burning herself as she was fed up with act and conduct of accused persons. He has stated that on 30.12.2011 on request of police he handed over Ext.PW9/A and Ext.PW9/B hand writing of deceased Meenakshi. He has stated that police took into possession documents vide seizure memo Ext.PW9/D and he also signed as a witness. He identified accused persons in Court. He has stated that accused persons demanded a sum of Rs.10000/- (Rupees ten thousand) but he could manage to pay only Rs.2000/- (Rupees two thousand). He has denied suggestion that accused persons did not harass the deceased.

8.14 PW14 Sachin Bansal has stated that he is working as JTO (WLL) in office of GM-CM Chotta Shimla and he has been authorised by Divisional Engineer (Admn) BSNL to depose before Court vide authority letter Ext.PW14/A. He has stated that on request of police call details of Cell No. 94186-00251 w.e.f. 28.11.2011 to 4.12.2011 were provided which are Ext.PW14/B-1 to Ext.PW14/B-10. He has stated that call details are computer generated and computer password is protected. He has stated that record contains call details maintained by department and it is correct as per computerised record.

8.15 PW15 HC Sanjay Kumar has stated that he is posted as MHC P.S. Nadaun District Hamirpur for the last two years. He has stated that on 4.12.2011 at about 1.20 PM a telephone call was received in police station from Sarla Thakur Pradhan G.P. Kamlah regarding incident and information was entered at GD Entry No. 19(A) dated 4.12.2011. He has stated that pursuant to information a party headed by SI Santokh Singh along with police officials went to spot and GD entry is Ext.PW15/A. He has stated that he brought original GD Entry register and copy Ext.PW15/A is correct as per original record. He has stated that on 4.12.2011 following articles were deposited by ASI Onkar Singh. (1) One sealed cloth parcel with five seals of impression A containing burn clothes and undergarments of Meenakshi. (2) One sealed plastic canny of green colour containing 1.5 litres of kerosene. He has stated that entry regarding deposit of above mentioned articles recorded vide Sr. No. 573/113/2011 and he has also brought original malkhana register No. 19 and entries are correct as per original record. He has stated that on 9.12.2011 above mentioned articles were sent to forensic examination at RFSL Gutkar through C.Baldev Singh No. 265 vide RC No. 185 of 2011. He has stated that copy of RC register is Ext.PW15/C. he has stated that same is correct as per original record. He has stated that case property remained intact during his custody. He has stated that on 2.1.2012 one sealed parcel containing documents was sent to RFSL Dhramshala through HHC Mohinder Singh No. 222 vide RC No. 4 of 2012 copy of which is Ext.PW15/D. He has stated that copy Ext.PW15/D is correct as per original record.

8.16 PW16 HHC Mohinder Singh has stated that he is posted at P.S. Nadaun since August 2011 and he remained associated with police during investigation. He has stated that on 30.12.2011 police took into possession diary Ext.P8 containing admitted handwriting of deceased vide seizure memo Ext.PW16/A in his presence. He has further stated that on 2.1.2012 HC Sanjay Kumar MHC of P.S. Nadaun handed over him one sealed parcel for depositing at RFSL Dharamshala vide RC No. 4/12 Ext.PW15/D and he deposited safe and intact parcel and handed over the receipt to MHC.

8.17 PW17 HHC Ashok Kumar has stated that on 4.12.2011 he was posted as general duty at P.S. Nadaun and SI Santokh Singh I.O. P.S. Nadaun handed over him statement of Meenkashi Ext.PW4/A which he took to P.S. Nadaun and FIR No. 200 of 2011 dated 4.12.2011 was registered under Sections 498-A IPC at P.S. Nadaun. He has further stated that after registration of FIR he took case file to CHC Nadaun and handed over the same to Investigating Officer.

8.18 PW18 C. Baldev has stated that he is posted at P.S. Nadaun for the last four years and on 9.12.2011 HC Sanjeev Kumar handed over to him one sealed cloth parcel bearing

five seals impressions containing burn clothes and undergarments of deceased and one sealed plastic canny of green colour containing 1.5 litres of kerosene for depositing at RFSL Gutkar vide RC No. 185 of 2011 Ext.PW15/C. He has stated that he deposited these articles on same day and on return handed over its receipt to MHC.

8.19 PW19 ASI Suresh Kumar has stated that he was posted as I.O. in P.S. Nadaun till April 2012 and on 14.2.2012 Inspector Mool Raj handed over to him the case file for further investigation. He has stated that on 14.2.2012 he recorded statements of three witnesses under Section 161 Cr.P.C. i.e. HHC Ashok Kumar, HHC Mohinder Singh and Neelam Kumari as per their versions and thereafter he handed over the case file to SHO.

8.20 PW20 ASI Ashok Kumar has stated that he is posted as I.O. at P.S. Nadaun since January 2011 and on 4.12.2011 at 4.10 PM he received original statement of Meenakshi Devi Ext.PW4/A scribed by SI Santokh Singh Addl.SHO P.S. Nadaun and he registered FIR No. 200/2011 dated 4.12.2011 against accused persons under Section 498-A IPC at P.S. Nadaun which is Ext.PW20/A and endorsement on FIR is Ext.PW20/B.

8.21 PW21 SI Santokh Singh has stated that he was posted as Investigating Officer at P.S. Nadaun District Hamirpur. He has stated that on 4.12.2011 an information was received at P.S. Nadaun through Smt. Sarla Thakur Pardhan G.P. Kamlah Tehsil Nadaun District Hamirpur regarding burn injuries case at village Galol. He has stated that on receiving information same was entered in GD Entry No. 19(A) at 1.20 PM Ext.PW15/A and thereafter he left for the spot along with ASI Onkar Singh, HHC Ashok Kumar, HHC Mohinder Singh in official vehicle being driven by HHC William Singh. He has stated that when he reached near village Galol he came to know that Meenakshi Devi who had sustained burnt injuries was already shifted to CHC Nadaun and thereafter he contacted Sarla Thakur and came to CHC Nadaun along with Pardhan and HHC Ashok Kumar. He has stated that ASI Onkar Singh and HHC Mohinder Singh stayed back for conducting investigation. He has stated that on reaching at CHC Nadaun Meenakshi Devi was under treatment and some relatives from her parental house also reached. He has stated that he immediately moved application Ext.PW12/A to medical officer CHC Nadaun for issuance of MLC regarding status of patient for making statement. He has stated that Dr. Savita Rana found Meenakshi Devi fit for making statement and thereafter he recorded dying declaration Ext.PW4/A in presence of Dr.Savita Rana, Smt. Sarla Thakur Pardhan G.P. Kamlah and Gurdial Singh Pardhan G.P. Nehri Tehsil Amb District Una. He has stated that after obtaining thumb impression of Meenakshi he sent dying declaration Ext.PW4/A with endorsement to P.S. Nadaun through HHC Ashok Kumar and thereafter FIR was registered at P.S. Nadaun under Section 498-A IPC and copy of FIR is Ext.PW20/A. He has stated that he recorded statement of Sarla Thakur Ext.PW21/A as per her version. He has stated that he also recorded statements of Gurdial Singh, Ishwar Dass Ext.PW21/B as per their versions and he also recorded statement of Neelam Kumari under Section 161 Cr.P.C. He has stated that he arrested accused persons present in Court from CHC Nadaun and on 5.12.2011 he went to village Galol along with accused and searched room of deceased and recovered following documents. (1) Carbon copy of statement of Meenakshi Devi dated 9.1.2011 Mark E. (2) OPD slip dated 20.8.2011 Mark F. (3) Two X-ray forms Mark G and Mark H. (4) Ultrasound TPs Mark-J, Mark-K and Mark L. (5) One handwritten note on paper slip of Meenakshi Ext.PW10/B. (6) Suicide note (undated) written by Meenakshi Ext.PW10/A. He has stated that above stated documents took into possession vide seizure memo Ext.PW7/A in presence of two witnesses Sukh Dev Sharma and Bidhi Chand. He also recorded statement of Bidhi Chand Ext.PW21/C. He has stated that on 30.12.2011 he went to village Chameti to the house of Khushi Ram and Khushi Ram handed over following articles. (1) One paper written by deceased Meenakshi when she was in fifth class of the year 1999 Ext.PW9/A. (2) Two outer cardboard cover of photo album containing writings of deceased Ext.PW9/B and Ext.PW9/C. He has stated that above mentioned documents took into possession vide seizure memo Ext.PW9/D in presence of Raj Lal. He has stated that he also recorded statements of Raj Lal and Khushi Ram under Section 161 Cr.P.C. He has stated that he again went to village Galol where co-accused Roop Singh handed over diary Ext.P8 containing the matter written by deceased which was took into possession vide seizure memo Ext.PW16/A in presence of HHC Mohinder Singh No. 220. He

has stated that he also recorded statement of HHC Mohinder Singh under Section 161 Cr.P.C. and after conducting aforesaid investigation he handed over case file to ASI Onkar Singh I.O.P.S. Nadaun as per direction of SHO on account of his transfer. He has stated that dying declaration Ext.PW4/A was recorded in room where deceased was given first aid by medical officer. He has stated that before recording dying declaration of deceased he sent out her parents and relatives. He has denied suggestion that dying declaration Ext.PW4/A was not recorded as per version of Meenkashi. He has denied suggestion that dying declaration Ext.PW4/A was recorded at the instance of parents and relatives of deceased Meenakshi.

8.22 PW22 SI Onkar Singh has stated that in the month of December 2011 he was posted as I.O. at P.S.Nadaun District Hamirpur H.P. and on 4.12.2011 he went to village Galol along with SI Santokh Singh and other police officials after receiving information regarding burn injuries case. He has stated that on reaching the spot SI Santokh Singh left to CHC Nadaun where deceased Meenakshi was shifted. He has stated that he stayed back and after associating Ashok Kumar Up Pardhan G.P. Kamlah and Leela Devi Ward Member G.P. Kamlah he prepared spot map Ext.PW22/A and took photographs of site Ext.PW22/B-1 to Ext.PW22/B-3 by official digital camera. He has stated that thereafter he took into possession pieces of burn clothes i.e. shirt Ext.P2, salwar Ext.P3, scarf Ext.P4, underwear Ext.P5 and bra Ext.P6 and one green colour five litres plastic canny Ext.P7. He has stated that burnt clothes were packed in a cloth parcel and sealed. He has stated that he recorded statements of Ashok Kumar, Leela Devi, HC Sanjay Kumar and C.Baldev Singh under Section 161 Cr.P.C. He has further stated that on 7.12.2011 communication regarding death of deceased Meenakshi received at P.S. Nadaun and on information he went to PGI Chandigarh and conducted inquest proceedings. He has stated that he also took photographs of dead body at Chandigarh Ext.PW22/F-1 to Ext.PW22/F-6 with official digital camera and filed application Ext.PW22/G for post mortem examination of deceased. He has stated that body of deceased Meenakshi was handed over to her father on 8.12.2011 at PGI Chandigarh in presence of witnesses. He has stated that he recorded statement of Bidhi Chand at PGI Chandigarh. He has stated that after death of Meenakshi section 306 IPC was added and after completion of investigation case file was handed over to Inspector Mool Raj SHO P.S. Nadaun. He has denied suggestion that statements of witnesses were not recorded as per their versions.

8.23 PW23 Inspector Mool Raj SHO has stated that he is posted as SHO in P.S. Nadaun since 15.11.2011. He has stated that on 8.12.2011 he procured the copy of family register of accused Roop Singh from Secretary G.P. Kamlah vide request application Ext.PW8/A. He has stated that copy of family register is Ext.PW8/B. He has stated that he also recorded statement of Jaswant Singh, Secretary G.P. Kamlah and after receiving FSL report Ext.PW10/B, Ext.PW11/A and call details Ext.PW14/B-1 to Ext.PW14/B-10 he prepared challan and presented in Court of learned Judicial Magistrate.

8.24 PW24 Dr. M. Kumaran has stated that he is posted as Junior Resident Department of Forensic Medicine PGI Chandigarh since July 2011 and on 8.12.2011 in between 10.28 AM to 11.45 AM he along with Dr.Dalbir Singh Professor Department of Forensic medicine PGIMER Chandigarh conducted post mortem examination of deceased Meenakshi wife of co-accused Manoj Kumar aged 23 years. He has stated that body was brought by ASI Onkar Singh and identified by Bidhi Chand and Lekh Raj. He has stated that case was of thermal burns dated 4.12.2011 at about 11.30 AM at her matrimonial house when deceased ignited herself with kerosene oil. He has stated that firstly deceased was brought to CHC Nadaun and thereafter she was referred to PGI Chandigarh. Following details were noted. (a) Date and time of arrival to PGIMER as per police information dated 4.12.2012 at 9.37 PM. (b) Time and date of death 7.12.2012 at 9.28 PM. (c) Time and date of commencing the autopsy 8.12.2012 at 10.28 AM. (d) Time and date of completing the autopsy 8.12.2012 at 11.45 AM. He has stated that on external examination it was observed that body was of moderately built female of length 153 cm and weight 48 Kg. and rigor mortis present over lower limbs. He has stated that total burn injuries area of deceased was approximately 65% septic burns injuries. He has stated that cause of death

was shock due to septicemia as a result of 65% septic burn injuries. He has further stated that all injuries were ante-mortem in nature. He has stated that probable time that has elapsed between injury and death was three days as per police paper and probable time that elapsed between death and post mortem was 13 hours. He has stated that post mortem report is Ext.PW24/A which is signed by him and Dr.Dalbir Singh. He has stated that photographs of deceased on post mortem table are Ext.PW22/F-1 to Ext.PW22/F-6 and they all bear his signatures.

9. Following documentaries evidence filed. (1) Ext.PW1/A is statement of Bidhi Chand. (2) Ext.PW21/C is statement of Bidhi Chand. (3) Ext.PW22/D is statement of Smt. Parkash Kumari. (4) Ext.PW22/B is statement of Ishwar Dass. (5) Ext.PW4/A is statement of deceased Meenakshi. (6) Ext.PW6/A is seizure memo of recovery of clothes and kerosene canny. (7) Ext.PW7/A is seizure memo of documents. (8) Ext.PW8/A is application filed by Investigating Officer before Secretary G.P. for supply of family register. (9) Ext.PW8/B is copy of family register. (10) Ext.PW9/A is hand written specimen. (11) Ext.PW9/B is specimen hand writing. (12) Ext.PW9/D is seizure memo of document. (13) Ext.PW10/A is specimen hand writing of deceased Meenakshi. (14) Ext.PW10/B is specimen hand writing of deceased Meenakshi. (15) Ext.P8 is diary. (16) Ext.PW10/D is FSL report. (17) Ext.PW11/A is FSL report. (18) Ext.PW12/A is application filed before medical officer. (19) Ext.PW12/B is MLC of Meenakshi aged 23 years. As per MLC Ext.PW12/B Meenakshi sustained 91% burn injuries upon her body. (20) Ext.PW14/A is authority letter given by Bharat Sanchar Nigam Limited. (21) Ext.PW14/B are call details. (22) Ext.PW15/A is abstract of daily station diary. (23) Ext.PW15/B is copy of malkhana register. (24) Ext.PW15/C is copy of road certificate. (25) Ext.PW15/D is copy of road certificate. (26) Ext.PW16/A is seizure memo of diary of deceased. (27) Ext.PW20/A is FIR No. 200 dated 4.12.2011 P.S. Nadaun District Hamirpur registered under Section 498-A IPC. (28) Ext.PW22/A is site plan. (29) Ext.PW22/B-1 to Ext.PW22/B-3 are photographs of deceased Meenakshi. (30) Ext.PW22/C is seal impression upon plain cloth. (31) Ext.PW22/E is inquest report. (32) Ext.PW22/F-1 to Ext.PW22/F-6 are photographs. (33) Ext.PW22/H is receipt of dead body of Meenakshi. (34) Ext.PW24/A is post mortem report. As per post mortem report death is ante-mortem in nature and cause of death is shock due to septicemia of 65% septic burns.

10. Statement of accused persons recorded under Section 313 of Code of Criminal Procedure 1973. Accused persons have stated that they are innocent. Accused persons did not adduce any defence evidence.

11. Submission of learned Advocate appearing on behalf of appellants that criminal offence under Section 498-A IPC is not proved against co-appellants Nos. 1 and 2 is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that Section 498-A IPC was enacted to prevent cruelty upon married women in her matrimonial house. PW1 Bidhi Chand father of deceased has specifically stated when he appeared in witness box that deceased was married with co-accused Manoj on 9.12.2009. PW1 has specifically stated that deceased was not allowed to talk with her parents on telephone and she was also not allowed to contact her parental house. PW1 has also stated that deceased has disclosed him directly that she was harasssed and tortured in her matrimonial house. He has stated that Rs.5000/- (Rupees five thousand) was also paid by him for repayment of loan amount. Testimony of PW1 is corroborated by PW2 Parveen Kumari who is mother of deceased. PW2 has stated when she appeared in witness box that deceased was beaten by accused persons in her matrimonial house and she was not provided maintenance allowance. PW2 has also stated in positive manner that deceased was prevented to contact her parents by way of phone. PW2 has also specifically stated when she appeared in witness box that co-accused Roop Singh also tried to outrage modesty of deceased during night period. PW2 has also stated that accused persons also demanded money from deceased when they received a bank notice. PW2 has further stated in positive manner that her husband had paid Rs.5000/- (Rupees five thousand) to accused persons. PW2 has specifically stated that deceased called her upon landline No. 263345 and she was disturbed and was shouting “bachao-bachao”(Save-save).

12. PW3 Ishwar Dass has specifically stated in positive manner that he received telephonic call from deceased Meenakshi. He has stated that Meenakshi was related to his wife. He has stated that on 4.12.2011 deceased Meenakshi was crying and told him that she was beaten by accused persons. PW3 has also stated in positive manner that deceased directly informed him that accused persons demanded money from her parents. PW12 Dr. Savita Rana has stated that deceased was brought in hospital with 91% burn injuries upon her body. PW13 Khushi Ram has stated that deceased had committed suicide because deceased was fed up with act and conduct of accused persons. PW13 has stated that Rs.10000/- (Rupees ten thousand) were demanded from him but he could pay only Rs.2000/-(Rupees two thousand). Testimonies of PW1 Bidhi Chand, PW2 Parveen Kumari, PW3 Ishwar Dass, PW13 Khushi Ram and PW12 Dr.Savita Rana are trustworty reliable and inspire confidence of Court. There is no reason to disbelieve the testimonies of above stated persons.

13. Court has also peursed the dying declaration of deceased Meenakshi Ext.PW4/A placed on record. It is proved on record that dying declaration of deceased was recorded in hospital when deceased sustained burn injuries to the extent of 91% upon her body. There is recital in dying declaration Ext.PW4/A placed on record given by deceased that she was harassed in her matrimonial house relating to money. There is recital in dying declaration given by deceased Ext.PW4/A that on 8.2.2010 when deceased was alone in her matrimonial house then her father-in-law co-accused namely Roop Singh came to her during night period and switched off the electric light and started outraging her modesty. Deceased Meenakshi also stated in dying declaration Ext.PW4/A that she was forced to bring money from her parental house several times and her parents paid Rs.5000/- (Rupees five thousand). There is recital in dying declaration that deceased Meenakshi was also beaten in her matrimonial house. There is recital in dying declaration that deceased was fed up with act and conduct of her husband and father-in-law and under compelling circumstances deceased sprinkled kerosene oil upon her body and set her body upon fire. It is well settled law that cruelty in matrimonial house are of two types. Mental cruelty and physical cruelty. Court is of the opinion that directing the married women to bring money from her parental house amounts to mental cruelty as defined under Section 498-A IPC. Court is also of the opinion that trying to outrage the modesty of married woman in her matrimonial house by her father-in-law also amounts cruelty as defined under Section 498-A IPC. Testimony of above said persons is corroborated by documentary evidence i.e. medical certificate and post mortem report placed on record. It is held that cruelty as defined under Section 498-A IPC upon deceased is proved against co-accused Manoj Kumar and co-accused Roop Singh beyond reasonable doubt. There is no allegation against co-accused No. 3 Nirmala Devi in dying declaration Ext.PW4/A placed on record by name. Hence it is held that Nirmala Devi is legally entitled for benefit of doubt relating to criminal offence under Section 498-A IPC. ***See (1977)9 SCC 338 title Balram Prasad vs. State of Bihar. See (1994)4 SCC 690 title Arun Vyas and others vs. Anita Vyas. See (2001)6 SCC 407 title Arvind vs. State of Bihar. See (2005)6 SCC 281 title Sushil Kumar vs. Union of India. See (2002)7 SCC 4141 title Mohd. Hussain vs. State of A.P. See (2002)2 SCC 619 title Gananath Patnaik vs. State of Orissa.***

14. Submission of learned Advocate appearing on behalf of appellants that no offence under Section 306 IPC is made out against co-accused Manoj Kumar and Roop Singh is rejected being devoid of any force for the reasons hereinafter. It is proved on record that deceased had committed suicide in her matrimonial house within two years after her marriage. As per Section 113-A of Indian Evidence Act 1872 the Court should presume that accused persons have committed the abetment of suicide upon married woman if suicide is committed within seven years of her marriage. Deceased Meenakshi Devi committed suicide in her matrimonial house when she was aged 23 years within two years of her marriage. Deceased Meenakshi has specifically stated in her dying declaration Ext.PW4/A that she committed suicide due to torture and harassment given to her in her matrimonial house and deceased was immediately brought to hospital for her medical treatment and thereafter deceased was referred to PGI Chandigarh and in PGI Chandigarh deceased died. Co-appellants Nos. 1 and 2 did not adduce any defence evidence despite opportunity granted by learned Trial Court. Evidence under Section 113-A of Indian

Evidence Act 1872 by way of dying declaration remained unrebutted against co-appellants Nos. 1 and 2. There is no eivdence against co-appellant Nirmala Devi that she abeted deceased to commit suicide. There is no reference of Nirmala co-accused in dying declaration Ext.PW4/A. Hence it is held that no criminal offence is proved beyond reasonable doubt against co-accused Nirmala Devi in present case under Section 306 IPC. ***See AIR 1990 SC 209 title Gurbachan Singh vs. Satpal Singh. See AIR 1989 SC 1661 Brij Lal vs. Prem Chand.***

15. Submission of learned Advocate appearing on behalf of co-appellants Manoj Kumar and Roop Singh that PW1 Bidhi Chand, PW2 Parveen Kumari, PW3 Ishwar Dass, PW13 Khushi Ram are relatives of deceased and their testimonies cannot be relied is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that if testimonies of relative witnesses are co-herent then same could be relied in criminal case. It is well settled law that in matrimonial dispute relatives are best witnesses. It is also well settled law that generally married women used to disclose the facts of cruelty upon her in matrimonial house to her relatives only. It is also well settled law that if cruelty in matrimonial house is committed within four walls of house then procurement of independent witness is not possible. It is well settled law that if criminal offence is committed within four walls then burden is upon owner of house to prove his innocence as per Section 106 of Indian Evidence Act 1872 ***See JT (2016)2 SC 459 title Gajanan Dassrath Kharate vs. State of Maharashtra.***

16. Submission of learned Advocate appearing on behalf of co-appellants namely Manoj Kumar and Roop Singh that there is major contradiction between testimonies of prosecution witnesses and on this ground appeal filed by co-appellants Manoj Kumar and Roop Singh be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Learned Advocate appearing on behalf of co-appellants Manoj Kumar and Roop Singh did not point out any major contradiction which goes to the root of case. It is well settled law that minor contadictions are bound to come in criminal case when testimonies of prosecution witnesses are recorded after a gape of sufficient time. In present case incident took place on 4.12.2011 and testimonies of witnesses were recorded on 14.1.2013, 15.1.2013, 16.1.2013, 17.1.2013, 19.1.2013, 21.1.2013, 22.1.2013, 23.1.2013, 26.4.2013, 6.5.2013. ***See (2010)9 SCC 567 title C. Muniappan and others vs. State of Tamil Nadu . See AIR 1972 SC 2020 title Sohrab and another vs. The State of Madhya Pradesh. See AIR 1985 SC 48 title State of U.P. vs. M.K. Anthony. See AIR 1983 SC 753 title Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat. See AIR 2007 SC 2257 title State of Rajasthan vs. Om Parkash. See (2009)11 SCC 588 title Prithu alias Prithi Chand and another vs. State of Himachal Pradesh. See (2009)9 SCC 626 title State of Uttar Pradesh vs. Santosh Kumar and others. See AIR 1988 SC 696 title Appabhai and another vs. State of Gujarat. See AIR 1999 SC 3544 title Rammi alias Rameshwar vs. State of Madhya Pradesh. See (2000)1 SCC 247 title State of H.P. vs. Lekh Raj and another. See (2004) 10 SCC 94 title Laxman Singh vs. Poonam Singh and others. See (2012)10 SCC 433 title Kuriya and another vs. State of Rajasthan.***

17. Submission of learned Advocate appearing on behalf of co-appellants Manoj Kumar and Roop Singh that above said co-appellants cannot be convicted simply on testimonies of PW1 Bidhi Chand, PW2 Parveen Kumari, PW3 Ishwar Dass, PW12 Dr. Savita Rana, PW13 Khushi Ram is rejected being devoid of any forced for the reasons hereinafter mentioned. It is well settled law that no particular number of witnesses in any case is required for the proof of any fact. It is well settled principle of law that conviction can be based on solitary statements of witnesses if Court comes to conclusion that statement is true and correct version of the case of prosecution. It is well settled law that Courts are concerned with merits of statements of particular witnesses and Courts are not concerned with number of witnesses examined by prosecution. ***See AIR 2010 SCW 4470 title Bipin Kumar Mondal vs. State of West Bengal. See AIR 2016 SCW 1160 title Sadhu Saran vs. State of U.P.***

18. Submission of learned Advocate appearing on behalf of co-appellants Nos. 1 and 2 that in view of statement of deceased Meenakshi Devi Ext.PW10/A and Ext.PW10/B placed on record co-appellants Nos. 1 and 2 be acquitted is rejected being devoid of any force for the

reasons hereinafter mentioned. Statements Ext.PW10/A and Ext.PW10/B are rebutted by dying declaration Ext.PW4/A placed on record. Dying declaration Ext.PW4/A placed on record is proved beyond reasonable doubt as per testimony of eye witness PW4 Gurdial Singh Pradhan Gram Panchayat Nehri Tehsil Amb District Unda (H.P.) Dying declaration Ext.PW4/A placed on record is also proved beyond reasonable doubt as per testimony of eye witness PW12 Dr. Savita. Dying declaration Ext.PW4/A is also proved beyond reasonable doubt as per testimony of PW21 Santokh Singh. Dying declaration Ext.PW4/A is trustworthy reliable and inspire confidence of Court. ***See (2000)8 SCC 514 title Lakhan vs. State of M.P. See (2010)5 SCC 451 title Munnawar and others vs. State of U.P. See (2007)12 SCC 562 title Saya alias Sultan Begum vs. State of Maharashtra. See (1992)2 SCC 126 title Paras Yadav vs. State of Bihar. See AIR 1992 SC 1817 title Paniben vs. State of Gujarat. See AIR 1985 SC 416 title State of H.P. vs. Ram Sagar Yadav. See AIR 1983 SC 164 title Ramavati vs. State of Bihar. See AIR 1979 SC 1505 title Suraj Deo Oza and others vs. State of Bihar.*** As per post mortem report placed on record deceased had died due to ante mortem injuries to the extent of 65% septic burns.

19. Submission of learned Advocate appearing on behalf of co-appellants Nos. 1 and 2 that in view of testimony of PW5 Sarla Devi dying declaration Ext.PW4/A cannot be relied is rejected being devoid of any force for the reasons hereinafter mentioned. Dying declaration Ext.PW4/A is duly signed by PW5 Sarla Devi. PW5 Sarla Devi did not give her dissenting note when she signed dying declaration Ext.PW4/A. PW5 did not complaint to any competent authority. Co-appellants Nos. 1 and 2 are voters of PW5 Sarla Devi. It is not expedient in the ends of justice to disbelieve dying declaration Ext.PW4/A on testimony of PW5 Sarla Devi.

20. Rulings cited by learned Advocate appearing on behalf of co-appellants namely Manoj Kumar and Roop Singh i.e. 2003 SCC (Cri.) 1523 title State of Haryana vs. Jai Parkash, (2005)9 SCC 769 title State of Punjab vs. Parveen Kumar, (2009)4 SCC 52 title Kishangiri Mangalgiri Goswami vs. State of Gujarat, (2002)5 SCC 371 title Sanju @ Sanjay Singh Sengar vs. State of M.P., (2009)10 SCC 164 title Mankamma vs. State of Kerala are not applicable in present case. Facts of present case and facts of cases cited by learned Advocate appearing on behalf of co-appellants Nos. 1 and 2 are different and distinguishable.

21. Submission of learned Additional Advocate General appearing on behalf of State that offence under Sections 498-A and 306 IPC is also proved beyond reasonable doubt against co-accused Nirmala Devi is rejected being devoid of any force for the reasons hereinafter mentioned. Name of Nirmala Devi did not figure in dying declaration given by deceased Ext.PW4/A placed on record. Even none of witnesses examined in Court stated by name that co-accused Nirmala Devi had committed cruelty and abetment as alleged by prosecution. Hence it is held that prosecution did not prove ingredients of Sections 498-A and 306 IPC against co-accused Nirmala Devi in present case beyond reasonable doubt. In view of above stated facts and case law cited supra point No. 1 is partly answered in yes and partly answered in no.

Point No. 2 (Final order)

22. In view of findings on point No.1 appeal is partly allowed. Conviction and sentence passed by learned Trial Court against co-appellants Manoj Kumar and Roop Singh affirmed and conviction and sentence passed by learned Trial Court against co-appellant Nirmala Devi is set aside. Co-appellant Nirmala Devi is acquitted qua offence punishable under Sections 498-A and 306 IPC by way of giving her benefit of doubt. Learned Additional Registrar (Judicial) will issue release warrant in favour of co-appellant Smt. Nirmala Devi forthwith if not required in any other case. File of learned Trial Court along with certified copy of judgment be sent back forthwith. Criminal appeal No. 4247 of 2013 is disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Mehar Chand. ...Petitioner

Versus

State of Himachal Pradesh and another. ...Respondents

CWP No. 4588 of 2015
Judgment reserved on: 29.8.2016
Date of Decision: 6.9.2016.

H.P. Land Revenue Act, 1954- Section 163- Proceedings were initiated against the petitioner on the ground that he was in unauthorized occupation of the land in dispute- order of eviction was passed against the petitioner, which was unsuccessfully challenged before various authorities- writ petition was filed against the orders- held, that revision petition was dismissed on 27.10.2001 and the order was assailed after 9 years- the power should be exercised within a reasonable period and not after inordinate delay- Financial Commissioner had not adjudicated this question- plea of adverse possession was taken but the reply filed by the petitioner before Assistant Collector Ist Grade was not placed on record – all unoccupied lands are the property of the Government- it is for the person asserting the title in himself to prove the adverse possession- possession according to the version of the petitioner commenced in the year 1962- proceedings were initiated prior to the lapse of 30 years- in these circumstances, authorities had rightly rejected the plea of adverse possession- petition dismissed - eviction order to be carried out at the cost of the petitioner. (Para-8 to 40)

Cases referred:

Joint Collector Ranga Reddy District & Another Vs. D.Narsing Rao and others (2015) 3 SCC 695

Saraswati Devi and others Vs. State of H.P. and others, Latest HLJ 2015 (HP) 1276

R. Hanumaiah and another vs. Secretary to Government of Karnataka, Revenue Department and others (2010) 5 SCC 203

Mandal Revenue Officer vs. Goundla Venkaiah and another (2010)2 SCC 461

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

For the Petitioner: Ms.Vandana Mishra Panta, Advocate.

For the Respondents: Mr.Shrawan Dogra, Advocate General with Mr.Anup Rattan, Mr.Romesh Verma, Mr.Varun Chandel, Additional Advocate Generals and Mr.Kush Sharma, Deputy Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Petitioner has lost before all the four authorities below and having been held to be an encroacher has been ordered to be evicted from the land measuring 6-19-5 bighas, comprised in Khasra No. 337/16/1, 331/323/1 and 171, Kita 2, situated in Mauza Chamog, Tehsil Karsog, District Mandi H.P. (herein after referred to as the land in dispute).

2. It appears that in the year 1990 on the report of Patwari Halka Dabrot, Tehsil Karsog, District Mandi, proceedings under Section 163 of the HP Land Revenue Act, 1954 (for short the 'Act') were initiated against the petitioner before the Assistant Collector 1st Grade, Karsog on 14.12.1990 on the ground that he was in unauthorized occupation of the land in dispute.

3. On 5.4.1991 the Assistant Collector 1st Grade passed ex parte order of eviction against the petitioner, which consequent upon appeal being filed by the petitioner was set aside on 8.10.1991 by the Collector Sub Division, Karsog and the matter was remanded back to the Assistant Collector 1st Grade for fresh decision.

4. The Assistant Collector 1st Grade again vide order dated 30.9.1997 ordered the eviction of the petitioner and at the same time imposed a fine of `6,950/-. This order was assailed by the petitioner by way of appeal before the Collector Sub Division, Karsog, who vide his order dated 21.9.1999 dismissed the appeal. These orders thereafter were challenged before the Commissioner, Mandi Division at Mandi by filing Revision Petition No. 40 of 2000. However, the same was also dismissed vide order dated 27.10.2001.

5. Undeterred, the petitioner then approached the Financial Commissioner (Appeals) by filing Revision Petition No. 35 of 2010. However, the said Revision Petition too ordered to be dismissed vide order dated 18.8.2015, constraining the petitioner to file the instant writ petition.

6. It is averred that the authorities below have failed to take into consideration the clear and unambiguous testimony of the petitioner corroborated by two other witnesses of the area, who have clearly deposed that there are about 250-300 fruit bearing apple and almond trees standing over the disputed land, which has been in possession of the petitioner and earlier to that in his father's possession for the last 35 years and thus it was proved on record that the petitioner was in open, hostile and continuous possession of the disputed land and therefore, had become owner thereof.

7. The respondents have filed reply, wherein it is averred that as the petitioner had miserably failed to prove his title, claim and right over the land in dispute by producing tangible oral or documentary evidence, therefore, he could not now find fault with the orders, which have been passed strictly in conformity and compliance of law. It is specifically averred that the claim of the petitioner with regard to adverse possession over the land in dispute is totally wrong, baseless and misleading because had the petitioner been in adverse possession of the land in dispute for more than 35 years, then the same would have been recorded/reflected in the record of rights prepared during the settlement carried out in early seventies in Tehsil Karsog.

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

8. At the outset, it may be noticed that the Commissioner Mandi had dismissed the Revision Petition vide order dated 27.10.2001, yet the petitioner did not chose to assail this order for nearly 9 years and the same was ultimately assailed on 9.3.2010 in Revision Petition by invoking the provisions of Section 17 of the H.P. Land Revenue Act, 1954, which reads thus:-

> *"**17. Power to call for, examine and revise proceedings of Revenue Officer.**—(1) The Financial Commissioner may at any time call for the record of any case pending before (or disposed of by) any Revenue Officer subordinate to him.*
>
> *(2) A Commissioner or Collector may call for the record of any case pending before, or disposed of by any Revenue Officer under his control.*
>
> *(3) If in any case in which a Commissioner or Collector has called for a record, is of the opinion that the proceedings taken or order made should be modified or reversed, he shall report the case with his opinion thereon for the orders of the Financial Commissioner.*
>
> *(4) The Financial Commissioner may in any case called for by himself under sub-section (1) or reported to him under sub-section (3) pass such order as he thinks fit.*
>
> *Provided that he shall not under this section pass an order reversing or modifying any proceeding or order of a subordinate Revenue Officer and effecting*

any question of right between private persons without giving those persons an opportunity of being heard."

9. It is manifest from the perusal of the aforesaid provision that no particular period of limitation in fact has been prescribed for filing of revision and the expression "may at any time" has been used.

10. Therefore, the first and foremost question which will require our consideration is as to whether in absence of any period of limitation having been prescribed for the exercise of powers of revision, can the period be extended to infinity and the order remain open for challenge forever?. Can it be assumed that the legislature has conferred an everlasting and interminable power in point of time for exercising the powers of revision by not specifically providing for any period of limitation?

11. These issues are no longer res integra and have been elaborately dealt with by the Hon'ble Supreme Court in its recent decision in case titled ***Joint Collector Ranga Reddy District & Another Vs. D.Narsing Rao and others (2015) 3 SCC 695***, where Hon'ble Justice T.S. Thakur, J., in his Lordships separate, though concurring judgment has held that where no limitation period is prescribed under the statute, the power should be exercised within a reasonable period. It was further observed that reasonableness of the period is to be determined having regard to lapse of time between the knowledge of the order and exercise of power. It was held as under:

> *"**25**. The legal position is fairly well-settled by a long line of decisions of this Court which have laid down that even when there is no period of limitation prescribed for the exercise of any power revisional or otherwise such power must be exercised within a reasonable period. This is so even in cases where allegations of fraud have necessitated the exercise of any corrective power. We may briefly refer to some of the decisions only to bring home the point that the absence of a stipulated period of limitation makes little or no difference in so far as the exercise of the power is concerned which ought to be permissible only when the power is invoked within a reasonable period.*
>
> ***26**. In one of the earlier decisions of this Court in S.B. Gurbaksh Singh v. Union of India1976 (2) SCC 181, this Court held that exercise of suo motu power of revision must also be within a reasonable time and that any unreasonable delay in the exercise may affect the validity. But what would constitute reasonable time would depend upon the facts of each case.*
>
> ***27**. To the same effect is the decision of this Court in Ibrahimpatnam Taluk Vyavasaya Coolie Sangham V.K. Suresh Reddy and Ors. (2003) 7 SCC 667 where this Court held that even in cases of fraud the revisional power must be exercised within a reasonable period and that several factors need to be kept in mind while deciding whether relief sooner be denied only on the ground of delay. The court said (SCC p.677,*
>
> *para 9)*
>
> > *"9….In cases of fraud, this power could be exercised within a reasonable time from the date of detection or discovery of fraud. While exercising such power, several factors need to be kept in mind such as effect on the rights of the third parties over the immovable property due to passage of considerable time, change of hands by subsequent bona fide transfers, the orders attaining finality under the provisions of other Acts (such as the Land Ceiling Act)."*
>
> ***28**. To the same effect is the view taken by this Court in Sulochana Chandrakant Galande. v. Pune Municipal Transport and Others (2010) 8 SCC 467 where this Court reiterated the legal position and held that the power to revise orders*

and proceedings cannot be exercised arbitrarily and interminably. This Court observed: (SCC p.476, para 28)

> *"28. The legislature in its wisdom did not fix a time-limit for exercising the revisional power nor inserted the words "at any time" in Section 34 of the 1976 Act. It does not mean that the legislature intended to leave the orders passed under the Act open to variation for an indefinite period inasmuch as it would have the effect of rendering title of the holders /allottee(s) permanently precarious and in a state of perpetual uncertainty. In case, it is assumed that the legislature has conferred an everlasting and interminable power in point of time, the title over the declared surplus land, in the hands of the State/allottee, would forever remain virtually insecure. The Court has to construe the statutory provision in a way which makes the provisions workable, advancing the purpose and object of enactment of the statute".*

***29**. In State of H.P. and Ors. v. Rajkumar Brijender Singh and Ors. (2004) 10 SCC this Court held that in the absence of any special circumstances a delay of 15 years in suo motu exercise of revisional power was impermissible as the delay was unduly long and unexplained. This Court observed (SCC pp.588-89, para-6)*

> *"6.We are now left with the second question which was raised by the respondents before the High Court, namely, the delayed exercise of the power under sub-section (3) of Section 20. As indicated above, the Financial Commissioner exercised the power after 15 years of the order of the Collector. It is true that High Court of H.P. sub-section (3) provides that such a power may be exercised at any time but this expression does not mean there would be no time-limit or it is in infinity. All that is meant is that such powers should be exercised within a reasonable time. No fixed period of limitation may be laid but unreasonable delay in exercise of the power would tend to undo the things which have attained finality. It depends on the facts and circumstances of each case as to what is the reasonable time within which the power of suo motu action could be exercised. For example, in this case, as the appeal had been withdrawn but the Financial Commissioner had taken up the matter in exercise of his suo motu power, it could well be open for the State to submit that the facts and circumstances were such that it would be within reasonable time but as we have already noted that the order of the Collector which has been interfered with was passed in January 1976 and the appeal preferred by the State was also withdrawn sometime in March 1976. The learned counsel for the appellant was not able to point out such other special facts and [pic]circumstances by reason of which it could be said that exercise of suo motu power after 15 years of the order interfered with was within a reasonable time. That being the position in our view, the order of the Financial Commissioner stands vitiated having been passed after a long lapse of 15 years of the order which has been interfered with. Therefore, while holding that the Financial Commissioner would have power to proceed suo motu in a suitable case even though an appeal preferred before the lower appellate authority is withdrawn, maybe, by the State. Thus the view taken by the High Court is not sustainable. But the order of the Financial Commissioner suffers from the vice of the exercise of the power after unreasonable lapse of time and such delayed action on his part nullifies the order passed by him in exercise of power under sub-section (3) of Section 20".*

30. *We may also refer to the decision of this Court in M/s Dehri Rohtas Light Railway Company Ltd. V. District Board, Bhojpur and Ors. (1992) 2 SCC 598 where the Court explained the legal position as under: (SCC pp.602-03, para 13)*

> *"13. The rule which says that the Court may not enquire into belated and stale claim is not a rule of law but a rule of practice based on sound and proper exercise of discretion. Each case must depend upon its own [pic] facts. It will all depend on what the breach of the fundamental right and the remedy claimed are and how delay arose. The principle on which the relief to the party on the grounds of laches or delay is denied is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there is a reasonable explanation for the delay. The real test to determine delay in such cases is that the petitioner should come to the writ court before a parallel right is created and that the lapse of time is not attributable to any laches or negligence. The test is not as to physical running of time. Where the circumstances justifying the conduct exist, the illegality which is manifest cannot be sustained on the sole ground of laches. The decision in Tilok chand case relied on is distinguishable on the facts of the present case. The levy if based on the net profits of the railway undertaking was beyond the authority and the illegal nature of the same has been questioned though belatedly in the pending proceedings after the pronouncement of the High Court in the matter relating to the subsequent years. That being the case, the claim of the appellant cannot be turned down on the sole ground of delay. We are of the opinion that the High Court was wrong in dismissing the writ petition in limine and refusing to grant the relief sought for. We however agree that the suit has been rightly dismissed".*

31. *To sum up, delayed exercise of revisional jurisdiction is frowned upon because if actions or transactions were to remain forever open to challenge, it will mean avoidable and endless uncertainty in human affairs, which is not the policy of law. Because, even when there is no period of limitation prescribed for exercise of such powers, the intervening delay, may have led to creation of third party rights, that cannot be trampled by a belated exercise of a discretionary power especially when no cogent explanation for the delay is in sight. Rule of law it is said must run closely with the rule of life. Even in cases where the orders sought to be revised are fraudulent, the exercise of power must be within a reasonable period of the discovery of fraud. Simply describing an act or transaction to be fraudulent will not extend the time for its correction to infinity; for otherwise the exercise of revisional power would itself be tantamount to a fraud upon the statute that vests such power in an authority."*

12. The aforesaid exposition of law makes it evidently clear that even when there is no period of limitation prescribed for exercise of any power revisional or otherwise such power must be exercised within a reasonable period. Delayed exercise of revisional jurisdiction is frowned upon because if actions or transactions were to remain forever open to challenge, it will mean avoidable and endless uncertainty in human affairs, which is not the policy of law. Similar is the re-iteration of law in judgment rendered by this Bench in ***Saraswati Devi and others Vs. State of H.P. and others, Latest HLJ 2015 (HP) 1276***.

13. Adverting to the facts, it would be noticed that the Financial Commissioner has though noted the delay of about 9 years in filing of the Revision Petition, but thereafter no findings with respect to the maintainability or non-maintainability of the Revision Petition on the basis of such delay has been recorded. In such circumstances, we are clearly of the opinion that it was incumbent upon the Financial Commissioner to have firstly decided the question of

delay, as there was clearly an embargo on his power to proceed further with the Revision. It was only after the delay had been condoned, could he have entertained and decided the Revision Petition on merits. There is no material placed on record by the petitioner, wherefrom it can be gathered that he diligently and promptly filed the Revision Petition. Rather the record clearly suggests that the petitioner not only adopted a cavalier, casual and lackadaisical approach in filing the Revision Petition, but was also negligent in doing so.

14. As regards the claim of adverse possession, we find that the petitioner has not chosen to place on record the reply filed by him before the Assistant Collector 1st Grade, so as to enable this Court to gather and appreciate the exact nature of plea of adverse possession that may have been set up. After all physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature.

15. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show:-

(a) On what date he came into possession;

(b) What was the nature of his possession;

(c) Whether the factum of possession was known to the other party;

(d) How long his possession has continued, and

(e) His possession was open and undisturbed.

16. Having failed to place on record the relevant pleadings, we are left with no other option but to drawn an adverse inference against the petitioner.

17. Now going by the evidence upon which much reliance has been placed by the learned counsel for the petitioner, we find that the petitioner in addition to himself had examined two witnesses. The petitioner while appearing as a witness has stated that he has been in possession of the encroached land for about 35 years and over which had planted 250-300 apple and almond trees. The age of apple trees was about 28 years and that of almond trees was 18 years. He had considered himself to be the owner of the land in dispute and had been cultivating the same without any let or hindrance or interference from any side and that he has no intention to give up such possession. Similar is the statement of two other witnesses examined by him and notably none of the witnesses including the petitioner have been cross-examined.

18. However, the moot question that still arises for consideration is as to whether the possession of the petitioner over the land in dispute has ripened into an adverse possession.

19. It is more than settled that all lands which are not the property of any person or which are not vested in a local authority, belong to the Government. All unoccupied lands are the property of the government, unless any person can establish his right or title to any such land. This presumption available to the Government is not available to any person or individual. Establishing title/possession for a period exceeding twelve years may be adequate to establish title in a declaratory suit or any other proceeding against any individual. On the other hand, title/possession for a period exceeding thirty years will have to be established to succeed in a declaratory suit or any other proceeding for title against the Government. This follows from Article 112 of the Limitation Act, 1963, which prescribes a longer period of thirty years as limitation in regard to suits by Government as against the period of 12 years for suits by private individuals. The reason is obvious. Government properties are spread over the entire State and it is not always possible for the Government to protect or safeguard its properties from encroachments.

20. The onus to prove title to unoccupied lands, belonging to the Government is on the private parties. Such lands are presumed to be Government land and weakness in Government's defence or absence of contest are not sufficient to grant declaratory or injunctive decrees against the Government by relying upon one of the principles underlying pleadings, that the averments contained therein have not been denied or traversed are deemed to have been

accepted or admitted. Similarly, the rights, entitlement and presumption of title is clearly in favour of the Government and has therefore to be distinguished from those of private parties.

21. Similar issue came up before the Hon'ble Supreme Court in ***R. Hanumaiah and another vs. Secretary to Government of Karnataka, Revenue Department and others (2010) 5 SCC 203*** and it is apt to reproduce the relevant observations which reads thus:

Nature of proof required in suits for declaration of title against the Government

"19. *Suits for declaration of title against the government, though similar to suits for declaration of title against private individuals differ significantly in some aspects. The first difference is in regard to the presumption available in favour of the government. All lands which are not the property of any person or which are not vested in a local authority, belong to the government. All unoccupied lands are the property of the government, unless any person can establish his right or title to any such land. This presumption available to the government, is not available to any person or individual. The second difference is in regard to the period for which title and/or possession have to be established by a person suing for declaration of title. Establishing title/possession for a period exceeding twelve years may be adequate to establish title in a declaratory suit against any individual. On the other hand, title/possession for a period exceeding thirty years will have to be established to succeed in a declaratory suit for title against government. This follows from Article 112 of Limitation Act, 1963, which prescribes a longer period of thirty years as limitation in regard to suits by government as against the period of 12 years for suits by private individuals. The reason is obvious. Government properties are spread over the entire state and it is not always possible for the government to protect or safeguard its properties from encroachments. Many a time, its own officers who are expected to protect its properties and maintain proper records, either due to negligence or collusion, create entries in records to help private parties, to lay claim of ownership or possession against the government. Any loss of government property is ultimately the loss to the community. Courts owe a duty to be vigilant to ensure that public property is not converted into private property by unscrupulous elements.*

20. Many civil courts deal with suits for declaration of title and injunction against government, in a casual manner, ignoring or overlooking the special features relating to government properties. Instances of such suits against the government being routinely decreed, either ex parte or for want of proper contest, merely acting upon the oral assertions of plaintiffs or stray revenue entries are common. Whether the government contests the suit or not, before a suit for declaration of title against a government is decreed, the plaintiff should establish, either his title by producing the title deeds which satisfactorily trace title for a minimum period of thirty years prior to the date of the suit (except where title is claimed with reference to a grant or transfer by the government or a statutory development authority), or by establishing adverse possession for a period of more than thirty years. In such suits, courts cannot, ignoring the presumptions available in favour of the government, grant declaratory or injunctive decrees against the government by relying upon one of the principles underlying pleadings that plaint averments which are not denied or traversed are deemed to have been accepted or admitted.

21 A court should necessarily seek an answer to the following question, before it grants a decree declaring title against the government : whether the plaintiff has produced title deeds tracing the title for a period of more than thirty years; or whether the plaintiff has established his adverse possession to the knowledge of the government for a period of more than thirty years, so as to

convert his possession into title. Incidental to that question, the court should also find out whether the plaintiff is recorded to be the owner or holder or occupant of the property in the revenue records or municipal records, for more than thirty years, and what is the nature of possession claimed by the plaintiff, if he is in possession - authorized or unauthorized; permissive; casual and occasional; furtive and clandestine; open, continuous and hostile; deemed or implied (following a title).

22. Mere temporary use or occupation without the animus to claim ownership or mere use at sufferance will not be sufficient to create any right adverse to the Government. In order to oust or defeat the title of the government, a claimant has to establish a clear title which is superior to or better than the title of the government or establish perfection of title by adverse possession for a period of more than thirty years with the knowledge of the government. To claim adverse possession, the possession of the claimant must be actual, open and visible, hostile to the owner (and therefore necessarily with the knowledge of the owner) and continued during the entire period necessary to create a bar under the law of limitation. In short, it should be adequate in continuity, publicity and in extent. Mere vague or doubtful assertions that the claimant has been in adverse possession will not be sufficient. Unexplained stray or sporadic entries for a year or for a few years will not be sufficient and should be ignored.

23. As noticed above, many a time it is possible for a private citizen to get his name entered as the occupant of government land, with the help of collusive government servants. Only entries based on appropriate documents like grants, title deeds etc. or based upon actual verification of physical possession by an authority authorized to recognize such possession and make appropriate entries can be used against the government. By its very nature, a claim based on adverse possession requires clear and categorical pleadings and evidence, much more so, if it is against the government. Be that as it may."

22. Reverting back to the facts, it would be noticed that the specific case of the petitioner while appearing as a witness before Assistant Collector 1st Grade was that the land in dispute was in his possession and earlier to that in his predecessor's possession for last about 35 years. Notably, the statement of the petitioner and his two witnesses had been recorded on 30.4.1997 and even if the same in absence of any cross-examination is taken to be a gospel truth, would at best prove his possession from the year 1962 onwards. Admittedly, the eviction proceedings against the petitioner as per his own showing were already initiated on 4.10.1990 i.e. well before the completion of the statutory period of 30 years and therefore, no fault can be found with the orders passed by the authorities below whereby they negated the plea of adverse possession set up by the petitioner.

23. The Court is dealing with public property, wherein the public has interest and it is more than settled that private interest must yield to public interest.

24. It has to be remembered that the right and title of the State cannot be permitted to be destroyed so as to give an upper hand to the encroachers, unauthorized occupants or land grabbers as has been held by the Hon'ble Supreme Court in ***Mandal Revenue Officer vs. Goundla Venkaiah and another (2010)2 SCC 461*** in the following terms:-

"47. *In this context, it is necessary to remember that it is well neigh impossible for the State and its instrumentalities including the local authorities to keep every day vigilance/watch over vast tracts of open land owned by them or of which they are the public trustees. No amount of vigil can stop encroachments and unauthorised occupation of public land by unscrupulous elements, who act like vultures to grab such land, raise illegal constructions and, at times, succeeded in manipulating the State apparatus for getting their occupation/possession and construction regularized. It is our considered view that where an encroacher, illegal occupant or land grabber of public property raises a plea that he has perfected title*

by adverse possession, the Court is duty bound to act with greater seriousness, care and circumspection. Any laxity in this regard may result in destruction of right/title of the State to immovable property and give upper hand to the encroachers, unauthorised occupants or land grabbers.

48. In State of Rajasthan v. Harphool Singh (Dead) through Lrs. 2000 (5) SCC 652, this Court considered the question whether the respondents had acquired title by adverse possession over the suit land situated at Nohar-Bhadra Road at Nohar within the State of Rajasthan. The suit filed by the respondent against his threatened dispossession was decreed by the trial Court with the finding that he had acquired title by adverse possession. The first and second appeals preferred by the State Government were dismissed by the lower appellate Court and the High Court respectively. This Court reversed the judgments and decrees of the courts below as also of the High Court and held that the plaintiff-respondent could not substantiate his claim of perfection of title by adverse possession. Some of the observations made on the issue of acquisition of title by adverse possession which have bearing on this case are extracted below: (SCC p.660, para 12)

> *"12. So far as the question of perfection of title by adverse possession and that too in respect of public property is concerned, the question requires to be considered more seriously and effectively for the reason that it ultimately involves destruction of right/title of the State to immovable property and conferring upon a third-party encroacher title where he had none. The decision in P. Lakshmi Reddy v. L. Lakshmi Reddy adverted to the ordinary classical requirement -- that it should be nec vi, nec clam, nec precario -- that is the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. It was also observed therein that whatever may be the animus or intention of a person wanting to acquire title by adverse possession, his adverse possession cannot commence until he obtains actual possession with the required animus."*

49. A somewhat similar view was expressed in A.A. Gopalakrishnan v. Cochin Devaswom Board 2007 (7) SCC 482. While adverting to the need for protecting the properties of deities, temples and Devaswom Boards, the Court observed as under: (SCC p.486, para 10)

> *"10. The properties of deities, temples and Devaswom Boards, require to be protected and safeguarded by their trustees /archakas /shebaits /employees. Instances are many where persons entrusted with the duty of managing and safeguarding the properties of temples, deities and Devaswom Boards have usurped and misappropriated such properties by setting up false claims of ownership or tenancy, or adverse possession. This is possible only with the passive or active collusion of the authorities concerned. Such acts of "fences eating the crops" should be dealt with sternly. The Government, members or trustees of boards/trusts, and devotees should be vigilant to prevent any such usurpation or encroachment. It is also the duty of courts to protect and safeguard the properties of religious and charitable institutions from wrongful claims or misappropriation."*

25. As observed earlier, the petitioner is a rank-encroacher and after making large scale encroachments has turned the litigation into fruitful industry, by succeeding in protecting his illegal possession and reaping the usufruct out of the land, which as per his own admission comprises of apple orchard. This illegal possession cannot be permitted to continue. Therefore, it is the duty of the court to see that such wrongdoer is discouraged at every stage and even if he has succeeded in prolonging the litigation, then he must suffer the costs of all these years and also bear the expenses of such unwanted and otherwise avoidable litigation.

26. The very object and purpose of encroaching upon the forest land is only to make a quick buck by illegal means. Therefore, there is no reason why the encroacher who has cut down the forests to pave way for apple orchards should not be made to cough up the extra buck which he has earned over a long period of time.

27. People have long referred to the trees as *'Earth's lungs'* as they play a crucial role in our existence, consuming large quantities of carbon dioxide and producing oxygen which enables us to breathe. Apart from providing oxygen, they also cleanse the air and improve its quality, control climate, protect soil and support vast varieties of wildlife. It is universally accepted that deforestation is major contributing factor of climate change and that is why it is so important to protect trees and secure our natural landscapes for future generations.

28. The 'sustainable development theory' recognizes and avows '*precautionary principle'* and '*polluter pays principle*'. The State is having the rights flowing from their position as *parents patriae*. The forest conservation and eco-management are two inevitable obligations which are to be respected when the theory of '*sustainable development'* is put into operation. What is required is the insistence for '*gun and guard*' approach in day-to-day supervisory functions of the Government.

29. The 1992 Rio Declaration on environment and development has been adopted by India and principle 13 thereof provides:

> *"The States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also co-operate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction."*

30. In view of the above declaration, the State is under obligation to safeguard and compensate not only the victims of pollution but also liable to compensate for the adverse effects of an environmental damage. The '*Polluters Pays Principle'* as interpreted by the Hon'ble Supreme Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation.

31. Remediation of the damaged environment is part of the process of '*Sustainable development'* and as such polluter is liable to pay the cost not only to the individual sufferers but even to the society as a whole, towards the cost of reversing the damaged ecology.

32. The '*Polluter Pays Principle'* can appropriately be applied to the cases of encroachers because it is the injury caused by each of the occupier/encroacher to the pristine forest wealth and is, therefore, liable to compensate for the same.

33. It is more than settled that the forest land cannot be put to use for any non-forest purpose but for the facts already set out, it would reveal that there would be environmental degradation in using the forest for non-forest purposes by the occupier/encroacher affecting the environmental equilibrium. This position is apodictic and unassailable.

34. The activities of the occupiers/encroachers in the forest land for the last so many years have had its antagonistic effectiveness in the environmental premise. Therefore, all those responsible for environmental degradation cannot be exculpated.

35. It is therefore the duty of this court to neutralize any unjust enrichment and undeserved gain made by the litigants only on account of keeping the litigation alive.

36. In ***Indian Council for Enviro- Legal-Action*** *vs.* ***Union of India and others (2011) 8 SCC 161,*** it is noticed that conduct of the parties is to be taken into consideration and it was held as follows:-

> *"197. The other aspect which has been dealt with in great details is to neutralize any unjust enrichment and undeserved gain made by the litigants. While adjudicating, the courts must keep the following principles in view:*

1. It is the bounden duty and obligation of the court to neutralize any unjust enrichment and undeserved gain made by any party by invoking the jurisdiction of the court.

2. When a party applies and gets a stay or injunction from the court, it is always at the risk and responsibility of the party applying. An order of stay cannot be presumed to be conferment of additional right upon the litigating party.

3. Unscrupulous litigants be prevented from taking undue advantage by invoking jurisdiction of the Court.

4. A person in wrongful possession should not only be removed from that place as early as possible but be compelled to pay for wrongful use of that premises fine, penalty and costs. Any leniency would seriously affect the credibility of the judicial system.

5. No litigant can derive benefit from the mere pendency of a case in a court of law.

6. A party cannot be allowed to take any benefit of his own wrongs.

7. Litigation should not be permitted to turn into a fruitful industry so that the unscrupulous litigants are encouraged to invoke the jurisdiction of the court.

8. The institution of litigation cannot be permitted to confer any advantage on a party by delayed action of courts."

37. It is not only high time, but it is necessary to arrest and curb immediately such unlawful activity of encroachment over the government lands as the public order is adversely affected by such unlawful activity. It is probably on account of the higher returns from agricultural and horticultural pursuits from the encroached lands that unscrupulous persons have occupied without any semblance of right, vast extends of land belonging to the Government. Therefore, unless all such cases of illegal encroachments are dealt with sternly and swiftly, the evil cannot subside and social injustice will continue to be perpetrated with impunity.

38. It is evidently clear from the aforesaid discussion that this petition not only sans merit, but the intent behind filing this petition is not also bonafide as the only endeavour of the petitioner appears to be to prolong the litigation so as to enable him to reap the benefits from the large tract of government land illegally encroached by him and thereby convert this litigation into a fruitful industry.

39. Accordingly, this petition is dismissed. The pending applications, if any, are also disposed of.

40. However, before parting, it needs to be clarified that the eviction to be carried out by the respondents shall be at the cost of the petitioner and this decision shall also not come in the way of the respondents in claiming any other relief against the petitioner including mesne profits etc. before the competent authority or Court of law.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Shri Mohan Lal ...Petitioner.

Versus

Shri Vineet Chaudhary ...Respondent.

COPC No. 916 of 2015
Decided on: 06.09.2016

Contempt of Courts Act, 1971- Section 12- Directions were issued to the respondent – it was alleged that directions were not complied with – a reply along with the consideration order was

filed- held, that fresh direction cannot be passed in contempt proceedings and the Court is to see, whether judgment passed by it has been complied with or not- respondents have complied with the direction of the Court and it is for the petitioner to seek appropriate remedy- petition dismissed- however, it was ordered that in case of filing a fresh petition, delay and laches will not come in the way of the petitioner in seeking appropriate remedy. (Para-1 to 9)

For the petitioner: Mr. B.N. Sharma, Advocate.

For the respondent: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Mr. Romesh Verma & Mr. Varun Chandel, Additional Advocate Generals.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

This contempt petition is outcome of judgment, dated 5th November, 2014, made by the Writ Court in CWP No. 10625 of 2011, titled as Mohan Lal versus State of H.P. and others, whereby the writ petition filed by the petitioner came to be disposed of with a command to the respondents to take appropriate action in accordance with law laid down by this Court in the case titled as Gauri Dutt & ors. versus State of H.P., reported in Latest HLJ 2008 (HP) 366.

2. The respondent has filed the reply alongwith the consideration order indicating therein how the petitioner is not entitled to the reliefs sought.

3. It is apt to reproduce the relevant portion of the consideration order, dated 21st April, 2016, herein:

> *".....And whereas the fact of the matter is that and as per the mandays of the petitioner Sh. Mohan Lal it is revealed that he has worked on two different posts i.e. Beldar/Assitt Fitter is w.e.f. 1984 to 1987 (Class-IV) post and w.e.f. 1987 to 1994 with 240 days in each calendar year as Fitter i.e. Class-III post i.e. for 7 years. Thereafter w.e.f. 1995 till date, the petitioner has worked as Beldar i.e. Class-IV post on his regularization.*
>
> *And whereas, the service of the petitioner was regularized w.e.f. 1994 as Beldar retrospectively on 19/01/1995 in terms of judgment in Mool Raj Upadhaya's case and he joined as such without any protest. The petitioner served the department as regular Beldar for more than 17 years, thereafter, he filed the writ petition for the first time 2011 after a delay of about 17 years.*
>
> *And whereas the petitioner has served in the department in two capacity as under:-*
>
> *(a) Beldar/Assitt. Fitter (Class-IV) post on daily wages w.e.f. 1983 to 1987 (4 years)*
>
> *(b) Fitter (Class-III) post on daily wages w.e.f. 1987 to 1994*
>
> *(c) Beldar (Class-IV) regular basis 01/01/1994 till date (regularized 19/01/1995 retrospectively)*
>
> *The petitioner was regularized as Beldar w.e.f. 01/01/1994 on the completion of 10 years as per the judgment in Mool Raj Upadhaya's case.*
>
> *Therefore, in the peculiar facts of circumstances of this case, the petitioner has never served for 10 years as Fitter, therefore, in the interest of the petitioner, the competent authority has already regularized him Beldar on completion of 10 years in terms of judgment in Mool Raj as well as Gauri Dutt's judgment.*
>
> *Since, the petitioner has never completed 10 years of service on Class-III posts, therefore, the petitioner is not entitled for regularization on higher posts. Accordingly, the case of the petitioner is considered in the light of the judgment passed by the Hon'ble High Court in LPA No.115/15 accordingly."*

4. In view of the above, it is not known why the petitioner has not invoked the jurisdiction of this Court within time.

5. At this stage, learned counsel for the petitioner stated at the Bar that the juniors to the petitioner have been given the benefits, but the petitioner has been deprived of the same.

6. The question is – whether this Court can pass the directions in contempt proceedings, which have not been passed in the judgment made by the Writ Court?

7. It is beaten law of the land that the Court in the contempt proceedings cannot pass fresh directions, but has to ascertain whether the directions passed in the judgment made by the Writ Court have been complied with.

8. It appears that the respondents have complied with the Court directions. It is for the petitioner to seek appropriate remedy, if still aggrieved. But, in the given circumstances of the case, the petitioner will be caught by delay and laches.

9. Keeping in view the peculiar facts of the case, we deem it proper to record herein that the delay and laches shall not come in the way of the petitioner in seeking appropriate remedy.

10. The contempt petition is disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

M/s USV Ltd. ..... Petitioner.

Versus

Himachal Pradesh State Electricity Board Ltd and others ....Respondents

CWP No. 3843 of 2015.

Date of decision: 6th September, 2016.

Constitution of India, 1950- Article 226- Appellate Authority has to pass a speaking and well reasoned order- however order passed in this case is non-speaking and no order in the eyes of law- order set aside and the case remanded to the Appellate Authority to decide the same afresh within two months. (Para-3 to 8)

For the petitioner: Mr. Bipin C. Negi, Sr. Advocate with Mr. Arjun Lall, Advocate.

For the respondents: Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate, for respondents No. 1 to 3.
Mr.Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma, and Mr. Varun Chandel, Additional Advocate Generals, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Heard.

2. While going through the order made by the Appellate Authority dated 4.4.2015, Annexure PO, in appeal No. 124 of 2014, one comes to an inescapable conclusion that the Appellate Authority has not passed a speaking and well reasoned order. Virtually, the Appellant Authority has passed a non-speaking order, is not an order in the eyes of law.

3. At this stage, the learned counsel for the petitioner stated that the respondents, without jurisdiction, have pressed into service Section 126 of the Electricity Act, 2003.

4. We have gone through the appeal. The petitioner has taken all grounds in the memo of appeal. 5. In the given circumstances, with the consent of the learned counsel for the parties and without discussing the facts and merits of the case, we deem it proper to set aside the order made by the appellate Authority. Ordered accordingly.

6. The Appellate Authority is directed to hear the parties and return the findings on all grounds taken by the petitioner in the memo of the appeal. Parties are also at liberty to take additional grounds available to them, as per the law applicable, before the Appellate Authority.

7. The learned counsel for the petitioner stated that the petitioner has deposited 50% of the amount before the Appellate Authority and 20% before this Court, shall remain deposited till the Appellate Authority decides the appeal on merits.

8. Parties are directed to cause appearance before the Appellate Authority on **3rd October, 2016.** The appellate Authority to decide the appeal within two months w.e.f. 3rd October, 2016.

9. The writ petition is disposed of, as indicated hereinabove, alongwith pending applications, if any. Copy dasti.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Shri Soju Ram ...Petitioner.

Versus

Shri Vineet Chaudhary ...Respondent.

COPC No. 915 of 2015
Decided on: 06.09.2016

Contempt of Courts Act, 1971- Section 12- Directions were issued to the respondent – it was alleged that directions were not complied with – a reply along with the consideration order was filed- held, that fresh direction cannot be passed in contempt proceedings and the Court is to see, whether judgment passed by it has been complied with or not- respondents have complied with the direction of the Court and it is for the petitioner to seek appropriate remedy- petition dismissed- however, it was ordered that in case of filing a fresh petition, delay and laches will not come in the way of the petitioner in seeking appropriate remedy. (Para-1 to 9)

For the petitioner: Mr. B.N. Sharma, Advocate.

For the respondent: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Mr. Romesh Verma & Mr. Varun Chandel, Additional Advocate Generals.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

This contempt petition is outcome of judgment, dated 7th January, 2015, made by the Writ Court in CWP No. 10626 of 2011, titled as Soju Ram versus State of H.P. and others, whereby the writ petition filed by the petitioner came to be disposed of with a command to the respondents to follow the directions passed by this Court in CWP No. 10625 of 2011, titled as Mohan Lal versus State of H.P. and others.

2. The respondent has filed the reply alongwith the consideration order indicating therein how the petitioner is not entitled to the reliefs sought.

3. It is apt to reproduce the relevant portion of the consideration order, dated 21st April, 2016, herein:

> *".....And whereas the fact of the matter is that and as per the mandays of the petitioner Sh. Soju Ram it is revealed that he has worked on two different posts i.e. Beldar/Assitt Fitter with 240 days w.e.f. 1983 to 30/06/1987 (Class-IV) post and Fitter (Class-III) posts w.e.f. 07/1987 to 31/12/1994. Thereafter w.e.f. 1995 till date, the petitioner has worked as Helper i.e. Class-IV post on his regularization.*
>
> *And whereas, the service of the petitioner was regularized w.e.f. 1994 as Helper retrospectively on 19/01/1995 in terms of judgment in Mool Raj Upadhaya's case and he joined as such without any protest. The petitioner served the department as regular Helper for more than 17 years, thereafter, he filed the writ petition for the first time 2011 after a delay of about 17 years.*
>
> *And whereas the petitioner has served in the department in two capacity as under:-*
>
> *(a) Beldar/Assitt. Fitter (Class-IV) post on daily wages w.e.f. 1983 to 1987 (5 years)*
>
> *(b) Fitter (Class-III) post on daily wages w.e.f. 1987 to 1994*
>
> *(c) Helper (Class-IV) regular basis 01/01/1994 till date (regularized 19/01/1995 retrospectively).*
>
> *The petitioner was regularized as Helper w.e.f. 01/01/1994 on the completion of 10 years as per the judgement in Mool Raj Upadhaya's case.*
>
> *Therefore, in the peculiar facts of circumstances of this case, the petitioner has never served for 10 years as Fitter, therefore, in the interest of the petitioner, the competent authority has already regularized him Helper on completion of 10 years in terms of judgement in Mool Raj as well as Gauri Dutt's judgment.*
>
> *Since, the petitioner has never completed 10 years of service on Class-III posts, therefore, the petitioner is not entitled for regularization on higher posts. Accordingly, the case of the petitioner is considered in the light of the judgement passed by the Hon'ble High Court in LPA No.169/15 accordingly."*

4. In view of the above, it is not known why the petitioner has not invoked the jurisdiction of this Court within time.

5. At this stage, learned counsel for the petitioner stated at the Bar that the juniors to the petitioner have been given the benefits, but the petitioner has been deprived of the same.

6. The question is – whether this Court can pass the directions in contempt proceedings, which have not been passed in the judgment made by the Writ Court?

7. It is beaten law of the land that the Court in the contempt proceedings cannot pass fresh directions, but has to ascertain whether the directions passed in the judgment made by the Writ Court have been complied with.

8. It appears that the respondents have complied with the Court directions. It is for the petitioner to seek appropriate remedy, if still aggrieved. But, in the given circumstances of the case, the petitioner will be caught by delay and laches.

9. Keeping in view the peculiar facts of the case, we deem it proper to record herein that the delay and laches shall not come in the way of the petitioner in seeking appropriate remedy.

10. The contempt petition is disposed of accordingly.

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

State of Himachal Pradesh ..... Appellant.
Vs.
Suresh Kumar & others .....Respondents.

Cr. Appeal No. 154 of 2011
Judgment Reserved on : 03.08.2016
Date of decision: 6.9.2016

N.D.P.S. Act, 1985- Section 20- Car was signaled to stop- 1 kg. charas was recovered- accused were tried and acquitted by the trial Court- according to prosecution, a bag was found in the back side of rear seat of the car covered by a seat cover having zip- however, no such bag was found in the car- front glass of the car was also found to be broken when it was produced in the Court- there are material contradictions and discrepancies in the statements of witnesses making the prosecution version doubtful- trial Court had rightly acquitted the accused- appeal dismissed.

(Para-20 to 29)

For the Appellant: Mr. V.S. Chauhan, Addl. Advocate General with Mr. Vikram Thakur andMr. Puneet Rajta, Deputy Advocate Generals.
For the Respondents: Mr. H.S. Rana, Advocate.

The following judgment of the Court was delivered:

Per Vivek Singh Thakur,J

Present appeal has been filed by State of Himachal Pradesh against the acquittal of respondents by learned Special Judge, Fast Track Court, Solan, District Solan vide judgment dated 8.12.2010, in Case No.9FTC/7 of 2010 under Section 20 of Narcotic and Psychotropic Substances, Act in FIR No.194 of 2009 registered at Police Station, Sadar, Solan.

2. As per prosecution story, one Santro car bearing registration No.DL-3CG-5464, occupied by three persons, was found parked on National Highway-22 Kumarhatti bye pass road on 2.8.2009 at about 5.15 p.m., during patrolling for traffic duty checking, by police party headed by ASI Vishwash Kumar and comprising of police officials, PW-7 HC Jai Singh, PW-9 HHC Mast Ram, HC Rajwinder and constable Rakesh Kumar. On enquiry, occupants of the car informed the police that vehicle was not in order and driver of vehicle disclosed his name as Suresh Kumar, who was asked to show documents and get the vehicle checked. When dicky of the car was opened by Suresh Kumar, with key of the vehicle and PW-14 Vishwash Kumar had intended to check dicky of the car, all the three occupants ran away towards the forest. Driver Suresh Kumar and another person Ram Narayan were apprehended by PW-14 Vishwash Kumar with the help of police officials. HC Rajwinder Singh and Constable Rakesh Kumar were sent to chase third occupant whose name was disclosed by his companion as Rakesh Kumar son of Shri Ramnaj, resident of village Nandal, Tehsil Lakhan Majra, District Rohtak. PW-6 Dayanand, who was passing through the road on foot, was associated as independent witness in investigation. The car was searched and during search, on opening zip of rear seat cover, a box was found, which contained a green colour plastic envelope in which 14 envelops, containing separate tablets and round shape substance, were found. On smelling and burning, recovered substance was found to be charas. The said charas was weighed on an electronic weighing machine in presence of witnesses and it was found to be one kilogram.

3. One hand bag was also recovered from dicky of vehicle containing a pant, a shirt, a towel and currency notes amounting to Rs.27,560/-. The recovered charas was sealed with seal impression 'M'. NCB form (Ex.PW-13/B) was filled up in triplicate. After taking

impressions of the seal on a piece of cloth and NCB form, seal was handed over to PW-4 Dayanand. Driving Licence of Suresh Kumar, RC of vehicle, bag and vehicle alongwith key were also taken into possession. A rukka Ex.PW-14/A was sent to Police Station through PW-9 Mast Ram for registration of FIR and after registration of FIR investigation was completed and challan was put in Court.

4. Prosecution has examined as many as 17 witnesses. Out of these, four official witnesses, PW-7 Jai Singh, PW-9 Mast Ram, PW-14 ASI Vishwash Kumar Investigating Officer and an independent witness PW-6 Dayanand associated during the course of investigation, are spot witnesses.

5. Close scrutiny of statements of these witnesses reveals that truth is being withheld from the Court and events have not occurred on the spot in the manner, as have been portrayed in prosecution case. The evidence on record also renders presence of police officials and occupants of car on the spot doubtful.

6. As per PW-7 Jai Singh, PW-9 Mast Ram and PW-14 ASI Vishwas Kumar Investigating Officer, the car was found parked on National Highway-22 , occupied by three persons, who on asking handed over documents of vehicle and Driving Licence of driver to PW-14 and during search of vehicle when dicky was opened by driver of the car, all three occupants ran away from the spot but two of them were apprehended and out of five police officials, two police officials namely Rajwinder Singh and Rakesh Kumar were sent to chase the third occupant of vehicle, and at this point in time PW-6 Dayanand, who was claimed to have reached on the spot, was associated in police investigation, whereas PW-6 Dayanand has belied this story stating that when he was going towards his house on 2.8. 2009 at about 5.20 p.m., one vehicle was stopped by police and only one Thanedar and PW-7 HHC Jai Singh were present on the spot alongwith Suresh and Ram Lal and the key was taken from Suresh, dicky was opened and contraband was recovered.

7. As per prosecution story, the car was found parked but as per PW-6 Dayanand, the car was stopped by the police. PW-6 Dayanand was associated in the investigation when Rajwinder Singh and Rakesh Kumar had gone to chase the third occupant, meaning thereby that at the time of associating PW-6 Dayanand, three police officials PW-14 Vishwash Kumar, PW-7 Jai Singh and PW-9 Mast Ram were present on the spot whereas as per PW-6 Dayanand only two officials HHC PW-7 Jai Singh and PW-14 Vishwash were present. As per police, dicky was opened by driver Suresh Kumar but as per PW-6 key was taken from driver and then dicky was opened in his presence. The case of the police that all three occupants of the car had run away from the spot after opening of dicky, whereas as per PW-6 Dayanand, dicky was opened in his presence, but he is silent about fleeing of occupants of car.

8. PW-9 Mast Ram has stated that when the accused persons ran away, they shouted for help of villagers for apprehending them but none came there to help them and Dayanand did not help them in apprehending the accused, though he was present. Thereafter he has stated that Dayanand had come later on, further stating that he did not remember that at what distance Dyananand was at the time of apprehending the accused.

9. The police party has been stated to be on patrolling for traffic checking duty. PW-9 Mast Ram has stated that they had stopped at 2-3 places for checking between Dohari Diwal and Samlech and checked small and heavy vehicles on the way and vehicles were challaned also. Whereas PW-7 Jai Singh has stated that he did not remember whether they Stopped on the way to spot or not. It is unbelievable that the person of police party remembering minute details of the case except stopping on the way, particularly, when as stated by PW-9 Mast Ram that after stopping 2-3 places, vehicles were not only checked but challaned also.

10. As per FIR registered on the basis of rukka, occupants of car had run towards forest and PW-7 Jai Singh has also stated so, whereas PW-14 Vishwash Kumar has stated that all occupants had run towards Kumarhatti and one of them ran towards downhill and others in

straight way towards jungle. PW-9 Mast Ram has stated that accused persons ran on the road itself and third person had entered the bushes.

11. As per PW-7 Jai Singh, respondents had been apprehended at the distance of 5 to 7 meters and Rajwinder and Rakesh, who were sent for chasing the third occupant, had not come back on the spot but as per PW-9 Mast Ram, both of them had come back after half and hour to the spot empty handed. PW-6 Dayanand is completely silent about their return on the spot. PW-14 has stated that they had not come back on the spot.

12. PW-9 Mast Ram has stated about shouting for help of the villagers, whereas PW-7 and PW-14 have not stated so.

13. PW-7 has stated that police party had gone in a private vehicle but he did not remember the number and ownership of the vehicle. The vehicle was driven by ASI Vishwash Kumar. He has shown his inability to say that whether other officials had also driven this private vehicle up to the spot. The means of arrival and departure of police party from spot becomes relevant when their presence on the spot is doubtful because of glaring contradictions in statements of official witnesses.

14. The car No.DL-3CG-5464, taken into possession by police, was out of order. PW-6 Dayanand is silent about the means of removal of said car from spot. PW-7 Jai Singh has stated that they did not try to start the vehicle so as to check whether it was out of order or not. He has stated that he did not know as to how and with what mode, apprehended vehicle was brought to police station or police post. He has stated that he had come back alongwith PW-14 Vishwash Investigating Officer from the spot. PW-14 has stated that said car was brought to police station by toeing with a private vehicle passing through the spot but he did not remember details of that vehicle. PW-7 has stated that he did not remember who drove apprehended car to police station.

15. The prosecution has also relied upon the photographs taken on the spot. PW-14 Vishwash Kumar has stated that these photographs were taken by him through a passer by. In examination-in-chief, PW-9 has stated that the photographs were taken by PW-14 Vishwash Kumar Investigating Officer. In cross-examination he has stated that he did not remember that who was the photographer and from where he was called. Whereas PW-14 Investigating Officer has stated that three photographs were taken by him and one photograph was taken by a passer by on his request. He has stated that he had neither recorded statement of passer by nor made any reference qua this fact in case diary. He has admitted that photograph Ex.P3-A was not clear and that it was of a car. He has also stated that neither accused nor police officials are visible in Ex.P3-A. PW-6 has admitted that he is not figuring in any of the photographs.

16. PW-7 Jai Singh has admitted that Tapan Motors is situated at a distance of 250 to 300 meters approximately from alleged place of occurrence and there are 4-5 shops, including two Dhabas, on the opposite side of Tapan Motors on the National Highway and that 50 workers work in Tapan Motors, and shops and dhabas also remain busy. He has also admitted that National Highway, on which alleged recovery was made, is a busy road. He has stated that no one was associated or called from Vikas Mushroom, Samlech or from other locality including Tapan Motors or shops. PW-9 Mast Ram has also admitted that Tapan Motors is at a distance of 200-250 meters from the alleged place of occurrence and road in question is a busy road.

17. Despite availability of independent persons, no one has been associated or tried to be associated during investigation and a person who was known to police was shown as an independent witness in the alleged proceedings. Thus, the conduct of police party is shrouded by suspicion.

18. PW-6 Dayanand has admitted that he was known to PW-7 HHC Jai Singh through wife of Manager of Railway Station as she was also serving in the police department at Dharampur.

19. DW-6 has stated that he is running canteen at Barog Railway Station. In cross-examination, he has also admitted that one train also used to cross Barog Station at 5.45 p.m. This fact renders his presence on the spot doubtful. Alleged occurrence took place about 5.15 p.m. and it was claimed that this witness was going home at 5.20 p.m. The witness is running a canteen at the Railway Station situated on a track on which limited numbers of trains run. At such a time, which was important for his business, he was not supposed to have left his canteen, in normal circumstances.

20. There is another material loophole in the prosecution story. As per prosecution, there was a box in back side of rear seat of the car covered by a seat cover having zip. The car was produced before PW-3 MHC Sunil Kumar alongwith other case property, who has stated that the case property remained intact till it remains in his possession and it was not tampered with. PW-8 Yoginder Kumar Mechanic has admitted that he had appeared in number of cases as a witness of police. He submits that he issued mechanical report Ex.PW-8/A endorsing version of prosecution story that there was a box in the rear seat of the car. However, when car was produced in the Court and shown to this witness, he has admitted that there was no such box in the rear seat of the car as had been mentioned in his report Ex.PW8/A.

21. PW-14 Vishwas Kumar, on seeing the apprehended car which was produced in the Court, has also admitted that there was no seat cover on the rear seat of car and also there was no box/khana on the back of rear seat and front glass of car was broken.

22. PW-12 HHC Narender Parkash has stated that he was MHC Malkhana, Police Station, Sadar Solan since 2010. The malkhana Incharge Sunil Kumar had handed over charge of malkhana of Police Station, Sadar Solan on 5.8.2010 to him. When the car was produced in the Court, it was found that the front glass of the car was broken but in taking and handing over charge of malkhana, no such fact has been mentioned. He has also stated that the case property was not tampered with and also was not aware that who had broken the glasses of the car.

23. PW-3 Sunil Kumar was also called for re-examination and was examined on 29.10.2010. He has admitted that front glass of car was broken on that date but he has stated that till the date of his examination-in-chief on 27.7.2010, the glass of car was not broken.

24. The defence propounded by respondents is that they had come to Chandigarh to purchase a car but before that they had come for sight seeing in hilly area, but some mechanical defect had developed in their car. They were having cash with them in the car and in order to grab such cash, they were falsely involved in this case by the police and in this regard an inquiry also going on against the police officials. PW-7 Jai Singh has admitted that an inquiry, on the allegation that Rs.2.6 lacs was taken by the police from the apprehended car, was going on. PW-9 has not denied this fact, but has shown his ignorance about such a complaint and inquiry being conducted on such complaint.

25. There are material contradictions and discrepancies in the statements of material witnesses of prosecution which go to the root of the case rendering prosecution story to be doubtful.

26. It is evident from the aforesaid discussion that prosecution evidence cannot be treated as cogent, reliable, credible and sufficient to prove the guilt of the accused-respondent beyond reasonable doubt.

27. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. The accused has been acquitted by the trial Court.

28. From perusal and scrutiny of evidence, it cannot be said that the learned trial court has not appreciated the evidence correctly and completely and acquittal of the accused has resulted into travesty of justice or has caused mis-carriage of justice.

29. After considering arguments of respective counsel for the parties and minutely examining the testimonies of the witnesses and other documentary evidence placed on record, we are of the considered view that no case for interference is made out. Consequently, present appeal, devoid of any merit, is dismissed, as also pending applications, if any. Bail bonds, if any, furnished by the accused are discharged. Records of the Court below be sent back immediately.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Virender Kumar Walia and another ...Petitioners.
Versus
Indian Oil Corporation Limited ...Respondent.

CWP No. 4055 of 2015
Decided on: 06.09.2016

Constitution of India, 1950- Article 226- Respondent submitted that he is not in a position to pass requisite orders in terms of the policy/guidelines in view of the pendency of probate proceedings before the District Judge- keeping in view these facts, District Judge directed to dispose of the proceedings within three months. (Para-2 to 4)

For the petitioners: Ms. Jyotsna Rewal Dua, Senior Advocate, with Ms. Charu Bhatnagar, Advocate.
For the respondent: Mr. K.D. Sood, Senior Advocate, with Mr. Mukul Sood, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Learned counsel for the respondent stated at the Bar that in compliance to order, dated 5th October, 2015, the supply of petrol and petroleum products is being made to the petitioners, but the respondent is not in a position to pass requisite orders in terms of the policy/guidelines (Annexure P-6) and in view of the pendency of probate proceedings before the District Judge, Sirmaur at Nahan, titled as Virender Kumar versus General Public.

2. Learned counsel for the petitioners stated at the Bar that the probate proceedings are pending, but the same are not directly or indirectly connected with the lis in hand.

3. Learned counsel for the parties further stated at the Bar that the dispute involved in this writ petition is whether clause 1.6 or clause 2.4, as contained in policy/guidelines (Annexure P-6), is applicable in the given facts and circumstances of the case.

4. Keeping in view the submissions made hereinabove read with the fact that the probate proceedings are pending, we deem it proper to dispose of the writ petition by providing that the interim directions, dated 5th October, 2015, are made absolute with a command to the District Judge concerned to take the probate proceedings to its logical end within three months.

5. It is made clear that in case need arises, the petitioners are at liberty to seek appropriate remedy including the reliefs sought in this writ petition.

6. The writ petition is disposed of accordingly alongwith all pending applications.

Copy **dasti.**

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

Amar Nath ....Petitioner.
Versus
State of HP & others. ... Respondents.

Cr.R. No. 273 of 2015.
Reserved on 31.8.2016.
Decided on: 7.9.2016.

Code of Criminal Procedure, 1973- Section 169- Complaint for the commission of offences punishable under Sections 420, 409, 466 and 120-B read with Section 34 of I.P.C was filed, which was forwarded to the police for investigation- it was found after investigation that no offence was made out- hence, a cancellation report was filed- objections were filed to the cancellation report, which were rejected and cancellation report was accepted- aggrieved from the order, present petition has been filed- held, that Court had passed a reasoned and speaking order justifying the acceptance of cancellation report - objections were also got investigated from the police and cancellation report was accepted after being satisfied that the objections were not valid - complaint and revision petition were filed for harassing the elected members of Gram Panchayat or public servants- petition dismissed with cost of Rs. 10,000/-. (Para-10 and 11)

For the petitioner. : Mr. Sunny Dhatwalia, Advocate.
For respondents No.1&2. : Mr. Pankaj Negi & Ms. Parul Negi, Deputy Advocate Generals.
For respondents No.3 to 7. : M/s Ajay Kumar Dhiman and G.K. Nadda, Advocates.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of this petition, the petitioner has challenged the order passed by the Court of learned Judicial Magistrate 1st Class, Court No.II, Ghumarwin, Distt. Bilaspur in C.R. No. 6/1 of 2011 dated 6.7.2015 vide which order, learned Court below while rejecting the objections of the present petitioner has accepted the cancellation report qua FIR No. 95 of 2010 lodged at Police Station Talai, Tehsil Ghumarwin, Distt. Bilaspur.

2. Facts as can be deciphered from the order passed by the Court of learned JMIC Court No.II, Ghumarwin, Distt. Bilaspur are that on 21.9.2010 a complaint was filed in the Court of learned JMIC, Court No.1, Ghumarwin by Amar Nath (i.e. the present petitioner) and one Mehar Chand alleging offences punishable under Sections 120-B, 420, 409, 466 read with Section 34 IPC against Deena Nath, President, Om Prakash, Vice-President, Hukam Chand, Ward Member of Ward No.1, Rattan Lal Secretary, and Vijay Kumar, Junior Engineer-cum-Technical Assistant of Gram Panchayat, Naghiar on the ground that the complainants were permanent residents of Gram Panchayat, Naghiar and they are beneficiaries of different development schemes executed by said Panchayat by spending public funds.

3. As per the complainants, a resolution was passed by Gram Panchayat, Naghiar to construct a "BOWRI" in Ward No.1 for which an amount of Rs. 68,000/- was sanctioned by BDO, Jhandutta on 8.12.2008. The said amount was embezzled and misappropriated by the accused by preparing false details of expenditure having incurred on the construction of Bowri, whereas no such Bowri was constructed.

4. The complaint so filed before the learned JMIC, Court No.1, Ghumarwin was forwarded to SHO, Police Station, Talai for registration of FIR and investigation in accordance with law under Section 156(3) of Cr.P.C. On these basis FIR No. 95 of 2010 was registered and investigation was carried out.

5. Investigation revealed that there was a Nallah called 'Nalli' in village Banal, Gram Panchayat Naghiar, water of which was used by the residents of Harijan Colony of village Banal. The source of said Nallah of villages Banal and Chambeh was in district Hamirpur. The water of said source was only used by the residents of village Banal because habitation of village Chambeh was about 2 kilometer away from the said source. Gram Panchayat, Naghiar obtained No Objection Certificate from Gram Panchayat, Giaragran of district Hamirpur for construction of Bowri on said water source and later on an estimate of Rs. 80,000/- was sent to BDO, Jhandutta who sanctioned Rs. 68,000/- for the construction of said Bowri under MNREGA.

6. Thereafter, Bowri was constructed on the spot and as per tatima and report issued by the local patwari in the course of investigation, the said disputed Bowri was found to have been constructed 35 karam inside the boundary of village Chambeh, district Hamirpur which was abutting to village Banal, Gram Panchayat, Naghiar, Distt. Bilaspur. Investigation also revealed that residents of village Banal used the water of disputed Bowri for ages and there was no other water source in village Banal where 'step-well' could be constructed. Investigation also revealed that residents of village Banal were the direct beneficiaries of the said Bowri, whereas residents of village Chambeh District Hamirpur never used the water of the said Bowri. Accordingly, on these bases cancellation report was filed as no forgery, embezzlement or cheating was found to have been committed by the accused persons.

7. The objections preferred by the complainant against the cancellation report were also sent for further investigation to SHO, Police Station, Talai by the learned Court below vide order dated 19.9.2012 and further investigation also revealed that no offence was made out against the accused. Learned Court below on the basis of material produced before it accepted the cancellation report and rejected the objections which were filed to the same by the complainant's therein.

8. While accepting the cancellation report learned Trial Court held that a reasonable explanation had been furnished by the concerned parties that the source of water from which water flows into Nallah leading to village Banal falls in village Chambeh as such the Bowri was required to be constructed there. It was further held by the learned Trial Court that the complainant had not denied the fact that the water of disputed Bowri which was constructed by utilizing the funds sanctioned by BDO, Jhandutta was being used by the residents of Harijan Colony of village Banal and not by the residents of village Chambeh of district Hamirpur. Learned Trial Court also held that it was also not the allegation of the complainant that the entire amount sanctioned for the construction of the Bowri was not so spent by the accused persons. On these basis learned Trial Court held that it could not be said that the accused persons had committed criminal breach of trust or embezzlement/dishonest misappropriation of public funds. On these bases, learned Court below held that no offence was made out against the accused and on these bases it accepted the cancellation report.

9. I have heard learned counsel for the parties and have also perused the record produced on record by the petitioner.

10. It is evident from the order passed by the learned Court below that after being satisfied about the averments which were made in the cancellation report, the same was accepted by the learned Court below. The reasoning which has been given by the learned Court below for accepting cancellation report is self speaking and learned counsel for the petitioner could not point out as to what was the jurisdictional error committed by the learned Court below while accepting the cancellation report. Order so passed by the learned Court below is both reasoned order as well as speaking order. It has duly justified as to why it was accepting the cancellation report. It is a matter of record that objections filed by the complainant against the cancellation report were also got investigated by the learned Court below and after being satisfied from the investigation reports that there was no merit in the objections, the same were rejected whereas the cancellation report was accepted.

11. The present petitioner apparently seems to be a busy body. Filing of the initial complaint before the learned Court below which resulted in the registration of the FIR as well as filing of the present revision petition against the order of cancellation of FIR is nothing but an act of abuse of the process of law. The doors of justice are always open for one and all, however, the first and foremost requirement which a person who approaches the Court of Law has to satisfy is that the process of law should not be abused to harass the others. However, filing of the present revision petition, against the order passed by the learned Court below vide which cancellation report with regard to FIR No. 95 of 2010 has been accepted is nothing but abuse of the process of law. It is apparent that the complaint as well as present revision petition was filed with the ulterior motive of harassing the private respondents who were either elected members of Gram Panchayat or public servants.

Therefore, while upholding order dated 6.7.2015 passed by the Court of Learned JMIC, Court No.2, Ghumarwin, Distt. Bilaspur in C.R. No. 6/1 of 2011, the present revision petition is dismissed with costs quantified at Rs. 10,000/- which shall be disbursed proportionately to the private respondents. Petitioner shall deposit the cost within a period of one month from today in the Registry of this Court and for this limited purpose the case shall be listed on 20.10.2016.

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

Court on its own motion ....Petitioner

Versus

State of HP & others ...Respondents

CWPIL No. 17 of 2016
Date of decision: 07.09.2016.

Constitution of India, 1950- Article 226- Respondent had not taken action against the persons who are indulged in illegal mining activities- such activities are going on in the entire State, therefore, Secretary (Industries), Director (Industries), State Geologist, H.P. Pollution Control Board through its Member Secretary, all the Deputy Commissioners and the Superintendents of Police of all the Districts, be arrayed as party respondents- fresh status reports ordered to be filed. (Para-5 to 8)

Present: Mr. B.C. Negi & Mr. Sanjeev Bhushan, Senior Advocates, as Amicus Curiae, with Ms. Abhilasha Kaundal, Advocate.
Mr. Anup Rattan, Mr. Romesh Verma and Mr. Varun Chandel, Additional Advocate Generals, for the respondents-State.
Mr. Manish Sharma, Advocate, for the Pollution Control Board.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Learned Amicus Curiae seeks and is granted two weeks' time to file suggestions.

2. Mr. Anup Rattan, learned Additional Advocate General stated at the Bar that status reports stand filed in the Registry. The Registry to trace and place the same on record.

3. Learned Amicus Curiae to file response to the status reports by or before the next date of hearing.

4. It appears that the respondents have not taken action against the persons, who are indulged in illegal mining activities, as required under law.

5. In the given circumstances, we request the learned Amicus Curiae and the learned Advocate General to suggest a mechanism to curb such activities.

6. Learned Amicus Curiae stated at the Bar that such activities are going on in the entire State and prayed that Secretary (Industries), Director (Industries), State Geologist, H.P. Pollution Control Board through its Member Secretary, all the Deputy Commissioners and the Superintendents of Police of all the Districts, be arrayed as party respondents in this petition. Accordingly, Secretary (Industries), Director (Industries), State Geologist, H.P. Pollution Control Board through its Member Secretary, all the Deputy Commissioners and the Superintendents of Police of all the Districts are ordered to be arrayed as party respondents in the petition. Registry to make necessary entries in the cause title.

7. Issue notice to the newly added respondents. Mr. Anup Rattan, learned Additional Advocate General and Mr. Manish Sharma, Advocate, waive notice on behalf of the respective respondents.

8. Respondents to file fresh status reports by or before the next date of hearing.

9. Secretary (Home) to the Government of Himachal Pradesh and Director (Industries) to remain present before this Court on the next date of hearing.

List on **21.09.2016.**

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

DAV Sr. Sec. School, Mandi & another. ....Petitioners.

Versus

Regional Provident Fund Commissioner, Shimla. ... Respondent.

CWP No. 4110 of 2010.
Decided on: 7.9.2016.

Constitution of India, 1950- Article 226- Order was passed by Regional Provident Fund Commissioner for assessing the amount due from the petitioner- amount was deposited and the certificate of recovery of Rs. 6,75,522/- was withdrawn subsequently- a notice was issued as to why damages be not imposed upon the petitioner- reply was filed but damages of Rs. 5,05,808/- were imposed upon the petitioner- a writ petition was filed, which was disposed with a direction to file an appeal before Provident Fund Appellate Tribunal- an appeal was filed by the petitioner, which was dismissed- aggrieved from the dismissal, present writ petition has been filed- held, that the order passed by Employee Provident Fund Appellate Tribunal is non-speaking and unreasoned - contentions raised in the appeal were not noticed and were not disposed of- right to appeal is a statutory right and Appellate Authority was competent to take into consideration all the factual aspects of the matter as well as evidence produced by the parties - application of mind and recording of reasoned decision are the basic elements of natural justice- order passed by Appellate Tribunal set aside and the case remanded to Appellate Tribunal for decision afresh.

(Para-8 to 15)

Cases referred:

Kranti Associates Private Limited and another Vs. Masood Ahmed Khan and others, (2010) 9 Supreme Court Cases 496

Oryx Fisheries Private Limited Vs. Union of India and others, (2010) 13 Supreme Court Cases 427

Manohar S/o Manikrao Anchule Vs. State of Maharashtra and another, (2012) 13 Supreme Court Cases 14

For the petitioners. : Mr. Atul Jhingan, Advocate.
For the respondent. : Mr. Rajiv Jiwan, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral).*

By way of present petition, the petitioners have prayed for the following relief:-

> *"It is, therefore, prayed that this writ petition may very kindly be allowed with costs throughout and after summoning the records and perusing the same, the impugned notice dated 5.8.2003 (Annexure P-4) issued by the respondent and orders dated 31.3.1999 (Annexure P-20 AND 20.2.2004(Annexure A-6) along with order dated 21.5.2010 (Annexure A-9) passed by the Employees' Provident Fund Appellate Tribunal, New Delhi in ATA 67(17)2008 may be quashed and set aside. Any other or further orders as may be deemed just and proper in the peculiar facts and circumstances of the case may also be passed while allowing the writ petition, in the interest of justice."*

2. The case as has been put-forth by the petitioners is that an order was passed by Regional Provident Fund Commissioner, Shimla dated 31.3.1999 under Section 7-A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (in short "EPF Act"), in the matter of determination of amount due from the petitioners and as per this order, Regional Provident Fund Commissioner made assessment of the amounts which were due from the petitioners as contemplated under Section 7-A of the above mentioned EPF Act. The assessment so made by Regional Provident Fund Commissioner was honoured by the petitioners. This was followed by communication dated 22.7.2009 addressed by Regional Provident Fund Commissioner to the Recovery Officer in which it was mentioned that petitioners had deposited an amount of Rs. 6,75,522/- on account of EPF contributions due from September, 1984 to November, 1998 and recovery certificate sent to the petitioners was accordingly withdrawn and no further action was required on the same.

3. This was followed by issuance of notice dated 5.8.2003 by Regional Provident Fund Commissioner, Shimla to the petitioners on the subject "notice under Section 14-B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952) levy of damages", vide which the petitioners were called upon to show cause as to why damages at such rates as are deemed fit be not imposed and recovered from the petitioners on account of default which was made by the petitioners in paying employees provident fund contribution etc. from September, 1984 till February, 1999. Said notice was duly replied to by the petitioners. However, Regional Provident Fund Commissioner vide order dated 20.2.2004 imposed damages to the tune of Rs. 5,05,808/- upon the petitioners in exercise of powers conferred upon the said authority under Section 14-B of the EPF Act.

4. Feeling aggrieved by order dated 20.2.2004, the petitioners initially filed CWP No. 191 of 2004 which was disposed of by this Court vide order dated 11.12.2007 with the direction to the petitioners to file an appeal before the Provident Fund Appellate Tribunal.

5. The appeal so filed by the petitioners before the Employees Provident Appellate Tribunal was dismissed by the said Tribunal under signatures of Presiding Officer, EPFAT vide order dated 21.5.2010. The order so passed by the Appellate Tribunal is quoted here-in-below:-

> *"The appeal in this case is preferred against the order passed by the PF authority under Section 14-B of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 directing the appellant to deposit the damage and interest.*
>
> *2. The case of the appellant is that the appellant is a small school and it was covered under the Act under 7-A proceedings and directed to deposit Rs. 670522/-. The appellant deposited the same by transferring the amount from the bank. The*

EPF authorities started a proceedings under Section 14-B alleging that there was delay and imposed the penalty and interest which is illegal one.

3. The case of the respondent is that as there was a default, the penalty and interest is correctly imposed.

4. It is contended that the appellant had no intention to met the default and the default is not intentional. Reliance is placed in the case of M/s Shyam Glass Workers Vs. State of UP and Supper Processors Vs. Union of India.

5. The Ld. Advocate of the respondent supported the order.

6. The applicability of the Act and the default is not questioned. It is only contended that the delay is not intentional and the amount was immediately transferred from the bank. In the case of Ernakulam Cooperative Bank Vs. RPFC in 2000 Vol. 1 LLJ at page 1662 their Lordship held that "even through there is sufficient reason for the petitioner to met the belated payment that is not a ground for granting exemption". No other cause was assigned for the belated payment. No inconsistency is noticed in the order of the authority.

7. Hence order, the appeal is dismissed. Copy of order be sent to the parties. File be consigned to record room."

6. By way of present petition, both orders dated 20.2.2004 passed by Regional Provident Fund Commissioner as well as order dated 21.5.2010 passed by the Employees' Provident Fund Appellate Tribunal are under challenge.

7. I have heard learned counsel for the parties and have also gone through the relevant documents produced on record by the respective parties.

8. A perusal of the order passed by the Appellate Tribunal demonstrates that the appeal filed against the order of Regional Provident Fund Commissioner by the present petitioners has been disposed of by the Employees' Provident Fund Appellate Tribunal, Shimla by passing a totally non-speaking and unreasoned order. It is apparent from perusal of the Appellate order that neither the contentions raised in the appeal by the present petitioners have been taken note of in the Appellate order, nor there is any determination of the contentions so raised in the appeal by way of a speaking and reasoned adjudication.

9. It is well settled principle of law that justice should not only be done but it should also seem to have been done. Employees' Provident Fund Appellate Tribunal is a statutory Tribunal. The same has been constituted under the provisions of Employees' Provident Fund and Miscellaneous Provisions Act, 1952. Right of appeal is not a common law right but is a statutory right. Whenever an authority adjudicates upon an issue as the First Appellate Court, then that Appellate authority is bound to take into consideration all the factual aspects of the matter as well as evidence produced on record by the respective parties and after due appreciation of all the facts and evidence on record, as well as law, the Appellate authority has to adjudicate upon the appeal so filed before it.

10. During the course of arguments, Mr. Jhingan learned counsel appearing for the petitioners vehemently argued that the order passed by the Regional Provident Fund Commissioner against which appeal was filed was itself a non-speaking and unreasoned order.

11. A perusal of appeal filed before the Appellate Tribunal demonstrates that the order passed by Regional Provident Fund Commissioner was, inter alia, challenged on nine grounds. None of these grounds find mention in the impugned order passed by the Appellate Authority and as I have already mentioned above, no reasoning worth its name has been given by the Appellate Tribunal as to why the said Tribunal did not find merit in the appeal so filed by the present petitioners.

12. Hon'ble Supreme Court in **Kranti Associates Private Limited and another** Vs. **Masood Ahmed Khan and others**, (2010) 9 Supreme Court Cases 496 has held as under:-

"12. The necessity of giving reason by a body or authority in support of its decision came up for consideration before this Court in several cases. Initially this Court recognized a sort of demarcation between administrative orders and quasi- judicial orders but with the passage of time the distinction between the two got blurred and thinned out and virtually reached a vanishing point in the judgment of this Court in A.K. Kraipak and others vs. Union of India.

13. In Kesava Mills Co. Ltd. vs. Union of India this Court approvingly referred to the opinion of Lord Denning in R. v. Gaming Board for Great Britain, ex p Benaim and quoted him as saying "that heresy was scotched in Ridge v. Baldwin.

14. The expression `speaking order' was first coined by Lord Chancellor Earl Cairns in a rather strange context. The Lord Chancellor, while explaining the ambit of Writ of Certiorari, referred to orders with errors on the face of the record and pointed out that an order with errors on its face, is a speaking order. (See pp. 1878-97 Vol. 4 Appeal Cases 30 at 40 of the Report).

15. This Court always opined that the face of an order passed by a quasi-judicial authority or even an administrative authority affecting the rights of parties, must speak. It must not be like the `inscrutable face of a Sphinx' x x x x x x x x"

45. In English vs. Emery Reimbold and Strick Limited, it has been held that justice will not be done if it is not apparent to the parties why one has won and the other has lost. The House of Lords in Cullen vs. Chief Constable of the Royal Ulster Constabulary, Lord Bingham of Cornhill and Lord Steyn, on the requirement of reason held: (WLR p. 1769, para 7)

> *"7. .....First, they impose a discipline ... which may contribute to such decisions being considered with care. Secondly, reasons encourage transparency ... Thirdly, they assist the Courts in performing their supervisory function if judicial review proceedings are launched."*

46. The position in the United States has been indicated by this Court in S.N. Mukherjee in SCC p. 602, para 11 : AIR para 11 at page 1988 of the judgment. This Court held that in the United States the Courts have always insisted on the recording of reasons by administrative authorities in exercise of their powers. It was further held that such recording of reasons is required as "the Court cannot exercise their duty of review unless they are advised of the considerations underlying the action under review". In S.N. Mukherjee this Court relied on the decisions of the U.S. Court in Securities and Exchange Commission vs. Chenery Corporation and Dunlop v. Bachowski in support of its opinion discussed above.

47. Summarizing 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 life blood 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 vs. University of Oxford, wherein the Court referred to Article 6 of 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".

13. This legal position has been reiterated by the Hon'ble Supreme Court in **Oryx Fisheries Private Limited** Vs. **Union of India and others**, (2010) 13 Supreme Court Cases 427.

14. Hon'ble Supreme Court in **Manohar S/o Manikrao Anchule** Vs. **State of Maharashtra and another**, (2012) 13 Supreme Court Cases 14 has held as under:-

17. The State Information Commission is performing adjudicatory functions where two parties raise their respective issues to which the State Information Commission is expected to apply its mind and pass an order directing disclosure of the information asked for or declining the same. Either way, it affects the rights of the parties who have raised rival contentions before the Commission. If there were no rival contentions, the matter would rest at the level of the designated Public Information Officer or immediately thereafter. It comes to the State Information Commission only at the appellate stage when rights and contentions require adjudication. The adjudicatory process essentially has to be in consonance with the principles of natural justice, including the doctrine of audi alteram partem. Hearing the parties, application of mind and recording of reasoned decision are the basic elements of natural justice. It is not expected of the Commission to breach any of these principles, particularly when its orders are open to judicial review. Much less to Tribunals or such Commissions, the Courts have even made compliance to the principle of rule of natural justice obligatory in the class of administrative matters as well."

15. It is apparent from ratio laid down in the above mentioned cases that hearing the parties, application of mind and recording of reasoned decision are basic elements of natural justice and Tribunals or Commissions or Courts are not expected to breach any of these principles. Therefore, in my considered view, without entering into the merits of the issues, the order passed by the Appellate Tribunal dated 21.5.2010 is liable to be quashed and set aside on this count alone that the same is a non-speaking and unreasoned order.

The writ petition is accordingly allowed and order dated 21.5.2010 passed by the Learned Appellate Tribunal is hereby quashed and set aside and the case is remanded back to the Learned Appellate Tribunal with a direction that the appeal be decided by it afresh after affording an opportunity to all the parties of being heard by passing a speaking and reasoned order as expeditiously as possible, preferably before **30th November, 2016.**

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

Hardeep Kaur Gandhi and others .....Petitioners./JDs

Versus

Ajit Lajwanti Gujral Trust and others ....Respondents./DHs.

Civil Revision No. 7 of 2015.
Reserved On: 17/08/2016
Date of decision: 07.09.2016

Code of Civil Procedure, 1908- Order 21 Rule 35- Warrant of possession was ordered by the Executing Court- petition for execution of decree of possession was filed- J.D. preferred objection pleading that plaintiff had not taken permission under Section 118 of H.P. Tenancy and Land Reforms Act- objections were rejected- held, in revision that Executing Court cannot go behind the decree and it cannot decide that decree is void – however, Court is bound to look into the fact that mandatory permission was not taken from the State of Government- evidence is to be taken in support of the same – Executing Court had not taken the evidence and had rejected the objections- petition allowed and trial Court directed to frame the issue on objections preferred by J.D.

For the petitioners/JDs: Mr. Vinay Kuthiala, Sr. Advocate with Mr. Gaurav Sharma, Advocate.

For the respondents/DHs: Mr. Neeraj Gupta, Advocate for respondents No. 1 and 2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.

The decree qua the suit land rendered by the Court of first instance vis.a.vis the plaintiffs, christened as a 'Trust' attained affirmation upto the Hon'ble Apex Court. Sequelly, the relevant decree acquired conclusivity. The plaintiffs/decree holders had thereupon constituted an apposite execution petition before the learned Executing Court, for theirs in the manner unraveled therein begetting its apposite execution. Under its impugned rendition, the learned Executing Court ordered for issuance of warrants of possession qua the suit property, warrants of possession whereof hold concurrence with the apposite judgement and decree put before it for execution. The judgement debtors/defendants stand aggrieved by the rendition of the learned Executing Court rendered on 3.1.2015. Succinctly their concert to impugn its validity rests upon the learned Executing Court in a mechanical, perfunctory besides in a rough shod manner making short shrift of their paramount objections qua its executability, objections whereof stood harboured upon the factum of the plaintiffs/decree holders casting a suit qua the suit property as

'a Trust', alienation whereof qua it remaining un-preceded by an apposite permission under Section 118 of the H.P. Tenancy and Land Reforms Act standing accorded by the appropriate Government, holding a concomitant effect of the alienation by its author of the corpus of the trust property vis-à-vis the plaintiffs standing vitiated, also a contention is raised qua want of apposite permission preceding its creation renders the suit being amenable to founder also thereupon the decree under execution qua the suit property stood rendered unamenable for execution given the inevitable statutory consequence, befalling it, qua its standing forfeited qua the appropriate Government, consequence whereof spurred from the aforesaid purported infraction of the apposite mandatory statutory provisions. The aforesaid objections raised by the judgement debtors/defendants qua the executability of the decree stood rejected by the learned Executing Court on the anvil of the decree under execution acquiring conclusivity, it standing affirmed upto the Hon'ble Apex Court. The learned Executing Court hence did not deem it fit to render an adjudication upon the trite objections aforesaid whereupon solitarily the counsel for the defendants/JDs anvils his submission for rendering unexecutable the decree put for execution before the learned Executing Court. Uncontrovertedly the learned Executing Court stood not enjoined under law to go behind the decree, also its omitting to pronounce a verdict upon the objections reared therebefore by the judgement debtors qua the facet aforesaid would hold validation unless the objections aforesaid reared therebefore by the judgement debtors devolved upon the executability of the decree, it holding no legal efficacy also it being void nonest, vices whereof ingraining it standing grooved in no title qua the suit property inhering in the plaintiffs/DHs, hence rendering it unexecutable. The learned Executing Court was under a profound legal obligation to not go behind the decree rather it peremptorily stood warranted to execute it. Without making any observation qua the tenacity of the objections aforesaid addressed herebefore by the counsel for the JDs qua the relevant decree standing infused with a pervasive vice of voidness hence it being unexecutable lest it casts any influence upon the learned Executing Court, yet the paramount factum of the plaintiffs suing qua the suit property christened as 'a Trust' wherebefore its constitution also preceding its author alienating thereunder the corpus of the suit property qua it his prima facie not obtaining the mandatory statutory permission of the appropriate Government may prima facie render the alienation of the corpus of the suit property by its author to the trust, to suffer the mishap of the consequences embodied in Section 118 of the H.P.Tenancy and Land Reforms Act, tritely the one of the corpus of the trust property suffering the ill-fate of its warranting forfeiture to the appropriate Government. However, any determination qua the facet aforesaid is enjoined to be rendered by the learned Executing Court on its appraising the tenacity of evidence adduced therebefore by the JDs qua the relevant issue struck by it. The mere factum of the apposite decree acquiring conclusivity it standing affirmed upto the Hon'ble Apex Court would not per se render it executable nor would any decree be executable if rendered in derogation of mandatory statutory provisions whereupon a pervasive cloud qua its legality is cast also with the paramount prevalence of mandatory statutory provisions vis.a.vis the apposite decree put to execution whereupon a telling effect stands engendered qua the holding of an indefeasible title by the plaintiffs qua the suit property also infraction if any of the mandatory statutory provisions whereupon the relevant objections stand anchored loudly pronounce upon the capacity of the plaintiffs to sue qua the suit property, are all inhibition which prima facie cumulatively render it to be obviously unexecutable. In taking a view of the apposite decree holding prevalence vis-à-vis the relevant statute whereunder a relevant bar stands embodied against the constitution by its author of the relevant trust qua the suit property unless prior thereto the apposite mandatory statutory permission from the appropriate Government stands obtained, would obviously entail an ill-consequence, of Courts of law undoing the effect of binding statutory law whereas reverence thereto ought to upsurge in all judicial pronouncements. For meteing deference to the relevant statutory provisions also for ensuring prevalence of statutory laws vis.a.vis the apposite decree besides to countervail the ill-consequence of the plaintiffs putting to execution a decree prima facie infused with a pervasive vice of voidness, it standing rendered vis.a.vis the plaintiffs who for reasons aforesaid prima facie hold no title qua the suit property, it was incumbent upon the learned Executing Court to qua the trite objections aforesaid laid therebefore by the JDs qua the

executability of the decree, frame an issue thereupon whereafter also it was enjoined to ask for adduction of evidence thereon by the contesting parties. However, the learned Executing Court has omitted to do so. Its omission to rid of sanctity, the trite objections aforesaid raised therebefore by the JDs/defendants has sequelled gross miscarriage of justice significantly when they invasively strike at the validity of the title of the plaintiff qua the suit property also impinge upon its right to sue, as a corollary when hence they cast aspersion qua the executability of the decree. The legal principle as meted by it to not render a verdict upon the objections aforesaid raised therebefore by the defendants stood anvilled upon its standing interdicted to go behind the apt conclusive decree yet the meteing of deference by it to the aforesaid principle, has begotten a conflict with the overwhelming paramount legal principle of a prima facie void nonest decree, stains whereof stand concerted by the JDs/defendants in their apposite objections, to permeate it, being hence un-executable. However, the aforesaid facet of the apposite decree being hence unexecutable enjoined its standing rested by a judicial verdict standing pronounced thereupon by the learned Executing Court. However, the learned Executing Court in a short shrift manner dismissed the trite objections aforesaid qua the executability of the decree, whereas they pervasively purportedly afflicted the decree with a vice of voidness, also concomitantly prima facie rendered it unexecutable. As a corollary, its not rendering an apposite verdict thereupon nor preceding thereto its casting any apposite issue qua it, whereupon the contesting parties were permitted to adduce evidence, renders its impugned rendition to suffer from a vice of thorough non application of mind, hence warranting its being quashed and set-aside. Even though the learned counsel appearing for the decree holders has relied upon a judgement of this Court reported in M/s K. N.Trading Company Vs. Masonic Fraternity of Shimla *1995 (2) Sim. LC 342* to contend of the learned Executing Court when seized with an execution petition laid therebefore by the decree holder for putting to execution the relevant executable decree it holding no empowerment to strike any issue qua any objection raised therebefore qua the suit property not by a person not a party to the suit rather by one who claims title to the suit property through the judgement debtor. The aforesaid rendition relied upon by the learned counsel for the plaintiffs/DHs to protect the impugned rendition of the learned Executing Court holds no clout given therein of conclusive decrees for eviction standing rendered vis.a.vis a landlord qua the demised premises, decree whereof when stood put to execution before the learned Executing Court, any resistance qua its execution by the JD, on anvil of his inducting sub-lessee in the demised premises stood discountenanced, on the anvil of it being a specious attempt to baulk the execution of a conclusive decree also on anvil of the apposite objections of the JD if standing vindicated would beget the ill-fate of decrees of eviction of a tenant from the demised premises suffering unwarranted/untenable stiff resistance qua their execution by the JD on an untenable ground of his subletting the premises whereas with the sub-lessees standing inducted in the demised premises by the JD also are bound by the relevant decree qua the demised premises. The aforesaid discountenancing by this Court in the citation aforesaid of the objection of the Judgement debtor stood prodded for obviating multiplicity of litigation also to not frustrate a decree holder to under a conclusive decree of eviction rendered against the tenant obtain its possession. Obviously in the citation aforesaid, the trite objections of the decree thereunder being unexecutable, its standing ingrained with a vice of no title inhering in the decree holder vis.a.vis the demised premises stood neither raised nor was at contest, contrarily the distinctive facet hereat qua the executability of the decree, it for reasons aforestated being void besides nonest, imperatively warranted the learned Executing Court to render an adjudication thereupon. Also the learned counsel appearing for the DHs relied upon a judgement reported in Phenu Ram vs. Sanatan Dharam Sabha (Regd.) and others *Latest HLJ 2014 (HP) 221* wherein this Court in a decree for eviction of a tenant from the demised premises had dispelled the vigour of a contention raised before the learned Executing Court by a person other than the judgement debtor, contention whereof qua the executability of the decree stood anvilled on his holding its possession also stood anvilled on his claiming rights through the judgement debtors where-against a conclusive executable decree qua their eviction from the demised premises stood put to execution. A reason similar to the one accorded by this Court in the aforesaid judgement stood assigned by it to disrobe the efficacy of the contention raised by a person resisting the execution

of a decree of eviction rendered against the JDs whereunder he claimed possession of the demised premises, preeminently when it stood unflinchingly established qua his claiming the relevant possession under the relevant judgement debtor where-against whom a conclusive decree qua the relevant premises stood pronounced. Imminently also when the question of title of DHs to obtain the relevant decree stood not contested by the JDs nor also when its stood contested qua the decree being hence unexecutable, whereas contradistinctively hereat, the aforesaid relevant contest stands projected by the JDs in their relevant objections preferred before the learned Executing Court, necessarily it was incumbent upon the learned Executing Court to pronounce a verdict thereupon. Consequently, both the aforesaid citations are distinguishable, also are not applicable for facilitating this Court to render an apt adjudication upon the efficacy of the impugned rendition hereat. Accordingly the instant revision petition is allowed. The impugned order is quashed and set-aside. The learned trial Court is directed to frame an issue on the objections raised before it by the judgement debtors/defendants qua vice of nullity on facet aforesaid ingraining the decree put to execution before it vice whereof ingraining it stands anvilled upon statutory infraction of the mandate of Section 118 of the H.P.Tenancy and Land Reforms Act. It shall permit the parties to adduce their respective evidence thereupon. It is directed to decide the Execution Petition besides the objections in accordance with law within three months hereafter. However, it is made clear that any observation made hereinabove will have no bearing on the merits of the case.

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

M/s Mukut Hotels and Resorts (Pvt) Ltd., ...Plaintiff/non-applicant.

Versus

M/s Khuller Resorts & others ....Applicant/Defendant No. 4 .

OMP No. 58 of 2016 in Civil Suit No. 90 of 2010
Decided on : 7.9.2016

Code of Civil Procedure, 1908- Order 6 Rule 17- An application for amendment of written statement was filed for pleading that agreement to sell was not valid as no sanction was taken under Section 118 of H.P. Tenancy and Land Reforms Act and Section 17 of the Companies Act – suit has been filed for specific performance and question of competency of the executant will be relevant in such a suit- therefore, application allowed.

For the plaintiff/non-applicant: Mr. Karan Singh Kanwar, Advocate.

For the defendants/non-applicants: Mr. Rajneesh K Lall, Advocate for defendants/non-applicants No.1 and 3.
Mr. Ajay Kumar Dhiman, Advocate for defendant No. 4/applicant and for defendants No. 5,6,8 and 9.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (Oral)

Defendant No.4 through the instant application has sought leave of this Court to incorporate in the written-statement the averments embodied in paragraph 4 of the application. However preliminary objection No. 5 occurring therein qua whose incorporation in the written-statement, leave of this Court is sought pertains to the legal incompetence of the plaintiff to record an agreement to sell qua the suit property with the defendants, legal incompetence whereof arises from the plaintiff not obtaining the statutory sanction under Section 118 of H.P Tenancy and Land Reforms Act, 1972 from the appropriate Government prior to its recording with

the defendants an agreement to sell qua the suit property whereupon the agreement to sell stands concomitantly ingrained with a vice of voidness whereupon this Court stands precluded to pronounce an executable decree qua the suit property vis-à-vis the plaintiff. However the aforesaid preliminary objection may not warrant its incorporation in the apposite pleadings given the requisite permission for validating the execution of a registered deed of conveyance qua the suit property may yet being available to be applied for also the requisite permission thereon may stand accorded by the appropriate government during the pendency of the suit. Also the aforesaid objection hence would remain attended to by this Court at the time of its pronouncing, if any, a decree of specific performance qua the plaintiff. However, as a matter of extreme wariness besides caution significantly when the aforesaid facet may remain undivulged before this Court also when given its standing camouflaged from the sight of the Court, it may pronounce a decree for specific performance qua the suit property, dehors the requisite permission standing neither applied for nor granted to it by the government, pronouncement whereof would obviously stands stained with a vice of voidness also would be un-executable, objection whereof qua the aforesaid facets may ultimately stand agitated before the learned executing Court**.** For obviating all the aforesaid unnecessary cumbersome ordeals also for facilitating this Court, if ultimately stands satisfied qua the probative tenacity of the evidence as stands adduced by the plaintiff on the apposite issue to thereupon pronounce an executable decree for specific performance bereft of any stain of voidness, it is deemed fit and appropriate that objection No. 5 as prayed to be incorporated in the written-statement be permitted to be incorporated therein.

2. The preliminary objection No. 4, as is also sought with leave of this Court to be incorporated in the written-statement pertains to the invalidity of the agreement to sell recorded inter-se the plaintiff and the defendants, invalidity whereof stands embodied therein to arise from no sanction within the mandate of Section 17 of the Companies Act standing obtained by the defendants qua alienation of the suit property, infringement whereof would ultimately stain with a vice of nullity the decree if any pronounced by this Court, for obviation whereof its incorporation in the written-statement is imperative. The aforesaid objection obviously also when pervasively invades the trite factum qua the execute-ability of an apposite decree if ultimately stands pronounced by this Court on its drawing affirmative satisfaction qua the tenacity of the relevant apposite evidence as adduced qua the apposite issue, as a corollary with ready availability before this Court of objection No. 4 also significantly with its constituting a potent incremental force to the cause of justice also its facilitating this Court to omit to record an un-executable decree, its incorporation in the written-statement is just and essential, conspicuously for empowering this Court to determine all the relevant germane issues which engage the parties at lis hereat.

3. However even before this Court has granted leave to defendant No.4 to incorporate in the apposite written-statement preliminary objections No. 4 and 5 nonetheless before parting, it is deemed apt to allude to the vigorous contest raised by the counsel for the non-applicants qua leave standing granted to defendant No.4 for their incorporation in his written-statement**.** The prime contention raised by the learned counsel for the non-applicants is anchored upon the factum of the applicant not meteing nor begetting satiation of the ingredients of the proviso occurring in Order 6 Rule17 CPC, provisions whereof stand extracted hereinafter, wherewithin an embargo stands constituted against this Court ordering for their incorporation in the apposite pleadings of any party to the lis, significantly when the relevant party to the lis concerts after commencement of trial to beget an apposite amendment to its pleadings unless this Court is satisfied that despite exercise of due diligence by any contesting party claiming leave of this Court to incorporate the proposed amendment in its pleadings his/its previously yet standing deterred to unearth it besides obviously standing precluded to raise it earlier. He fortifies his submission by contending qua with the aforesaid facets being at the outset within the knowledge of the defendant his omitting to thereat incorporate them in his pleadings, invites the embargo constituted in the proviso of Order 6 Rule 17 CPC to stand attracted vis-à-vis the defendant. He also contends qua hence his omission to incorporate them in his pleading renders him disabled to contend qua his despite exercising due diligence he stood disabled to thereat unearth them also

concomitantly is disabled to contend qua hence his extantly unearthing them he is rendered capacitated to seek their incorporation in his apposite pleadings. Consequently he submits of his aforesaid awareness at the outset qua the aforesaid facets significantly when they within their gamut encompassed knowledge of law, ignorance whereof thereat cannot efficaciously stand canvassed by him qua hence his standing precluded to initially incorporate them in his written-statement, vigorously ousts his belated concert for seeking their incorporation in the written-statement conspicuously when the principle of estoppel contemplated in the Proviso Under Order 6 Rule 17 CPC works against the defendant concerned. Even though the aforesaid fetter embodied in the relevant proviso to Order 6 Rule 17 CPC may work in favour of the non-applicants also hence their contention may warrant acceptance nonetheless the proviso occurring in Order 6 Rule 17 CPC is not to stand meted a pedantic strict interpretation dehors the preceding provisions thereto. Even if the facts aforesaid for the reasons aforesaid were at the outset in the knowledge of the defendant concerned also cannot coax this Court to come to a conclusion of the defendant concerned despite his earlier awareness qua theirs existence his omission to at the outset incorporate them in his pleadings oust him at this belated stage to seek their incorporation in his pleadings. However, as stated hereinabove the rigor of the proviso would stand relaxed besides waned especially when its provisions do not warrant theirs standing read in isolation vis-à-vis the preceding provisions occurring therein significantly the one of given on an objective satisfaction drawn by this Court qua the proposed amendments being necessary for determining the relevant controversy, it, thereupon despite the mandate of the proviso working against the defendant concerned, holding jurisdiction to permit their incorporation in the apposite written-statement. Unless the aforesaid harmony stands begotten inter-se the relevant provision preceding the proviso vis-à-vis the proviso, a conflict would arise qua theirs respective workability, conflict whereof is to be obviated. Predominantly to the mind of this Court the apt provision preceding the proviso besides the nuance of the import of the provisions of Order 6 Rule 17 CPC which upsurges on a wholesome reading of its provisions in its entirety is when the relevant Court draws objective satisfaction qua the incorporation of the relevant pleadings in the relevant amendments being both just and essential for determining the relevant controversy engaging the parties at lis, it stands statutorily empowered to permit their incorporation in the relevant pleadings As a corollary when this Court draws an objective satisfaction within the ambit of the relevant provisions of Order 6 Rule 17 CPC preceding its proviso qua their incorporation therein being essential for determining the relevant controversy engaging the parties at lis, hence when the amendments aforesaid in the relevant pleadings of the contesting parties fall within the ambit of the nuance of the apt provisions of CPC besides are facilitative for this Court to ultimately pronounce an executable decree also when their incorporation would aid this Court to determine all the questions engaging the parties at lis preponderantly when their incorporation would aid this Court to ensure prevalence of statutory laws vis-à-vis the agreement to sell recorded inter-se the parties at lis. In sequel a decree for specific performance cannot either benumb or negate the effect of statutory laws nor also can the workability of the apposite statutory laws stand ousted qua the apposite renditions recorded by this Court. As an apt sequitur if the amendments as prayed to be incorporated in the written-statement are rejected while accepting the contention of the counsel for the non-applicants contention whereof stands anvilled upon the relevant proviso the ultimate causality would be the decree itself, as a corollary its rejection is warranted**.** Any decree, if, rendered in gross detraction besides transgression of the mandate of statutory provisions holding clout qua the suit property also if their incorporation in the relevant pleadings is not permitted, would hence stand infected with a vice of nullity. The aforesaid objections qua a vice of nullity hence ingraining the apposite renditions if remain un-attended by this Court also if their incorporation in the relevant pleadings is not permitted, it would stand prodded to render an un-executable decree whereupon the JD would stand empowered to rear them before the learned Executing Court whereupon it on its finding qua theirs holding tenacity may ultimately render a verdict annulling the decree, it standing ingrained with a deep pervasive vice of voidness, its overriding the mandate of statutory laws whereupon the entire exercise embarked upon by this Court would be rendered nugatory. Consequently for obviating all the aforesaid casualties it is not deemed fit and appropriate to solitarily hold reliance

upon the proviso appended to order 6 Rule 17 CPC rather it is deemed fit and appropriate to beget harmony vis-à-vis the relevant proviso and the statutory provisions occurring preceding thereto, primarily for ensuring the paramount factum of prevalence of statutory laws vis-à-vis the suit property also for ensuring the clout of statutory laws qua the controversy besetting the parties at lis besides to preclude the rendition of an assumingly nonest decree. In view of above, the petition is allowed.

> *"Amendment of pleadings-The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties: Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."*

CS No. 90 of 2010

Amended written-statement be filed within two weeks. Replication, if any, to the amended written-statement be filed within two weeks thereafter. List thereafter.

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

Padama @ Mathra Devi & ors. .....Appellants.

Versus

Bhagat Ram & ors. .....Respondents.

RSA No. 272 of 2008.
Reserved on: 6.09.2016.
Decided on: 7.09.2016.

Specific Relief Act, 1963- Section 5- Plaintiffs filed a civil suit for seeking possession of the land pleading that they are owners and defendants are in possession without any right to do so- they were asked to deliver the possession but in vain- suit was opposed by filing a reply pleading that their predecessor was recorded in possession and defendants are in possession since then – earlier a suit was filed by the plaintiffs, which was dismissed- defendants have become owners on the commencement of H.P. Tenancy and Land Reforms Act- suit was dismissed by the trial Court- an appeal was preferred, which was allowed – held, in second appeal that Assistant Collector 2nd Grade had held the predecessor-in-interest of the defendants to be a tenant - he was not competent to decide the dispute under Section 104(4) and his order is nullity- defendants have not proved that any rent was paid to the landlord- tenancy is a bilateral act and will not come into existence without payment of rent - copy of the plaint in earlier suit was not filed- order made in favour of predecessor-in-interest of the defendant is nullity and without jurisdiction- Appellate Court had rightly allowed the appeal- appeal dismissed. (Para-11 to 14)

For the appellant(s): Mr.Lalit K. Sharma, Advocate.
For the respondents: Mr. Suneet Goel, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Mandi, H.P., dated 11.3.2008, passed in Civil Appeal No. 40/2007.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the respondents-plaintiffs (hereinafter referred to as the plaintiffs), have instituted a suit for possession of land comprised in Khewat Khatauni No. 25/32, Kh. No. 497 measuring 1-13-15 bighas, situated in Mauja Anu, Illaqa Balh, Tehsil Sadar, Distt. Mandi, H.P. (hereinafter referred to as the suit land), as per jamabandi for the year 1995-96 with the averments that the appellants-defendants (hereinafter referred to as the defendants) are in possession of the suit land without any right, title or interest. They have completely refused to vacate the suit land from 7.12.2001. The defendants were again asked by the plaintiffs on 19.12.2001 to hand over the possession but they have refused to do so.

3. The suit was contested by the defendants. According to the defendants, the suit was barred under Order 2 Rule 2 CPC. The predecessor-in-interest of defendants, namely, Durgu son of Kanhu had filed an application before the Assistant Collector for correction of revenue entries against the plaintiffs. It was decided in favour of Durgu. Since then, Durgu was recorded in possession and after his death the defendants are in possession of the same. Later on, one of the plaintiffs, i.e. Shiv Shankar, filed an application for correction of the revenue entries in respect of the suit land which was dismissed vide order dated 4.5.1996. The plaintiffs filed a civil suit for declaration in respect of the suit land which was also dismissed on 17.9.2001 and the possession of Durgu, was confirmed as non-occupancy tenant. The defendants were in possession of the suit land and they have acquired proprietary rights by operation of H.P. Tenancy and Land Reforms Act.

4. Replication was filed and the learned Civil Judge (Jr. Divn.) Court No. II, Mandi and issues were framed on 20.4.2004. The suit was dismissed on 15.3.2007. The plaintiffs, feeling aggrieved, preferred an appeal before the learned District Judge, Mandi. He allowed the same on 11.3.2008. Hence, this regular second appeal.

5. The regular second appeal was admitted on 5.12.2008 on the following substantial questions of law:

> "1. Whether the judgment and decree of the 1st appellate Court is vitiated on account of mis-appreciation, misreading and non-appreciation of Ext. PB and Ext. DA, the judgment and decree dated 17.9.2001 passed in the earlier suit, Ext. D-1, the order dated 4.5.1994 of Assistant Collector and Ext. DW-1/A the order dated 31.8.1982?
>
> 2. Whether the learned first Appellate Court is justified to reverse the findings of the trial Court by concluding that Order 2 Rule 2 CPC is not attracted in the present case, although, vide Ext. DA it has come on record that the plaintiff in the earlier suit has abandoned the relief for possession of the suit land?
>
> 3. Whether Ext. DW-1/A can be read in favour of the defendants with respect to the factum of possession of the suit land since 1982, although, the said order has not been assailed by the plaintiffs in the instant suit and the findings thereof has already been concluded in the earlier suit vide Ext. PB and Ext. AD?"

6. Mr. Lalit K. Sharma, Advocate, appearing on behalf of the appellants, on the basis of the substantial questions of law framed, has vehemently argued that the first Appellate Court has mis-read judgment Ext. PB and Ext. DA decree dated 17.9.2001 passed in the earlier suit Ext. D-1, the order dated 4.5.1994 of Assistant Collector and Ext. DW-1/A and the order dated 31.8.1982. According to him, Order 2 Rule 2 CPC was attracted in the present case. Ext DW-1/A could not be read in favour of the defendants with respect to factum of possession of the suit land since 1982. On the other hand, Mr. Suneet Goel, Advocate has supported the judgment and decree passed by the first Appellate Court.

7. Since all the substantial questions of law are inter-connected, hence are taken up together for determination to avoid repetition of discussion of evidence.

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

9. PW-1 Shiv Shankar testified that the plaintiffs, including him were owners of the suit land. The plaintiffs have never inducted defendants as their tenants. He has denied that the plaintiffs have inducted Durgu as non-occupancy tenant. He admitted that Durgu moved an application before the Tehsildar for correction of revenue entries. However, he had no knowledge about the outcome of the same. He also admitted that earlier they had filed a suit qua the suit land.

10. DW-1 Bhup Chand testified that the suit land earlier was in possession of their predecessor and thereafter it came into possession of Durgu. His father had filed an application for correction of revenue entries in the Tehsil which was decided in his favour. Shiv Shankar had also moved an application for correction of the revenue entries. The plaintiffs filed a suit qua the suit land which was dismissed. The plaintiffs never remained in possession of the suit land and they were owners of the suit land. They were inducted as *Gair Marusi* in the year 1981-82, however, he could not tell about the negotiations qua the same.

11. The copy of judgment dated 17.9.2001 has been exhibited as Ext. PB and Ext. D-2. The present suit has been filed for possession under Section 5 of the Specific Reliefs Act, 1963 on the basis of title. There are specific averments that cause of action accrued to the plaintiffs on 7.12.2001 when the defendants refused to vacate the possession from the suit land and did not hand over the same despite requests made by the plaintiffs. The predecessor-in-interest of the defendants Durgu has filed an application for correction of the revenue entries before Assistant Collector IInd Grade. He placed on record order dated 31.8.1982 vide Ext. DW-1/A. The plaintiffs moved an application for correction of the revenue entries which was rejected by Assistant Collector IInd Grade on 4.5.1994. The predecessor-in-interest of defendants, namely, Durgu son of Kanhu was held to be tenant over the suit land by Assistant Collector IInd Grade, Sadar Mandi. The Assistant Collector IInd Grade was not competent to decide the dispute under Section 104(4) of the Act. The order Ext DW-1/A dated 31.8.1982 was nullity and without jurisdiction. It is also well settled that the order passed without inherent jurisdiction is nullity. The actions taken pursuant thereto are also nullity. The entries were made in favour of predecessor-in-interest of defendants, namely, Durgu son of Kanhu on the basis of Ext DW-1/A, order dated 31.8.1982. Durgu was recorded as *"Gair Maurusi Bila Lagan Babajah Ghas Katai"* as per jamabandi for the year 1995-96. The defendants have not proved that they have paid any rent to the landlord. The tenancy is a bilateral act. Moreover, Bhoop Chand, while appearing as DW-1 has admitted that no rent was ever paid to the plaintiffs. Thus, neither the predecessor-in-interest of defendants, namely, Durgu son of Kanhu nor the defendants could be termed as tenants over the suit land.

12. Now, as far as previous judgment dated 17.9.2001 is concerned, the relief of possession was also claimed in the previous suit. The defendants were required to prove that the second suit was in respect of the same cause of action as in the previous suit and the plaintiffs were entitled to more than one relief in the previous suit and without the leave of the Court omitted to sue for such relief for which second suit has been filed. Lastly, unless there was identity between the cause of action on which the earlier suit was filed and upon which the claim in the later suit was based, there would be no scope for application of the bar. The defendants have not proved as to what was the exact nature of the relief claimed in the previous suit as even the copy of the plaint has not been filed. The plaintiffs have never relinquished the claim of possession in the previous suit. Since order Ext DW-1/A dated 31.8.1982 is nullity and without jurisdiction, it could be challenged in collateral proceedings. Moreover, the order being null and void could be assailed before the Civil Court. The order passed by Assistant Collector IInd Grade Ext DW-1/A dated 31.8.1982 would not create any right, title or interest in favour of the defendants.

13. The first Appellate Court has correctly appreciated the judgment and decree dated 17.9.2001 as well as orders dated 4.5.1994 and 31.8.1982 rendered by Assistant Collector

IInd Grade, Sadar Mandi. The first Appellate Court has rightly come to the conclusion that Order 2 Rule 2 CPC was not attracted in the instant case. It is reiterated that one of the defendants DW-1 Bhoop Singh has also categorically admitted that no rent was ever paid to the plaintiffs. The substantial questions of law are answered accordingly.

14. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

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

Raj Kumar .....Appellant.
Vs.
Smt. Rumalo Devi and others .....Respondents.

RSA No.: 242 of 2007
Reserved on: 02.09.2016
Date of Decision: 07.09.2016

Specific Relief Act, 1963- Section 34 and 38- A civil suit was filed for declaration pleading that suit land was joint and ancestral of the plaintiff and defendant No. 1- plaintiff was coparcener, who had right by birth- defendant No. 1 had relinquished the suit property in favour of defendant No. 2 without legal necessity- suit was dismissed by the trial Court- an appeal was preferred, which was dismissed- it was contended in second appeal that DW-1 had admitted the nature of the suit land, however, he had only admitted that suit land was earlier owned by S and thereafter by N and S- no document was placed on record to show that suit land was ancestral and coparcenary qua the plaintiff- relinquishment deed was executed by defendant No. 1 in favour of defendant No. 2 as he and his family members were looking after the defendant No. 1 as well as his land- Courts had rightly held that plaintiff had failed to prove the ancestral and coparcenary nature of the property- appeal dismissed. (Para-14 to 22)

Cases referred:

Balraj Taneja Vs. Sunil Madan (1999)8 SCC 396

Standard Chartered Bank Vs. Andhra Bank Financial Services Limited and others (2016) 1 Supreme Court Cases 207

Vinod Kumar Vs. Gangadhar (2015) 1 Supreme Court Cases 391

Nicholas V. Menezes Vs. Joseph M. Menezes and others (2009) 4 Supreme Court Cases 791

For the appellant: Mr. G.D. Verma, Senior Advocate, with Mr. B.C. Verma, Advocate.
For the respondents: Mr. Dinesh Bhanot, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge :

This appeal has been filed by the appellant/plaintiff against judgment and decree passed by the Court of learned Additional District Judge, Solan, Camp at Nalagarh in Civil Appeal No. 15-NL/13 of 2006 dated 08.03.2007 vide which, learned appellate Court while dismissing the appeal filed by the present appellant has upheld the judgment and decree passed by the Court of learned Civil Judge (Senior Division), Nalagarh, District Solan in Civil Suit No. 99/1 of 2002, whereby the suit for declaration and permanent prohibitory injunction filed by the present appellant against the respondents/defendants was dismissed.

2. This appeal was admitted on 16.06.2007 on the following substantial questions of law:

"1. Whether the findings as recorded by both the Courts below are contrary to the provisions of law inter alia for the reason that the appellant has establish on record that the property in suit is ancestral and coparcenary property and therefore by virtue of his birth in the family, he acquired ownership and he cannot be divested thereof, merely on the basis of transaction of relinquishment by the defendant No. 1 in favour of defendant No. 2.

2. Whether alienation of the property in suit by way of relinquishment by defendant No. 1 in favour of the defendant No. 2 in the absence of legal necessity is illegal, unauthorized and void, therefore, plaintiff is entitled to relief as claimed?"

3. Brief facts necessary for the adjudication of the present case are that appellant/plaintiff (hereinafter referred to as 'the plaintiff') filed a suit for declaration and permanent prohibitory injunction originally against his father and uncle, namely Gandu Ram and Sita Ram, respectively mentioning therein that the suit land situated in Mauja Malpur, Pargana Dharampur, Tehsil Nalagarh, District Solan, as per jamabandi for the year 19976-98, was joint and ancestral of the plaintiff and defendant No. 1. According to the plaintiff, pedigree table of plaintiff and defendants was as under:

"Sehaj Ram
()
Nanak
()
Surat Ram
()

()	()	()	()	()	()	()	()	Gandu	Shiv
Sita	Husan	Lajja	Hakam	Agya	Jagdish"				
Ram	Ram	Ram	Chand	Ram	Singh	Ram	Chand		

4. According to the plaintiff, after the death of Sehaj Ram, his property including the suit land was succeeded by his son and after the death of Nanak, the properties were inherited by Surat Ram etc. vide mutation dated 06.09.1985. Thereafter, after the death of Surat Ram, his share in the properties including the suit land were inherited by his eight sons, which included the defendants also. They inherited the same vide mutation No. 723 dated 18.03.1992. As per the plaintiff, he was son of defendant No. 1 and grandson of Surat Ram. According to him, it was apparent from the pedigree table and mutation that the suit land was ancestral qua the plaintiff and no partition had taken place as per law and the plaintiff had right in the ancestral property by birth. According to the plaintiff, he was a coparcener to the suit land and was possessing the suit land under the law by virtue of his birth in the family and he could not have been dispossessed from the suit land. It was further the case of the plaintiff that defendant No. 1 was having good source of income from crops etc. and suit land being ancestral could not have been transferred or sold without any necessity, however, defendant No. 1 without any right to transfer the suit land, had relinquished the same by way of transfer in favour of defendant No. 2 without legal necessity just to deprive the plaintiff of his legal right vide relinquishment deed dated 12.12.2001. According to the plaintiff, said relinquishment deed was wrong, illegal, null and void.

5. It was on these basis that the suit was filed by the plaintiff praying for a decree of declaration to the effect that the suit land was ancestral and coparcenary property of the plaintiff and the plaintiff was coparcener and joint owner of the suit land and for decree of declaration to the effect that relinquishment deed executed by defendant No. 1 in favour of defendant No. 2 dated 12.12.2001 and registered with Sub Registrar, Nalagarh and subsequent mutation No. 872 dated 26.12.2001 attested on the basis of said relinquishment deed was wrong, illegal, null and void being without legal necessity and not binding on the right, titled and interest of the plaintiff. Plaintiff also prayed for a decree of permanent prohibitory injunction for restraining the

defendants from interfering in the suit land, ousting the plaintiff from the suit land or causing any kind of damage etc. on the suit land. Alternatively, plaintiff prayed that in case Court comes to the conclusion that defendant No. 2 was in possession on any portion of the suit land, then decree for joint possession be passed in favour of the plaintiff and in case defendant No. 2 was found in exclusive possession, then in that event, decree for possession be passed in favour of the plaintiff.

6. In the written statement filed to the suit by defendants No. 1 and 2, it was stated that plaintiff was residing at village Nanakpur in Tehsil Kalka in the State of Haryana and he had absolutely no concern with the actual possession of suit land and the same was with defendant No. 2. According to the defendants, plaintiff never resided in village Mallpur and the suit land was in possession of defendant No. 2, who was real younger brother of defendant No. 1. As per the defendants, plaintiff had filed the suit at the instance of persons inimical to the defendants just to harass them. According to defendants, defendant No. 1 was being looked after and served by the family of defendant No. 2 for the last 40 years, who had spent huge amount on the treatment of defendant No. 1 when he was seriously injured in the attack by Mohan Lal and others. It was further the case of defendants that as defendant No. 1 was physically unable to undertake hard jobs of agricultural nature, it was defendant No. 2 and his family who were carrying on all the hard and laborious jobs of cultivating the suit land. As per the defendants, defendant No. 1 had executed a deed of relinquishment in favour of defendant No. 2 as plaintiff had never cared to visit defendant No. 1 for the last 40 years and had left defendant No. 1 at the mercy of God and had fully deserted him to settle at Village Nanakpur, Tehsil Kalka (Haryana). Further, in the written statement, it was denied by the defendants that the suit property was property of Sehaj Ram, Nanak and Surat Ram, who inherited the same by way of succession only. As per the defendants, defendant No. 1 had no one to look after him but for defendant No. 2 and his family. Defendant No. 1 had executed relinquishment deed in favour of defendant No. 2 which was legal and valid and plaintiff had no right to question the validity of the same. It was also the case of the defendants that the suit land was in peaceful and uninterrupted possession of defendant No. 2, who was cultivating the same since 1982. It was denied by the defendants that the plaintiff was a coparcener and the suit land was a coparcenary property.

7. On the basis of pleadings of the parties, learned trial Court framed the following issues:

"1. Whether the suit land is ancestral property qua the plaintiff? OPP

2. Whether the plaintiff is having share as alleged in para-1 of the plaint? OPP

3. Whether the relinquishment deed executed by defendant No. 1 in favour of defendant No. 1552 dated 12.12.2001 is bad for want of competence? OPP

4. Whether there exists custom prohibitory alienation except for legal necessity? OPP

5. Whether the suit of the plaintiff is not maintainable? OPD

6. Whether the plaintiff has not come to the Court with clean hands? OPD

7. Relief."

8. On the basis of evidence adduced by the respective parties in support of their respective claims, the following findings were returned by learned trial Court on the issues so framed:

"Issue No. 1: No.
Issue No. 2: No.
Issue No. 3: No.
Issue No. 4: No.
Issue No. 5: No.
Issue No. 6: No.

Relief: *The suit of the plaintiff stands dismissed as per operative portion of the judgment.*

9. Accordingly, learned trial Court vide its judgment and decree dated 21.04.2006 dismissed the suit filed by the plaintiff. It was held by learned trial Court that the onus to prove whether the suit land was ancestral property qua plaintiff or not was on the plaintiff and he had not produced any documentary evidence worth its name from which it could be concluded that the said property was ancestral property. It was further held by learned trial Court that document Ex.-P8 merely reflected that after the death of proprietor of the property therein, who was joint owner alongwith others, the land was inherited by Surat Ram and Asa Ram, however, there was no documentary evidence on record to bring home the point that Nanak had inherited the suit property from Sehaj Ram and thereafter it passed through Surat Ram from whom the same was allegedly inherited by the father of the plaintiff and thereafter by the plaintiff. It was further held by learned trial Court that bare statement of plaintiff as PW-1 was not sufficient to establish the ancestral nature of the suit property. It was also held by learned trial Court that defendant Sita Ram had entered the witness box as DW-1 and he had stated that the suit property was exclusively owned by defendant No. 1, i.e. father of the plaintiff, who remained in possession of the suit property till it was relinquished in his favour vide relinquishment deed. Learned trial Court further held that this witness was subjected to cross-examination, but his testimony on material points could not be shattered. It was further held by learned trial Court that DW-2 Atma Ram had deposed about the execution of relinquishment deed by defendant No. 1 in favour of defendant No. 2 and DW-3 Pritam, who was Pradhan of Gram Panchayat, Manpur in the year 2000 also stated that defendant No. 2 was continuing in possession of the suit land and it was only defendant No. 1, who cultivated the same. It was further held by learned trial Court that as per Jamabandis on record Ex. P-2 and Ex. P-4, the suit land was owned and possessed by defendant No. 1 and subsequently defendant No. 2 was owner in possession of the suit land. It further held that relinquishment deed Ex. D-1 stood duly proved on record, which was executed voluntarily by defendant No. 1 in favour of defendant No. 2 in lieu of services rendered by defendant No. 1 to defendant No. 2. On these basis, learned trial Court dismissed the suit of the plaintiff.

10. Feeling aggrieved by judgment and decree passed by learned trial Court, plaintiff filed an appeal. Learned appellate Court vide its judgment and decree dated 08.03.2007 upheld the findings returned by learned trial Court and dismissed the appeal so filed by plaintiff. Learned appellate Court also held that there was no evidence on record from which it could be deciphered that the suit property was ancestral qua the father of the plaintiff and the suit property was coparcenary in the hands of his father. It was further held by learned appellate Court that plaintiff had placed on record copy of Bandobast Doam Ex. P-4 to establish that suit land at one point of time was owned by Nanak, father of Surat Ram from whom the land was inherited by Gandu Ram, however, a perusal of Ex. P-4 demonstrated that the land mentioned therein was different from the suit land. It was further held by learned appellate Court that even copy of jamabandi for the year 1992-93 Ex. P-5 in which Gandu Ram was recorded as co-sharer in the suit land alongwith others in no manner proved that the suit land was ancestral or coparcenary in his hands. In fact it was held by learned appellate Court that the appellant therein had relied upon copy of mutation Ex. P-7, vide which suit land was alleged to have been inherited by defendant No. 1 alongwith his brothers including defendant No. 2 from their father after his death. On the basis of said document, it was contended on behalf of the appellant before the first appellate Court that the said document proved that the suit land was inherited by defendant No. 1 alongwith his other brothers from their father. The findings which were returned on this aspect of the matter by learned appellate Court were that perusal of Ex. P-7 copy of mutation demonstrated that the description of land mentioned therein nowhere tallied with the suit land. It was further held by learned appellate Court that even if it was assumed that property came to Gandu Ram vide mutation Ex. P-7, even then it could not be said that the property was ancestral in nature because contents of Ex. P-7 revealed that the suit land had not devolved upon Gandu Ram and his brothers on the basis of succession, but Surat Ram had executed a Will in favour of

Gandu Ram and his brothers and as such mutation was attested in favour of Gandu Ram, defendant No. 1 and his brothers on the basis of Will. It was further held by learned appellate Court that though it was the plea of the plaintiff that he was in possession of the suit land and accordingly, he had prayed that the defendants be restrained from interfering or ousting him from the suit land, however, nothing was placed on record by the plaintiff except his self serving statement to substantiate that he was in fact in possession of the suit land. There was no entry in his name in the *pariwar* register in village Malpur and in *ration* card and voter list of the plaintiff village Nankpur was mentioned. It was also held by learned appellate Court that oral evidence adduced on behalf of the defendants corroborated the fact that plaintiff was not residing in village Malpur and he was not in possession of the suit land and defendant No. 2 was in fact in possession of the suit land and he also used to look after defendant No. 1 and the property of defendant No. 1 before the same was relinquished in favour of defendant No. 2. Accordingly, learned appellate Court also dismissed the appeal filed by the plaintiff.

11. Mr. G.D. Verma, learned Senior Counsel for the appellant argued that the findings returned by both the learned Courts below to the effect that the suit property was not coparcenary and ancestral were perverse as both the learned Courts below failed to appreciate that besides the factum of the appellant having produced material on record to demonstrate this fact, defendant No. 2 in his statement in the Court on oath had admitted that the suit property was ancestral. According to Mr. Verma, once the factum of the suit property being ancestral was admitted by defendant No. 2 as witness, there was no further need for the plaintiff to have had adduced any material to prove this fact. It was further argued by Mr. Verma that both learned Courts below failed to appreciate that the defendants had withheld the best evidence, i.e. defendant No. 1 who never entered the witness box. According to Mr. Verma, adverse inference in this regard ought to have been drawn against the defendants and this aspect of the matter had also been ignored by both the learned Courts below. Mr. Verma further argued that the findings returned by learned Courts below to the effect that the suit property was not ancestral was not borne out from the material on record and accordingly, he argued that judgments and decrees passed by both the learned Courts below were not sustainable either on facts or on law.

12. Mr. Dinesh Bhanot, learned counsel for the respondent, on the other hand submitted that whether the suit land was ancestral or not stood decided against the plaintiff and in favour of the defendants by both the learned Courts below. He further submitted that it was also concurrently held by both the learned Court below that the relinquishment deed executed in favour of defendant No. 2 by defendant No. 1 was a legal and valid document. Accordingly, he submitted that keeping in view the fact that plaintiff had not produced any material on record to establish that either the suit land was ancestral or that the relinquishment deed executed by defendant No. 1 in favour of defendant No. 2 was not a valid relinquishment deed, the concurrent findings arrived at in favour of the defendants by both learned Courts below called for no interference in this appeal. He thus submitted that there was no merit in the present appeal and the same be dismissed with costs.

13. I have heard the learned counsel for the parties and have also gone through the records of the case as well as the judgments passed by both the learned Courts below.

14. The factum of the suit land being ancestral and the plaintiff having coparcenary rights over the same has been disbelieved by both the learned Courts below. It has been concurrently held by both the learned Courts below that no evidence has been produced on record by the plaintiff to establish this fact that the suit land which was relinquished by the father of the plaintiff in favour of defendant No.2 was coparcenary and ancestral qua the plaintiff. It has also been held by both the learned Courts below that the documents on the basis of which it was emphasized on behalf of the plaintiff that the suit land was ancestral and coparcenary property did not further the case of the plaintiff as the particulars of the land mentioned in the said documents did not pertain to the suit land. In order to meet the said findings arrived at by both the learned Courts below, the contention of learned Senior Counsel for the appellant was that there was no need or requirement for the plaintiff to have had adduced any evidence in view

of the fact that defendant No. 2 as DW-1 had admitted that suit land was ancestral in nature. I am afraid that the said contention on behalf of appellant is not sustainable in law. It is a matter of record that no material has been adduced by the plaintiff from which it could be inferred that he suit land in fact was a coparcenary property and said land in fact was inherited by way of succession by his father from grandfather of the plaintiff. A perusal of the statement of DW-1 demonstrated that in his cross-examination, he has admitted that the suit property was earlier owned by Sehaj Ram and then by Nanak and thereafter by Surat Ram. However, it was neither put to the said witness nor he has said in his cross-examination that the property was inherited by Nanak and Surat Ram by way of natural succession. Therefore, it cannot be inferred that the suit property had devolved upon them by way of natural succession. Besides this, in my considered view, the testimony of DW-1 has to be read harmoniously with the stand which has been taken by the defendant in the written statement as well as in the examination-in-chief of the said witness, which is by way of an affidavit in which the case as was put forth by the plaintiff has been clearly disputed and denied. Further, the factum of the father of plaintiff, i.e. Gandu Ram not having entered the witness box is also not going to be fatal for the simple reason that there were two defendants in the case and the relinquishment deed in issue under challenge in the suit was in favour of defendant No. 2, who has submitted this fact as DW-1. Therefore, the contention of the appellant to the effect that best evidence was withheld by the defendants and adverse inference should have been drawn against them is also without merit. During the course of arguments, learned counsel for the appellant could not draw the attention of this Court towards any document on record from which it could be inferred that the suit property was in fact ancestral and coparcenary qua the plaintiff and it could not have been relinquished by his father in favour of defendant No. 2. As far as the factum of execution of relinquishment deed by defendant No. 1 in favour of defendant No. 2 is concerned, it is a matter of record. Plaintiff has not adduced any evidence from which it could be inferred that the said relinquishment deed was not executed voluntarily by defendant No. 1 in favour of defendant No. 2 in lieu of services rendered by defendant No. 2 and his family to defendant No. 1. On the other hand, evidence has been led by the defendants to demonstrate that the relinquishment deed was executed by defendant No. 1 in favour of defendant No. 2 because when on account of ill health, defendant No. 1 was not in a position to look after himself or his property, it was defendant No. 2 and his family who were looking after him as well as his land and after the execution of relinquishment deed, the property was in possession of defendant No. 2, who was cultivating the same. The argument of the appellant to the effect that both learned Courts below have failed to appreciate that there was no specific denial in the written statement of the fact that the suit land was ancestral and coparcenary qua the plaintiff is also without any merit. It is evident and apparent from the averments made in the written statement that it is mentioned in para-2 of the preliminary objections that the suit land was not ancestral or joint Hindu family property and thereafter it was denied in para-3 of the written statement on merit that the property in issue was inherited by way of succession.

15. Order VIII Rule 5 of the Code of Civil Procedure provides that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability. It is settled position of law that if an allegation made in the plaint is not specifically denied in the written statement, then it is treated as admitted. This was held by the Hon'ble Supreme Court in **Balraj Taneja** Vs. **Sunil Madan** (1999)8 SCC 396 and this legal position has again been reiterated by the Hon'ble Supreme Court in **Standard Chartered Bank** Vs. **Andhra Bank Financial Services Limited and others** (2016) 1 Supreme Court Cases 207.

16. In my considered view, in the present case, it can not be said that the allegations made in the plaint were not specifically denied in the written statement. The contention of the plaintiff that the suit land was ancestral has been denied in the written statement. The contention of the plaintiff that he was in possession of the suit land has been denied in the written statement. The contention of the plaintiff that the relinquishment deed was not valid in

the eyes of law has been denied in the written statement. Therefore, it is not a case where the allegations made in the plaint were not specifically denied in the written statement.

17. Learned Senior Counsel for the appellant during the course of arguments has relied upon the following judgments in support of its case:

"1. Vinod Kumar Vs. Gangadhar (2015) 1 Supreme Court Cases 391.

2. Nicholas V. Menezes Vs. Joseph M. Menezes and others (2009) 4 Supreme Court Cases 791.

18. It has been held by the Hon'ble Supreme Court in **Vinod Kumar** Vs. **Gangadhar** (2015) 1 Supreme Court Cases 391 that while sitting as Court of first appeal, it is the duty of High Court to deal with all issues and evidence led by parties before recording its findings.

19. It has been reiterated by the Hon'ble Supreme Court in **Nicholas V. Menezes** Vs. **Joseph M. Menezes and others** (2009) 4 Supreme Court Cases 791 that while deciding a first appeal, the High Court must consider the evidence on record, oral and documentary and also the questions of law raised before it and at the same time it is duty of the High Court to consider the reasons given by the trial Court against which the first appeal was filed and thereafter dispose of the same after passing a speaking and reasoned order in accordance with law.

20. In my considered view, the law declared by the Hon'ble Supreme Court in the above mentioned judgments is not applicable in the facts and circumstances of the present appeal.

21. Therefore, in view of the discussion held above, it cannot be said that the findings recorded by both learned Courts below are contrary to the provisions of law or the appellant had in fact established on record that the suit land was ancestral and coparcenary property and it could not have been divested by his father by way of a relinquishment deed. Similarly, keeping in view the fact that plaintiff has not been able to demonstrate that the suit land was coparcenary and ancestral property, it cannot be said that the alienation of the said property by way of a valid registered relinquishment deed in favour of defendant No. 2 by defendant No. 1 was not sustainable in law. Substantial questions of law are decided accordingly.

22. In view of the findings returned above, there is no merit in the present appeal and the same is dismissed with costs.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE P.S.RANA, J.

CWP No.1466 of 2010 along with CWP No.1467, 1468, 8074 of 2010, CWP Nos. 6425 and 6586 of 2011.
Reserved on :11.8.2016
Decided on: 7.9.2016

CWP No.1466 of 2010
Ranjeet Singh ...Petitioner
Vs
State of HP & ors ...Respondents
CWP No.1467 of 2010
Vivek Sharma ...Petitioner
Vs
State of HP & ors ...Respondents
CWP No.1468 of 2010
Gaurav Mahajan ...Petitioner
Vs
State of HP & ors ...Respondents

CWP No.8074 of 2010
Avinash Chander ...Petitioner
Vs
State of HP & ors ...Respondents
CWP No.6425 of 2011
Kanta Verma ...Petitioner
Vs
State of HP & ors ...Respondents
CWP No.6586 of 2011
Kanta Verma ...Petitioner
Vs
State of HP & ors ...Respondents

Constitution of India, 1950- Article 226- Petitioners are Judicial Officers- they were senior to the private respondents in the cadre of Civil Judge (Junior Division)- however, private respondent scored a march over them in the promotion/selection to the post of Civil Judge (Senior Division)- writ petition was filed for challenging the appointment- held, that Selection Committee has power to assess the individual entries in the ACR and it is not bound by the ACRs– Court cannot sit in an appeal over the assessment made by DPC- DPC has power to record its own assessment which may be at variance with reporting officer or reviewing office –no allegations of mala-fides, violation or infraction of the rules were made against the committee - court cannot arrogate to itself the power to judge the comparative merit of the candidates and will not sit in appeal over the decision of DPC- proceedings of DPC were approved by Full Court and decision of the Full Court should not be reviewed in exercise of Writ jurisdiction except in case of extra ordinary circumstances - petitioner did not have any legitimate expectation of being promoted as promotion is to be made on the basis of merit-cum-seniority and not on the basis of seniority-cum-merit- rules and regulations have been framed by the High Court in accordance with the judgment of the Supreme Court- petitioner had participated in the selection process and cannot challenge the same, when the result is not favourable- petition dismissed. (Para-13 to 65)

Cases referred:

Malik Mazhar Sultan and another Vs. Uttar Pradesh Public Service Commission & Others, 2008 (17) SCC 703
Malik Mazhar Sultan and another Vs. Uttar Pradesh Public Service Commission & Others, (2009) 17 SCC 583
Union Public Service Commission Vs. Hiranyalal Dev and others AIR 1988 SC 1069
Dalpat Abasaheb Solunke Vs. Dr.B.S. Mahajan etc, AIR 1990 SC 434
State of Madhya Pradesh Vs. Shrikant Chapekar, JT 1992 (5) SC 638
Nutan Arvind Vs. Union of India & ors (1996) 2 SCC 488
Ramanand Prasad Singh & another Vs. Union of India & others (1996) 4 SCC 64
UPSC Vs. K.Rajaiah (2005) 10 SCC 15
UPSC Vs. L.P. Tiwari (2006) 12 SCC 317
Union of India & Another Vs. S.K. Goel and others (2007) 14 SCC 641
M.V. Thimmaiah and Others Vs. Union Public Service Commission and another (2008) 2 SCC 119
Union of India & ors Vs. S.P. Nayyar, (2014) 14 SCC 370
Rajendra Singh Verma Vs. Lieutenant Governor (NCT of Delhi) and others (2011) 10 SCC 1.
Registrar General, Patna High Court Vs. Pandey Gajendra Prasad and others, AIR 2012 SC 2319
High Court of Judicature of Patna, through Registrar General Vs. Shyam Deo Singh & ors (2014) 4 SCC 773
Union of India & Another vs. Lieutenant Colonel P.K. Choudhary and others (2016) 4 SCC 236
All India Judges' Association & ors Vs. Union of India & ors, (2002) 4 SCC 247
Pradeep Kumar Rai And Others vs. Dinesh Kumar Pandey and others (2015) 11 SCC 493

Madras Institute of Development Studies and Another Vs. K. Sivasubramaniyan & ors, (2016) 1 SCC 454
N. Lokanadham Vs. Chairman, Telecom Commission & ors, (2008) 5 SCC 155

For the Petitioner(s):	Mr. Yudhbir Singh Thakur and Ms. Shree Chauhan, Advocates, for the petitioner(s) in CWP Nos. 1466, 1467 and 1468 of 2010. Mr. Sanjeev Bhushan, Senior Advocate with Ms. Abhilasha Kaundal, Advocate, for the petitioner in CWP No.8074 of 2010. Mr. Ashwani K. Sharma, Senior Advocate with Mr. Nishan Kumar, Advocate, for the petitioner in CWP No.6425 of 2011 and CWP No.6586 of 2011.
For the Respondents:	Mr. Shrawan Dogra, Advocate General with Mr.Kush Sharma, Dy AG and Mr.J.S.Guleria, Assistant Advocate General, for respondent No.1 in CWP Nos. 1466, 1467,1468 of 2010, 8074 of 2010, 6425 of 2011 and 6586 of 2011. Ms. Jyotsna Rewal Dua, Senior Advocate with Ms. Charu Bhatnagar, Advocate, for respondent No.2 in CWP No. 8074 of 2010. Mr. C.N. Singh, Advocate, for respondent No.2 in CWP Nos. 1466, 1467 and 1468 of 2010. Mr. Sunil Mohan Goel and Mr. Suneet Goel, Advocates, for respondent No.5 in CWP Nos. 1466, 1467,1468 of 2010. Mr. Suneet Goel, Advocate for respondent No.5 in CWP Nos.8074 of 2010 and 6425 of 2011 for respondent No.3 Mr. George, Advocate for respondent No.6 in CWP Nos. 1466, 1467, 1468 of 2010, 8074 of 2010, for respondent No. 6, for respondent No.4 in CWP No.6425 of 2011 and for respondent No.5 in CWP No.6586 of 2011. Mr. Vikas Rathore, Advocate for respondent No.2 in CWP Nos.6425 of 2011 and 6586 of 2011.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

Since common questions of law and facts arise for consideration in these petitions, therefore, they were taken up together for hearing and are being disposed of by a common judgment.

2. Petitioners and private respondents are all Judicial Officers. Petitioners were admittedly senior to the private respondents in the cadre of Civil Judge (Junior Division). However, private respondents scored a march over them in the promotion/selection to the post of Civil Judge (Senior Division) and aggrieved by such promotion have filed these writ petitions.

3. On 16.3.2004, the State in exercise of powers conferred by Articles 233, 234 and proviso to Article 309 of the Constitution of India read with Sub section (1) of Section 4 of the H.P. Judicial Officers (Pay and Conditions of Service), Act, 2003 in consultation with the High Court of Himachal Pradesh and the State Public Service Commission framed Rules, regulating the Recruitment and Conditions of Service of Members of different cadres of H.P. Judicial Service, nomenclatured as Himachal Pradesh Judicial Service Rules, 2004. Some of the salient provisions of these rules are as under.

> *".Rule 2(1) (g) 'Regulations' means the regulations framed by the High Court under these rules for the following purposes:-*

(i) To prescribe the syllabus for the competitive examination and suitability test to be conducted by the High Court for the cadre of District Judges/ Addl. District Judges and the cadre of Civil Judges (Jr. Division).

(ii) …….

(iii) ……

(iv) To prescribe the syllabus and to conduct the departmental examinations for the different cadres of the H.P. Judicial Service.

(v) To prescribe the syllabus for and to conduct the special examinations or tests, if any, required to be passed during the period of probation or officiation in relation to all the appointments to the service by direct recruitment or by promotion,

(vi) To evaluate the performance of the officers and assign marks for the competitive examination to be conducted by the High Court for the cadre of District Judges/Addl. District Judges,

(vii) …….

(viii) To evaluate the performance of the officers (appointed to the service) in relaxation to departmental and special examinations or tests.

(ix) …….

Rule 4 (2) The Civil Judges (Sr. Division) shall be promoted by the High Court of Himachal Pradesh on the basis of merit-cum-seniority. Civil Judges (Junior Division) shall be appointed by the Governor in consultation with the Himachal Pradesh Public Service Commission and High Court of Himachal Pradesh.

Rule – 5. Method of recruitment, qualification and age limit.- In respect of each category of posts specified in column (2) of the Table below, the method of recruitment and minimum qualification, age limit etc. shall be as specified in the corresponding entries in columns (3) and (4) thereof.

TABLE UNDER RULE – 5

Sr.No	*Cadre*	*Method of Recruitment*	*Qualification, age limit and experience etc.*
1.	*XXX*	*XXX*	*XXX*
2.	*Civil Judge (Sr. Division)*	*By promotion from the cadre of Civil Judge (Jr. Division) on the basis of merit-cum-seniority.*	*Minimum experience of 5 years in the cadre of Civil Judge (Junior Division).* ***Note**. – The appointing authority, may in situations where Civil Judges (Jr. Division) with the aforesaid requisite experience are not available, relax the aforesaid minimum experience criteria but in no case shall such relaxation go below three years.*

4. On 4.1.2007, the Hon'ble Supreme Court in the matter *of* ***Malik Mazhar Sultan and another*** Vs**. *Uttar Pradesh Public Service Commission & Others*, 2008 (17) SCC 703,** issued various directions for filling up of vacancies in the cadre of District Judge, Civil Judge (Sr. Division) and requested the High Courts to constitute a Committee of two or three Judges to

monitor and oversee that timely selection and appointment of Judicial Officers are made. Relevant observations read thus:

> *"9. We request the Chief Justice of each High Court to constitute a committee of two or three judges to monitor and oversee that timely selection and appointment of judicial officers is made. The Chief Justice is further requested to constitute a special cell in the name of 'Selection and Appointment' in the High Court or under such other name as the learned Chief Justice may be consider proper with an officer of the rank of Registrar for assisting the Committee and the Chief Justice for complying with the aforesaid time schedule."*

5. This led to issuance of notification dated 20.9.2008 i.e. Himachal Pradesh Judicial Services (First Amendment) Rules, 2008 which affected amendment of table under Rule 5, whereby the post of Civil Judge (Senior Division) was required to be filled up from the cadre of Civil Judge (Junior Division) on the basis of merit-cum-seniority from the Judicial Officers in the cadre of Civil Judges (Junior Division) having the minimum experience of 5 years in the said cadre.

6. On 28.3.2009, the High Court in exercise of the powers conferred under Rule 2 (1) (g) read with Rule 5 of the Himachal Pradesh Judicial Service Rules, 2004, framed regulations providing for merit-cum-suitability test for promotion to the cadre of Civil Judges (Senior Division) from amongst the Civil Judges (Junior Division) in terms of clause 1(a) of the table given below:

Short Title:	1.	The Regulations may be called "The Himachal Pradesh Judicial Service {Suitability Test for Promotion to the cadre of Civil Judges (Senior Division)} Regulations, 2009."
Commencement:	2	These Regulations shall come into force with immediate effect.
Suitability test:	3.	Suitability of an officer of the cadre of Civil Judge (Junior Division) for promotion to the cadre of Civil Judges (Senior Division) shall be determined on the basis of the examination of judgments, assessment of the A.C.Rs for the last 5 years, as under:
	(i)	Evaluation of 5 civil and 5 criminal judgments rendered by the eligible Judicial Officer during the last one year in any month to be specified by the Hon'ble Chief Justice. …50 marks.
		Provided that where the concerned Civil Judge (Junior Division) is working on a post in which he does not have to write judgments such as a deputation post in the High Court or in any other authority or Forum or Government etc. the expression "last one year" shall be construed as the last one year prior to his aforesaid posting meaning thereby "such a year" in which he was occupying a post/holding an appointment in which he had to write judgments.
	(ii)	Evaluation of ACRs for the last five years ……40 marks
	(iii)	Performance in the oral interview …10 marks
		Total …100 marks

Qualifying Marks. 4	The qualifying marks in the suitability test shall be 60%.
Zone of 5 Consideration.	The zone of consideration shall ordinarily be three times the available and anticipated vacancies.
Constitution of 6 Committees.	The Full Court shall constitute two committees, each consisting of at least two Judges, hereinafter referred to as "First Committee" and "Second Committee".
Functions and 7 factors to be considered by the Committees	1. The "First Committee" shall evaluate ACRs of the eligible Judicial Officers and conduct viva voce test. 2. While assessing the ACRs, the "First Committee" shall make evaluation on the basis of the entries in the various columns of the ACRs and the assessment will not be made only on the entry made against the last column (net result) so far as the ACRs are concerned, or the ultimate opinion of the District and Sessions Judge. The Committee shall also examine the performance in the oral interview. 3 (a) The "Second Committee" shall examine the judgments of the eligible Judicial Officers. (b) The judgments shall be evaluated having due regard to the following factors:- (i) Knowledge of law (ii) Collation and appreciation of facts (iii) Correctness of conclusions (iv) Language (v) Clarity and reasoning. (c) The final marks obtained shall be worked out by process of averaging, i.e. to say, by dividing the gross total marks allocable for all the judgments by the number of judgments examined.
Preparation of 8 merit- cum-suitability test.	From amongst such Judicial officers who have qualified the suitability test by obtaining the qualifying marks as prescribed in Regulation No. 4 the promotion shall be made on the basis of principle of seniority in the lower cadre."

7. On 14.7.2009 the Hon'ble Supreme Court in ***Malik Mazhar Sultan and another*** Vs. ***Uttar Pradesh Public Service Commission & Others, (2009) 17 SCC 583*** held that the officers should not be subjected to oral interview for the purpose of promotion to the post of Civil Judge (Sr. Division). It further directed that if any High Court/State Government had framed such rules pursuance to the directions of the Court dated 4.1.2007, such rule should also be considered as deleted.

8. This led to issuance of notification on 2.9.2009 whereby amendments in 'The Himachal Pradesh Judicial Service (Suitability Test for Promotion to the cadre of Civil Judges (Senior Division) from amongst the Civil Judges (Junior Division), Regulations 2004" to be called "The Himachal Pradesh Judicial Service (Suitability Test for Promotion to the cadre of Civil

Judges (Senior Division) from amongst the Civil Judges (Junior Division) (1st amendment) Regulations, 2009" were carried out thereby deleting the Clause relating to Performance in the 'oral interview'.

9. On 14.9.2009 vacancies of Civil Judge (Sr. Division) were invited and selection process initiated and thereafter result was declared.

10. However, the petitioners could not qualify and aggrieved by their non-promotion submitted representations, which were rejected by the High Court, constraining the petitioners to file these petitions on the following grounds:

"(i) Selection of respondents No.3 to 6 is bad in law, contrary to established norms and procedure.

(ii) Himachal Pradesh Judicial Services (Suitability Test for promotion to Civil Judges (Sr.Divn) Regulation 2009 ultra vires to the provision of Himachal Pradesh Judicial Service Rules, 2004.

(iii) Beyond the power of High Court to frame such rules.

(iv) The Himachal Pradesh Judicial Service Rules 2004 does not prescribe any suitability test for promotion to the post of Civil Judge (Sr.Divn) Regulation of 2004 as amended in 2009 suffers from the vires of excessive delegation of power and as such cannot be sustained.

(v) No criteria for the assessment of ACRs in the Regulations."

11. Based upon the aforesaid grounds, the petitioners have prayed for the following reliefs;

"1. That the selection of Respondents No.3 to 6 as Civil Judge (Senior Division) may be quashed and set aside.

2. That Himachal Pradesh Judicial Service (Suitability Test for Promotion to Civil Judges (Senior Division) Regulations 2009 may be declared to be ultra vires to the provisions of Himachal Pradesh Judicial Service Rules-2004 and may be quashed and set aide.

3. That the respondent No.2 may be directed to conduct the selection process for the post of Civil Judge (Senior Division) in accordance with the principle of merit-cum-seniority as contained in Himachal Pradesh Judicial Service Rules-2004.

4. That alternatively respondent no.2 may be directed to adopt valid and proper criteria for evaluation of ACRs and Judgments for promotion to the post of Civil Judge (Senior Division)

5. That the petitioner may be promoted to the post of Civil Judge (Senior Division) in accordance with the principles of merit-cum-seniority giving due considerations to the seniority."

12. The High Court in its reply has averred that the petitioners were considered for promotion along with other eligible candidates, however, they failed to secure the minimum marks as prescribed under the Regulations for merit-cum-suitability test under the regulations for promotion to the posts of Civil Judges (Sr. Division) and, as such were not promoted.

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

13. It is vehemently argued by the petitioners that the members of the Selection Committee could not have down graded ACRs, particularly when the same had been accepted by the Hon'ble Chief Justice as Accepting Authority and earlier to that these had already been submitted to the Reviewing Authority (Administrative Judge), who, too, is an Hon'ble Judge of this court.

14. We are not impressed by such submission as the selection committee is not guided merely by the overall grading that may be recorded in the ACR and in order to ensure justice, equity and fair play, is required to make its own assessment on the basis of in-depth examination of service records of eligible officers, deliberating on the quality of the officers on the basis of performance as reflected under various columns recorded by the Reporting/Review Officer/Accepting Authority in the ACRs for different years and then finally arrive at the classification to be assigned to each eligible officer in accordance with the provisions of promotions, regulations/rules.

15. It has come on record that the High Court in terms of Regulation 6 of the Regulations dated 28.3.2009, constituted two committees consisting of two Hon'ble Judges, referred therein as the First Committee and the Second Committee as provided under Regulation No.7. The First Committee evaluated the ACRs of all Judicial Officers by taking into consideration all the entries in various columns of the ACRs and the assessment thereafter was independently made not influenced by the entries made against last column 'Net Result' or the ultimately decision of the District & Sessions Judge. This was done as per provisions of Regulation 7.2.

16. Similarly, the Second Committee as per provisions of Regulation 7.3 (a), (b) & (c) had examined the judgments delivered by the Judicial Officers bearing in mind:

(i) Knowledge of law;

(ii) Collation and appreciation of facts

(iii) Correctness of allegations

(iv) Language

(v) Clarity and reasoning.

Assessment of merit of each and every eligible officer was independently made by the Committees and thereafter the selections were made.

17. As already observed earlier, the criteria for selection as also the composition and constitution of the Committees to evaluate the ACRs and the judgments of the Judicial Officers was pursuant to and in compliance of the directions of the Hon'ble Supreme Court in ***Malik Mazhar Sultan and another vs. Uttar Pradesh Public Service Commission & Ors. 2008 (17) SCC 703*** as clarified in ***Malik Mazhar Sultan and another vs. Uttar Pradesh Public Service Commission & Ors. 2009 (17) SCC 583.***

18. Notably, petitioners themselves have appended with their petitions copy of the guidelines framed by the government for effecting promotions on the basis of merit-cum-seniority wherein it is clearly provided that the DPC is to independently assess the Annual Confidential Reports of the candidates and grade them as 'average', 'good', 'very good' and 'outstanding'. It is further provided that while grading officers, as aforesaid, one should not mechanically follow the grading given by the Reporting Officer. The relevant portion of the instruction is extracted below and reads thus:

> *"While grading officers as "Outstanding", "Very Good" and "Good", one should not mechanically follow the grading given by the Reporting Officer. They should also take into account the nature of the job against which an individual is posted as well as its responsibilities……."*

19. A perusal of the aforesaid instructions leave no manner of doubt in our mind that the Selection Committees was not to be guided merely by the overall grading in the ACRs, but was required to make its own assessment on the basis of entries in the ACRs.

20. Petitioners would then seek indulgence of this court to interfere with the grading given by the Selection Committee, which to our mind, is not permissible in view of the consistent law on the subject, as discussed hereinafter.

21. In ***Union Public Service Commission Vs. Hiranyalal Dev and others AIR 1988 SC 1069,*** the Hon'ble Supreme Court held as under:

"5.....How to categorize in the light of the relevant records and what norms to apply in making the assessment are exclusively the functions of the Selection Committee. The jurisdiction to make the selection is vested in the Selection Committee....."

22. In the case *of* ***Dalpat Abasaheb Solunke Vs. Dr.B.S. Mahajan etc, AIR 1990 SC 434,*** the Hon'ble Supreme Court held as under:

"9.....It is needless to emphasise that it is not the function of the Court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of the Candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject....."

23. In the case of ***State of Madhya Pradesh Vs. Shrikant Chapekar, JT 1992 (5) SC 638,*** the Hon'ble Supreme Court held as under:

"4.We are of the view that the Tribunal fell into patent error in substituting itself for the DPC. The remarks in the annual confidential report are based on the assessment of the work and conduct of the official/officer concerned for a period of one year. The Tribunal was wholly unjustified in reaching the conclusion that the remarks were vague and of a general nature. In any case, the Tribunal 'outstepped its jurisdiction in reaching the conclusion that the adverse remarks were not sufficient to deny the respondent his promotion to the post of Deputy Director. It is not the function of the Tribunal to assess the service record of a Government servant and order his promotion on that basis. It is for the DPC to evaluate the same and make recommendations based on such evaluation. This Court has repeatedly held that in a case where the Court/Tribunal comes to the conclusion that a person was considered for promotion or the consideration was illegal, then the only direction which can be given is to reconsider his case in accordance with law. It is not within the competence of the Tribunal, in the fact of the present case, to have ordered deemed promotion of the respondent."

24. In ***Nutan Arvind Vs. Union of India & ors (1996) 2 SCC 488***, the Hon'ble Supreme Court has held that when a High level committee had considered the respective merits of the candidates, assessed the grading and considered their cases for promotion, the court cannot sit over the assessment made by the DPC as an appellate authority.

25. In the case of ***Ramanand Prasad Singh & another Vs. Union of India & others (1996) 4 SCC 64***, the Hon'ble Supreme Court held as under:

"14.....The Committee applies its mind to the service records and makes its own assessment of the service records of the candidates marking them as outstanding, very good. good and so on. The Selection Committee does not necessarily adopt the same grading which is given by the Reporting/Reviewing Officer in respect of each of the candidates. In fact the Selection Committee makes an overall relative assessment of the confidential report dossiers of the officers in the zone of consideration. It thus does not evaluate the confidential report dossier of an individual in isolation. It is after this comparative assessment that the best candidates are put in the Select List....."

26. The Hon'ble Supreme Court in the case of ***UPSC Vs. K.Rajaiah (2005) 10 SCC 15***, has held that the power to classify as 'outstanding', 'very good', 'good' and 'unfit' is vested with the Selection Committee. That is a function incidental to the selection process. The classification given by the State Government authorities in the ACRs is not binding on the Committee. No doubt, the Committee is by and large guided by the classification adopted by the State Government, but for good reasons, the Selection committee can evolve its own classification which may be variance with the gradation given in the ACRs.

27. Again, the Hon'ble Supreme Court in the case of ***UPSC Vs. L.P. Tiwari (2006) 12 SCC 317***, has held that it is now more or less well settled that the evaluation made by an expert committee should not be easily interfered with the courts which do not have the necessary expertise to undertake the exercise that is necessary for such purpose.

28. In the case of **Union of India & Another Vs. S.K. Goel and others (2007) 14 SCC 641,** it has been held by the Hon'ble Supreme Court as under:

> *"28.....In the absence of any violation, the impugned order of the High Court while undertaking a judicial review under Art. 226 of the Constitution of India, is wholly unjustified. Since the matter of seniority has been well settled and this Court in a plethora of cases has held that the seniority/promotion granted on the strength of DPC selection should not be unsettled after a lapse of time. Therefore, in the facts and circumstances of the present case, where there is no adverse remarks whatsoever against respondent No.1, the High Court ought not to have interfered with and passed the impugned direction. This apart, as per the instructions contained in para 6.21 of DOPT Order No. 22011/5/86/Estt. D dated 19.4.1981, as amended, the DPC is not required to be guided merely by the overall grading, if any, that may be recorded in the CRs but to make its own assessment on the basis of the entries in the CRs. The DPC enjoyed full discretion to devise its method and procedure for objective assessment of suitability and merit of the candidate being considered by it. Hence, the impugned order of the High Court, in our opinion, is liable to be set aside."*

29. The Hon'ble Supreme Court in the case of ***M.V. Thimmaiah and Others Vs. Union Public Service Commission and another (2008) 2 SCC 119,*** reaffirmed the aforesaid view holding that the view taken by the High Court was correct that it is always within the power of the Selection Committee to record its own assessment about the selection which may be at variance with that of the reporting officer or reviewing officer.

30. In the case of ***Union of India & ors Vs. S.P. Nayyar***, (***2014) 14 SCC 370,*** it has been held by the Hon'ble Supreme Court as under:

> *"11.It is settled that High Court under Article 226 of the Constitution of India cannot sit in appeal over the assessment made by the DPC. If the assessment made by the DPC is perverse or is not based on record or proper record has not been considered by the DPC, it is always open to the High Court under Article 226 of the Constitution to remit the matter back to the DPC for recommendation, but the High Court cannot assess the merit on its own, on perusal of the service record of one or the other employee.*
>
> *12. The selection to the post of Addl. DIG is based on merit-cum- suitability which is to be adjudged on the basis of ACRs of different candidates. The merit position can be adjudged by the Selection Committee on appreciation of their Character Roll. In absence of the Character roll of other candidates, who were also in the zone of promotion, it is not open to the High Court to assess the merit of one individual who moves before the High Court, to give a finding whether he comes within the zone of promotion or fit for promotion."*

31. In addition to the aforesaid, we also find that there are no allegations of malafides, violation or infraction of the rules and that being the case, this court cannot sit as an appellate authority to examine the recommendations of the Selection Committee like the court of appeal. The discretion to make recommendation has to be given to the Selection Committee alone and the courts rarely sit in appeal to examine the selection of the candidates nor is it the business of the court to examine each candidate and record its opinion. Moreover, it is settled that the function of the Selection Committee is neither judicial nor adjudicatory, it is purely administrative.

32. It is equally settled that this court cannot arrogate to itself the power to judge the comparative merit of the candidates and consider the fitness and suitability for promotion, it is the job of DPC. That apart, this court, while exercising its power of judicial review, will not sit in appeal over the assessment made by the DPC, unless the same is perverse or is not based on record or proper record has not been considered by the DPC and even in such cases, the court will only remit the matter back to the DPC for recommendation, but will not assess the merit of its own on perusal of the service record of one or the other employee. However, as observed earlier, in absence of bias or malafides, even this ground will not be available to the petitioners.

33. Moreover, the petitioners have failed to point out any rule or regulation requiring the Selection Committee to record reasons. In the absence of any such legal requirement, the selection made without recording reasons cannot be faltered with. Even otherwise, giving of reasons for decision is different from and in principle distinct from the requirement of procedure or fairness. The procedure or fairness is the main requirement in the administrative action. The 'fairness' or 'fair procedure' in the administrative action has to be observed and the Selection Committee cannot be an exception to this principle. It must take a decision reasonably without being guided by extraneous or irrelevant considerations. But there is nothing on record to suggest that the Selection Committee did anything contrary.

34. As already observed earlier, petitioners have not raised or levelled directly or indirectly or even tacitly any allegations or malafides against any of the members of the Selection Committee. In fact, none of the petitioners in any of these petitions have pleaded or raised the question that the DPC had not adopted same or similar criteria or assessing/ making the evaluation of the eligible Judicial Officers considering the ACRs/service records and judgments. It is also not in dispute that the criteria adopted by the DPC was uniformally applied in respect of all the eligible officers, who together were considered in one go by the same members of the DPC for their assessment/evaluation of the ACRs/service records and judgments and, therefore, in such circumstances, there will be no question or hardly any question of any arbitrariness.

35. At this stage, we may also notice that this court on 18.9.2015, after having heard the matter for some time, directed respondent No.2 (High Court) to place on record the reports of both the committees i.e. First Committee which evaluated the ACRs of all the Judicial Officers and the Second Committee which evaluated the judgments of the Judicial Officers in terms of provisions contained in Regulation 6, 7.2 and 7.3 of the Regulations.

36. In compliance to the aforesaid order, reports of the Committees were placed as Annexures R-2/A and R-2/B respectively. The final marks sheet were then placed and thereafter unanimously approved by the Hon'ble Full Court vide Annexure R-2/C.

37. In such circumstances, the further question that falls for our consideration is the scope of judicial review in matters which have been approved by the Hon'ble Full Court.

38. It cannot be disputed that the Full Court acts on the collective wisdom of all Judges and, therefore, the exercise undertaken by the Full Court is not ordinarily amenable to judicial review except under extra ordinary circumstances.

39. Here, it would be equally relevant to refer to the following observations of the Hon'ble Supreme Court in ***Syed T.A. Naqshbandi & ors*** Vs**. *State of Jammu & Kashmir & ors (2003) 9 SCC 592***, wherein it was inter alia held thus:

> *"10. ….Neither the High Court nor this Court, in exercise of its powers of judicial review, could or would at any rate substitute themselves in the place of the Committee/Full Court of the High Court concerned, to make an independent reassessment of the same, as if sitting on an appeal. On a careful consideration of the entire materials brought to our notice by learned counsel on either side, we are satisfied that the evaluation made by the Committee/Full Court forming their unanimous opinions is neither so arbitrary or capricious nor can be said to be so irrational as to shock the conscience of the Court to warrant or justify any*

interference. In cases of such assessment, evaluation and formulation of opinions a vast range of multiple factors play a vital and important role and no one factor should be allowed to be overblown out of proportion either to decry or deify an issue to be resolved or claims sought to be considered or asserted. Viewed thus, and considered in the background of the factual details and materials on record, there is absolutely no need or justification for this Court to interfere in the matter, with the impugned proceedings."

40. In this context, it shall be apt to re-produce the following observations of the Hon'ble Supreme Court in ***Rajendra Singh Verma Vs. Lieutenant Governor (NCT of Delhi) and others (2011) 10 SCC 1.***

"218. On a careful consideration of the entire material, it must be held that the evaluation made by the Committee/Full Court, forming their unanimous opinion, is neither so arbitrary nor capricious nor can be said to be so irrational, so as to shock the conscience of this Court to warrant or justify any interference. In cases of such assessment, evaluation and formulation of opinions, a vast range of multiple factors play a vital and important role and no one factor should be allowed to be blown out of proportion either to decry or deify an issue to be resolved or claims sought to be considered or asserted. In the very nature of things it would be difficult, nearing almost an impossibility to subject such exercise undertaken by the Full Court, to judicial review except in an extraordinary case when the Court is convinced that some monstrous thing which ought not to have taken place has really happened and not merely because there could be another possible view or someone has some grievance about the exercise undertaken by the Committee/Full Court.

219. Viewed thus, and considered in the background of the factual details and materials on record, there is absolutely no need or justification for this Court to interfere with the impugned proceedings. Therefore, the three appeals fail and are dismissed. Having regard to the facts of the case, there shall be no order as to costs."

41. In ***Registrar General, Patna High Court*** Vs. ***Pandey Gajendra Prasad and others, AIR 2012 SC 2319,*** the Hon'ble Supreme Court after reviewing the entire case law reiterated the principles laid down from time to time with regard to the scope of judicial review in such like cases and held that when the report of the Administrative Committee was put up before the Full Court which takes a conscious decision to award the punishment/dismissal from service, then it would be very difficult rather almost impossible to subject such an exercise to judicial review except in extra ordinary cases.

42. Yet again in recent decision in ***High Court of Judicature of Patna, through Registrar General*** Vs***. Shyam Deo Singh & ors (2014) 4 SCC 773,*** after referring to the earlier decision in Syed T.A. Naqshbandi Vs. State of Jammu & Kashmir, (2003) 9 SCC 592, the limited judicial review that is permissible was reiterated by the Hon'ble Supreme Court in para 8 of the judgment, which reads thus:-

"8.The importance of the issue can hardly be gainsaid. The evaluation of the service record of a judicial officer for the purpose of formation of an opinion as to his/her potential for continued useful service is required to be made by the High Court which obviously means the Full Court on the administrative side. In all High Courts such evaluation, in the first instance, is made by a committee of senior Judges. The decision of the Committee is placed before the Full Court to decide whether the recommendation of the Committee should be accepted or not. The ultimate decision is always preceded by an elaborate consideration of the matter by Hon'ble Judges of the High Court who are familiar with the qualities and attributes of the judicial officer under consideration. This is also what had happened in the present case. The very process by which the decision is eventually

arrived at, in our view, should permit a limited judicial review and it is only in a rare case where the decision taken is unsupported by any material or the same reflects a conclusion which, on the face of it, cannot be sustained that judicial review would be permissible."

43. What, therefore, emerges from the aforesaid exposition of law is that where the Full Court of the High Court recommends any particular action on the administrative side, the High Court on the judicial side has to exercise great caution and circumspection in setting aside that order because it is a complement of all the High Court Judges, who act on their collective wisdom. In the very nature of things it would be difficult, nearing almost an impossibility to subject such exercise undertaken by the Full Court, to judicial review except in an extraordinary case when the Court is convinced that some monstrous thing which ought not to have taken place has really happened and not merely because there could be another possible view or someone has some grievance about the exercise undertaken by the Committee/Full Court.

44. It is next contended by the petitioners that they being senior to the private respondents, had legitimate expectation of being promoted earlier to them.

45. The doctrine of legitimate expectation has been subject matter of a recent decision of the Hon'ble Supreme in ***Union of India & Another vs. Lieutenant Colonel P.K. Choudhary and others (2016) 4 SCC 236,*** wherein it was observed as under:

"51. Halsbury's Laws of England, Fourth Edition, Volume I(I) 151 explains the meaning of "Legitimate Expectation" in the following words:

> *"81. Legitimate expectations. — A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice.*
>
> *The existence of a legitimate expectation may have a number of different consequences; it may give locus standi to seek leave to apply for judicial review; it may mean that the authority ought not to act so as to defeat the expectation without some overriding reason of public policy to justify its doing so; or it may mean that, if the authority proposes to defeat a person's legitimate expectation, it must afford him an opportunity to make representations on the matter. The courts also distinguish, for example in licensing cases, between original applications, applications to renew and revocations; a party who has been granted a licence may have a legitimate expectation that it will be renewed unless there is some good reason not to do so, and may therefore be entitled to greater procedural protection than a mere applicant for a grant." (emphasis supplied)*

52. Legitimate expectation as a concept has engaged the attention of this Court in several earlier decisions to which we shall presently refer. But before we do so we need only to say that the concept arises out of what may be described as a reasonable expectation of being treated in a certain way by an administrative authority even though the person who has such an expectation has no right in law to receive the benefit expected by him. Any such expectation can arise from an "express promise" or a "consistent course of practice or procedure" which the person claiming the benefit may reasonably expect to continue. The question of redress which the person in whom the legitimate expectation arises can seek and the approach to be adopted while resolving a conflict between any such expectation, on the one hand, and a public policy in general public interest on the other, present distinct dimensions every time the plea of legitimate expectation is raised in a case.

53. In Food Corporation of India v. Kamdhenu Cattle Feed Industries (1993) 1 SCC 71 one of the earlier cases on the subject this Court considered the question whether Legitimate Expectation of a citizen can by itself create a distinct enforceable right. Rejecting the argument that a mere reasonable and legitimate expectation can give rise to a distinct and enforceable right, this Court observed: (SCC p. 76, para 8)

> *"8. The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."*
>
> *(emphasis supplied)*

54. To the same effect is the decision of this Court in Union of India v. Hindustan Development Corporation and Ors. (1993) 3 SCC 499, where this Court summed up the legal position as under: (SCC pp. 540 & 546-47, paras 28 & 33)

> *"28..... For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Again it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense."*
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> * * *
>
> *33. On examination of some of these important decisions it is generally agreed that legitimate expectation gives the applicant sufficient locus standi for judicial review and that the doctrine of legitimate expectation is to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightaway from the administrative authorities as no crystallised right as such is involved. The protection of such legitimate expectation does not require the fulfilment of the expectation where an overriding public interest requires otherwise. In other words where a person's legitimate expectation is not fulfilled by taking a particular decision then decision-maker should justify the denial*

of such expectation by showing some overriding public interest. Therefore, even if substantive protection of such expectation is contemplated that does not grant an absolute right to a particular person. It simply ensures the circumstances in which that expectation may be denied or restricted. A case of legitimate expectation would arise when a body by representation or by past practice aroused expectation which it would be within its powers to fulfil. The protection is limited to that extent and a judicial review can be within those limits. But as discussed above a person who bases his claim on the doctrine of legitimate expectation, in the first instance, must satisfy that there is a foundation and thus has locus standi to make such a claim. In considering the same several factors which give rise to such legitimate expectation must be present. The decision taken by the authority must be found to be arbitrary, unreasonable and not taken in public interest. If it is a question of policy, even by way of change of old policy, the courts cannot interfere with a decision. In a given case whether there are such facts and circumstances giving rise to a legitimate expectation, it would primarily be a question of fact. If these tests are satisfied and if the court is satisfied that a case of legitimate expectation is made out then the next question would be whether failure to give an opportunity of hearing before the decision affecting such legitimate expectation is taken, has resulted in failure of justice and whether on that ground the decision should be quashed. If that be so then what should be the relief is again a matter which depends on several factors." (emphasis supplied)

55. Reference may also be made to the decision of this Court in Punjab Communications Ltd. v. Union of India and Ors. (1999) 4 SCC 727, where this Court held that a change in policy can defeat a substantive legitimate expectation if it can be justified on "Wednesbury reasonableness." The choice of policy is for the decision-maker and not the Court. The legitimate substantive expectation merely permits the Court to find out if the change of policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which no reasonable person could have made. A claim based merely on legitimate expectation without anything more cannot ipso facto give a right. Similarly in Dr. Chanchal Goyal (Mrs.) v. State of Rajasthan (2003) 3 SCC 485, this Court declined relief on the plea of legitimate expectation on the ground that the appellants had not shown as to how any act was done by the authorities which created an impression that the conditions attached to the original appointment order were waived. No legitimate expectation could be, declared this Court, claimed on such unfounded impression especially when it was not clear as to who and what authority had created any such impression. The decisions of this Court in Ram Pravesh Singh v. State of Bihar (2006) 8 SCC 381, Sethi Auto Service Station and Anr. v. Delhi Development Authority and Ors. (2009) 1 SCC 180, Confederation of Ex- servicemen Association v. Union of India (2006) 8 SCC 399, and State of Bihar and Ors. v. Kalyanpur Cements Ltd. (2010) 3 SCC 274, reiterate the legal position stated in the decisions earlier mentioned.

56. In Monnet Ispat and Energy Ltd. v. Union of India and Ors. (2012) 11 SCC 1, this Court reviewed the case law on the subject and quoted with approval the following passage in Attorney General for New South Wales (1990) 64 Aust LJR 327: (Monnet Ispat case, SCC p. 107, para 184)

"184.....To strike down the exercise of administrative power solely on the ground of avoiding the disappointment of the legitimate expectations of an individual would be set the courts adrift on a featureless sea of pragmatism. Moreover, the notion of a legitimate expectation (falling short

of a legal right) is too nebulous to form a basis for invalidating the exercise of a power when its exercise otherwise accords law.' (Attorney General for New South Wales case.)

This Court went on to hold that if denial of legitimate expectation in a given case amounts to denial of a right that is guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or in violation of principles of natural justice the same can be questioned on the well-known grounds attracting Article 14 of the Constitution but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles."

46. It would be evident from the aforesaid exposition of law that the legitimate expectation is a concept that arises out of what may be described as a reasonable expectation of being treated in a certain way by an administrative authority even though the person who has such an expectation has no right in law to receive the benefit expected by him. Any such expectation can arise from an "express promise" or a "consistent course of practice or procedure" which the person claiming the benefit may reasonably expect to continue. For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However, earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences.

47. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Therefore, a person who basis his claim on the doctrine of legitimate expectation, in the first instance, must satisfy that there is a foundation and thus has locus standi to make such a claim. In considering the same, several factors which give rise to such legitimate expectation must be present. The decision taken by the authority must be found to be arbitrary, unreasonable and not taken in public interest. Whether there are such facts and circumstances giving rise to a legitimate expectation, would primarily be a question of fact.

48. Bearing in mind the aforesaid exposition of law, we find that this plea of legitimate expectation is not available to the petitioners for the simple reason that the principles of seniority-cum-merit and merit-cum-seniority are conceptually different. For the former, greater emphasis is laid on seniority, though it is not the determinative factor, while in the later, merit is the determinative factor and, therefore, the officer cannot claim promotion as a matter of right by virtue of his seniority alone.

49. Principles of merit-cum-seniority lay greater emphasis on merit and ability and seniority plays less significant role. Seniority is to be given only when merit and ability are approximately equal. Therefore, in such circumstances, there was no question of petitioners having any legitimate expectation for promotion as the ranking or position in the gradation list-seniority list in itself did not confer any right upon them to be promoted to selection post.

50. The petitioners would thereafter contend that the promotions in question were required to be made only on the evaluation of the ACRs and seniority as was subsequently clarified by the Hon'ble Supreme Court in ***Malik Mazhar Sultan & anr Vs. Uttar Pradesh Public Service Commission & ors (2009) 17 SCC 583.***

51. In support of this submission, the petitioners have placed heavy reliance upon the judgment rendered by the Hon'ble High Court of Jharkhand in W.P.(S) No.7098 of 2013 titled as ***Chandrika Ram & ors Vs. The State of Jharkhand & ors***, wherein after relying upon the Malik Mazhar Sultan case, it has been observed as under:

"54. The direction of the Hon''ble Supreme Court in Malik Mazhar Sultan's case was in the context of number of vacancies available under the 25% limited competitive examination. While considering the promotion of Civil Judges (Senior Division) as against 65% quota, the principle laid down by the Hon''ble Supreme

Court in Malik Mazhar Sultan and Anr. v. Uttar Pradesh Public Service Commission and Others, (2009) 17 SCC 530 - the principle being seniority has to be kept in view.

55. In Malik Mazhar Sultan and Anr. v. Uttar Pradesh Public Service Commission and Others, (2009) 17 SCC 583, the Hon"ble Supreme Court considered the case of 18 Civil Judges (Junior Division) in the cadre of Andhra Pradesh State Subordinate Judicial Service who were denied promotion to the cadre of Civil Judge (Senior Division). The main contention urged by the applicants thereon was that Civil Judges (Junior Division) who were in the zone of consideration for promotion to the cadre of Civil Judge (Senior Division) were subjected to oral interview and based on the marks secured in the interview, promotions were given and 33 candidates including the application were denied promotion.

56. In the case of Malik Mazhar Sultan and Anr. v. Uttar Pradesh Public Service Commission and Others, (2009) 17 SCC 583, the Hon"ble Supreme Court has gone to say to the extent that promotion should be based only on the evaluation of the ACRs and seniority, when grievance was raised by the members of Andhra Pradesh State Subordinate Judicial Service that they were subjected to oral interview and based on the marks secured in the interview, promotions were given whereby they were denied promotions. Their Lordships considering the earlier direction given in the case of Malik Mazhar Sultan, did observe as follows :-

> *"5. The High Court has filed a counter-affidavit/reply stating that they followed the guidelines issued by this Court in Malik Mazhar Sultan (3) v. U.P. Public Service Commission passed on 4-1- 2007. As regards the promotion to the cadre of Civil Judge (Senior Division), in the said judgment, this Court had given a direction under clause (4). It states that for the purpose of filling up vacancies in the cadre of Civil Judge (Senior Division) to be filled by promotion:*
>
> > *"... Viva voce criteria"*
>
> *and it was further stated:*
>
> *"(a) ACRs for last five years;*
>
> *(b) Evaluation of judgments furnished; and*
>
> *(c) Performance in the oral interview."*
>
> *6. Promotion from the cadre of Civil Judge (Junior Division) to Civil Judge (Senior Division) is the first promotion stage in the Subordinate Judicial Service. All these officers must have worked for more than five years in the State Subordinate Service and in some cases they would have got promotion as Civil Judge (Senior Division) only after completion of 10 years of service as Civil Judge (Junior Division). So their performance is evaluated on the basis of their past ACRs and also in case of necessity their judgments can also be perused for the purpose of evaluation. But we do not think that these officers should be subjected to oral interview for the purpose of promotion. Normally promotions are given based on the evaluation of the ACRs and seniority. We do not think that they shall be subjected to oral interview for the purpose of their promotion to Civil Judge (Senior Division). The direction of this Court in the said judgment that for the purpose of promotion, their performance based on oral interview shall also be considered as deleted. If any High Court/State Government has framed any rules pursuant to the direction of this Court, that rule also be treated as deleted."*

57. In the above case, the Hon"ble Supreme Court held that "normally promotions are given based on the evaluation of the ACRs and seniority". Though the said

observation was in the context of promotion of Civil Judge (Junior Division) to Civil Judge (Senior Division), we are of the view that the ratio of the above decision that normally promotions are given based on the evaluation of the ACRs and seniority has to be kept in view."

52. We are again not impressed by the aforesaid contention, as the judgment in ***Malik Mazhar Sultan and another vs. U.P. Public Service Commission and Ors. (2009) 17 SCC, 583*** cannot be read out of context. The only question before the Hon'ble Supreme Court in ***Malik Mazhar Sultan*** case (supra) was as to whether members of the Andhra Pradesh State Judicial Service could be subjected to oral interview and thereafter promoted only on the basis of marks secured in the interview. It was in this context that the Hon'ble Supreme Court held that promotion should be based only on the evaluation of the ACRs and seniority, but in no manner was the judgment rendered earlier in ***Malik Mazhar Sultan & anr Vs. U.P. Public Service Commission & ors (2008) (17) SCC 703,*** whittled down or over ruled or even clarified or held that the promotions to the post of Civil Judge (Sr. Division) was not to be made on the basis of ACRs of last five years and upon evaluation of the judgments rendered by the Judicial Officers. The relevant observation from the judgment reads thus:

"C. For filing up of vacancies in the cadre of Civil Judge (Senior Division to be filled by promotion

"4. Viva voce 1st to 16th August

(deleted)

Criteria

(a) ACR for last five years

(b) Evaluation of judgments furnished; and

(c) Performance in the oral interview."

(deleted)

53. The petitioners would then vehemently argue that they could not be subjected to the passing of suitability test which otherwise was not provided for by the Hon'ble Supreme Court.

54. To say the least, the petitioners appear to be labouring under a misconception that they were subjected to some sort of a test. In view of the clarification issued by the Hon'ble Supreme Court in ***Malik Mazhar Sultan & anr Vs. Uttar Pradesh Public Service Commission & ors (2009) 17 SCC 583,*** the requirement/condition of oral interview was specifically deleted by the High Court vide notification dated 2.9.2009 (supra) and thereafter the selection carried out on the basis of the two remaining criterias i.e. ACRs for the last five years and evaluation of judgments furnished.

55. As a last ditch effort, petitioners would then contend that the Regulations framed by this Court suffer from vice of excessive delegation of power and are un-canalized and thereby confer an unguided discretion upon the authorities. It is further argued that once no suitability test for carrying out promotions to the post of Civil Judge (Sr. Division) was provided for by the Hon'ble Supreme Court in decision rendered in ***All India Judges' Association & ors*** Vs***. Union of India & ors, (2002) 4 SCC 247.*** No such procedure could have been prescribed by the High Court.

56. Even these contentions are equally without merit because as observed earlier the Rules and Regulations have been framed by the High Court strictly in compliance to the directions of the Hon'ble Supreme Court in ***Malik Mazhar Sultan & anr Vs. U.P. Public Service Commission & ors (2008) (17) SCC 703,*** and ***Malik Mazhar Sultan & anr Vs. Uttar Pradesh Public Service Commission & ors (2009) 17 SCC 583.***

57. In addition to the above, we find that the petitioners in any event are not entitled to any relief under Article 226 of the Constitution for more reasons than one. They participated in the selection process and knew well from the rules and regulations, the mode and manner in which the selection was to be conducted and yet participated in the selection process without any demur or protest and after taking a chance and being unsuccessful, they cannot now resile or take somersault saying that the procedure as adopted by the High Court was vitiated. This cannot be allowed. The petitioners cannot approbate and reprobate at the same time. Moreover, petitioners have not even approached this court promptly and there is a gap of almost six months in between filing of these petitions and the declaration of the result. The result was declared on the website of the High Court on 14.9.2009, whereas the petition came to be filed only on 6.4.2010. The petitioners, if really aggrieved, should have questioned the rules and regulations before participating in the selection process and are clearly estopped from filing these petitions.

58. In taking this view, it is not necessary to refer to multiple decisions on the issue and it would suffice to refer to two recent judgments of the Hon'ble Supreme Court. In ***Pradeep Kumar Rai And Others vs. Dinesh Kumar Pandey and others (2015) 11 SCC 493***, the Hon'ble Supreme Court observed as under:

> *"17. Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellant did not challenge it at that time. Thus, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Earlier the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted (See: Vijendra Kumar Verma vs. Public Service Commission (2011) 1 SCC 150 and K.H. Siraj vs. High Court of Kerala, (2006) 6 SC 395)".*

59. Similar issue came up recently before the Hon'ble Supreme Court in ***Madras Institute of Development Studies and Another*** Vs. ***K. Sivasubramaniyan & ors, (2016) 1 SCC 454,*** wherein it was held as under:

> *"13. Be that as it may, the respondent, without raising any objection to the alleged variations in the contents of the advertisement and the Rules, submitted his application and participated in the selection process by appearing before the Committee of experts. It was only after he was not selected for appointment, turned around and challenged the very selection process. Curiously enough, in the writ petition the only relief sought for is to quash the order of appointment without seeking any relief as regards his candidature and entitlement to the said post.*
>
> *14. The question as to whether a person who consciously takes part in the process of selection can turn around and question the method of selection is no longer res integra.*
>
> *15. In Dr. G. Sarana vs. University of Lucknow & Ors., (1976) 3 SCC 585, a similar question came for consideration before a three Judges Bench of this Court where the fact was that the petitioner had applied to the post of Professor of Athropology in the University of Lucknow. After having appeared before the Selection Committee but on his failure to get appointed, the petitioner rushed to the High Court pleading bias against him of the three experts in the Selection Committee consisting of five members. He also alleged doubt in the constitution of the Committee. Rejecting the contention, the Court held: (SCC p. 591, para 15)*
>
> > *"15. We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even*

his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee. This view gains strength from a decision of this Court in Manak Lal's case where in more or less similar circumstances, it was held that the failure of the appellant to take the identical plea at the earlier stage of the proceedings created an effective bar of waiver against him. The following observations made therein are worth quoting: (AIR p.432, para 9)

> *'9….It seems clear that the appellant wanted to take a chance to secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point.'"*

16. In Madan Lal & Ors. vs. State of J&K & Ors. (1995) 3 SCC 486, similar view has been reiterated by the Bench which held that: (SCC p. 493, para 9)

> *"9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of Om Prakash Shukla v. Akhilesh Kumar Shukla 1998 Supp SCC 258 it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner."*

17. In Manish Kumar Shahi vs. State of Bihar, (2010) 12 SCC 576, this Court reiterated the principle laid down in the earlier judgments and observed: (SCC p.584, para 16)

> *"16.We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition."*

18. In the case of Ramesh Chandra Shah and others vs. Anil Joshi and others, (2013) 11 SCC 309, recently a Bench of this Court following the earlier decisions held as under: (SCC p. 320, para 24)

> *"24. In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents."*

60. Apart from the above, we also find that petitioners themselves have subsequently availed of the benefit of these Regulations and have been promoted as Civil Judges (Sr. Division) and are, therefore, clearly estopped from filing these petitions and raising such pleas questioning the criteria. In this context, it shall be fruitful to refer to the following observations of the Hon'ble Supreme Court in ***N. Lokanadham*** Vs**. *Chairman, Telecom Commission & ors, (2008) 5 SCC 155***:

> *"18. We may furthermore notice that the appellant herein without any demur whatsoever appeared in the subsequent examination. He even did not qualify therein. The principle of estoppel would, therefore, apply in this case. Tribunal had, thus, exceeded to its jurisdiction in passing its order dated 23.4.2004."*

61. The upshot of the aforesaid discussion is that though the petitioners were well aware of the selection criteria and yet participated in the selection process without any demur or protest. Having done so, it is not now open for them to turn round and question the procedure of selection as adopted by the official respondents.

62. The regulations providing for conducting merit cum suitability test of judicial officers is nothing but compliance of the directions of the Hon'ble Supreme Court in ***Malik Mazhar Sultan and another*** Vs**. *U.P. Public Service Commission & ors*, 2008 (17) SCC 703.**

63. The criteria for selection as adopted by the High Court by setting up two separate committees to evaluate the ACRs and judgments, is strictly in conformity and in compliance to the aforesaid judgment of the Hon'ble Supreme Court.

64. The selection to the post in question has been made on the basis of the assessment made by the two committees constituted under the rules and regulations and in absence of any allegations of malafides and biasness against the committees or any one of its member, these writ petitions are not maintainable.

65. There is nothing illegal or arbitrary in the rules and regulations framed by the High Court and these otherwise are not open to challenge as admittedly, it is on the basis of these rules and regulations that the petitioners have subsequently been promoted as Civil Judges (Sr. Division).

66. Having said so, we find no merit in these petitions and the same are dismissed, leaving the parties to bear their own costs.

****

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

Smt. Roshni Devi ... Appellant

Versus

Man Chand ... Respondent

RSA No. 444 of 2007
Reserved on: 24.08.2016
Date of decision: 07.09.2016

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for injunction pleading that suit land was jointly owned and possessed by the plaintiff and her son - defendant was threatening to raise construction on the suit land without any right to do so- suit was dismissed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that no tatima of the suit land was filed- suit land was not got demarcated before filing the suit- plaintiff was not even aware of the khasra number of the suit land- PW-2 admitted that latrine of the defendant was constructed within his property- plaintiff had alleged that construction was raised on her land – therefore, burden was upon her to prove this fact- a Local Commissioner cannot be appointed to collect the evidence, especially when Court was satisfied on the basis of material that no construction was raised- appeal dismissed. (Para-13 to 18)

For the appellant: Mr. Ramakant Sharma, Advocate.
For the respondent: Mr. Rajesh Kumar, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of this present appeal, appellant/plaintiff has challenged the judgment and decree passed by the Court of learned Presiding Officer/Additional District Judge, Fast Track Court, Hamirpur, in Civil Appeal No. 21 of 2006 dated 30.05.2007, vide which, learned Appellate Court while dismissing the appeal filed by the present appellant has upheld the judgment and decree passed by the Court of learned Civil Judge (Junior Division), Court No. II, Hamirpur, in Civil Suit No. 329 of 2002 dated 07.11.2005, whereby the suit for permanent prohibitory injunction and mandatory injunction filed by the present appellant was dismissed.

2. This appeal was admitted on 20.06.2008 on the following substantial questions of law:-

1. Whether the findings given by the learned Courts below are perverse, their being either contrary to the evidence on the record or having been based on no material on the record and, as such, the same has resulted into erroneous decision?

2. Whether the learned 1st Appellate Court below has wrongly rejected the application for appointment of Local Commissioner to demarcate the suit land, their being boundary dispute?

3. Brief facts necessary for adjudication of the present appeal are that appellant/plaintiff (hereinafter referred to as the plaintiff) filed a suit for permanent prohibitory injunction and mandatory injunction against present respondent/defendant (hereinafter referred to as the defendant), on the grounds that the suit land comprised in Khata No. 32 min, Khatauni No. 33 min, Khasra No. 304 measuring 4 Kanals 2 Marlas, situated in Tika Punjhali, Tappa Mati-Morian, Tehsil and District Hamirpur, was jointly owned and possessed by the plaintiff and her son Surinder Kumar and defendant was stranger as far as suit land was concerned and was having no right, title and interest over the same. As per the plaintiff, defendant who was a head-strong and quarrelsome person had collected construction material for the purpose of contracting a latrine and to raise a retaining wall on the suit land. As per plaintiff, for this purpose, defendant also forcibly started digging part of the suit land in the last week of December, 2002. It was on these basis that the suit was filed by the plaintiff praying for a decree of permanent prohibitory injunction for restraining the defendant from raising construction over the suit land and for mandatory injunction in case the defendant succeeded to raise any construction during the pendency of the suit over the suit land.

4. Claim of the plaintiff was denied by the defendant. In the written statement stand of the defendant was that suit filed by the plaintiff was frivolous and was with malafides as neither any construction had been carried out by the defendant over the suit land nor the defendant proposed to carry out any construction over the same. Defendant denied that any

digging had been done on any part of the suit land for the construction of latrine or for raising retaining wall.

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

1. Whether the plaintiff is entitled to the relief of permanent prohibitory injunction as prayed for? … OPP
2. Whether the plaintiff is entitled to the relief of mandatory injunction by way of demolition as prayed for? … OPP
3. Whether the plaintiff has no cause of action in the present suit? … OPD
4. Whether the suit is not maintainable in the present form? … OPD
5. Whether the suit is not properly valued for the purpose of Court fee and jurisdiction? … OPD
6. Relief.

6. On the basis of material placed on record by the respective parties, learned trial Court returned the following findings to the issues so framed:-

Issue No. 1:	No.
Issue No. 2:	No.
Issue No. 3:	Yes.
Issue No. 4:	Yes.
Issue No. 5:	Un-pressed.
Relief :	The suit of the plaintiff is dismissed as per operative part of the judgment.

7. It was held by learned trial Court that the plaintiff who stepped into the witness box as PW-1 stated that she did not remember the Khasra No. of the suit land and she also admitted in her cross-examination that she had not got the land demarcated before filing the suit. Learned trial Court held that the relief of permanent prohibitory injunction is a discretionary relief and the plaintiff had to prove a right and violation thereon or breach of corresponding duty by the defendant and only then such reliefs can be granted. Learned trial Court further held that in the present case, the plaintiff had failed to prove that defendant violated any right of the plaintiff with respect to the suit land. It was further held by learned trial Court that plaintiff failed to prove that any construction had been carried out by defendant over the land of the plaintiff and no demarcation was on record to support the allegations of the plaintiff. It was further held by learned trial Court that the witnesses of the plaintiff including the plaintiff were not able to prove that defendant had actually carried out construction over the suit land. It was further held by learned trial Court that the plaintiff was also not able to prove that during the pendnecy of the suit defendant had carried any construction or had thrown any material over the land belonging to the plaintiff. On these basis, it was concluded by learned trial Court that the plaintiff was not entitled for relief of permanent prohibitory injunction or mandatory injunction.

8. Feeling aggrieved by the said judgment passed by learned trial Court, plaintiff filed an appeal.

9. Learned Appellate Court vide its judgment dated 30.05.2007 dismissed the appeal so filed by the plaintiff and in its judgment learned Appellate Court held that plaintiff had neither filed any Tatima nor any site plan alongwith the plaint in order to show where and on what portion of the suit land, defendant had raised the alleged construction. Learned Appellate Court held that in fact the claim of plaintiff that defendant had raised construction over the suit land appeared to be hollow as neither she remembered Khasra No. of the suit land nor she had obtained any demarcation of the suit land before filing the suit. Learned Appellate Court also took note of the fact that PW-2 Dharam Singh had clearly stated that the land of the plaintiff was

on higher side and that of the defendant was on the lower side and the construction had been raised by the defendant on his own land situated on the lower side. Learned Appellate Court also held that there was also a boundary between the two lands and the latrine constructed by the defendant was on his own land which was below the suit land. Learned Appellate Court also took the note of the fact that it was deposed by DW-1 that he had constructed the latrine on his own land and it was about 10 feet away and about 5 feet below the suit land. It was held by Appellate Court that testimony of the defendant was supported by the statement of Chaumphi Ram DW-2. Learned Appellate Court after perusal of the entire evidence adduced on behalf of both the parties concluded that it was apparent from the record that the plaintiff had failed to prove that defendant had carried out any construction of latrine etc. over the suit land. Learned Appellate Court also held that it was argued by learned counsel for the plaintiff that since it was a boundary dispute, the Court should have appointed a Local Commissioner to ascertain whether any part of the suit land had been encroached by the defendant or not. However, this contention of learned counsel for the plaintiff was not accepted by learned Appellate Court by holding that since plaintiff had neither requested nor moved an application before the trial Court for appointment of any Local Commissioner, as such, appreciation of evidence by learned trial Court could not be faulted with. On these basis, judgment passed by learned trial Court was upheld by learned Appellate Court.

10. Mr. Ramakant Sharma, learned counsel for the appellant has argued that the judgments passed by both learned Courts below were not sustainable in law because both learned Courts below have failed to appreciate that it stood proved from the material produced on record by plaintiff that defendant had in fact carried out construction over the suit land. Mr. Sharma further argued that even otherwise judgments passed by both learned Courts below were not sustainable as it was the onerous duty entrusted upon the Courts below to have had got the suit land demarcated because matter pertained to boundary dispute. According to Mr. Sharma, even if the plaintiff had not moved any application for demarcation of the suit land or appointment of a Local Commissioner in this regard, it was the duty of the Courts below to have had got the suit land demarcated. As per Mr. Sharma, as both learned Courts below had failed to do so, the judgments and decrees passed by Courts below were liable to be set aside on these count alone.

11. On the other hand, Mr. Rajesh Kumar, learned counsel for the respondent, argued that the judgments passed by both learned Courts below could not be faulted with on the grounds raised by the present appellant. It was argued by Mr. Rajesh Kumar that whether or not the defendant had carried out any construction over the suit land was a pure and simple question of fact and as both learned Courts below had concurrently decided this fact against the appellant, there was no occasion for this Court to interfere with the said findings recorded by learned Courts below especially in view of the fact that the appellant was not able to demonstrate from the material on record that the findings so recorded by both learned Courts below were perverse. According to Mr. Rajesh Kumar, there was not even an iota of evidence on record to suggest or substantiate that the defendant had encroached upon the suit land. He further argued that statement of PW-2 as well as statements of defendant's witnesses proved cogently and convincingly that there was no encroachment over the suit land by the defendant. It was further argued by Mr. Rajesh Kumar that the plaintiff had neither got the suit land demarcated before filing the suit nor any application in this regard was filed for the simple reason that the plaintiff was also aware that no construction of any kind had been carried out by the defendant over the suit land. Accordingly, he prayed that the suit was without any merit and the same should be dismissed.

12. I have heard learned counsel for the parties and have also gone through the records of the case as well as judgments passed by both learned Courts below.

13. In my considered view, the findings which have been returned by both learned Courts below to the effect that plaintiff had not placed any material on record to suggest that any construction had been carried out over the suit land by the defendant cannot be faulted with. It is

a matter of record that neither any Tatima of the suit land was filed with plaint nor the suit land was got demarcated by the plaintiff before filing of the suit. It is apparent from the statement of the plaintiff that she was not even aware of Khasra No. of the suit land. Statement of PW-2 Dharam Singh demonstrates that in his cross-examination this witness has admitted that latrine of the defendant has been constructed within his property. Similarly, besides the defendant who entered the witness box as DW-1, Chaumphi Ram DW-2 has also corroborated the version of the defendant that no construction whatsoever had been carried out by the defendant over the suit land.

14. It is a settled principle of law that he who alleges has to prove.

15. In the present case, it was the plaintiff who approached the Court of law praying for a decree of permanent and mandatory injunction on the ground that defendant was threatening to raise construction over her land by raising a retaining wall and constructing a latrine over the suit land. However, this allegation of the plaintiff against the defendant could not be proved by her. Onus obviously was upon the plaintiff to have had produced on record cogent and reliable evidence from which learned trial Court could have deciphered as to whether or not there was merit in the case of the plaintiff. However, plaintiff miserably failed to discharge the said onus. It is a matter of record that no application for the appointment of a Commissioner to have suit land demarcated, was filed by the plaintiff before learned trial Court. The argument of learned counsel for the appellant that it was the duty of learned trial Court to have had appointed a Commissioner suo motu and have had got the suit land demarcated is without merit. As I have already mentioned above, it is for the party to prove its case and Court is not to collect evidence either for the plaintiff or for the defendant. This Court is not oblivious to the fact that Rule 9 of Order 26 of the Civil Procedure Court envisages issuance of commission to make local investigation. However, the object of this provision is not to collect evidence which can be taken in the Court but the purpose is to obtain such evidence which from its peculiar nature, can only be had on the spot with a view to elucidate any point which is left doubtful on the evidence produced before the Court. The Court obviously can issue local commission suo motu if in the facts and circumstances of the case, it is deemed necessary that a local commission is required for the purpose of adjudication of the case. However, exercise of this power is discretionary. This Court in ***Bali Ram Vs. Mela Ram and another***, ***AIR 2003 Himachal Pradesh 87***, has held:-

> "13. Rule 9 of Order 26 of the Code of Civil Procedure (hereafter referred to as 'the Code'), empowers the Court to issue commission to make local investigation which may be required for the purpose of elucidating any matter in dispute. Though the object of the local investigation is not to collect evidence which can be taken in the Court, but the purpose is to obtain such evidence, which from its peculiar nature, can only be had on the spot with a view to elucidate any point which is left doubtful on the evidence produced before the Court. To issue a commission under Rule 9 of Order 26 of the Code, it is not necessary that either or both the parties must apply for issue of commission. The Court can issue local commission suo motu, if, in the facts and circumstances of the case, it is deemed necessary that a local investigation is required and is proper for the purpose of elucidating any matter in dispute. Though exercise of these powers is discretionary with the Court, but in case the local investigation is requisite and proper in the facts and circumstances of the case, it should be exercised so that a final and just decision is rendered in the case."

16. Coming back to the facts of the present case, a perusal of the judgment passed by learned trial Court demonstrates that learned trial Court was satisfied on the basis of material on record especially in view of the deposition of PW-2 and defendant's witnesses that no construction whatsoever had been carried out by the defendant over the suit land. Therefore, in my considered view, it cannot be said that there was any confusion in the mind of learned trial Court which required appointment of a commission as is envisaged under Order 26 Rule 9

C.P.C. Further, judgment passed by learned Appellate Court also categorically and clearly demonstrates that on the basis of material produced on record as well as on the basis of the findings returned by learned trial Court, learned Appellate Court was convinced that there was no infirmity with the findings returned by learned trial Court and in fact defendant had not carried out any construction over the suit land either by raising a boundary wall or by digging a pit for the construction of latrine. It was on this conviction that learned Appellate Court upheld the findings of learned trial Court and dismissed the appeal filed by the plaintiff.

17. Records of learned Appellate Court demonstrates that appeal against the judgment passed by learned trial Court was filed on 02.06.2006 and the same was decided on 30.05.2007. During the pendency of the said appeal, an application dated 28.05.2007 was filed under Order 26 Rule 9 for the appointment of a Local Commissioner, which application did not find favour by learned Appellate Court vide separate order dated 30.05.2007 on the ground that evidence on record adduced by the parties was sufficient to adjudicate upon the matter in controversy and there was no need to appoint any Local Commissioner. Learned counsel for the plaintiff could not point out any infirmity with said finding. Therefore, in my considered view, there is neither any perversity nor any infirmity with the findings returned by both the learned Courts below while dismissing the suit and appeal of the plaintiff. Substantial questions of law are answered accordingly.

18. In view of my findings returned above, there is no merit in the present appeal and the same is dismissed with costs. Miscellaneous application(s) pending, if any, also stand disposed of.

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

Shailender Kumar and others. ...Petitioners.

Versus

State of Himachal Pradesh and others. ...Respondents.

CWP No. 5340/2012
Decided on: 7.9.2016

Constitution of India, 1950- Article 226- Petitioners were appointed as teachers on different dates- Government has framed rules for providing grant for meeting the deficit in the net approved expenditure on salary of approved staff of privately managed schools- grant was to be released for the component of the salary and not for any other purpose - State Government had also framed rules providing appointment and methods of appointment- managing Committee of the petitioners' school terminated the services of the petitioners as it was not able to bear the expenses of classes 6th to 10th- writ petition was filed, which was dismissed on the ground of alternative remedy- an appeal was preferred, which was rejected on the ground that school was closed due to less strength- however, government has taken a decision to take over all existing 95% Government aided schools- staff receiving grant-in-aid from the Government and their services were required to be taken over by the State Government- services of the petitioners were not taken over – writ petition allowed and services of the petitioners deemed to have been taken over within a period of 10 weeks from the date of decision. (Para-5 to 10)

For the Petitioners: Ms. Jyotsna Rewal Dua, Sr. Advocate with Ms. Shalini Thakur, Advocate.

For the Respondents: Mr. Parmod Thakur, Addl. Advocate General With Mr. Neeraj K. Sharma, Dy. A.G. for respondent Nos. 1 to 3.

Mr. Rajnish Maniktala, Advocate for respondent No.4.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge (oral)**:**

Petitioners were appointed as teachers in respondent No.4-school on different dates. The State Government has framed the rules called "The Himachal Pradesh Non-Government Institution (Grant-in-aid) Rules, 1997" Appendix-II". These were notified on 29.10.1998. The object of the grant was to provide for meeting the deficit in the net approved expenditure on salary of approved staff of privately managed schools. The grant was to be released exclusively for salary component and it was not to be utilized for any other purpose. According to the notification, before the grant was to be released, the grantee was required to execute a bond with two sureties to the Governor of H.P. to the effect that he would abide by the condition of grant and in the event of his failing to comply with the condition or committing breach of bond, he and the sureties individually and jointly were liable to refund to the Governor of H.P., the entire amount of the grant with interest. The grant was to be based on average attendance for the preceding year or for such shorter period as the school might have been in existence. The management was required to ensure monthly salary to the teachers working in the private institutions. The payment of salary was to be made through cheques and by opening an account in the name of each teacher in a scheduled bank. According to the notification, seven Lecturers for schools running only Humanities Group were required for Senior Secondary Schools, i.e. +1 and +2 classes, and not less than 150 students in both the classes and additional three Lecturers were required for Science Group provided the number of students studying the science subjects is not less than 50 in both the classes. For High Schools having only two classes, i.e. IX and X, there was requirement of one Trained Graduate (Science), one Trained Graduate (Arts), one O.T. or L.T., if number of students in both the classes was not less than 50. For Middle schools having classes VI to VIII, there was requirement of one Trained Graduate (Science), one Trained Graduate (Arts), one O.T. or L.T., if number of students was not less than 20. In Primary Schools, two J.B.T. Teachers were required upto the strength of 60 students.

2. The State Government has also framed "The H.P. State Privately Managed Recognized/Aided School Employees (Security of Service) Rules, 1997". The appointment and methods of appointment are provided under rule 2. All the appointments to the aided schools were to be made by the managing committee in the following manner:-

i) Appointing authority shall advertise in both English and Vernacular daily newspapers in the State, vacancy or vacancies to be filled in by giving full particulars thereof including the requisite qualifications, number of vacancies to be filled in and the last date by which the applications may be submitted. In the alternative name of suitable candidates may be obtained through the employment exchange.

ii) The recommendations for appointment of the candidates shall be made by a sub-committee consisting of five members of managing committee and a representative/nominee of H.P. Education Department.

3. The members of the sub-committee other than Departmental Nominee were required to be appointed by the managing Committee. The employees were to be governed by the Code of Conduct. Dismissal/removal etc. of the employees is provided under rule 6. According to rule 7, the scale of pay and other allowances of the employees working in the private aided schools were not to be less than those of the employees of the schools run by the State Government. The age of retirement was 58 years.

4. The Management Committee of St. Hilda's Senior Secondary School, Kangra resolved in its meeting held on 27.6.2008 that since it was not possible for the management to bear the expenses of the classes 6th to 10th of St. Hilda's School, Kangra, the same be closed w.e.f. 16.10.2008. The services of the petitioners were terminated w.e.f. 16.10.2008. Petitioners had earlier approached this Court against the decision of the management dated 16.10.2008 by filing

CWP Nos. 2500, 2501, 2502 and 2503 of 2010. These petitions were permitted to be withdrawn with liberty to file fresh on the same cause of action. According to the averments made in the petitions, the petitioners were duly qualified as per the rules, noticed hereinabove. Petitioners were teaching and serving in the school since 1985, 1986, 1996 and 1997, respectively. They were fully qualified.

5. One Shri Om Parkash filed a CWP No. 1898/2008 before this Court against the decision dated 27.6.2008. The writ petition was dismissed on the ground of alternative remedy. It was clarified that the petitioners have the right to raise all the grounds, which were taken in the writ petitions before the competent court of law/appropriate authority. An appeal was preferred under rule 6 (b) Appendix-II of the Himachal Pradesh Non-Government Institution (Grant-in-aid) Rules, 1997. The appeal was rejected by the Director of Elementary Education, Himachal Pradesh vide Annexure P-1 annexed with Annexure P-2. Respondent Nos. 1 to 3 have filed detailed reply. The gist of the reply is that since the strength of students was reduced, the school was closed down by the management vide decision dated 27.6.2008.

6. Ms. Jyotsna Rewal Dua has drawn the attention of the Court to letter dated 30.7.2011 Annexure P-1 whereby a decision was taken to take over all existing 95% Government aided schools in the following manner:

a) the Management is willing to transfer the school alongwith movable and immovable assets to the State Government; and

b) the Management is unwilling to handover the school.

7. The petitioners had been teaching in the respondent-school w.e.f. 1.5.1986, 1.1.1996, October, 1997 and 1.10.1985, respectively. A decision was taken by the management to close down the school on 27.6.2008. However, vide Annexure P-1, a conscious decision has been taken to take over the services of the employees, both teaching and non-teaching, who were paid from grant-in-aid from the Government at the time of taking over with a rider that the employee must possess qualifications, as prescribed in the Recruitment and Promotional Rules applicable to the identical posts of Education Department. The services of the staff working in 95% aided schools were to be taken over as a fresh appointment on regular basis on minimum of pay scale of the post in those cases where the management was willing to handover the school to the State Government. In those cases where the management was unwilling to handover the school, the services of only those employees, both teaching and non-teaching were to be taken over, who were paid from the grant-in-aid from the Government at the time of taking over and the employees possessed requisite qualification as per the Recruitment and Promotional Rules. The services of taken over aided staff could be utilized any where in the State and they were to give in writing an undertaking to this effect. Thus, it is evident that the staff of the respondent-school was receiving grant-in-aid from the Government at the time of taking over of the school. Their services were required to be taken over by the State Government.

8. According to letter dated 20.7.2011, even the services of an employee, who has worked only for a few months were liable to be taken over by the State Government and the petitioners, who have worked w.e.f. 1.5.1986, 1.1.1996, October, 1997 and 1.10.1985, respectively, their services have not been taken over. The respondents have also not followed rule 6 of the H.P. State Privately Managed Recognized/Aided School Employees (Security of Service) Rules, 1997. According to rule 6 (b), subject to any rule that may be made in this behalf, no employee was to be dismissed, removed nor his services were otherwise to be terminated except with the prior approval of the Deputy Director of Zone. In the present case, the respondents have not placed on record contemporaneous record that the approval of the Deputy Director of Zone was obtained before terminating the services of the petitioners. The decision dated 20.7.2011 will apply retrospectively. All the teachers appointed in the 95% Government aided schools on 20.7.2011 and before that also constitute homogenous class. There could not be a class within the class.

9. Accordingly, in normal circumstances, the Court would have struck down the cut of date, i.e. 20.7.2011, but in order to make it practical, the same is read down to declare that the petitioners' services are also liable to be taken over on the basis of Annexure P-1 dated 20.7.2011.

10. Consequently, in view of the analysis and discussion made hereinabove, writ petition is allowed. In normal circumstances we would have ordered the respondents to consider the cases of the petitioners, but taking into consideration that one of the petitioners Shailender Kumar is 57 years old, their services would be deemed to have been taken over on the basis of letter dated 20.7.2011 within a period of 10 weeks from today with all the consequential benefits except back wages for this period. Pending application(s), if any, also stands disposed of. No costs.

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

SRS Real Infrastructure Limited .....Petitioner.

versus

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

CWP No.4194 of 2015
Reserved on: 01.09.2016
Pronounced on: September 7, 2016.

Constitution of India, 1950- Article 226- Respondent No. 2 invited application for allotment of 150 Small Hydro Power Projects up to the capacity of 5 MW- petitioner-Company also applied for allotment of the Project but the allotment was rejected and the project was allotted to respondent No. 3- it was contended that as per clause - 9 of the guidelines for private investors for participation in small hydro programme upto 5 MW in Himachal Pradesh"- project was allotted in the year 2010- a separate criteria was to be adopted for the allotment of the projects- held, that according to conditions (i) and (ii), an applicant who re-applied for the project in the year 2014 shall be entitled for five additional marks and that preference will not be given to an applicant of his being Himachali- however, applicant could not prove that he had applied in the year 2010 and had re-applied in the year 2014- therefore, applicant cannot claim any preference- petition dismissed. (Para-6 to 13)

For the Petitioner: Ms.Jyotsna Rewal Dua, Senior Advocate, with Ms.Charu Bhatnagar, Advocate.

For the Respondents: Mr.Shrawan Dogra, Advocate General, with M/s Romesh Verma, Anup Rattan & Varun Chandel, Addl.A.Gs. and Mr.Kush Sharma, Dy.A.G, for respondent No.1.
Mr.Vijay Arora, Advocate, for respondent No.2.
Mr.Sunil Mohan Goel, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

Petitioner, by the medium of instant writ petition, has invoked the jurisdiction of this Court under Article 226 of the Constitution of India, whereby the petitioner-Company has questioned the allotment of Achheran 4 MW Hydro Electric Project, (hereinafter referred to as the Project), in favour of respondent No.3, on the grounds taken in the memo of writ petition.

2. Facts of the case, in brief, are that respondent No.2-HIMURJA, an agency of the State engaged in energy development, invited applications for allotment of 150 Small Hydro

Power Projects upto the capacity of 5 MW in September, 2014, out of which 54 projects were identified by respondent No.2 itself and the rest 96 projects were identified earlier by different project proponents pursuant to the advertisement issued in September, 2010, which advertisement was cancelled because of court cases.

3. Terms and conditions are contained in Annexure P-3. Petitioner-Company also applied for allotment of the Project vide Annexure P-5. However, the application of the petitioner-Company was rejected and the Project was allotted to respondent No.3. Hence, the writ petition.

4. Respondents contested the writ petition by filing replies and petitioner also filed the rejoinder.

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

6. Petitioner-Company has made the foundation of its case on Clause 9 of the "Guidelines for private investors for participation in small hydro programme (upto 5 MW) in Himachal Pradesh" (Annexure P-3). According to the petitioner, the Project in question was one among those advertised in the year 2010 and that separate criteria was to be adopted for allotment of these projects. Contention putforth by the petitioner-Company was that five additional marks were to be awarded to those desirous applicants who had reapplied in terms of the fresh advertisement issued in 2014 and the preference allowed to Himachalis was not to be given. Therefore, it was contended that respondent No.2 has violated the conditions contained in Clause 9 of Annexure P-3, brochure.

7. The controversy revolves around Clause 9. It is profitable to reproduce said Clause 9 hereunder:

> *"9. Projects which were identified and applied under self identified category by the applicants in response to the advertisement issued during September 2010 and could not be allotted due to court case, are to be advertised now as per the order of Hon'ble Court and further clarification given by advocate General. In order to give fair chance to the applicants who have identified the projects at their own level and applied to the Government for allotment of those projects against the advertisement issued during 2010, criteria for evaluation shall be as under:*
>
> > *(i) Additional 5 marks shall be awarded to the applicants reapplying for these projects.*
> >
> > *(ii) Preference allowed to Himachalis for projects above 2 MW upto 5 MW will not be applicable for these self identified projects."*

8. Thus, Clause 9 reproduced above contains mechanism for providing edge to such applicants who had earlier applied in terms of advertisement issued in 2010 under the self identified category, which process could not be taken to its logical end, as discussed above, and also applied in terms of the fresh advertisement notice. Condition (i) states that an applicant who reapplied for the project in the year 2014 shall be entitled for five additional marks and Condition (ii) provides that preference will not be given to an applicant of his being Himachali.

9. Clause 9 of Annexure P-3, referred to above, nowhere provides that the said clause will be applicable for those applicants also who have applied in terms of fresh advertisement notice issued in September, 2014 for the first time. Learned counsel for the petitioner was asked to show - whether the petitioner had applied for those projects which were advertised in the year 2010? The answer was in the negative.

10. On the other hand, respondents No.1 and 2 have specifically pleaded in the reply that the petitioner has no right to seek relief in terms of Clause 9 of the Annexure P-3 for the reason that it had not applied in the year 2010. It is apt to reproduce paragraph 2(iv) of the reply as under:

> *"2(iv) That the averments made in this para are matter of record. However, it is submitted that this clause is self explanatory and has been inserted to give fair chance to*

the applicants (Himachalis and non Hiamachalis) who so ever had identified these projects and applied to the government for allotment during 2010. Hence the Himachalis who had identified these projects could not be deprived of the preferential marks/preference what so ever. In fact the clause 9(ii) is elaborated for the kind perusal of this Hon'ble court. For example - Himachali applicant (A) and non Himachali applicant (B) had identified and applied for the projects during 2010 and have applied afresh during 2014 too, and in addition other Himachali applicant(s) has/have also applied for the same project during 2014 only, in such instance the Himachali applicant who had applied during 2014 only (but not applied during 2010) shall not be entitled for any preference. However, if none of the applicants (who had identified and applied during 2010) applied afresh during 2014 but applications received from other fresh Himachali/Non Himachali applicants in that case the Himachali applicants are entitled for all type of preference/marks as per policy criteria."

11. The positive case of the respondents is that those persons who had applied in terms of advertisement issued in the year 2014 for the first time shall not be entitled for additional five marks. Further, in case an applicant had applied in terms of previous advertisement notice issued in 2010 and also applied again in terms of advertisement notice issued in 2014 and an Himachali applicant also applied, for the first time, in response to the advertisement issued in the year 2014, in such a situation, the Himachali applicant will not be entitled for claiming preference. It is also the case of respondents No.1 and 2 that in case a Non-Himachali and a Himachali apply for the same Project in response to the advertisement issued in the year 2014 for the first time, in that case Himachali shall be entitled for preference.

12. We have minutely examined Clause 9 reproduced hereinabove. Condition (ii), as contained in Clause 9, is not independent and flows out of condition (i). Thus, there is no ambiguity. We wonder why the petitioner has filed the writ petition. The writ petitioner has nowhere averred that he had participated in the year 2010 and has also reapplied in pursuance to the advertisement issued in the year 2014.

13. Having said so, no case is made out, the writ petition merits to be dismissed and the same is dismissed, alongwith pending CMPs, if any. Interim directions granted by this Court, vide order, dated 28th October, 2015 and made absolute on 5th January, 2016 shall stand vacated.

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

State of Himachal Pradesh ....Appellant.
Versus
Bal Krishan ...Respondent.

Cr. Appeal No.: 399 of 2007
Reserved on: 22.08.2016
Decided on: 07.09.2016

Indian Penal Code, 1860- Section 376- Informant had gone to field for bringing the grass- her daughter(prosecutrix) was in the house – when the informant returned, prosecutrix started crying and told that accused had done something in her private part due to which she felt severe pain- informant checked and found that blood was oozing out from the private part of the prosecutrix - accused was tried and acquitted by the trial Court- held, in appeal that there was no delay in reporting the matter to police- informant admitted that she had taken the prosecutrix to the Doctor but no medical record was produced- there are contradictions in the testimonies of PW-1 and PW-2- medical officer stated that prosecutrix was a virgin – injuries noticed by her were possible by scratching and by fall- medical evidence does not prove the commission of rape- trial

Court had considered all the circumstances and had arrived at the right conclusion that prosecution version was not proved beyond reasonable doubt- appeal dismissed. (Para-18 to 32)

Cases referred:
Dattu Ramrao Sakhare v. State of Maharashtra (1997 (5) SCC 341)
Ratansinh Dalsukhbhal Nayak Vs. State of Gujarat, AIR 2004 Supreme Court 23
State of Madhya Pradesh versus Ramesh and Another, (2011) 4 Supreme Court Cases 786
K. Venkateshwarlu Versus State of Andhra Pradesh, (2012) 8 Supreme Court Cases 73
Munna Versus State of Madhya Pradesh, (2014) 10 Supreme Court Cases 254
Golla Yelugu Govindu vs. State of Andhra Pradesh (2008) 16 SCC 769

For the appellant : Mr. Varun Chandel, Addl. AG with Mr. Punit Rajta, Dy. AG.
For the respondent: Mr. Bimal Gupta, Sr. Advocate, with
Mr. Vineet Vashisht, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of the present appeal, the appellant-State has challenged the judgment passed by learned Sessions Judge, Kinnuar at Rampur Bushahr, in Session Trial No. 40-S/7 of 2005, dated 12.07.2007, vide which judgment, learned trial Court has acquitted the accused for commission of offences punishable under Section 376 of IPC, on the ground that there was no sufficient evidence on record to bring home the guilt of the accused and that the prosecution had not been able to prove its case against the accused beyond reasonable doubt.

2. The case of the prosecution was that on 18.06.2005, at around 1:15 p.m., Tilka Devi made a report at Police Station Ani, District Kullu to the effect that she was married to Bir Singh about 10 years ago and after divorce she was residing with her parents at village Jabo. Prosecutrix, aged about 7 years was her youngest daughter and was residing with her. Her elder daughter was residing with her maternal uncle at Shimla. As per complainant, on 05.06.2005, she had gone to bring grass from the field and her daughter (prosecutrix) was in her house. When she came back from the fields, at about 5:30 p.m., her daughter (prosecutrix) started weeping loudly and when she inquired from her then she (prosecutrix) told that her maternal uncle Bal Krishan had caught hold of her and took her inside the house and did something in her private parts, due to which, she felt severe pain. Complainant checked private parts of prosecutrix and found that blood was oozing out from the private parts of prosecutrix and there were blue marks on the adjoining parts. She could not believe this as accused was son of her uncle and was maternal uncle of the prosecutrix, so she did not discuss it with any person so that there might not be any social stigma to her family. Thereafter she went to the house of accused but he was not found there. Complainant thought of discussing the said incident with her real brother who was to come on Saturday, however, he did not come on Saturday. In the meanwhile, the prosecutrix was not taking meal and appeared upset. Complainant was an illiterate lady and had no knowledge that she was required to report the matter in the Police Station immediately neither she was having telephone number. Swarup Chand, brother of complainant, came on 17.6.2005 at around 7:00 p.m. and she thereafter disclosed the entire episode to him who asked her as to why she did not report the matter to the police. Thereafter, complainant went to Police Station, Ani, alongwith her brother Swarup Chand and the prosecutrix and the report was lodged, on the basis of which, case was registered against the accused under Sections 376 and 511 of Indian Penal Code (for short 'IPC'). Investigation was thereafter conducted. Prosecutrix was got medically examined and after the completion of investigation, charge-sheet was filed against the accused for having committed the offence under Section 376 of IPC and as a prima-facie case was found against the accused, accordingly he was charged for commission of offence punishable under Section 376 of IPC, to which he pleaded not guilty and claimed trial.

3. In order to substantiate its case, the prosecution has examined 8 witnesses.

4. Complainant Tilka Devi entered the witness box as PW2. She deposed that prosecutrix was 8 years of age. On 05.06.2005, at around 2:30 p.m. she had gone to collect grass/ fodder and her daughter (prosecutrix) was alone in the house. She deposed that when she came back at 5:00 p.m., prosecutrix was weeping at that time and she told her that accused had laid her (prosecutrix) down and after opening his pant and trouser of prosecutrix, did bad thing with her. She also stated that she found blood and two black scars on the private part of the prosecutrix. This witness further deposed that Bal Krishan was her uncle's son. She also deposed that she went to the house of accused but he was not there. She deposed that she was not aware that the matter was to be reported to the police and thereafter she fell ill. She further deposed that her brother Swarup Chand came from Shimla after 11 days and then she narrated the incident to him and thereafter they went to Police Station and reported the matter. In her cross examination, this witness has stated that adjoining to her house was the house of Jayasi Ram, Rama Nand and Ranjit and there were 30 houses in the locality. She also deposed that when she went to the house of accused, all the family members of the accused met her and she was informed that Bal Krishan was at Narkanda. She also stated that before lodging FIR, she had taken the prosecutrix to a government Doctor at Shawad for taking medicine as prosecutrix was not having food. She also stated that Doctor gave medicines for local application as well as for oral consumption. She also deposed that thereafter she got the prosecutrix admitted at Ani Hospital. In her cross examination she admitted it to be incorrect that prescription slips were not given to the police. She admitted it to be correct that her grand father Mansa Ram had willed his property in the name of father of accused. She admitted it to be correct that after the execution of said Will by her grand father, her father Shyam Lal and father of accused Dekh Ram had severed all type of relations. She also stated that she was residing at her paternal house for the last 7-8 years and before the said incident, she used to go to house to accused. She also stated that when she lodged FIR, she did not state that accused had committed intercourse.

5. PW-3 Jyoti Ram, Panchayat Secretary, is a formal witness who produced on record copy of Parivar register.

6. Dr. Gian Thakur entered the witness box as PW-4 and stated that on 20.06.2005, he had medically examined Bal Krishan and as per him, there was nothing to suggest that he was not capable of performing sexual act.

7. Sher Singh entered the witness box as PW-5 and stated that complainant was his daughter and after a week of the incident, she told him that Bal Krishan had sexually assaulted the prosecutrix and thereafter prosecutrix had fallen ill and she did not go to school. This witness also deposed that his daughter was illiterate. In his cross examination, this witness deposed that his statement was recorded by the police after 10-15 days and his daughter told him about the occurrence of the incident after 4-5 days. He stated that he did not ask the complainant to go to police. He further stated that he cannot say with certainty whether complainant told the name of accused as Bal Krishan or Ram Krishan. He admitted it to be correct that his father had willed away 2/3rd of his property in favour of father and uncle of the accused and 1/3rd in his favour. He denied that after the execution of the Will, he had severed all type of relations with the family of accused. In his cross examination, this witness stated that in his statement Exhibit PW5/A, he had told the police that accused had committed sexual intercourse with prosecutrix, which fact was told to him by his son. This witness was confronted with his statement Exhibit PW5/A wherein it was not recorded that Swarup Chand told him that the accused had committed sexual intercourse with prosecutrix but only this fact was recorded that accused had tried to commit rape. He stated that he told the complainant to take the prosecutrix to Medical Officer at Shawad and thereafter to hospital at Ani. In the later part of his cross examination, he admitted it to be correct that after his father willed away property in favour of father of accused, he was not having good relations with them.

8. PW6 Govind Singh, Head Teacher, Govt. Primary School, Fati Karana, entered the witness box as PW-6. He placed on record, date of birth certificate of prosecutrix, Exhibit PW6/A.

9. Inspector Manohar Lal entered the witness box as PW-7 and he stated that on 18.06.2005, complainant lodged FIR Exhibit PW-2/A and after the registration of the same, he sent the prosecutrix for medical examination. He also deposed that he recorded the statement of witnesses under Section 161 of Code of Criminal Procedure (for short 'Cr.P.C') and during the course of investigation, he obtained copy of Parivar register and copy of date of birth certificate of the prosecutrix. In his cross examination, he stated that he did not get the accused identified from the prosecutrix. He stated that she had disclosed the name of accused as she knew the accused. He stated that he did not notice any marks of blood or semen in the room in which the alleged occurrence took place nor did he notice any marks of blood and semen on the clothes.

10. Dr. Neelam Verma entered the witness box as PW-8 and she stated that prosecutrix was medically examined by her on 17.06.2005. According to her there were following injury marks on the private parts of the prosecutrix:

1. Superficial abrasion, 1.5 cm, obliquely placed, reddish brown scab present, 5cm above the left wrist.
2. Multiple small linear superficial abrasions with dried scab, brown coloured presented over the inner and upper aspect of the right thigh.

11. This witness also deposed as under:

"Labia Majora were adjacent to each other and closing the vaginal orifices. No swelling, tenderness, injury marks seen. No swelling, tenderness or injury marks present over of the labia minora.

The hymen was intact, with the small round opening, margins uniform and continuous, not admitting little finger. No tenderness present. No discharge P/v visible at the time of examination. No mark of injury visible.

Based on the above examination, it was inferred that the possibility of the sexual intercourse could not be ruled out."

12. In her cross examination, this witness stated that injuries No. 1 and 2 were possible by scratching. She also deposed that as per observation under specific local examination, mentioned at No. 2 and 3, it can be said that the prosecutrix was virgin. She also deposed that as per her examination, there was no complete penetration but partial penetration or attempt to commit rape cannot be ruled out. She also deposed that she had not noticed any black scars on the private part of the victim and injuries mentioned on second page of MLC at serial No. 3 are possible if child falls while playing. She further stated that because she had examined the patient after 13 days and thereafter she had giver her opinion that the possibility of rape cannot be ruled out.

13. The prosecutrix entered the witness box as PW-1 and she stated that at 4:00 p.m. her mother had gone to bring grass/fodder and at that time accused Bal Krishan came and he removed her trouser and also his pant and he put his organ of passing urine on her organ of passing urine after laying her on the gunny bag and thereafter she felt pain and started weeping and accused ran away. In her cross examination, this witness stated that she narrated the said fact to her mother on the same day and thereafter her mother said nothing to her. This witness initially stated in her cross examination that there was no bleeding and thereafter she stated that blood came from place/part of the body from where urine is passed. She denied that there was any house in her neighbourhood. She stated that when her mother came back she was inside the room and she did not cry. She stated that thereafter she continuously kept on attending the school. She admitted it to be correct that she had been asked by her mother and maternal uncle Swarup Chand to depose so in the Court. She also deposed that she received no other injury other than on her private parts. In fact what she deposed is quoted herein below:

"My mother took me to the doctor because I was having pain in my private part from where I urinate. I had not told the doctor."

14. On the basis of material so produced before it, learned trial Court held that the prosecution was not able to prove the guilt of the accused beyond reasonable doubt and there was not sufficient evidence on record in this regard and accordingly it acquitted the accused of charge framed against him.

15. Mr. Varun Chandel, learned Additional Advocate General has argued that the judgment of acquittal passed by learned trial Court was perverse and not sustainable in law. Mr. Chandel argued that the findings returned by learned trial Court to the effect that the story of the prosecution was not reliable as mother of the prosecutrix had not disclosed the occurrence of the incident to the Doctor by whom the prosecutrix was examined before lodging of FIR was not sustainable as learned trial Court failed to appreciate that no parents of a girl would make such kind of incident public as the same would have had cast stigma on the future of the career of the girl. Mr. Chandel further argued that the findings arrived at by learned Court below to the effect that the statement of prosecutrix was not corroborated with medical evidence was contrary to the material placed on record. As per Mr. Chandel, the testimony of Dr. Neelam was not appreciated by learned trial Court in its correct perspective. It was further submitted by Mr. Chandel that learned trial Court erred in concluding that there was enmity between the family of the prosecutrix and accused, ignoring the fact that PW5 Sham Singh had categorically stated that there was no enmity between his family and family of accused. It was further argued that even otherwise the judgment passed by learned trial Court was not sustainable because the findings arrived at by learned trial Court were based on conjectures and surmises and the testimony of the prosecution witnesses and other evidence produced on record by the prosecution had been brushed aside by learned trial Court without appreciating the same in its correct perspective. Accordingly, Mr. Chandel argued that the appeal be allowed and the judgment of acquittal passed by learned trial Court be set aside and accused be convicted for commission of offence punishable under Section 376 of IPC.

16. On the other hand, Mr. Bimal Gupta, learned senior counsel appearing for the accused argued that there was no merit in the present appeal and the judgment and acquittal returned by learned trial Court in favour of respondent-accused did not warrant any interference because the findings so arrived at by learned trial Court were neither perverse nor there was any infirmity in the same. Mr. Gupta submitted that it was apparent and evident from the material which was placed by the prosecution on record that the guilt of the accused was not proved beyond reasonable doubt. Mr. Gupta argued that the conduct of the mother of the prosecutrix was highly suspicious as there was undue delay in lodging the FIR, which had gone unexplained on record and thus her testimony was not reliable at all. According to Mr. Gupta, even the testimony of prosecutrix could not be relied upon to convict the accused because she had categorically admitted in her cross examination that she was tutored by her mother and uncle to depose so in the Court. Mr. Gupta further argued that in fact prosecution had miserably failed to bring home the guilt of accused and therefore the judgment passed by learned trial Court in favour of accused be upheld and present appeal be dismissed.

17. We have heard learned counsel for the parties and have gone through the records of the case as well as the judgment passed by learned trial Court.

18. Admittedly, there is no eye-witness who has seen the occurrence of the alleged incident except the prosecutrix, who is the victim in the present case. Besides this, prosecutrix is a minor. According to prosecution, the alleged incident took place on 05.06.2005. Admittedly, the FIR was lodged on 18.06.2005. The explanation, which has been given by the mother of the prosecutrix as to why no FIR was lodged before 18.06.2005, is that she was an illiterate lady and after the unfortunate incident took place, she had fallen ill and it is only after her brother Swarup Chand came from Shimla after about 11 days, that she narrated said incident to him who asked her as to why she had not lodged any FIR and thereupon the FIR was lodged. In her cross examination, this witness had admitted that the alleged incident was a serious incident. This

witness has also stated that there were houses of Jaisi Ram, Rama Nand and Ranjit adjoining to her house and there were approximately 30 houses in the locality. This witness also stated that after the occurrence of the incident, she went to the house of accused but did not find him there. This witness also stated in her cross examination that before lodging the FIR she had taken her daughter to a government Doctor at Shawad who had given medicines because her daughter was not taking food. This witness deposed that thereafter she got her daughter admitted in the hospital at Ani. The prosecution has not placed on record any material from which it can be deciphered/inferred that the mother of the prosecutrix either took her to any Doctor or the prosecutrix remained admitted in the hospital at Ani before lodging of FIR. This witness also stated that after the alleged incident, her daughter i.e. the prosecutrix remained at home for one month. She also stated that after the occurrence of the incident she had narrated this incident to her brother Swarup Chand after he came back from Shimla about 11 days post occurrence of the alleged incident. This witness in her cross examination also admitted it to be correct that her grand father had willed his property in the name of father of accused and thereafter her father had severed all type of relations with the family of accused.

19. When we compare the statement of PW2 with the statement of prosecutrix and PW5, we find lot of inconsistencies and contradictions. Whereas as per PW2, prosecutrix remained at home for one month after the occurrence of the alleged incident, however, prosecutrix in her statement has deposed that she continuously kept on attending the school. As per PW2, the prosecutrix was taken to a Doctor at Shawad as she was not taking food, however, as per the prosecutrix, she was taken to the doctor because she was having pain in her private part. Further as per PW2, after the occurrence of the incident, she narrated this incident to her brother Swarup Chand after he returned from Shimla 11 days after the incident, whereas her father, who has entered the witness box as PW5, has deposed that the incident was disclosed to him by his daughter (complainant) and he advised her to take prosecutrix to the Doctor and it was on his advice, that the prosecutrix was taken to Medical Officer at Shawad and thereafter to hospital at Ani. PW2 deposed in her statement that after the occurrence she fell ill, whereas her father PW5 stated that after the occurrence of the alleged incident, prosecutrix fell ill and she could not attend her school.

20. Incidentally and most crucially, brother of complainant (PW2) i.e. Swarup Chand, who, in our considered view, was a very important witness, has not been examined by the prosecution. No cogent explanation has come forth from the prosecution as to why Swarup Chand was not examined by the prosecution. Keeping in view that the FIR, as per PW2, was got registered at the behest of Swarup Chand, in the absence of his testimony on record to corroborate as to what has been deposed by PW2, it cannot be said that delay in lodging of FIR was sufficiently explained by the prosecution.

21. On the above facts and circumstances which includes the inconsistencies of and contradictions in the testimonies of prosecution witnesses who mostly are interested witnesses, it cannot be said that on the basis of material produced on record by the prosecution, it had proved its case against the accused beyond reasonable doubt.

22. Now coming to the testimony of PW8, Dr. Neelam Verma who medically examined the prosecutrix, stated that the prosecutrix was medically examined by her on 17.06.2005. In her cross examination, this witness has stated that injuries No. 1 and 2 which were found by her on the body of prosecutrix were possible by scratching. This witness also deposed that as per observation under specific local examination mentioned at No. 2 and 3 in the MLC, it can be said that the prosecutrix was virgin. She also stated that as per her examination, there was no complete penetration but partial penetration or attempt to rape cannot be ruled out. She also stated that she had not noticed any black scars on the private parts of the victim and injury mentioned at Sr. No. 3 is possible if child falls while playing. This witness also stated that because she had examined the witness after 13 days, accordingly she had given the opinion that possibility of rape cannot be ruled out.

23. In our considered view, it cannot be conclusively held from the testimony of this witness that the prosecutrix was raped by the accused. The statement of this witness though raises a strong suspicion that the accused might have committed the offence for which he was charged, however, suspicion howsoever strong cannot substitute for proof. Therefore, it cannot be concluded beyond reasonable doubt from the testimony of PW8 that the prosecution was raped by the accused as is the case of the prosecution.

24. A perusal of the judgment passed by learned trial Court will demonstrate that all the relevant aspects of the matter have been taken into consideration by learned trial Court and after appreciation of the evidence produced on record by the prosecution, it was concluded by learned trial Court that the prosecution could not prove its case against the accused beyond reasonable doubt. In our considered view, the findings so returned by the learned trial Court cannot be faulted with. According to us also, the material produced on record by the prosecution is not sufficient enough from which it can be concluded beyond reasonable doubt that the prosecutrix was raped by accused. The material on record adduced by the prosecution at the most raised strong suspicion that the accused might have committed the offence for which he was charged, however, we are afraid that the prosecution was not able to prove beyond reasonable doubt this suspicion.

25. In ***Dattu Ramrao Sakhare v. State of Maharashtra (1997 (5) SCC 341)*** it was held:

> *'5. .....A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words 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. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. 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'.*
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> *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. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that 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."*

26. It has been held by the Hon'ble Supreme Court that evidence of a child witness should find adequate corroboration before it could be accepted.

27. Rule of caution requires that conviction should not be based on the uncorroborated testimony of a child witness. Though there is no bar in acting upon the uncorroborated testimony of a child witness yet prudence requires that it should be corroborated on the material particulars. It is a sound rule of practice not to act upon the uncorroborated testimony of a child whether sworn or not. But this is a rule of caution and not rule of law. This is because testimony of a child witness cannot be discarded at all together and if testimony is truthful and not shaken in the cross-examination, the same can be accepted. The Hon'ble Supreme Court has held in ***Ratansinh Dalsukhbhal Nayak Vs. State of Gujarat***, ***AIR 2004 Supreme Court 23***, that if the testimony of a child witness is found to be a satisfactory, conviction can be based on the same.

28. Hon'ble Supreme Court in ***State of Madhya Pradesh versus Ramesh and Another, (2011) 4 Supreme Court Cases 786*** has held as under:

> *" In Rameshwar S/o Kalyan Singh v. The State of Rajasthan, AIR 1952 SC 54, this Court examined the provisions of Section 5 of Indian Oaths Act, 1873 and Section 118 of Evidence Act, 1872 and held that every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind. There is always competency in fact unless the Court considers otherwise.*
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> *The Court further held as under:*
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> > *".....It is desirable that Judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate...."*
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> *In Mangoo & Anr. v. State of Madhya Pradesh, AIR 1995 SC 959, this Court while dealing with the evidence of a child witness observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The Court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.*
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> *In Panchhi & Ors. v. State of U.P., AIR 1998 SC 2726, this Court while placing reliance upon a large number of its earlier judgments observed that the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held that*
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> *"the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring."*
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> *In Nivrutti Pandurang Kokate & Ors. v. State of Maharashtra, AIR 2008 SC 1460, this Court dealing with the child witness has observed as under:*
>
> > *"10. '...7...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 the 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. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that 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."*
>
> *The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether*

he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on a oath and the import of the questions that were being put to him. (Vide: Himmat Sukhadeo Wahurwagh & Ors. v. State of Maharashtra, AIR 2009 SC 2292).

In State of U.P. v. Krishna Master & Ors., AIR 2010 SC 3071, this Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the Court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.

Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. (Vide: Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516).

In view of the above, the law on the issue can be summarized to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition."

29. Hon'ble Supreme Court in ***K. Venkateshwarlu Versus State of Andhra Pradesh, (2012) 8 Supreme Court Cases 73*** has held as under:

"The trial court acquitted the appellant basically on the ground that the victim and her mother did not speak anything about the rape and the child witnesses stated that they were kept by the police in police station prior to giving evidence and therefore, their evidence cannot be relied upon. The trial court observed that the appellant is entitled to benefit of doubt. An appeal was carried by the State of Andhra Pradesh to the High Court. The High Court came to a conclusion that there was no appreciation of evidence at all by the trial court. The High Court re- appreciated the evidence and recorded a finding that the prosecution has proved its case beyond reasonable doubt. The High Court set aside the trial court's order and convicted the appellant as aforesaid, which has led to this appeal.

We have heard learned counsel for the appellant. He submitted that the High Court erred in setting aside the order of acquittal which was based on a correct appreciation of evidence. Counsel submitted that by no stretch of imagination the order of acquittal passed by the Sessions Court can be characterized as perverse warranting interference by the High Court. Counsel submitted that PW-1 Anjaiah and PW-3 Padma, father and mother of the victim have not supported the prosecution case. PW-2 Aruna the victim has also not stated that she was sexually assaulted by the appellant. The child witnesses have admitted that they were at the police station for considerable period before they were brought to the court. It is evident, therefore, that they were tutored by the police. Counsel submitted that though medical evidence suggests that PW-2 Aruna had been sexually assaulted, there is no evidence on record to conclude that it is the appellant who had committed the heinous

crime. Counsel submitted that the view taken by the trial court is a reasonably possible view which ought not to have been disturbed by the High Court. Learned counsel for the State supported the impugned order.

The High Court has set aside order of acquittal. This court has repeatedly stated what should be the approach of the High Court while dealing with an appeal against acquittal. If the view taken by the trial court is a reasonably possible view, the High Court cannot set it aside and substitute it by its own view merely because that view is also possible on the facts of the case. The High Court has to bear in mind that presumption of innocence of an accused is strengthened by his acquittal and unless there are strong and compelling circumstances which rebut that presumption and conclusively establish the guilt of the accused, the order of acquittal cannot be set aside. Unless the order of acquittal is perverse, totally against the weight of evidence and rendered in complete breach of settled principles underlying criminal jurisprudence, no interference is called for with it. Crime may be heinous, morally repulsive and extremely shocking, but moral considerations cannot be a substitute for legal evidence and the accused cannot be convicted on moral considerations. The present appeal needs to be examined in light of above principles.

Several child witnesses have been relied upon in this case. The evidence of a child witness has to be subjected to closest scrutiny and can be accepted only if the court comes to the conclusion that the child understands the question put to him and he is capable of giving rational answers (see Section 118 of the Evidence Act). A child witness, by reason of his tender age, is a pliable witness. He can be tutored easily either by threat, coercion or inducement. Therefore, the court must be satisfied that the attendant circumstances do not show that the child was acting under the influence of someone or was under a threat or coercion. Evidence of a child witness can be relied upon if the court, with its expertise and ability to evaluate the evidence, comes to the conclusion that the child is not tutored and his evidence has a ring of truth. It is safe and prudent to look for corroboration for the evidence of a child witness from the other evidence on record, because while giving evidence a child may give scope to his imagination and exaggerate his version or may develop cold feet and not tell the truth or may repeat what he has been asked to say not knowing the consequences of his deposition in the court. Careful evaluation of the evidence of a child witness in the background and context of other evidence on record is a must before the court decides to rely upon it.

The Evidence of child witnesses PW-4 D. Marry, PW-5 Swapna, PW-6 Ch. Vijaya and PW-7 Ch. Borraiah have made prosecution case suspect. It must be mentioned here that statements of these witnesses were recorded by PW-14 K. Prasad Rao, JFCM, Kodad, under Section 164 of the Code. But, these statements also cannot be relied upon because there is intrinsic evidence to show that all these witnesses were under the pressure of the police. PW- 4 D. Marry did not say anything about the appellant. She stated that she gave a statement before the Magistrate at Kodad but she could not state what statement she had given. Because she was unable to answer the questions she was discharged. PW-5 Swapna also admitted that she was at the police station at Garidapalli for six days along with PWs 1 to 3 and others and she gave a statement before the Magistrate at the instance of the police. The defence has produced a certificate (Annexure-P/8) from RCM High School, Vepalasingaram, where PW-4 and PW-5 were studying, which states that they did not attend the school from 30.10.2000 to 7.11.2000 and 27.10.2000 to 06.11.2000 respectively. PW-6 Ch. Vijaya Kumar and PW-7 Ch. Borraiah narrated the incident in the examination-in-chief, but the similarity in their narration suggests tutoring by the police. PW-6's effort to disown that he was detained at the police station along with others is belied by evidence of other witnesses. PW-7 Ch. Borraiah stated in the cross-examination that all of them were at the police station since last Tuesday. From the evidence of the child witnesses it is clear that they were detained by the police at the police station. Once this is established, the inevitable conclusion that they were tutored by the police must follow.

Having perused the evidence of all the witnesses, we find it difficult to rely on them. We feel that the trial court had rightly discarded their evidence as unworthy of reliance and the High Court erred in taking it into consideration. This, in our opinion, is a case where neither the evidence of parents of victim PW-2 Aruna nor the evidence of PW- 2 Aruna, nor the evidence of child witnesses, who claim to have witnessed the incident, nor the medical evidence supports the prosecution case. Besides, all the pancha witnesses have turned hostile, a fact which we have noted with some anguish. A needle of suspicion does point out to the appellant because he is a police constable and in a small village where the incident took place, witnesses may be scared to depose against him because of his clout. There are certain circumstances which do raise suspicion about the appellant's involvement in the crime. The children were playing on the terrace of the appellant. The appellant was not arrested by police till 4.9.1998. The demeanour of PW-2 Aruna, the tears in her eyes, her walking out of the court after looking at the appellant, pricks the judicial conscience. But convictions cannot be based on suspicion, conjectures and surmises. We are unable to come to a conclusion that the trial court's judgment is perverse. For want of legal evidence we will have to set aside the appellant's conviction and sentence. But we make it clear that we are doing so only by giving him benefit of doubt."

30. Hon'ble Supreme Court in ***Munna Versus State of Madhya Pradesh, (2014) 10 Supreme Court Cases 254***, has held as under:

"……..We are conscious that testimony of the prosecutrix is almost at par with an injured witness and can be acted upon without corroboration as held in various decisions of this Court. Reference may be made to some of the leading judgments.

In Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat, this Court held as under :

"9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. 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? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical.

10. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault …….. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because (1) A girl or a woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends, and

neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition-bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by counsel for the culprit, and the risk of being disbelieved, acts as a deterrent."

In State of Maharashtra vs. Chandraprakash Kewalchand Jain, this Court held as under :

"15. It is necessary at the outset to state what the approach of the court should be while evaluating the prosecution evidence, particularly the evidence of the prosecutrix, in sex offences. Is it essential that the evidence of the prosecutrix should be corroborated in material particulars before the court bases a conviction on her testimony? Does the rule of prudence demand that in all cases save the rarest of rare the court should look for corroboration before acting on the evidence of the prosecutrix? Let us see if the Evidence Act provides the clue. Under the said statute 'Evidence' means and includes all statements which the court permits or requires to be made before it by witnesses, in relation to the matters of fact under inquiry. Under Section 59 all facts, except the contents of documents, may be proved by oral evidence. Section 118 then tells us who may give oral evidence. According to that section all persons are 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. Even in the case of an accomplice Section 133 provides that he shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. However, illustration (b) to Section 114, which lays down a rule of practice, says that the court 'may' presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. Thus under Section 133, which lays down a rule of law, an accomplice is a competent witness and a conviction based solely on his uncorroborated evidence is not illegal although in view of Section 114, illustration (b), courts do not as a matter of practice do so and look for corroboration in material particulars. This is the conjoint effect of Sections 133 and 114, illustration (b).

16. A prosecutrix of a sex offence cannot be put on 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. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness. For the above reasons we think that exception has rightly been taken to the approach of the High Court as is reflected in the following passage:

"It is only in the rarest of rare cases if the court finds that the testimony of the prosecutrix is so trustworthy, truthful and reliable that other corroboration may not be necessary."

With respect, the law is not correctly stated. If we may say so, it is just the reverse. Ordinarily the evidence of a prosecutrix must carry the same weight as is attached to an injured person who is a victim of violence, unless there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony if there is independent evidence lending assurance to her accusation.

17. We think it proper, having regard to the increase in the number of sex violation cases in the recent past, particularly cases of molestation and rape in custody, to remove the notion, if it persists, that the testimony of a woman who is a victim of sexual violence must ordinarily be corroborated in material particulars except in the rarest of rare cases. To insist on corroboration except in the rarest of rare cases is to equate a woman 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 story of woe will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime. Ours is a conservative society where it concerns sexual behaviour. Ours is not a permissive society as in some of the western and European countries. Our standard of decency and morality in public life is not the same as in those countries. It is, however, unfortunate that respect for womanhood in our country is on the decline and cases of molestation and rape are steadily growing. An Indian woman is now required to suffer indignities in different forms, from lewd remarks to eve-teasing, from molestation to rape. Decency and morality in public life can be promoted and protected only if we deal strictly with those who violate the societal norms. The standard of proof to be expected by the court in such cases must take into account the fact that such crimes are generally committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. Courts must also realise that ordinarily a woman, more so a young girl, will not stake her reputation by levelling a false charge concerning her chastity."

Similar observations were made in State of Punjab vs. Gurmit Singh, as under :

"8……The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable." (emphasis in original)

Thus, while absence of injuries or absence of raising alarm or delay in FIR may not by itself be enough to disbelieve the version of prosecutrix in view of the statutory presumption under Section 114A of the Evidence Act but if such statement has inherent infirmities, creating doubt about its veracity, the same may not be acted upon. We are conscious of the sensitivity with which heinous offence under Section 376, IPC has to be treated but in the present case the circumstances taken as a whole create doubt about the correctness of the prosecution version. We are, thus, of the opinion that a case is made out for giving benefit of doubt to the accused."

31. In ***Golla Yelugu Govindu vs. State of Andhra Pradesh (2008) 16 SCC 769***, the Apex Court has held as under:-

"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) Supreme 1).

32. Accordingly, in view of discussion held above and the ratio laid down in the abovementioned cases, while upholding the judgment passed by the learned trial Court, we dismiss the appeal filed by the appellant being devoid of any merit. Pending application(s), if any, also stands disposed of.

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

State of Himachal Pradesh ...Appellant

Versus

Vijay Singh and others ...Respondents

Cr. Appeal No. 512/2011
Reserved on: September 6, 2016
Decided on: September 7, 2016

Indian Penal Code, 1860- Section 120-B, 408, 420, 467, 468, 471, 201 read with Section 120-B- **Prevention of Corruption Act, 1988-** Section 7 and 13(1)(c)- Accused V was appointed as secretary – he was maintaining accounts of society – he prepared four pronotes in the pronote register each worth Rs. 4,000/-- it was found subsequently that amount of loan was repaid- interest of Rs. 225/- was charged- accused V was removed and another person took over the charge- it was found that amount of Rs. 53,000/- was shown in the audit note but the same was not given by the accused to S- it was also found that persons in whose names pronotes were issued had not signed them- accused were acquitted by the trial Court- held, that it was proved that J was cashier in society at the relevant time- J was not interrogated during investigation- duties of Secretaries were also not proved- it was also not established that J had entrusted the accused V with money - thus, charge of breach of trust was not established against the accused V- loans were sanctioned by the executive committee - it was admitted that resolution was passed at the time of advancement of the loan and it is entered in the proceedings book- it was not proved that accused had forged entry in the pronote register and had embezzled the money- proceeding register was not produced- prosecution version was not proved beyond reasonable doubt- view taken by the trial Court could not be said to be perverse- appeal dismissed.

(Para-22 to 29)

Case referred:
AIR 1980 SC 791

For the Appellant: Mr. Parmod Thakur, Additional Advocate General.

For the Respondents: Mr. Anoop Chitkara, Advocate, for respondent No. 1.
Mr. Naresh Kaul, Advocate, for respondents No.2 and 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge

This appeal is instituted against Judgment dated 29.7.2011 rendered by the learned Special Judge, Kangra at Dharamshala (HP) in Corruption Case No. 3-N/2006, whereby the respondents-accused (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for the commission of offence under Sections 120-B, 408, 420, 467, 468, 471, 201 read with Section 120-B IPC and under Sections 7 and 13(1)(c) read with Section 13(2) of the Prevention of Corruption Act, have been acquitted.

2. Case of the prosecution, in a nutshell, is that the accused Vijay Singh was appointed as Secretary, Cooperative Agricultural Society, Khajjan, during the year 1992-93 and he was holding and maintaining the entire record of the society including accounts and cash of the society. Vijay, in the month of October, 1992 prepared four pronotes in the pronote register Ext. PW-1/A-2 in favour of Suram Singh, Prem Singh (Ext. PW-2/F), Chattar Singh (Ext. PW-2/G) and Darshan Singh (Ext. PW-2/H), each amounting to Rs.4,000/-, in which the loanees and the sureties were identified by accused Krishan Chand and Pancham Chand amongst others. Charan Singh, a founding member of the Cooperative Agricultural Society, Khajjan, came to know about the preparation of forged pronotes in the name of aforesaid persons. He inquired from accused Vijay about the pronote and money of the society. Charan Singh thereafter made a report against accused to the Assistant Registrar Cooperative Societies. Harnam Singh (PW-2) was entrusted with the inquiry by Assistant Registrar Cooperative Societies on 20.8.2002. He scrutinized the record of the society i.e. ledger Ext. PW-1/A-1. Harnam Singh PW-2 found that accused Vijay had advanced the loan on the pronotes to the aforesaid persons mentioned in the pronote and these loans were shown to have been recovered after a period of one year and interest of Rs.225/- each was shown to have been charged. Vijay made entry showing that the loan had been repaid. PW-2 Harnam Singh submitted report Ext. PW-2/A to Assistant Registrar Cooperative Societies, Nurpur. On the basis of report, FIR Ext. PW-22/B was registered. Vijay was removed from the post of Secretary, Cooperative Agricultural Society, Khajjan and one Sukhdev Sharma (PW-18) took over the charge of Cooperative Agricultural Society, Khajjan from Inspector Gurbachan Singh. It is further alleged that as per audit note Ext. PW-1/C, society was having funds of Rs.53,000/- approximately but despite this, no amount was given in the charge to Sukhdev Sharma, which was due against Vijay. As such, no cash-in-hand was received by him. Sukhdev Sharma, after assuming charge of Secretary, had not received any proceedings book for the period prior to his joining which was maintained by the Secretary in which day-to-day proceedings were recorded relating to loan etc. Sukhdev Sharma, thereafter opened a new proceedings book Ext. PW-2/B-1 and mentioned about taking over charge and articles/items/documents which he had received/not received in the proceedings dated 28.10.1994 (Ext. PW-18/A). PW-18 Sukhdev Sharma after functioning as Secretary handed over the charge in 2002 to Mukta Sharma, Inspector, Inspector, Co-operative Societies and recorded handing over and taking over of the said fact in Ext.PW-2/B-1. During investigation, it was found that the loanees as mentioned in pronotes were non-existent in the area of Gram Panchayat Oundh. Accused Vijay Singh made a statement Ext. PW-2/C during the inquiry, confessing the misappropriation of amount and the circumstances under which it was done. Specimen handwriting and signatures of accused Vijay, Pancham Chand and Kishan Chand were taken before the Executive Magistrate, Sant Ram (PW-4). Signatures of Man Singh (PW-8) and Dhian Chand were also obtained before the Executive Magistrate, Sant Ram (PW-4). Specimen handwritings of Karam Chand (PW-13) and Vakil Singh (PW-12) were also obtained before PW-5 Raj Krishan, Executive Magistrate, Nurpur. Dhian Singh, Man Singh and Vakil Singh had not signed the pronotes. The admitted handwriting contained in the register was got compared from PW-23 Visheswar Sharma. He submitted his report, Ext. PX. Matter was investigated. Challan was put up in the Court after completing all the codal formalities.

3. Prosecution examined as many as twenty three witnesses to prove its case against accused. Accused were examined under Section 313 of Criminal Procedure Code. Accused stated that they were innocent. Accused were acquitted as noticed above. Hence, this appeal.

4. Mr. Parmod Thakur, Additional Advocate General, has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. Anup Chitkara and Mr. Naresh Kaul, Advocates, appearing for the respective respondents, have supported judgment dated 29.7.2011.

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

7. PW-1 Mukta Sharma, the then Inspector, Co-operative Societies, Nurpur testified that the society was closed in the year 2002. Sukhdev Sharma was the Secretary of Cooperative Agricultural Society during her tenure. In the year 2002, Sukhdev Sharma deposited record of the society with her as the society was not functioning. She kept the record in safe custody. She had produced record of Khata Bahi Ext. PW-1/A-1, pronote register Ext. PW-1/A-2, Cash book Ext. PW-1/A-3 and another cash book with effect from 6.5.1966 to 31.3.2002, Ext. PW-1/A-4, which was taken into possession vide seizure memo Ext. PW-1/A. Audit report is Ext. PW-1/C-1 and order of Assistant Registrar Cooperative Societies is Mark A1. However, in her cross-examination, she could not narrate as to who had handed over charge to Sukhdev Sharma. Embezzlement came to the notice of the Society in the year 1993.

8. PW-2 Harnam Singh, is a material witness. He was Inspector, Co-operative Societies Nurpur. He was entrusted with inquiry by Assistant Registrar Cooperative Societies. He checked register, Ext. PW-1/A-1 in which four pronotes were prepared at pages No. 27, 28, 29 and 30 vide Ext. PW-2/E to Ext. PW-2/H. He submitted his report Ext. PW-2/B to the Assistant Registrar Cooperative Societies. He has recorded statement of Charan Singh, Ext. PW-2/A and of the accused, Ext. PW-2/C. According to him, as per inquiry, it was found that the loan has been repaid. He was cross-examined. He could not narrate who had written the pronotes. He has admitted that sanction was given by Kishan Chand and Executive Members Beli Ram, Nageen Chand, Sahai Deen and Jiwan Kumar for preparing pronotes. He admitted that before granting loan, sanction is given by the Committee and entered in the proceedings. He admitted that when loan is advanced entry is made in the cash book. Entry is also made at the time of repayment of the loan. He could not narrate whether he has seen the proceedings book at the time of inquiry. He had not seen the relevant entries of pronotes in the cash book as well as in the proceedings book in the Court. He admitted that the Secretary works on the direction of the members and he has no independent power. He admitted that till the time money is not deposited in the Bank, it is supposed to be with the cashier. Self stated that Vijay has admitted that he was having Rs.16,900/- approximately. He had not associated cashier at the time of inquiry. He had associated only Charan Singh and Vijay. He has not summoned the person who had sanctioned the loan.

9. Manohar Lal, PW-3 was posted as Inspector Audit. He has handed over record Mark B1, Mark B2 and Mark B3 and inquiry report Ext. PW-2/A. Statements of witnesses were recorded vide Ext. PW-2/B. Documents were taken into possession vide Ext. PW-3/B. He has explained that the work of society is undertaken by Secretary and in this connection Secretary makes entries in the cash book. Secretary deposits money in the Bank. In his cross-examination, he admitted that the cash remains with the cashier though cashier will get the cash if handed over by the Secretary.

10. PW-4 Sant Ram, Executive Magistrate has obtained the specimen signatures of Vijay on 10.8.2004 and also of Pancham Chand, Kishan Chand, Dhian Chand and Man Singh. In his cross-examination, he could not mention any of the provision of CrPC, under which he could obtain specimen signatures of the accused.

11. PW-5 Dhian Singh testified that he has not taken any amount from the society. He has not stood surety as per pronote Ext. PW-2/H. He was declared hostile and cross-examined by the learned Public Prosecutor. He has stated that his specimen signatures were taken by the Tehsildar. In his cross-examination by learned defence Counsel he has testified that pronote Ext. PW-2/H does not contain name of his father.

12. PW-6 Beli Ram was member of the Cooperative Society from 1992 to 1996. He deposed that at the that time, Kishan was Pradhan of the Cooperative Agricultural Society and Charan Singh was the Up Pradhan, Jiwan Kumar was Cashier , Sain Deen, Hoshiar Singh and Babu Ram were members. Vijay was Secretary. He has not stood surety for any person. He used to take ration from the society and Vijay used to obtain his thumb impression on record. His thumb impression was obtained on Ext. PW-2/E. He did not know Suram Singh son of Mohar singh, PremSingh son of Sohan Singh, Chattar Singh son of Pritam Chand, Darshan Singh son of Jagat Ram. They were not the residents of his Panchayat. In his cross-examination, by the learned defence Counsel, he has deposed that the loan is sanctioned by the Pradhan and Secretary of the Society, which is entered in the proceedings. He denied that in the pronote, President, vice President and Members put their signatures. He could not say whether at the time of sanctioning of loan, by the society, he, President and the members had signed the pronote.

13. PW-7 Charan Singh was member of Cooperative Agricultural Society, Khajjan from 1991 to 1996-97. Accused Vijay was Secretary of the society. Accused Vijay prepared forged *Tamsak* in 1992-93, which were in the names of Suram Singh, Chattar Singh etc. Pronotes were not prepared in their presence. Accused had obtained thumb impressions of illiterate persons. They had inquired about fake persons but no record was found in the Gram Panchayat. There was no money in the account of the society. Matter was reported to the Assistant Registrar Cooperative Societies. When report was made against accused, he made entry that the loan had been repaid. PW-2 Harnam Singh also recorded his statement. He specifically admitted that other members have signed Ext. PW-2/H. He also admitted that when any pronote is prepared it is signed by Pradhan and other members of the Committee. Decision is taken by Pradhan and other Members. Secretary works under the directions of the Committee.

14. PW-8 Man Singh testified that he has not signed pronote Ext. PW-2/G. He was not having any account No. 108 as mentioned in Ext. PW-2/G. He did not know Chattar Singh.

15. PW-9 Raj Krishan is the Tehsildar before whom, Vakil Singh had given his specimen signatures. PW-9 Raj Krishan has also obtained specimen signatures of Karam Chand.

16. PW-10 Ashwani Kumar testified that he made inquiry under Section 69(1) of the Cooperative Societies Act. Report is Ext. PW-10/Al. In his cross-examination, he has admitted that in his report, there is reference about pronotes and regarding forging the pronotes regarding cash-in-hand. According to him, proceedings book, cash book were not available at the time of inquiry. Therefore, he could not properly conduct the inquiry. He admitted that pronotes were sanctioned by Pradhan and Members. He had also mentioned in the inquiry report that recoveries are not effected from Secretary, then recoveries are effected from members of the Committee. All the decisions are taken by the executive committee of the society, which are entered into the proceedings book and then implemented by the Secretary.

17. PW-12 Vakil Singh testified that he was not a member of Cooperative Agricultural Society, Khajjan. He was member of Agricultural Society Sadwan. His specimen signatures were obtained by the Tehsildar Nurpur.

18. PW-13 Karam Chand claimed that he was a member of Cooperative Agricultural Society, Khajjan. However, he never stood surety to any person. He did not know Prem Singh. His specimen signatures were taken by Tehsildar Nurpur.

19. PW-16 Roshan Deen testified that he was Pradhan of Aund Panchayat some 13-14 years ago. He has seen Ext. PW-2/D which was issued by him that there was no person in the name of Suram Singh, Prem Singh or Chattar Singh and Darshan Singh.

20. PW-17 Manohar Lal testified that he issued certificate Ext. PW-17/A mentioning that Suram Singh, Prem Singh Chattar Singh or Darshan Singh were not the residents of his village.

21. PW-18 Sukhdev Sharma is another material witness. He remained Secretary of the Cooperative Agricultural Society, Khajjan from 26.10.1994 to 31.3.2002. He has taken charge from Inspector Gurbachan Singh. He handed over charge in 2002 to Mukta Sharma, qua which entry was made in Ext. PW-2/B-1 at Page No. 183. He has admitted that he has not mentioned about amount of Rs.53,000/- was due from Vijay. He had seen the pronote in dispute signed by Kishan Singh Pradhan, Charan Singh Up Pradhan, Jeewan Kumar Cashier and Karam Chand, member of the society. He could identify their signatures.

22. PW-22 Jodha Mal has investigated the case. FIR Ext. 22/ was registered. He has taken into possession register of the Khata Bahi, *Tamsak* and register of Rokar Bahi. There were produced by Mukta Sharma, PW-1. He has also taken into possession record, inquiry conducted with respect to audit note and charge of Secretary. Vijay handed over charge to Krishan Singh on 7.6.1993, vide Ext. DA. He also seized certificate issued by Gram Panchayat Secretary, Ext. PW-17/A. He has admitted that pronotes were prepared in October, 1992 and case was registered in July, 2003. He has admitted in his cross-examination that the salesman, Secretary and Cashier are under the control of Inspector and higher officers of the Cooperation Department. He has not secured any evidence regarding entrustment of Rs.16,900/-. He has also admitted that at the time of advancement of loan by the Society, resolution is passed by the Executive body of the society and thereafter, it is entered in the proceedings book. He has admitted that President Krishan Chand, Nageen Chand, Beli Ram have signed and sanctioned the loan vide Ext. PW-2/G and similarly in all other three *Tamsak*s, the President and other executive members have signed and sanctioned the loan. He further admitted that he has not challaned the said members of the executive committee in the present case. He has admitted that Jiwan Kumar was Cashier of the society at the relevant time but he has not interrogated him in the investigation.

23. Cooperative Agricultural Society, Khajjan is a registered society. Shri Chararn Singh reported the matter to the Assistant Registrar Cooperative Societies. Inquiry was entrusted to Harnam Singh, PW-2. His report is Ext. PW-2/A. FIR Ext. PW-22/A was registered. Matter was investigated by PW-22 Inspector Jodha Mal. Documents were taken into possession. Admitted signatures and handwritings of accused and others were taken by PW-4 Sant Ram and PW-9 Raj Krishan, Tehsildar. It has come on record that Jiwan Kumar was the cashier of the society at the relevant time. PW-22 Inspector Jodha Mal admitted that Jiwan Kumar was not interrogated during investigation. Prosecution has not placed on record constitution of the society and its bye-laws to prove that who was handling the cash. It was necessary for the prosecution to prove duties of Secretary. PW-2 Harnam Singh who has conducted inquiry and prepared report Ext. PW-2/A has also admitted that the cashier was also working in the society and he was supposed to deal with the cash. Prosecution has not led any evidence who was entrusted the duties of cashier. Police has not even associated Jiwan Kumar, Cashier during the investigation. Specimen handwritings and signatures of the accused and others who were cited as witnesses in the case, have been obtained by PW-4 Sant Ram and PW-9 Raj Krishan during the course of investigation. Admitted handwriting and signatures of accused could not be obtained during the course of investigation as held in **AIR 1980 SC 791**. It was necessary for the prosecution to prove that cash was entrusted to Vijay. Proof of entrustment of money is a *sine qua non*. Thus, the charge of breach of trust has not been established against Vijay. Moreover, even Jiwan Kumar was cashier. It was necessary for the prosecution to prove that the Secretary used to look after cash as per its constitution. Jiwan Kumar was material witness to state whether it was Secretary who was entrusted with cash.

24. There is sufficient material on record that loans were sanctioned by the executive committee of the society. PW-2 Harnam Singh has also not deposed in whose presence, statement of accused Vijay Ext. PW-2/A was recorded. There is no evidence that the statement was made by accused Vijay voluntarily.

25. PW-5 Dhian Singh claimed that his father's name was not written in the pronote and there was another person by the same name. Similarly, Man Singh has claimed that his father's name was not mentioned in the *Tamsak* and there was another person by that name. PW-13 Karam Singh has denied that he stood surety in any pronote. In case there were other persons in the village by the same name, IO should have ascertained the same to find out whether persons mentioned in the pronote were not available in the village. Persons who were examined as sureties, claimed that there were other persons of their names in the village.

26. PW-2 Harnam Singh has admitted that at the time of advancement of loan by the society, resolution is passed by the executive committee of the society and it is entered in the proceedings book.

27. There is no evidence that the proceedings have been destroyed by the accused. prosecution has failed to prove that the accused has forged entry in the pronote register and embezzled Rs.16,900.80 and other accused have connived with him. IO should have associated the members of the society during investigation. Proceedings register was neither produced nor the members of the executive committee were examined. Moreover, their specimen handwritings were also not obtained. Pronotes were signed by the members of the executive committee. Thus, it can not be said that these were forged.

28. It is reiterated that prosecution has failed to prove that Vijay being secretary of Cooperative Agricultural Society, Khajjan being a public servant entered into criminal conspiracy with co-accused Kishan Chand and Pancham Chand by forging false pronotes and after that used such forged pronotes to be genuine documents for the purpose of cheating. Prosecution has thus failed to prove case against the accused Vijay under Sections 120-B, 408, 420, 467, 468, 471 and 201 IPC and Sections 13(1)(c) punishable under Section 13(2) of the Prevention of Corruption Act, 1988 and against co-accused under Sections 120-B, 408, 420, 467, 468, 471 and 201 IPC.

29. Moreover, the view taken by the learned trial Court can not be said to be perverse. There is no occasion for this Court to interfere with the well reasoned judgment of the learned trial Court.

30. Accordingly, there is no merit in the present appeal and the same is dismissed, so also the pending applications, if any. Bail bonds of accused are discharged.

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

Sudershan Singh Rana .....Appellant

Versus

Municipal Corporation, Shimla and another .....Respondents

RSA No. 268/2008
Reserved on: September 6, 2016
Decided on: September 7, 2016

Code of Civil Procedure, 1908- Section 100- Plaintiff had taken a parking lot in the fourth floor - he was assured that access would be provided to the same - he had given a bid for Rs. 13.50 lacs, whereas, fifth floor was auctioned for Rs.9.5 lacs- possession of fourth floor was never given to the plaintiff- amount of Rs. 2,21,000/-was wrongly forfeited as possession was never delivered- suit was opposed by filing a written statement pleading that plaintiff had seen the particular area

and had offered the highest bid of Rs. 13.50 lacs-, amount was forfeited on failure to take possession by the plaintiff as per terms and conditions of the auction notice - suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held in second appeal, plaintiff admitted that he had gone through the terms and conditions of the tender notice- it was specifically provided in Clause 2 that the bidder was required to deposit 20% of the bid amount at the fall of hammer and remaining amount would be paid within 30 days and in case of failure, initial amount would be forfeited- amount was forfeited strictly according to terms and conditions of the bid auction notice- appeal dismissed. (Para-12 and 13)

For the Appellant : Mr. Suneel Awasthi, Advocate.
For the Respondents : Mr. Hamender Chandel, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

This Regular Second Appeal has been instituted against judgment and decree dated 1.3.2008 rendered by the learned District Judge, Shimla in Civil Appeal no. 62-S/13 of 2007.

2. "Key facts" necessary for the adjudication of the present appeal are that appellant-plaintiff (hereinafter referred to as 'plaintiff' for convenience sake) filed a suit for recovery of Rs.3,32,417/-, against the respondents-defendants (hereinafter referred to as 'defendants' for convenience sake). Case of the plaintiff is that the defendants issued an auction notice for the car parking-cum-commercial complex on Cart Road, near High Court of HP, Shimla to be held on 9.12.2002, at 11 AM and as per the terms and conditions, bidder was required to pay 20% of the bid amount at the fall of hammer and earnest money of the successful bidder was to be adjusted against the 20% amount and balance was to be paid within 7 days from the issuance of allotment letter or with the interest @ 15% per annum within next 30 days. It is further averred that the defendants constructed three parking floors in the aforesaid building i.e. top floor on the main road (Circular Road) and two floors below the same. According to the plaintiff, he had been assured that at least 80-100 vehicles could be accommodated in the parking lot in the fourth floor and therefore, plaintiff was induced to make a bid for Rs.13.50 Lakh. Parking, for which, plaintiff had made bid was in the fourth floor and two floors above said fourth floor were having greater capacity to accommodate vehicles which were easily accessible from Circular road but this facility was not available for the fourth floor and access to fourth floor was not easy. He was assured that access would be taken care of and before area is handed over for commercial use, same would be made easily accessible and approachable. It is further averred that approach to fourth floor was by taking U turn on circular road which was quite impossible due to congestion on the road. However, despite all these disadvantages, plaintiff made aforesaid bid but subsequently came to know that fifth floor had a greater area and better access which was auctioned only for Rs.9.50 Lakh. Not only this, fourth floor parking area could accommodate only 40 vehicles and even if said parking area was fully occupied throughout the year, it was not possible to recover the bid amount. Area available for parking was only 920 square metres. Plaintiff was asked to deposit Rs.2,71,000/- However, possession of the parking lot i.e. fourth floor was never given to the plaintiff despite assurances and rather the defendants remained in possession throughout of the said parking area. It is further averred that various representations were made for delivering the possession but in vain. On 13.12.2002, defendants were apprised that the area is being used by them during peak season and parking has not been completed and construction material was lying there. Plaintiff issued a notice on 13.12.2002 to the defendants requesting to reduce the bid money. Vide letters dated 26.12.2002, plaintiff was apprised that bid money can not be reduced and in case he failed to sign papers, earnest money would be forfeited. He was informed vide letter dated 10.9.2003, that as per conditions No. 2 and 14, 20% of the

amount i.e. Rs.2,71,000/- has been forfeited. According to the plaintiff, amount of Rs.2,71,000/- was wrongly forfeited since possession was never delivered.

3. Suit was contested by the defendants. Defendants admitted auction notice dated 9.12.2002. Plaintiff was apprised that in the event of highest bidder, failing to deposit the balance amount within 30 days, the bid shall be cancelled and 20% of the bid amount deposited would be forfeited and that the period of payment of the balance amount was not seven days but was four weeks. It is denied that the plaintiff had been assured about particular number of vehicles to be accommodated in the parking lot claiming that plaintiff after visiting the spot had seen space and only thereafter had offered highest bid of Rs.13.55 Lakh and not Rs.13.50 Lakh for the fourth floor. It was averred that fourth floor was accessible from main road like 5th and 6th floor. It was averred that the plaintiff had inspected the area of 5th and 6th floors and only then had offered bid for 4th floor. Plaintiff was informed vide letter dated 10.9.2003 that an amount of Rs.2,71,000/- has been forfeited as per terms and conditions of the auction notice as he had failed to take possession of car parking and sign the papers. It is further averred that all the representations were replied by them.

4. Replication was filed by the plaintiff. Issues were framed by the learned Civil Judge (Senior Division) on 28.7.2007. He decreed the suit on 31.8.2007. Defendants filed an appeal. Appeal was allowed on 1.3.2008 by the learned District Judge, Shimla. Hence, this Regular Second Appeal.

5. The Regular Second Appeal was admitted on 16.6.2008, on the following substantial question of law:

> "whether the learned Appellate Court has totally misread and misconstrued the documents Exts. PW-1/A & PW-1/D?."

6. Mr. Suneel Awasthi, Advocate has supported the judgment and decree dated 31.8.2007 passed by the learned Civil Judge (Senior Division). On the other hand, Mr. Hamender Chandel, Advocate, has supported the judgment and decree dated 1.3.2008 passed by the learned District Judge, Shimla.

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

8. Plaintiff has appeared as PW-1. According to him, auction was held on 9.12.2002 for the car parking on fourth floor. He had deposited Rs.2.00 lakh before the auction vide Ext. PW-1/B. He had been made to understand that 100 vehicles could be accommodated in each floor. He had made bid for Rs.13.50 Lakh as per Ext. PW-1/A. Fifth and sixth floors had been auctioned for Rs.9.50 Lakh. Approach to the parking lot was not easy. He visited the office of Municipal Corporation, Shimla for possession. However, no officer was present on 1.1.2003. He has made representations to the defendants. In his cross-examination, he has admitted that he has carefully gone through the terms and conditions of the auction notice. He denied the suggestion that the work of the fourth floor was complete. He has admitted that he was asked vide Ext. PW-1/D to execute the lease deed.

9. PW-2 Sukh Ram testified that the defendants assured that the possession would be delivered on 1.1.2003, though the possession was not delivered. Construction material was lying on the spot. he has accompanied the plaintiff on 1.1.2003 to take possession of parking lot. None of the officials of Municipal Corporation, Shimla was present.

10. DW-1 Jagdish Chand testified that the plaintiff has made highest bid of Rs.13.55 Lakh for the parking lot in fourth floor. He has signed the bid-sheet. Plaintiff and others had seen the spot and only thereafter they had participated in the auction. Plaintiff had deposited Rs.2.00 lakh as earnest money vide receipts Exts. PW-1/B and PW-1/C. Plaintiff was asked to take possession vide Ext. PW-1/D. He has also deposed that terms and conditions were read over and plaintiff has failed to deposit the balance amount within 30 days.

11. Plaintiff has also issued notice Ext. PW-1/A to the defendants to consider his claim to reduce the bid money. It is not in dispute that the plaintiff made the highest bid of Rs.13.50 Lakh. He has deposited Rs. 2,71,000/- as per Ext. PW-1/S. It is also admitted case that the plaintiff has not deposited the balance amount, though made several representations to the defendants. Plaintiff has admitted that he has gone through the terms and conditions of tender notice. DW-1 Jagdish Chand has deposed that the parties have been apprised of the terms and conditions.

12. Mr. Suneel Awasthi, Advocate, has relied upon the statement made by DW-1 Jagdish Chand that there was no condition that 20% of the total bid amount will be forfeited. It is evident from a plain reading of clause 2 of the Notice Inviting Tender that the bidder was required to deposit 20% of the bid amount at the fall of hammer. Earnest money by the successful bidder was to be adjusted against 20% of the balance amount to be paid within seven days from the issuance of allotment or within 30 days with interest @ 15% per annum. Parties were put to notice that in case bidder fails to deposit the amount within 30 days, with interest, bid shall be cancelled and 20% of the total bid amount will be forfeited. Plaintiff has made bid of Rs.13.50 Lakh but has failed to deposit the amount within 30 days with interest and thus bid was liable to be cancelled and 20% of the bid amount was to be forfeited. All the terms and conditions are to be read harmoniously. Statement of DW-1 could not be dehors the terms and conditions of the Notice Inviting Tender. Learned District Judge has correctly appreciated the oral and documentary evidence. The substantial question of law is answered accordingly.

13. Thus there is no illegality or perversity in the judgment and decree passed by the District Judge below where a sum of Rs.2,71,000/- has been forfeited strictly as per clause 2.

14. Accordingly, in view of the discussion and analysis made hereinabove, there is no merit in the appeal and the same is dismissed. Pending application(s), if any, also stand disposed of. No costs.

****

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

Amit Garg and others ....Appellants.

Versus

The State of Himachal Pradesh and others ... Respondents.

RSA No. 137 of 2005.
Reserved on 01.09.2016.
Decided on: 08.09.2016.

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit for declaration and injunction pleading that suit land was earlier recorded in the ownership of Sarkar Daulatmadar and in possession of Mahkma District Board- land was sold to J by His Highness by way of oral sale- J constructed a building on the suit land- land was sold by successor of J, M and, predecessor-in-interest of the plaintiffs No. 1 to 3- entry showing the State of Himachal Pradesh as owner of the suit land is illegal, inoperative and void- suit was partly decreed by the trial court- an appeal was preferred, which was dismissed- held, in second appeal that there is no material on record to show that suit land was purchased by J by way of oral sale- no recent entry was recorded regarding the ownership of J- adverse possession pleaded in the alternative also could not be proved- moreover, suit could not have been filed on the basis of adverse possession- appeal dismissed. (Para-14 to 22)

Cases referred:

Gurdwara Sahib Vs. Gram Panchayat Village Sirthala and another, (2014) 1 SCC 669

Chatti Konati Rao and others Vs. Palle Venkata Subba Rao, (2010) 14 Supreme Court Cases 316

For the appellants. : Mr. Rajnish K. Lal, Advocate.
For respondent No. 1 : Mr. V.S. Chauhan, Addl. AG.
For respondents No. 2(a), 2(c), 2(i), 2(j), 2(k), 2(l) and 2(m) : Mr. Dhanjay Sharma, Advocate.
For respondent No. 2(b), 2(d), 2(e), 2(f), 2(g), &2 (h) : *Ex Parte*.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge.

This appeal has been filed by the appellants-plaintiffs against the judgment and decree passed by the Court of learned District Judge, Sirmaur District at Nahan, in Civil Appeal No. 59/1 of 2002 dated 03.01.2005, vide which, learned Appellate Court, while upholding the judgment and decree passed by the Court of learned Civil Judge (Jr. Divn.) Rajgarh, Camp at Sarahan, District Sirmour, in Civil Suit No. 59 of 2002 dated 19.12.2003, dismissed the appeal so filed against the same.

2. This appeal was admitted on 04.08.2006 on the following substantial question of law:

*"Whether the two Courts below have not appreciated the evidence, particularly the entries in the copies of the Jamabandis, while dealing with the plea of the plaintiffs that there had been their **Abadi** on the suit land for more than thirty years and thus they had acquired titled by prescription?"*

3. On 05.08.2016, on an application filed by the appellants, it was agreed that the appeal shall also be heard on following substantial questions of law:

"Whether the findings of the court below are perverse, based on misreading of oral and documentary evidence and particularly the pleadings of the parties and the document of PW-2/A?

Whether in view of the fact that ejectment proceedings were only against Beni Prashad?

Whether the oral sale was permissible when TPA was not applicable to the H.P. and it only applied after 1970 and the courts have rightly held that the property earlier in the name of His Highness Sirmaur and findings contrary to that there was oral sale, was not permissible was sustainable in the eyes of law?"

4. Brief facts necessary for the adjudication of this case are that the appellants-plaintiffs (hereinafter referred to as 'plaintiffs') filed a suit for declaration and injunction on the ground that the suit land in issue was earlier recorded in Jamabandi Misal Haquiat 1987-88 Samvat i.e. Christen era 1931-32 in the ownership of Sarkar Daulatmadar i.e. His Highness, Sirmaur and possession of Mahkma District Board. His Highness, Sirmaur, invited people from different places for the purpose of developing Sarahan village as town and in this process, Jadon alongwith others, came to Sarahan and approached His Highness to purchase the suit land from His Highness. According to the plaintiffs, His Highness sold the suit land in favour of Jadon by way of an oral sale and Jadon constructed a building on the said land i.e. Khasra No. 326 min. After the death of Jadon, he was succeeded by his representatives (sons) Banarsi Dass, Munna Lal and Ram Swarup. Banarsi Dass died issueless and Munna Lal and Ram Swarup succeeded him. After the death of Munna Lal, he was succeeded by his widow Smt. Krishna and after the death of Ram Swarup, he was succeeded by his widow Shakuntla Devi, sons Surender Prakash, Prem Chand and daughters Prem Lata, Raj Rani and Shyam Lal. Further as per the plaintiffs, the successors became absolute owners in possession of Khasra No. 326 min. on which building was constructed before settlement. Further as per the plaintiffs, by way of a private partition, abovementioned persons separated their shares and became absolute owners in possession of Khasra No. 326 min. old and 1005 new, situated in village Sarahan Kalan, Tehsil Pachhad, District Sirmaur, H.P. Thereafter, vide sale deed No. 88, dated 14.8.1978, Shakuntla and others

sold the land alongwith building in favour of Manmohan s/o Beni Prashad for a sale consideration of Rs. 35,00/- which sale deed was duly registered by Sub Registrar, Pachhad. On the basis of this sale deed, Manmohan became absolute owner in possession of Khasra No. 326 min old and 1005 new, measuring 57.25 sq. meter. After the death of Manmohan, plaintiffs No. 1 to 3 being sons and widow of Manmohan, succeeded him. It was further the case of the plaintiffs that Manmohan Garg had constructed a double storeyed building on the suit land and when the land in issue was purchased by him he had also purchased alongwith the land two rooms, one kitchen, courtyard and a latrine. It was further the case of the plaintiffs that there was an adjoining house of Sumer Chand, son of Pyare Lal which was purchased by plaintiff No. 4 vide sale deed dated 16.7.1948. According to plaintiffs, entries in Jamabandi showing the State of Himachal Pradesh as owner of the suit land were illegal, inoperative void and were not binding on the rights of the Plaintiffs No. 1 to 3. According to the plaintiffs, Beni Prashad and Manmohan Garg were owners in possession of different parcels of land but in the recent settlement, the lands owned and possessed by them separately, were shown as joint, which was illegal and wrong. Further as per the plaintiffs, is it was proved by the defendant that the plaintiffs were not owners in possession of the suit land then the plaintiffs had become owner in possession of suit land by virtue of adverse possession. On these bases, it was prayed that they had become owners in possession of the suit land and defendants had no right, title or interest on the suit land. On these pleadings, the plaintiffs have prayed for the following reliefs:

> *"a) That the plaintiffs No. 1 to 3 are owners in possession of the land comprised in Khara Khatauni No. 201 Min/448 min Khasra No. 326 old and 1005 new by way of sale deed situated in village Sarahan Kalan, Tehsil Pachhad, District Sirmour, H.P.*
>
> *b) That in the alternative the plaintiffs No. 1 to 3 are owner in possession of the land comprised in Khata Khatauni No. 201 min/488 min Khasra No. 326 old and 1005 new vide recent settlement situated in village Sarahan Kalan Tehsil Pachhad, District Sirmour, H.P. by way of adverse possession.*
>
> *c) That the entries in revenue papers showing the defendant as owner in possession of the land comprised in Khata Khatauni No. 201 min/488 min Khasra No. 326 old and 1005 bnew situated in village Sarahan Kalan, Tehsil Pachhad, District Sirmaur, H.P. is illegal, inoperative and void and is not binding on the rights of the plaintiffs.*
>
> *d) That the order passed by the settlement Collector Shimla in the case titled as state V/S Beni Prashad passed on 6.4.2002 is illegal, void, inoperative and is not binding on the rights of the plaintiffs.*
>
> *e) That the decree permanent injunction restraining the defendants from dispossessing of the plaintiffs in the land comprising situated in village Sarahan Kalan Tehsil Pachhad, Distt. Sirmour, H.P. through himself through his agent servant or assignee or through any manner what so ever may kindly be passed in favour of the plaintiffs and against the defendants with cost of suit."*

5. In the written statement, which was filed on behalf of State, it was averred that the plaintiffs had come up with a false story just to grab the government land which they had encroached during settlement and from which they had been ordered to be legally ejected. According to the defendant-State, Khasra No. 326 was recorded to be owned by Sarkar Daulatmandar and it continued to be as such and there was no entry in the revenue record regarding sale to Jadon and had there been any such sale, same would have been reported to the revenue authorities and entries should have been incorporated in the revenue record. As such, as per State, Jadon was not owner of the suit land and there was no question of inheritance or possession of suit land by his legal representatives. It was also averred that during recent settlement, plaintiff No. 4, Beni Prashad was found in unauthorized possession of Khasra No. 326 min old measuring 71 sq. meters which had been given new Khasra No. 1000 and accordingly ejectment proceedings had been initiated against plaintiff No. 4. Remaining averments made in

the plaint were also denied and it was reiterated that the suit land was owned by State of Himachal Pradesh and whereas earlier it was in the ownership of Sakar Daulatmandar and in the possession of Mahkma District Board, later on as per Jamabandi for the year 1960-61, suit land was in possession of Territorial Council, Himachal Pradesh and same was recorded as *'gair mumkin abadi uftada'*. It was further stated in the written statement that during recent settlement, plaintiff No. 4 was found in unauthorized possession of the suit land and plaintiff had come up with a false story just to grab the government land. It was further mentioned in the written statement that when encroachment made by Beni Prashad was found during recent settlement, same was reported to the authorities and after giving him due opportunity of hearing, Settlement Officer had passed valid and legal order thereupon which was binding on the plaintiffs, which had attained finality. On these grounds, claim of the plaintiffs was denied by the defendants.

6. On the basis of pleadings of the parties, learned trial Court framed the following issues:-

"1. Whether the suit land was earlier in the ownership of Sarkar Daulatmandar i.e. His Highness Sirmaur and possession of Mehkma Distt. Board, as alleged? OPP.

2. Whether Sh. Jadon the predecessor-in-interest of the plaintiff had purchased the suit land through oral sale from His Highness Sirmaur, as alleged, if so its effect? OPP.

3. Whether Smt. Shakuntla etc sold the land alongwith building in favour of Manmohan S/o Sh. Beni Prashad by registered sale deed, as alleged? OPP.

4. Whether the plaintiffs are entitled to the alternative of adverse possession, as alleged? OPP.

5. Whether the revenue entry in favour of defendant as owner in possession of suit land is illegal, as alleged? OPP

6. Whether order passed by Settlement Collector Shimla Dt. 6.4.02 is illegal, void and without jurisdiction, as alleged? OPP

7. Whether the plaintiffs are entitled to the relief of permanent injunction, as alleged? OPD.

8. Whether the suit is not maintainable? OPD.

9. Whether this court has no jurisdiction to try the present suit, as alleged? OPD.

10. Whether the plaintiffs are estopped to file the present suit by their own act and conduct, as alleged? OPD.

11. Whether the suit is bad for want of notice u/s 80 CPC, as alleged? OPD.

12. Relief."

7. On the basis of evidence produced on record by the parties, the following findings were returned by the learned trial Court on the issues so framed:-

"Issue No.1 : Yes.
Issue No. 2 : No.
Issue No. 3 : No.
Issue No.4 : No.
Issue No.5 : No.
Issue No.6 : No.
Issue No. 7 : Yes.
Issue No. 8 : No.
Issue No. 9 : No.
Issue No. 10 :No.

Issue No. 11 *:No.*

Relief *:Suit partly decreed as per operative part of the judgment."*

8. Accordingly, the suit filed by the plaintiffs was partly decreed by learned trial Court by passing a decree for permanent injunction in favour of plaintiffs and against the defendant, restraining the defendant from forcibly dispossessing the plaintiffs, from suit land till they were evicted in due course of law. Rest of the suit was dismissed.

9. Feeling aggrieved by the said judgment passed by the learned trial Court, the plaintiffs filed an appeal and the learned Appellate Court, vide judgment and decree dated 03.01.2005, while upholding the judgment and decree passed by learned trial Court, dismissed the appeal so filed by the plaintiffs.

10. Mr. Rajnish K. Lal, learned counsel appearing for the appellants has argued that the judgments and decrees passed by both the learned Courts below are not sustainable in law as both the learned Courts below had erred in not appreciating that the suit land was purchased by Jadon by way of oral sale which was permissible in law, from the original owner of the land i.e. His Highness, Sirmaur and after the death of Jadon, the suit land was succeeded by Banarasi Dass, Munna Lal and Ram Swarup, from whom the property devolved upon the predecessor in interest of plaintiffs No. 1 to 3 on 14.08.1978 by way of a sale deed. Learned counsel for the appellants further submitted that it stood proved from the record that Ram Swarup was succeeded by Shakuntla, Surender Prakash, Prem Chand, Prem Lata, Raj Rani and Shyam Lata and they had sold the suit land in favour of Manmohan i.e. predecessor in interest of plaintiffs No. 1 to 3. It was further contended by learned counsel for the appellants that even otherwise the findings which were returned by both the learned Courts below were totally perverse as the true intent of Ext. PW2/A was not appreciated by both the learned Courts below and this aspect of the matter was not appreciated by both the learned Court below that as the ejectment proceedings had been initiated only against Beni Prashad, other plaintiffs could not be made to suffer and put to loss on account of and in the process of ejectment proceedings in which they were not even a party. He also argued that both the learned Courts below erred in not accepting the alternative plea of adverse possession as it stood proved on record that appellants had perfected their title by way of adverse possession. On these bases, it was urged by learned counsel for the appellants that judgments and decrees passed by both the learned Courts below were perverse and not sustainable in law.

11. Mr. V.S. Chauhan, learned Additional Advocate General, on the other hand, argued that there was neither any perversity not any infirmity with the findings which were returned by both the learned Courts below because plaintiffs had miserably failed to prove that any sale, oral or otherwise, took place by virtue of which, Jadon became owner of the suit land. Mr. Chauhan further argued that the findings returned by both the learned Courts below to the effect that no sale as was alleged by plaintiffs was ever proved on record and that the plaintiffs were encroachers on the suit land, were based on material produced on record. Mr. Chauhan further argued that even otherwise whether or not sale was entered into between Jadon and His Highness of Sirmaur was a question of fact which stood decided concurrently against the appellants by both the learned Courts below and the findings so returned by both the learned Courts below did not warrant any interference in the second appeal. Mr. Chauhan further argued that there was not even an iota of evidence on record to substantiate that Jadon had purchased any property from His Highness Sirmaur by way of any oral sale as was the case put forth by the plaintiffs. According to Mr. Chauhan, the edifice of the case of the plaintiffs was so called oral sale qua the suit land between Jadon and His Highness, Sirmaur and when the plaintiffs had failed to prove that any such sale took place, the findings which were returned by both the learned Courts below holding that the plaintiff were nothing but encroachers over the suit land were the correct finding. According to Mr. Chauhan, there was no mis-appreciation or misreading of any document on record including Ext. PW2/A. He further argued that contention of learned counsel for the appellants that persons not party in the ejectment proceedings could not be made to suffer

on account of a proceeding which was only initiated against Beni Prashad was also without any merit because the judgment passed by learned trial Court very clearly and categorically mentioned that the plaintiffs can be evicted from the suit land only in due process of law and the said judgment, duly protected the interests of plaintiffs. Mr. Chauhan also argued that the findings returned by both the learned Courts below to the effect that plaintiffs had failed to prove that they had become the owners of the suit land by way of adverse possession also calls for no interference because plaintiffs had failed to prove that their possession of suit land was open, peaceful and hostile as to the knowledge of real owners. On these bases, it was argued by Mr. Chauhan that there was no merit in the appeal and the same be dismissed.

12. Learned Counsel for the private respondents supported the case of appellants.

13. I have heard the learned counsel for the parties and I have also gone through the records of the case as well as the judgments passed by both the learned Courts below.

14. A perusal of the issues framed by learned trial Court demonstrates that there was a specific issue framed by learned trial Court whether Jadon had purchased the suit land through an oral sale from His Highness, Sirmaur or not. It was held by learned trial Court on the basis of evidence produced on record that there was nothing on record which showed that Jadon had purchased suit land from His Highness Sirmaur. Learned trial Court held that there was no convincing evidence on record to substantiate that Banarasi Dass, Munna Lal and Ram Swarup had succeeded Jadon after his death. It was further held by the learned trial Court that the contention of the plaintiffs that in a partition proceedings between Krishna Devi and Shakuntla, suit land came to the share of Shakuntla, was also not substantiated from any material on record as no partition whatsoever was reflected in any revenue record. It was further held by the learned trial Court that Ext. PW2/A in fact reflected Shakuntla Devi, a power of attorney holder of others, having sold the suit property in favour of Manmohan Singh son of Beni Prashad. This sale deed was shown to be executed on 14.08.1978 and registered on the same date. Learned trial Court held that a perusal of the sale deed demonstrated that there were no particulars of khasra numbers mentioned in the same qua the property which purportedly was the subject matter of sale in favour of Manmohan. It was further held by learned trial Court that it was the admitted position that said sale deed was never incorporated in any revenue record. Learned trial Court further held that seller reflected in the sale deed was in fact not recorded either in the column of ownership or in the possession of suit land and title of Shakuntla, Surinder Prakash, Prem Chand, Prem Lata, Raj Rani and Shyam Lata was nowhere recorded in the revenue record. It was further held by learned trial Court on the basis of documents on record that as far as revenue records were concerned, long standing entries appearing in the same reflected the Government of Himachal Pradesh as recorded owner of the suit land though in the latest revenue records, in the column of possession, there was entry qua illegal possession recorded as "*Mukhtlif Kabjan Najayaj*". Accordingly, it was concluded by learned trial Court that it could not be proved by the plaintiffs that Jadon had in fact purchased the suit land by way of an oral sale and he was succeeded by Banarasi Dass, Munna Lal and Ram Swarup etc. Learned trial Court further held that it was not established that the suit land was inherited by Shakuntla, Surender Prakash, Prem Chand, Prem Lata, Raj Rani and Shyam Lata after the death of Ram Swarup or that at the time of execution of sale deed dated 14.8.1978 by Shakuntla etc in favour of Manmohan Singh son of Sh. Beni Prashad, said Shakuntla etc. were owner in possession of the suit land. Thus, it was held by learned trial Court that title of Jado and Ram Swarup was not established on record and hence question of inheritance of title by Shakuntla thereof does not arise. It was further held by learned trial Court that Kaka Ram, Reader of Tehsildar Pachhad, who had entered the witness box as DW1 had deposed that as per record at case file No. 4/88 received on 6.4.2002, Patwari had made report of encroachment and Kanungo had also made report in this regard and notice under Section 163 of the H.P. Land Revenue Act had been issued to plaintiff No. 4. Learned trial Court further held that in the said proceedings, after the issuance of notice under Section 163 of said Act, warrant of ejectment under Section 163 of the H.P. Land Revenue Act had also been issued by the competent authority for the ejectment of plaintiff No. 4. It was further held by learned trial Court that DW1 had stated that the proceedings which had been initiated against

plaintiff No. 4 under Section 163 of the H.P. Land Revenue Act were attended by Beni Prashad as well as his sons. DW2 Piar Chand, Kanungo also corroborated the case of defendant. It was further held by learned trial Court that there was no convincing ground to infer that possession of plaintiffs over the suit land ripened into ownership by way of adverse possession. On these bases, learned trial Court while rejecting the other reliefs claimed by plaintiffs, partly decreed the suit restraining the defendant from forcibly dispossessing the plaintiffs from the suit property except in due course of law.

15. Learned Appellate Court while affirming the findings so returned by learned trial Court held that the plaintiffs were not able to make out any case for interference. It was held by learned Appellate Court that the contention of the plaintiffs with regard to their title based on sale deed was not proved by them. Learned Appellate Court held that a perusal of sale deed Ext. PW2/A demonstrated that there was not even a fleeting reference as to the suit property in the so called sale deed. It was further held by learned Appellate Court that Kaka Ram, Registration Clerk, who had entered the witness box to testify Ext. DW2/A admited that there was no mention of khasra numbers in the said sale deed. Learned Appellate Court also held that Ext. PW2/A also did not reveal as to whether the house in issue was forming part of suit property which was sold by her to the plaintiffs. It was also held that revenue records categorically demonstrated that defendant was recorded as owner in possession of the suit property, however, in bandobast settlement, plaintiff No. 4 and his sons were shown in joint possession of Khasra No. 1005/1, measuring 54.25 sq. meters to the extent of half share each and plaintiff No. 4 was shown in exclusive possession of Khasra No. 1006, measuring 21.38 Sq. meters, whereas in earlier revenue records, right from samvat 2001-02 till 1968-69, defendant was recorded in possession of the suit land. It was further held that it was for the first time, the entry in the column of possession of suit property comprised in Khasra No. 1005 was "*Mukhtlif Kabjan Najayaj*", which entry continued up to settlement. Learned Appellate Court also held that there was no document of sale pertaining to the purchase of house from Sumer Chand by plaintiff No. 4 nor there was any mutation etc. recorded in this regard. Learned Appellate Court also held that plaintiff No. 4 had not stepped into witness box in support of contention of purchase of said property from Sumer Chand. On these bases, it was held by the learned Appellate Court that the findings to the effect that plaintiffs had not been able to make out a case for ownership and possession of the suit property could not be faulted with. Learned Appellate Court has upheld the findings of the learned trial Court to the effect that plaintiffs could not demonstrate that they had perfected their title on the suit property by way of adverse possession. It was held by learned Appellate Court that plaintiffs were claiming their title on the basis of sale deed which though could not be proved and it was enjoined upon them to show as to since when they started proclaiming their adverse or hostile title or since when they had animus to possess suit property adversely in denial of the title of the true owner i.e. defendant-State. On these bases, the appeal so filed by the plaintiffs was dismissed by learned Appellate Court.

16. In my considered view, the findings, which had been returned by both the learned Courts below holding that there was no material on record from which it can be inferred that the suit property was ever purchased by Jadon from His Highness of Sirmaur, by way of oral sale, are correct findings. Case to the effect that Jadon had become owner of the suit property by way of an oral sale was put forth and propounded by the plaintiffs and obviously the onus to prove the same was on the plaintiffs. In fact, the entire edifice of the case of the plaintiffs was this oral sale of the suit land by His Highness Sirmaur in favour of Jadon. However, as has been rightly held by both the learned Courts below, plaintiffs miserably failed to prove that any oral sale was entered into between Jadon and his Highness, Sirmaur, as was the case put forth by plaintiffs. There is no revenue entry to this effect that Jadon had become owner of the suit property by virtue of oral sale entered into by him with His Highness, Sirmaur. In this view of the matter, the subsequent findings returned by both the learned Courts below to the effect that the plaintiffs could not prove on record that the suit property was subsequently inherited by the successor in interest of Jadon and from one of such successor in interest, the same was legally purchased by late Shri Manmohan, the predecessor in interest of plaintiffs cannot be faulted

with. During the course of arguments, learned counsel for the appellant could not point out as to what was the material on record produced by the plaintiffs from which it could be inferred that the findings returned by both the learned Courts below to this effect were either perverse or erroneous. Learned counsel appearing for the appellants could not draw the attention of this Court to any of the documents on record from which it could be inferred that the persons from whom the suit property was purchased vide sale deed dated 14.8.1978 by Shri Manmohan, were owners in possession of the suit property and had any valid title over the same. In this view of the matter, it is reiterated that the findings returned by the learned Courts below that the plaintiffs had miserably failed to prove on record that the suit property was purchased by Jadon by way of an oral sale from His Highness and subsequently the same was inherited by his successors in interest are correct findings. Similarly, the findings returned by both the learned Court below to the effect that plaintiffs could not prove on record that they had perfected their title on the suit property by way of adverse possession also cannot be faulted with.

17. The theory of adverse possession is that an adverse possession allows a trespasser, a person guilty of tort or even crime in the eyes of law to gain legally title of land, which he has illegally possessed for 12 years or 30 years in the case of Government land.

18. Incidentally, the appellants before this Court were the plaintiffs who had filed a suit for seeking declaration to the effect that they be declared owner in possession of the suit property as they had perfected the said title by way of adverse possession. The Hon'ble Supreme Court in **Gurdwara Sahib Vs. Gram Panchayat Village Sirthala and another**, (2014) 1 Supreme Court Cases 669 has held as under:-

> "There cannot be any quarrel to this extent that the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."

19. The Hon'ble Supreme Court in **Chatti Konati Rao and others Vs. Palle Venkata Subba Rao**, (2010) 14 Supreme Court Cases 316, has held:-

> "12. ..... What is adverse possession, on whom the burden of proof lie, the approach of the court towards such plea etc. have been the subject matter of decision in a large number of cases. In the case of T. Anjanappa v. Somalingappa, it has been held that mere possession however long does not necessarily mean that it is adverse to the true owner and the classical requirement of acquisition of title by adverse possession is that such possessions are in denial of the true owner's title. Relevant passage of the aforesaid judgment reads as follows: (SCC p. 577, para 20)
>
> "20. 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. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action."
>
> 13. What facts are required to prove adverse possession have succinctly been enunciated by this Court in the case of Karnataka Board of Wakf vs. Government

of India and Ors. It has also been observed 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. SCC para 11 of the judgment which is relevant for the purpose reads as follows : (SCC p. 785)

"11. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, 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. (See S.M. Karim v. Bibi Sakina, Parsinni v. Sukhi and D.N. Venkatarayappa v. State of Karnataka. Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. (Mahesh Chand Sharma (Dr.) v. Raj Kumari Sharma.)"

14. In view of the several authorities of this Court, few whereof have been referred above, what can safely be said that mere possession however long does not necessarily mean that it is adverse to the true owner. It means hostile possession which is expressly or impliedly in denial of the title of the true owner and in order to constitute adverse possession the possession must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The possession must be open and hostile enough so that it is known by the parties interested in the property. The plaintiff is bound to prove his title as also possession within 12 years and once the plaintiff proves his title, the burden shifts on the defendant to establish that he has perfected his title by adverse possession. Claim by adverse possession has two basic elements i.e. the possession of the defendant should be adverse to the plaintiff and the defendant must continue to remain in possession for a period of 12 years thereafter.

15. Animus possidendi as is well known a requisite ingredient of adverse possession. Mere possession does not ripen into possessory title until possessor holds property adverse to the title of the true owner for the said purpose. The person who claims adverse possession is required to establish the date on which he came in possession, nature of possession, the factum of possession, knowledge to the true owner, duration of possession and possession was open and undisturbed. A person pleading adverse possession has no equities in his favour as he is trying to defeat the rights of the true owner and, hence, it is for him to clearly plead and establish all facts necessary to establish adverse possession. The courts always take unkind view towards statutes of limitation

overriding property rights. Plea of adverse possession is not a pure question of law but a blended one of fact and law."

20. Accordingly, applying these principles to the facts of the present case, I am of the considered view that appellants have miserably failed to demonstrate that they were either in possession of the suit land for more than required number of years as alleged and that their alleged possession was open, peaceful and hostile as against the true owner.

21. From the material on record it cannot be said that both the learned Courts below have misread or mis-appreciated the evidence produced on record including the jamabandis and other revenue records nor it can be said that the findings recorded by both the learned Courts below were perverse or were a result of misreading of documentary evidence produced on record including Ext. PW2/A. It is pertinent to take note of the fact that it is not as if both the learned Courts below held that though plaintiffs were able to prove that Jadon had purchased the suit land by way of an oral sale, however, oral sale was not permissible in law. The clear and categorical findings returned by both the learned Courts below are to the effect that the plaintiffs had failed to prove that any sale transaction took place between Jadon and His Highness, Sirmaur either oral or otherwise. The contention of the learned counsel appearing for the appellants that both the learned Courts below have failed to appreciate that in the proceedings which had been initiated under Section 163 of the H.P. Land Revenue Act against plaintiff No. 4, all the plaintiffs could not be harassed is also misconceived because learned trial Court itself has given protection to the plaintiffs to the effect that they shall not be dispossessed from the suit land forcibly except in due process of law.

22. Therefore, in view of the above discussion, there is no merit in the present appeal. The substantial questions of law are answered accordingly.

The appeal is dismissed with costs, so also pending miscellaneous application(s), if any.

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

Anil Khan s/o Sh. Manir Khan .....Petitioner

Versus

State of H.P. .....Non-petitioner

Cr.MP(M) No. 899 of 2016
Order Reserved on 02.09.2016
Date of Order 08.09.2016

Code of Criminal Procedure, 1973- Section 439- An FIR was registered for the commission of offences punishable under Sections 498-A and 306 read with Section 34 of I.P.C.- petitioner filed a bail application- held, that mere release of female co-accused is not sufficient to release the petitioner on bail as special provision of bail are applicable to female accused- innocence or guilt of the accused will be seen at the time of conclusion of trial and not at this stage- while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- in case of release of petitioner on bail, he can induce or threaten the prosecution witnesses- keeping in view the gravity of offence and interest of the public; it is not expedient to release the petitioner on bail- petition dismissed.

(Para-5 to 9)

Cases referred:

Mt. Choti vs. State, AIR 1957 Rajasthan page 10

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

The State Vs. Captain Jagjit Singh, AIR 1962 SC 25
Prasanta Kumar Sarkar Vs. Ashish Chatterjee and another, 2010 (14) SCC 496

For petitioner : Mr. Sunil Chaudhary, Advocate
For non-petitioner : Mr. M. L. Chauhan, Addl. A. G. with Mr. R. K. Sharma, Dy. A.G.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present petition is filed under Section 439 Code of Criminal Procedure 1973 for grant of bail in FIR No.162/2015 dated 26.09.2015 registered under Sections 498-A, 306 read with Section 34 IPC in Police Station Barmana Distt. Bilaspur (H. P.).

Brief facts of the case:

2. It is alleged that deceased Nahid aged 26 years was married with co-accused Ishan Khan in the month of February 2015. It is further alleged that deceased Nahid was posted in Animal Husbandry department Devli. It is alleged that on 26.09.2015 deceased Nahid aged 26 years telephoned her brother that accused persons committed cruelty upon deceased in her matrimonial house and abeted the deceased to commit suicide. It is alleged that deceased also written suicide note. It is alleged that deceased Nahid jumped from the bridge on 26.09.2015 and committed suicide at Slappar bridge and her dead body was recovered on 05.10.2015. On the basis of FIR investigation was conducted and charge sheet was filed against accused persons under Sections 498-A, 306 read with Section 34 IPC. Accused persons are facing trial which is under process before learned Trial Court as of today and listed for prosecution evidence.

3. Response filed on behalf of State of Himachal Pradesh. Court heard learned Advocate appearing on behalf of petitioner and learned Deputy Advocate General appearing on behalf of non-petitioner and Court also perused the entire record carefully.

4. Following points arise for determination:

(1) Whether bail application filed by petitioner is liable to be accepted as mentioned in memorandum of grounds of bail application?

(2) Final Order.

Findings upon Point No.1 with reasons.

5. Submission of learned Advocate appearing on behalf of petitioner that female co-accused have been released on bail and on the concept of parity co-accused Anil Khan be also released on bail is rejected being devoid of any force for reasons hereinafter mentioned. It is well settled law that there is special provision for bail relating to minor accused under age of 16 years, woman accused, sick or infirm accused as per proviso of clause of Section 437 Code of Criminal Procedure 1973 relating to non-bailable criminal offences punishable with death or imprisonment for life. Female co-accused were released on bail as per special provision of bail relating to female co-accused. It was held in case reported in AIR 1957 Rajasthan page 10 title ***Mt. Choti*** vs. ***State*** that special treatment of women and children in bail matter is not inconsistent with Article 15 of Constitution of India. Hence it is held that in view of above stated facts concept of parity will not apply to male accused namely Anil Khan in the present case.

6. Submission of learned Advocate appearing on behalf of petitioner that petitioner is innocent and petitioner did not commit any criminal offence as alleged by the prosecution and on this ground bail application be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Fact whether petitioner committed criminal offence or not is complicated issue of facts. Same will be decided by learned Trial Court after giving due opportunity to prosecution and accused to lead evidence in support of their case. It is not expedient in the ends of justice to give judicial findings relating to innocence of petitioner at this stage of the case unless opportunity is granted to prosecution and accused to lead evidence in support of their

case. Judicial findings relating to absence of *mens rea* on the part of petitioner or *actus reus* cannot be given at this stage of the case being complicated questions of facts. Judicial findings relating to absence of *mens rea* or *actus reus* will be given by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case.

7. Submission of learned Advocate appearing on behalf of petitioner that any condition imposed by the Court will be binding upon petitioner and on this ground bail application be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Allegations against the petitioner are very heinous and grave in nature relating to criminal offence punishable under Section 306 IPC. At the time of granting bail following factors should be considered: (1) Nature and seriousness of offence. (2) Character of evidence. (3) Circumstances peculiar to the accused. (4) Reasonable possibility of presence of accused in trial or investigation. (5) Reasonable apprehension of witnesses being tampered with. (6) Larger interest of the public or State. See AIR 1978 SC 179 title ***Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see AIR 1962 SC 253 title ***The State Vs. Captain Jagjit Singh.*** Also see 2010 (14) SCC 496 title ***Prasanta Kumar Sarkar*** Vs. ***Ashish Chatterjee and another.***

8. Submission of learned Additional Advocate General appearing on behalf of State that trial is under process before competent Court of law and criminal case has been listed for prosecution evidence and if petitioner is released on bail at this stage then petitioner will threat or induce the prosecution witnesses is accepted for reasons hereinafter mentioned. There is apprehension in the mind of the Court that if petitioner is released on bail at this stage then petitioner would induce or threat the prosecution witnesses. Court is of the opinion that in view of gravity of offence and in the interest of general public and State it is not expedient in the ends of justice to release the petitioner on bail at this stage of the case. Point No.1 is answered in negative.

Point No.2 (Final order).

9. In view of my findings on point No.1 above bail application filed by petitioner under Section 439 Code of Criminal Procedure 1973 is dismissed. Observations will not effect merits of case in any manner and will be strictly confined for disposal of bail application. However learned Trial Court will dispose of case expeditiously because male accused persons are in judicial custody. Cr.MP(M) No.899/2016 is disposed of. Pending application if any also disposed of.

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

Brahmi Devi and others .....Appellants

Versus

Bavita Devi .....Respondent

RSA No. 568/2015
Reserved on: September 7, 2016
Decided on: September 8, 2016

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs filed a civil suit seeking declaration and permanent prohibitory injunction pleading that they are owners in possession on the basis of natural succession being legal heirs of S- mutation attested in favour of deceased husband of the defendant was wrong, null and void- defendant pleaded that her predecessor was sole owner in possession on the basis of Will- suit was dismissed by the trial court- an appeal was preferred, which was dismissed- held, in second appeal that legal heirs of S had given their no objection for attestation of mutation on the basis of Will- plaintiff again preferred an appeal before A.C. 2nd Grade and gave her no objection- Will always remained in the custody of plaintiff No. 1- it was not case of the plaintiff that Will was outcome of fraud and undue influence- appeal dismissed.

(Para-18)

For the Appellants : Mr. Surinder Saklani, Advocate.
For the Respondent : Mr. Umesh Kanwar, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

This Regular Second Appeal has been instituted against judgment and decree dated 7.5.2015 rendered by the learned Additional District Judge, Ghumarwin, District Bilaspur, Himachal Pradesh in Civil Appeal No. 80/13 of 2014.

2. "Key facts" necessary for the adjudication of the present appeal are that appellants-plaintiffs (hereinafter referred to as 'plaintiffs' for convenience sake) filed a suit for declaration and for permanent prohibitory injunction against the respondent-defendant (hereinafter referred to as 'defendant' for convenience sake). According to the averments made in the plaint, plaintiffs were owners-in-possession to the extent of 5/6 shares measuring 9-19 Bigha compromised in Khasra Nos. 113, 187, 191, 206, 229 Kita -5 Khata/Khatauni No. 25/31 situate in village Talwara, Pargna Tiun, Tehsil Ghumarwin, District Bilaspur, on the basis of natural succession after the death of Shankar being class-1 legal heirs. Declaration was sought to the effect that mutation No. 529 dated 16.3.1985 regarding the estate of deceased Shankar attested in favour of deceased husband of defendant on the basis of some illegal document and subsequent revenue entries on the basis of said mutation were wrong, illegal, null and void. Consequential relief of permanent prohibitory injunction to restrain the defendant from dispossessing the plaintiffs from the suit land, alienating, creating charge or changing the nature of the suit land was also prayed for. In the alternative, the plaintiffs had sought possession of the suit land in case they were dispossessed from suit land during the pendency of the suit. It was prayed that plaintiff No. 1 was widow and plaintiffs No.2 to 5 were the daughters of deceased Shankar. Defendant was widow of deceased Vijay Kumar, who was the brother of plaintiffs No.2 to 5 and only son of plaintiff No.1 and deceased Shankar. Shankar was owner of suit land. He had died intestate on 11.3.1984 and they being class-1 legal heirs of deceased Shankar had inherited the suit land to the extent of 5/6 shares measuring 9-19 Bigha. Husband of defendant died on 30.8.2005 and after his death defendant on 10.7.2006 had threatened to dispose off the suit land claiming that she was the only successor to the suit land after the death of her husband. Plaintiffs came to know that mutation No. 529 had been attested in favour of husband of defendant on the basis of some document dated 23.2.1984. The mutation was alleged to be illegal, wrong, null and void as no Will was ever executed by deceased Shankar.

3. Suit was contested by the defendant. She pleaded that after the death of her husband Vijay Kumar, she and plaintiff No.1 were co-owners in joint possession of the suit land to the extent of half share each because Vijay Kumar was the sole owner in possession of the suit land on the basis of Will duly executed in his favour by Late Shankar on 23.2.1984.

4. Plaintiffs filed replication. Issues were framed by the learned Civil Judge (Junior Division) on 22.7.2010. He dismissed suit on 31.10.2014. Plaintiffs filed an appeal before the learned Additional District Judge, Ghumarwin. He dismissed the appeal on 7.5.2015. Hence, this Regular Second Appeal.

5. The present Regular Second Appeal was admitted on 28.6.2016, on the following substantial questions of law:

> "1. Whether the impugned mutation No. 529 dated 16.3.85 qua estate of Shankar Dass is apparently wrong and illegal, attested purportedly on the basis of will, where as there is no Will supporting the mutation hence, judgments & decrees passed by both the learned Courts below stand vitiated?
>
> 2. Whether in the absence of any legal document conveying the title to one and all natural heirs are entitled for succession to the estate of their father contrary findings returned by both the courts below stands vitiated?

3. Whether without the production and proof of the alleged Will, inference of exclusion of natural heirs is untenable?"

6. Mr. Surinder Saklani, Advocate, on the basis of substantial questions of law framed has vehemently argued that mutation No. 529 dated 16.3.85 was illegal. Defendant neither produced nor proved Will dated 23.2.1984, on the basis of which Mutation No. 529 dated 16.3.1984 was attested.

7. Mr. Umesh Kanwar, Advocate, has supported the judgments and decrees passed by the learned Courts below.

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

9. Since all the substantial questions of law are interconnected and interlinked, the same are taken together for determination to avoid repetition of discussion of evidence.

10. Plaintiff has appeared as PW-1. She has led her evidence by filing affidavit Ext. PW-1/A. She has proved copy of *Jamabandi* Ext. PW-1/B, copy of mutation Ext. PW-1/C and death certificate of Vijay Kumar Ext. PW-1/D. In her cross-examination, she deposed that Vijay Kumar died seven years ago. She feigned ignorance that after the death of her husband, mutation of his property was entered in favour of Vijay Kumar on 16.3.1985. She was not aware about the Will executed by her husband in favour of her son Vijay Kumar on 23.2.1984. She denied the suggestion that she was called to Kuthera by Tehsildar Ghumarwin regarding inheritance of property of her husband. She admitted that in the year 1984 Sh. Bali Ram was President of her Gram Panchayat. She expressed inability to state if no objection was raised by her daughters Satya Devi and Fullan Devi before Assistant Collector 2nd Grade, qua attestation of impugned mutation in favour of her son. She admitted that she never raised any objection regarding the inheritance of the property of her husband till the death of her son. She admitted that she filed the present suit when defendant threatened to dispose of the suit land. She denied that she had concealed the original Will.

11. PW-2 Smt. Neelam Kumari has corroborated the statement of PW-1.

12. PW-3 Brij Lal has deposed by way of affidavit Ext. PW-3/A that on 20.8.2006, the defendant came to village Talwara alongwith her relatives and expressed her intention to dispose of her share in the suit land. In his cross-examination, he deposed that Shankar was his uncle. He feigned ignorance qua the fact that mutation of the estate of Late Shankar was attested by Assistant Collector 2nd Grade at Kuthera on 6.6.1984 and during mutation proceedings, plaintiff, her daughters and her son Vijay Kumar used to appear before Assistant Collector 2nd Grade. He feigned ignorance about any Will executed by Shankar.

13. Defendant has appeared as DW-1. She has led her evidence by filing affidavit Ext. DW-1/A. She was married to Vijay Kumar in 2005. At that time, sisters of Vijay Kumar were already married. Her husband died three months after her marriage. She had seen the Will in favour of her husband. Names of her mother-in-law and her husband were mentioned in the Will. She denied the suggestion that no will was ever executed by Late Shankar in favour of her late husband.

14. Narayan Singh has appeared as DW-2. He deposed hat he was Field Kanungo of Kuthera Circle in the year 1984-85 and at that time, Lokender Singh Chauhan was Tehsildar, Ghumarwin. Mutation No. 529 regarding inheritance of Shankar was entered by Patwari Bhag Singh. Mutation was compared by him after scrutinizing the Will. He has admitted his signatures on mutation Ext. DW-2/A.

15. Longu Ram has appeared as DW-3. He deposed that he was Numberdar of Village Talwara and Late Shankar and Late Vijay were known to him. Will was produced by Vijay Kumar for mutation before Tehsildar. He admitted his signatures on the mutation.

16. DW-4 Hemraj has produced the original mutation.

17. DW-5 Sh. Lokender Singh Chauhan, has deposed that he was Naib Tehsildar Jhandutta from November 1984 to October, 1985. Mutation No. 529 regarding inheritance of Late Shankar was attested by him on the basis of an unregistered Will on 16.3.1985 (six. 16.2.1985). Will was produced by wife of deceased, Smt. Brahmi Devi, who was identified by *Numberdar* Sh. Longu Ram. Will was executed by Shankar in favour of his son Vijay Kumar. Will was read over to the plaintiff No.1 and at that time, daughters of Brahmi Devi (plaintiff) namely Satya and Fullan Devi were also present. He proved the certified copy of mutation (Ext. DW-2/A/Ext. PW-1/D). Mutation was attested by him at Kuthera. He has called all the legal heirs of Shankar but only Brahmi Devi (plaintiff No.1) and daughters Satya Devi and Fullan Devi appeared before him.

18. Will is dated 23.2.1984. DW-2 Narayan Singh, Field Kanungo and DW-5 Lokender Singh Chauhan specifically testified that they had seen the Will of Shankar executed in favour of Vijay Kumar. DW-2 Narayan Singh has testified that mutation No. 529 regarding inheritance of Shankar was entered by Patwari Bhag Singh. DW-5 Lokender Singh Chauhan as noticed herein above stated that he attested the mutation No. 529 on the basis of unregistered Will on 16.3.1985 (sic. 16.2.1985) executed by Shankar. Contents of Will were also read over to Brahmi Devi. Brahmi Devi and her daughters, Satya and Fullan were also present at the time of attestation of the mutation. Unregistered Will was produced on 6.6.1984 before the Assistant Collector 2nd Grade. Matter was adjourned to 2.2.1985 for hearing objections and arguments. Legal heirs of late Shankar Smt. Satya Devi and Smt. Fullan Devi appeared and gave their no objection for attestation of mutation. Thereafter, on 16.2.1985, plaintiff Brahmi Devi again appeared before Assistant Collector 2nd Grade for attestation of mutation and gave her no objection for attestation of mutation. It is in these circumstances, mutation was attested on 16.3.1985 by PW-5 Lokender Singh Chauhan. Defendant has also moved an application under Section 65 of Indian Evidence Act, to prove Will. As noticed above, DW-2 Narayan Singh and DW-5 Lokender Singh Chauhan, have stated that the Will of deceased Shankar was seen by them and mutation No. 529 was attested on 16.3.1985 on the basis of Will executed by Shankar in favour of his son. Both of them are public servants. Their testimony has rightly been accepted by the learned Courts below. Bavita Devi (defendant)never came in possession of the Will. She lost her husband three months after the marriage. Courts below have rightly come to the conclusion that the Will always remained in the custody of plaintiff No. 1 Brahmi Devi. It was not the case of the plaintiffs that the Will was the outcome of fraud or undue influence. Plaintiff No.1 has admitted in her statement that she has challenged inheritance after the death of her son.

19. The substantial questions of law are answered accordingly.

20. Accordingly, in view of the discussion and analysis made hereinabove, the present appeal is devoid of merit and the same is dismissed. Pending application(s), if any, also stand disposed of. No costs.

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

Chhering Dolma ....Petitioner.

Versus

State of H.P. & anr. ....Respondents.

CMPMO No. 349 of 2016.
Reserved on: 7.9.2016.
Decided on: 8.9.2016.

H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971- Section 4- Proceedings were initiated for encroachment over the forest land, which resulted in the eviction of the petitioner - appeal was filed before Divisional Commissioner, Mandi, which was dismissed- held, that petitioner had admitted that she was an encroacher – she had also filed an application for regularization of encroachment - petitioner has failed to prove the plea of adverse possession –

Collector-cum-Assistant Conservator of Forests had rightly ordered the eviction of the petitioner-petition dismissed. (Para-7 to 11)

Cases referred:
Hemaji Waghaji Jat vs. Bhikhabhai Khengarbhai Harijan and ors., (2009) 16 SCC 517
Tribhuvanshankar vs. Amrutlal, (2014) 2 SCC 788

For the petitioner: Mr. Sanjeev Kuthiala, Advocate.
For the respondents: Mr. Neeraj K. Sharma, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition is instituted against the order Annexure P-4 dated 4.8.2014, rendered in case No. 58/K/2007-08 by the learned Collector-cum-Assistant Conservator of Forests, Parvati Forest Division, Distt. Kullu, H.P. and order dated 23.12.2015 rendered in case No. 279/2014 by the learned Divisional Commissioner, Mandi, H.P.

2. "Key facts" necessary for the adjudication of this petition are that the petitioner applied vide application No. 0132021 dated 22.7.2002 for regularization of encroachment made by her on Government/Forest land. The Patwari concerned visited the spot and prepared spot map dated 3.8.2002. During spot inspection the Patwari concerned noticed that the petitioner has erected a Khokha over the encroached land which was Banjar unmeasured land. Since the encroachment was found to be on the forest land, as such the application of the petitioner along with the relevant papers was forwarded to DFO Kullu. Thereafter, notice under Section 4(1) of the H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971 was issued to the petitioner. She filed reply to the same.

3. PW-1 Dayal Singh, Halqua Patwari Sosan testified that he received the application for regularization from the petitioner. He measured the land on the spot. He prepared missal of encroachment on 3.8.2002 and submitted to Halqua Kanungo.

4. PW-2 Mohar Singh Halqua Kanungo has admitted that he has received the application form of the petitioner for regularization.

5. The petitioner has appeared as DW-1 before the Collector-cum-Assistant Conservator of Forests. She has admitted categorically that she has constructed residential house on the suit land by encroaching upon the forest land since 1971.

6. The Collector-cum-Assistant Conservator of Forests ordered the eviction of the petitioner vide order dated 4.8.2014. The petitioner filed an appeal before the learned Divisional Commissioner, Mandi bearing No. 279/2014. He dismissed the same on 23.12.2015.

7. Mr. Sanjeev Kuthiala, Advocate, has vehemently argued that the land in question was not demarcated in accordance with law. However, the fact of the matter is that identification of the land was not in issue since the petitioner has herself admitted to be encroacher and submitted an application for regularization of the encroachment made by her in Manikaran K-III, UPF Tehsil Bhuntar, Distt. Kullu, H.P. Mr. Kuthiala, Advocate has also argued that the land was Phati Abadi and not forest land. However, no tangible evidence has been led by the petitioner that it was Phati Abadi and not forest land. The petitioner has taken contradictory stand in her application submitted for regularization of the encroached land. She came in possession of the land in the year 1991. However, in the reply filed by the petitioner before the Collector-cum-Asstt. Conservator of Forests, she stated that she came into possession from the year 1971. The petitioner has miserably failed to prove the plea of adverse possession. The petitioner has failed to prove the factum of possession over the suit land hostile to that of true owner i.e. the State Government.

8. Their lordships of the Hon'ble Supreme Court in the case of ***Hemaji Waghaji Jat vs. Bhikhabhai Khengarbhai Harijan and ors.,*** reported in ***(2009) 16 SCC 517,*** have held that the law of adverse possession which ousts an owner on the basis of inaction within limitation is irrational, illogical and wholly disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of the true owner. The law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law. This in substance would mean that the law gives seal of approval to the illegal action or activities of a rank trespasser or who had wrongfully taken possession of the property of the true owner. The law should not place premium on dishonesty by legitimizing possession of a rank trespasser and compelling the owner to loose its possession only because of his inaction in taking back the possession within limitation. It has been held as under:

> "32. Before parting with this case, we deem it appropriate to observe that the law of adverse possession which ousts an owner on the basis of inaction within limitation is irrational, illogical and wholly disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of the true owner. The law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law. This in substance would mean that the law gives seal of approval to the illegal action or activities of a rank trespasser or who had wrongfully taken possession of the property of the true owner.
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> 33. We fail to comprehend why the law should place premium on dishonesty by legitimizing possession of a rank trespasser and compelling the owner to loose its possession only because of his inaction in taking back the possession within limitation."

9. Their lordships of the Hon'ble Supreme Court in the case of ***Tribhuvanshankar vs. Amrutlal,*** reported in ***(2014) 2 SCC 788,*** have held that a possession or user or permissive possession does not remotely come near the spectrum of adverse possession. Possession to be adverse has to be actual, open, notorious, exclusive and continuous for the requisite frame of time as provided in law so that the possessor perfects his title by adverse possession. Their lordships further held that the jurisdiction of Rent Controller/Court under the Rent Control Act should be limited to existence of landlord-tenant relationship. The question of plaintiffs' title based on his purchase of suit property or adverse possession thereof by defendant is beyond the scope of enquiry in eviction suit under Rent Control Act. There is difference in exercise of jurisdiction when the civil court deals with a lis relating to eviction brought before it under the provisions of the Transfer of Property Act, 1882 where the equitable relief under Order 7 Rule 7 CPC could be granted and under any special enactment pertaining to eviction on specified grounds. The *sine qua non* for granting the relief in the suit for eviction under the Rent Control Act is that between the plaintiffs and defendant the relationship of "landlord and tenant" should exist. The scope of the enquiry before the Courts is limited. It has been held as under:

> "25. The Court posed a question whether on the facts and in the circumstances of the case the High Court was right in law holding that an equitable decree for eviction of the defendant could be passed under Order VII Rule 7 of the Civil Procedure Code and remanding the case to the first appellate court for recording its finding on the question of title of the parties to the suit premises and for passing an equitable decree for eviction against the defendant if the plaintiffs were found to have title thereto. Answering the question the learned Judges proceeded to state thus:
>
> > "7. It is evident that while dealing with the suit of the plaintiffs for eviction of the defendant from the suit premises under clauses (c) and (d) of sub-section (1) of Section 11 of the Act, courts including the High Court were exercising jurisdiction under the Act which is a special

enactment. The sine qua non for granting the relief in the suit, under the Act, is that between the plaintiffs and the defendant the relationship of "landlord and tenant" should exist. The scope of the enquiry before the courts was limited to the question: as to whether the grounds for eviction of the defendant have been made out under the Act. The question of title of the parties to the suit premises is not relevant having regard to the width of the definition of the terms "landlord" and "tenant" in clauses (f) and (h), respectively, of Section 2 of the Act."

26. In course of deliberation, the two-Judge Bench distinguished the authorities in Firm Sriniwas Ram Kumar v. Mahabir Prasad[8] and Bhagwati Prasad (supra) by observing thus: -

"15. These are cases where the courts which tried the suits were ordinary civil courts having jurisdiction to grant alternative relief and pass decree under Order VII Rule 7. A Court of Rent Controller having limited jurisdiction to try suits on grounds specified in the special Act obviously does not have jurisdiction of the ordinary civil court and therefore cannot pass a decree for eviction of the defendant on a ground other than the one specified in the Act. If, however, the alternative relief is permissible within the ambit of the Act, the position would be different."

27. Thereafter, the learned Judges proceeded to express thus:

"16. In this case the reason for denial of the relief to the plaintiffs by the trial court and the appellate court is that the very foundation of the suit, namely, the plaintiffs are the landlords and the defendant is the tenant, has been concurrently found to be not established. In any event inquiry into title of the plaintiffs is beyond the scope of the court exercising jurisdiction under the Act. That being the position the impugned order of the High Court remanding the case to the first appellate court for recording finding on the question of title of the parties, is unwarranted and unsustainable. Further, as pointed out above, in such a case the provisions of Order VII Rule 7 are not attracted."

28. At this juncture, we may fruitfully refer to the principles stated in Dr. Ranbir Singh v. Asharfi Lal[9]. In the said case the Court was dealing with the case instituted by the landlord under Rajasthan Premises (Control of Rent and Eviction) Act, 1950 for eviction of the tenant who had disputed the title and the High Court had decided the judgment and decree of the courts below and dismissed the suit of the plaintiff seeking eviction. While adverting to the issue of title the Court ruled that in a case where a plaintiff institutes a suit for eviction of his tenant based on the relationship of the landlord and tenant, the scope of the suit is very much limited in which a question of title cannot be gone into because the suit of the plaintiff would be dismissed even if he succeeds in proving his title but fails to establish the privity of contract of tenancy. In a suit for eviction based on such relationship the Court has only to decide whether the defendant is the tenant of the plaintiff or not, though the question of title if disputed, may incidentally be gone into, in connection with the primary question for determining the main question about the relationship between the litigating parties.

29. In the said case the learned Judges referred to the authority in LIC v. India Automobiles & Co.[10] wherein the Court had observed that:

"9. ..... in a suit for eviction between the landlord and tenant, the Court will take only a prima facie decision on the collateral issue as to whether the applicant was landlord. If the Court finds existence of relationship of landlord and tenant between the parties it will have to

pass a decree in accordance with law. It was further observed therein that all that the Court has to do is to satisfy itself that the person seeking eviction is a landlord, who has prima facie right to receive the rent of the property in question. In order to decide whether denial of landlord's title by the tenant is bona fide the Court may have to go into tenant's contention on the issue but the Court is not to decide the question of title finally as the Court has to see whether the tenant's denial of title of the landlord is bona fide in the circumstances of the case."

30. On a seemly analysis of the principle stated in the aforesaid authorities, it is quite vivid that there is a difference in exercise of jurisdiction when the civil court deals with a lis relating to eviction brought before it under the provisions of Transfer of Property Act and under any special enactment pertaining to eviction on specified grounds. Needless to say, this court has cautiously added that if alternative relief is permissible within the ambit of the Act, the position would be different. That apart, the Court can decide the issue of title if a tenant disputes the same and the only purpose is to see whether the denial of title of the landlord by the tenant is bona fide in the circumstances of the case. We respectfully concur with the aforesaid view and we have no hesitation in holding that the dictum laid down in Bhagwati Prasad (supra) and Bishwanath Agarwalla (supra) are distinguishable, for in the said cases the suits were filed under the Transfer of Property Act where the equitable relief under Order VII Rule 7 could be granted.

31 . At this juncture, we are obliged to state that it would depend upon the Scheme of the Actwhether an alternative relief is permissible under the Act. In Rajendra Tiwari's case the learned Judges, taking into consideration the width of the definition of the "landlord" and "tenant" under the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982, had expressed the opinion. The dictionary clause under the Act, with which we are concerned herein, uses similar expression. Thus, a limited enquiry pertaining to the status of the parties, i.e., relationship of landlord and tenant could have been undertaken. Once a finding was recorded that there was no relationship of landlord and tenant under the Scheme of the Act, there was no necessity to enter into an enquiry with regard to the title of the plaintiff based on the sale deed or the title of the defendant as put forth by way of assertion of long possession. Similarly, the learned appellate Judge while upholding the finding of the learned trial Judge that there was no relationship of landlord and tenant between the parties, there was no warrant to reappreciate the evidence to overturn any other conclusion. The High Court is justified to the extent that no equitable relief could be granted in a suit instituted under the Act. But, it has committed an illegality by affirming the judgment and decree passed by the learned trial Judge because by such affirmation the defendant becomes the owner of the premises by acquisition of title by prescription. When such an enquiry could not have been entered upon and no finding could have been recorded and, in fact, the High Court has correctly not dwelled upon it, the impugned judgment to that extent is vulnerable and accordingly we set aside the said affirmation.

34. The conception of adverse possession fundamentally contemplates a hostile possession by which there is a denial of title of the true owner. By virtue of remaining in possession the possessor takes an adverse stance to the title of the true owner. In fact, he disputes the same. A mere possession or user or permissive possession does not remotely come near the spectrum of adverse possession. Possession to be adverse has to be actual, open, notorious, exclusive and continuous for the requisite frame of time as provided in law so that the

possessor perfects his title by adverse possession. It has been held in Secy. Of State for India In Council v. Debendra Lal Khan[11] that the ordinary classical requirement of adverse possession is that it should be nec vi, nec clam, nec precario.

37. It is to be borne in mind that adverse possession, as a right, does not come in aid solely on the base that the owner loses his right to reclaim the property because of his willful neglect but also on account of the possessor's constant positive intent to remain in possession. It has been held in P.T. Munichikkanna Reddy and others v. Revamma and others[14]."

10. In the instant case also, the jurisdiction of the Collector-cum-Assistant Conservator of Forests, is limited.

11. Accordingly, there is no perversity in the order dated 4.8.2014, rendered in case No. 58/K/2007-08 passed by the learned Collector-cum-Assistant Conservator of Forests, Parvati Forest Division, Distt. Kullu, H.P. and order dated 23.12.2015 rendered in case No. 279/2014 by the learned Divisional Commissioner, Mandi, H.P.

12. Consequently, there is no merit in this petition, the same is dismissed so also the pending application(s), if any.

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

Jogesh Kumar Gomber ....Petitioner.

Versus

State of Himachal Pradesh ....Respondent.

Cr.R. No. 86 of 2007.
Reserved on: 21.07.2016.
Decided on: 08.09.2016.

Indian Penal Code, 1860- Section 419, 466, 468, 471 and 120B- Copy of an order passed by Hon'ble Supreme Court of India was received by Government of Himachal Pradesh along with a letter from Rasharapati Bhawan, New Delhi, appointing the accused to the post of Joint Secretary- letter of recommendation was signed by accused S as Authorized Signatory – no official intimation was received by the Government on which inquiries were made and it was found that no such recommendation was ever made in favour of the accused – FIR was registered against the accused- accused were tried - accused S was acquitted while accused A and J were convicted- an appeal was filed, which was dismissed- held, in revision that it was not stated by PW-11 and PW-12 that J had visited Shimla or the offices along with accused A- PW-4 did not state that J was seen with accused A- PW-3, PW-5 and PW-6 did not support prosecution version- mere production of documents does not prove the criminal conspiracy between A and J- accused S who was another signatory was acquitted- it was not permissible to convict against the accused J on the basis of same evidence- I.O. admitted that he had never confronted accused J with his signatures- handwriting expert had not examined the original document but had only examined carbon copy- further, opinion of handwriting expert is a weak kind of evidence and is corroborative in nature, which cannot be used for convicting the accused in absence of the substantive evidence- trial Court had wrongly convicted the accused J- petition allowed.

(Para-30 to 41)

Cases referred:

Magan Bihari Lal v. The State of Punjab, 1977 Cri. L.J. 711
Jagmal Singh Yadav Versus Aimaduddin Ahmed Khan, 1994 Supp (2) Supreme Court Cases 308
Alamgir Versus State (NCT, Delhi), (2003) 1 Supreme Court Cases 21
Fakhruddin v. The State of Madhya Pradesh, AIR 1967 Supreme Court 1326

Kehar Singh and Ors. V. State (Delhi Administration), (1988) 2 SCC 609
State of Maharashtra and Ors. V. Som Nath Thapa and Ors. (1996) 4 SCC 659

For the petitioner. : Mr. R.L. Sood, Senior Advocate, with Mr. Sanjeev Kumar, Advocate.
For the respondent : Mr. V.S. Chauhan, Addl. AG with Ms. Parul Negi, Dy. AG.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way this revision petition, the petitioner has prayed for the following relief:

"It is, therefore, prayed that the judgment of conviction and order of sentence passed by the learned trial Court be set-aside and the appellant may please be acquitted of all the changes by way of acceptance of this appeal, in the interest of justice."

2. The case of the prosecution was that through accused Ashok Kumar Chaudhary Government of Himachal Pradesh received a copy of order dated 25.09.2002 purportedly passed by the Hon'ble Supreme Court of India alongwith a letter from Rashtrpati Bhawan, New Delhi, whereby accused Ashok Kumar Chaudhary was recommended as appointee to the post of Joint Secretary to the Government of Himachal Pradesh. Letter of recommendation for appointment was signed by accused Surender Singh Bhatia as authorized signatory and accused Jogesh Kumar Gomber (present petitioner) as authorized signatory. Further as per the prosecution, accused Ashok Kumar Chaudhary visited the office of Shri B.S. Nanta, Special Secretary to the Government of Himachal Pradesh in connection with his appointment many times. He also visited other high officials in this regard. However, as there was no intimation to the State Government regarding so called orders passed by the Hon'ble Supreme Court, prima facie, the entire episode was found to be suspicious and accordingly Shri Subhash Negi, the then Secretary (Personnel), to the government of Himachal Pradesh telephonically contacted Rashtrpati Bhawan, New Delhi and it was gathered that no such recommendation was ever made in favour of accused Ashok Kumar Chaudhary for being appointed as Joint Secretary. According to the prosecution, accused Ashok Kumar Chaudhary alongwith other co-accused including the present petitioner connived with each other and forged documents in order to cheat the State Government so that accused Ashok Kumar Chaudhary be appointed as Joint Secretary to the Government of Himachal Pradesh.

3. On the basis of complaint lodged by Special Secretary to the Government of H.P., FIR was registered against the accused persons and investigation was carried out. After the completion of the investigation, challan was filed in the Court and as a prima-facie case was found against the accused, accordingly, they were charged for offences punishable under Sections 419, 466, 468, 471 and 120B of the Indian Penal Code (for short 'IPC') to which they pleaded not guilty and claimed trial.

4. Learned trial Court held that the prosecution was able to substantiate the guilt of accused Ashok Kumar Chaudhary and the present petitioner while acquitting accused S.S. Bhatia. Learned trial Court convicted Ashok Kumar Chaudhary and the petitioner for offences punishable under Sections 120B, 419, 466, 468 and 471 of IPC and sentenced the petitioner alongwith Ashok Kumar Chaudhary to suffer rigorous imprisonment for a period of two years and fine in the sum of Rs. 1,000/- each for offence punishable under Section 120-B of IPC. Learned trial Court further sentenced both the convicts to undergo rigorous imprisonment for a period of two years and fine in the sum of Rs. 1,000/- each for offence punishable under Section 419 of IPC, rigorous imprisonment for a period of two years and fine of Rs. 1,000/- each for offence punishable under Section 466 of IPC, rigorous imprisonment for a period of two years and fine of Rs. 1,000/- each for offence punishable under Section 468 of IPC and rigorous imprisonment for a period of two years and fine of Rs. 1,000/- each for offence punishable under Section 471 of IPC.

5. The judgment passed by the learned trial Court was challenged by the petitioner before the learned Appellate Court and learned Appellate Court, vide judgment dated 28.06.2007, dismissed the appeal so filed by the petitioner and upheld the judgment of conviction passed against him by the learned trial Court.

6. Mr. R.L. Sood, learned Senior Counsel appearing for the petitioner has argued that the judgments of conviction passed against the present petitioner by both the learned Courts below were perverse and not sustainable either on fact or on law. Mr. Sood argued that the findings of conviction returned by learned trial Court and upheld by learned Appellate Court were not borne out from the records of the case and both the learned Courts below in fact miserably failed to appreciate that the prosecution was not able to prove its case beyond reasonable doubt against the petitioner, hence, conviction of petitioner had resulted in travesty of justice. Mr. Sood, vehemently argued that it was a fit case where this Court should exercise its revisional jurisdiction because the perversity in the findings returned by the learned Courts below against the petitioner was writ large. According to Mr. Sood, both the learned Courts below failed to appreciate that the prosecution did not produce an iota of evidence on record to substantiate that the petitioner herein had hatched any criminal conspiracy with Ashok Kumar Chaudhary for commission of offences for which he had been convicted. As per Mr. Sood, the petitioner deserved acquittal on this count alone. He further argued that even otherwise both the judgments passed by learned Courts below were perverse because both the learned Courts below failed to appreciate that there was no material on record to link the petitioner with the commission of the alleged offence. Mr. Sood, further argued that there was no evidence on record that petitioner either was known to accused A.K. Chaudhary or that he had entered into a criminal conspiracy with accused A.K. Chaudahry and in furtherance of the same, he had forged any document. Mr. Sood further argued that none of the prosecution witnesses pointed towards complicity of the petitioner in the crime committed. It was further argued by Mr. Sood that both the learned Courts below erred in relying upon unsubstantiated and uncorroborated evidence of the handwriting expert without appreciating that the opinion of a handwriting expert even otherwise was only a corroborative piece of evidence and conviction cannot solely be based on it.

7. On the other hand, Mr. V.S. Chauhan, learned Additional Advocate General argued that keeping in view the fact that both learned Courts below had held that the petitioner was guilty of the offences charged against him, the judgment of conviction so passed by learned Courts below did not warrant any interference in exercise of the revisional jurisdiction by this Court. Therefore, he submitted that as there was no merit in the revision petition, the same be dismissed.

8. I have heard the learned counsel for the parties and also gone through the records of the case as well as the judgments passed by both the Courts below.

9. Before proceeding in the matter, it is relevant to take note of what is the scope of revisional jurisdiction of this Court. It is settled law that the scope of revisional jurisdiction of this Court does not extend to re-appreciation of evidence. It has been held by the Hon'ble Supreme Court that the High Court in exercise of its revisional power can interfere only if the findings of the Court whose decision is sought to be revised is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where judicial discretion is exercised arbitrarily or capriciously. It has been held by Hon'ble Supreme Court in ***Sanjaysinh Ramrao Chavan Versus Dattatray Gulabrao Phalke and Others, (2015) 3 Supreme Court Cases 123***, that unmerited and underseved prosecution is an infringement of guarantee under Article 21 of the Constitution of India. In this case, Hon'ble Supreme Court has further held that the purpose of revision jurisdiction is to preserve the power in the Court to do justice in cases of criminal jurisprudence.

10. In the backdrop of the scope of scope of revisional jurisdiction of this Court, hereinafter this Court shall deal with the respective contentions of the parties.

11. In order to prove its case, prosecution examined 15 witnesses and this Court shall now refer to the testimony of material prosecution witnesses.

12. HC Jai Prakash entered the witness box as PW1 and deposed that he had brought the requisitioned record regarding FIR registered against accused A.K. Chaudhary at Preetvihar Police Station.

13. Sh. Ashok Kumar, HC, Crime Branch, State CID, entered the witness box as PW2 and he deposed about the search which was carried out in the house of A.K. Chaudhary in Model Town, Yamuna Nagar.

14. Ms. Seema entered the witness box as PW3 and stated that she was working in the STD of the petitioner in Moti Nagar, Delhi. This witness did not support the case of prosecution and was declared as hostile witness. In her cross examination by the State, this witness stated that she used to work in the shop alone. She admitted it to be correct that during day time, record used to be with her. This witness denied that documents mark 7-1 to mark 7-5 were handed over to police by her. She stated that she was working with J.K. Gomber for the last one year. In her cross examination on behalf of accused A.K. Chaudhary, this witness stated that she did not know A.K. Chaudhary, nor had he ever come to the shop of the petitioner in her presence.

15. Mr. Raj Mohan Singh entered the witness box as PW4 and he stated that he works as a Chemist in Yamuna Nagar. As per his testimony, accused A.K. Chaudhary used to reside behind his house. In his entire testimony, this witness has not stated, either in his examination in chief or in cross examination, that he knew the petitioner or recognized him. Another very important aspect of the matter is that in the cross examination, this witness stated that he knew accused S.S. Bahtia who was a Lawyer, practicing on the taxation side.

16. Rasif Ahmad entered the witness box as PW5. He stated that the petitioner was running STD shop which was adjacent to his shop. As per him, when he went to the shop of petitioner, police was already there and he signed Ext. PW7/A on their asking. He denied that any document was taken into possession in his presence. He was also declared as hostile as he did not support the case of prosecution.

17. Mr. Harbans Lal entered the witness box as PW6. As per the case of prosecution, this witness was associated during the course of investigation, however, he did not corroborate the case of prosecution and was declared as a hostile witness.

18. PW7 ASI Chanchal Singh deposed that he was posted in Police Station East, Shimla at the relevant time and that on the basis of statement of Shri B.S. Nanta recorded under Section 154 of Code of Criminal Procedure, he lodged FIR Ext. PW7/A.

19. PW8 Dy. S.P. Swarn Singh has interalia deposed about the preparation of supplementary challan and filing of the same in the Court.

20. PW9 Satish Kumar deposed that in the year 2005 he was posted in State CID and he had deposited the case property at FSL, Junga.

21. PW10 Sheel Kumar deposed that from February, 2006, he was posted in Chanakyapuri Police Station as MHC and he had brought FIR register of Police Station Chanakyapuri. He further stated that FIR 94/03, dated 03.04.2003 under Section 420, 467, 468 and 471 of IPC was registered only against accused Ashok Chaudhary.

22. Mr. B.S. Nanta entered the witness as PW-11 and he deposed that from April 2002 to August 2003, he remained posted as Special Secretary to the Government of Himachal Pradesh. He deposed qua the factum of accused A.K. Chaudhary having come to his office in October 2002 and having presented before him a letter addressed from the office of President of India to the effect that the said accused be appointed against the post of Joint Secretary. This witness also stated that the letter which purportedly had come from the President of India's office was signed by S.S. Bhatia and J.K. Gomber as authorized signatory. This witness also stated that

as there was doubt about the veracity of the said communication, accordingly, it was inquired as to whether any such kind of communication had been addressed from Rashtrapati Bhawan which query revealed that no such communication in fact had been issued by Rashtrapati Bhawan and on these bases, case was registered on the ground that all the accused i.e. A.K. Chaudhary, S.S. Bahtia and J.K. Gomber, by entering into a criminal conspiracy, had created forged documents with the intent of cheating, to have appointed A.K. Chaudhary, as Joint Secretary to the Government of Himachal Pradesh.

23. Mr. Subhash Chand Negi, entered the witness box as PW12. He deposed that in the year 2002-03, he was serving as Commissioner-cum-Secretary to the Government of Himachal Pradesh, when accused A.K. Chaudhary, first took appointment from him on telephone and intimated that he was to join as Joint Secretary, as per the directions of Hon'ble Supreme Court and communication issued by Rashtrapati Bhawan. He further deposed about the factum of accused A.K. Chaudhary having come to Shimla and the facilities extended to him and A.K. Chaudhary producing with communication addressed by Rashtrapati Bhawan to him which was subsequently found to be incorrect. In his cross examination this witness deposed that he did not make any inquiry about the documents in issue from J.K. Gomber or S.S. Bhatia. He also stated that he was not aware as to what J.K. Gomber and S.S. Bahtia do in life and he also stated that petitioner and S.S. Bhatia never visited his office.

24. Mr. Satish Mathur, Director, President's Secretariat, New Delhi, entered the witness box as PW13 and deposed that Rashtrapati Secretariat received letter Ext. P-2 from Secretary, Personnel, Government of Himachal Pradesh, dated 01.11.2002, to which it was responded that no directions/recommendations to the Government of Himachal Pradesh, as alleged by accused A.K. Chaudhary, were ever issued. He also stated that there were no authorized signatories or additional authorized signatories of President of India as alleged by accused A.K. Chaudhary. In his cross examination, this witness stated that signatures on Ext. P-1, Ext. P-10 and Ext. P-11 were not got investigated by their office. He admitted it to be correct that S.S. Bhatia and J.K. Gomber were not known to him. He stated that he cannot say that signatures of S.S. Bhatia and J.K. Gomber were forged.

25. Mr. Visheshwar Sharma, Scientific Officer, State Forensic Science Laboratory, Junga, entered the witness box as PW14. This witness proved on record the signatures of the signatories including the accused on the allegedly forged documents. In his cross examination on behalf of present petitioner, this witness stated that they had prepared photo enlargement but the same were not sent with the report. He also stated that no chemical test was done. He also admitted that in the age of computer, possibility of scanning cannot be ruled out. This witness further deposed that they had not used the water for spreading the ink as the same was destructive technique. He admitted that they had not reported whether the questioned signatures of the present petitioner were by fountain pen or by ball point pen. Another very important aspect of the matter is that this witness admitted it to be correct in his cross examination that the admitted signatures Ext. PW12/A-12 and PW12/A-13 were carbon signatures. His exact testimony in this regard is mentioned herein below:

> ***"It is correct that the admitted signatures in Ext. PW12/A-12 and PW12/A-13 are carbon signature."***

26. Investigating Officer Virender Kalia entered the witness box as PW15. A perusal of testimony of this witnesses demonstrates that he has stated in his cross examination on behalf of the petitioner that he had recorded the statements of only two officials of the Rashtrapati Bhawan. He also admitted it to be correct that neither did he visit the Ministry of Justice, Law and Company Affairs in course of investigation of this case nor he collected any material in this regard. He also admitted in his cross examination that petitioner never met him in Delhi nor he ever confronted the petitioner with his alleged signatures. He further admitted it to be correct that the present petitioner had a shop of communication, however, he stated that he was not aware of the fact that as to whether or not his telephone number and fax number were written outside the shop or not. He further admitted it to be correct that he did not conduct any investigation from

the office of Joint Secretary, Government of India, pertaining to the documents in issue. He also admitted it to be correct that he acted against S.S. Bahtia and the present petitioner only because their names were written on the documents. He admitted it to be correct that in this regard he neither interrogated the present petitioner nor did he ever show the documents in issue to the petitioner. In his cross examination, he further stated that he could not tell as to whether the signatures of the present petitioner were original or scanned.

27. It is evident and clear from the perusal of the testimony of prosecution witnesses that PW11 and PW12 respectively have nowhere stated that the petitioner either came to Shimla or he visited their respective offices with accused A.K. Chaudhary. PW3, PW5 and PW6, who as per prosecution were independent witnesses, have not supported the case of prosecution. PW4, Raj Mohan Singh has nowhere stated that he ever saw the present petitioner with A.K. Chaudhary. The FIRs, which have been exhibited by the prosecution, did not contain the name of the present petitioner and the witnesses who have proved these FIRs, clearly stated that only person named in these FIRs was A.K. Chaudhary.

28. From the above facts one thing is very apparent and clear that no material was produced on record by the prosecution linking the present petitioner with A.K. Chaudhary. The factum of accused A.K. Chaudhary having produced some communication, purportedly issued by Rashtrapati Bhawan, which were purportedly signed by the present petitioner as authorized signatory does not ipso facto prove that the present petitioner hatched any criminal conspiracy with accused A.K. Chaudhary and in furtherance of same, forged documents were prepared to play fraud upon the Government of Himachal Pradesh. Independent witnesses associated in this regard by the prosecution have not supported its case. Though these witnesses have been subjected to extensive cross examination by the prosecution, however, nothing could be elucidated from their cross examination to further the cause of the prosecution. There is not an iota of evidence adduced by the prosecution on record to prove that in fact petitioner hatched any criminal conspiracy with A.K. Chaudhary and it was a result of such criminal conspiracy that forged documents were prepared which were purportedly signed by present petitioner in his capacity as authorized signatory. There is no evidence on record which either links the present petitioner with accused A.K. Chaudhary or from which it can be inferred that petitioner and A.K. Chaudhary had in fact connived and conspired to commit the offences for which present petitioner has been convicted. Another important aspect of the matter is that S.S. Bhatia, who was also one of the accused and against whom allegations were similar as against the petitioner, stood acquitted by learned trial Court. Therefore, also it is not understood as to how learned trial Court convicted the present petitioner for commission of offences under Sections 419, 466, 468, 471 and 120-B of IPC, when on the same set of evidence, other co-accused S.S. Bhatia was acquitted by it.

29. In the present case, the findings which have been returned by learned trial Court while convicting the present accused for commission of offences punishable under Sections 419, 466, 468, 471 and 120-B of IPC, are not borne out from the records of the present case thus findings returned are glaringly unreasonable.

30. PW15, the IO of the case, in his cross examination has admitted that he never confronted the petitioner with his alleged signatures. Testimony of this witness has been totally ignored by the learned Courts below which has already been discussed by me in detail above.

31. Both the learned Courts below while convicting the petitioner erred in not appreciating that it was thus apparent from the record that material prosecution witnesses had admitted that the petitioner was in fact never confronted with his alleged signatures on the alleged forged documents.

32. As far as the testimony of PW12, Visheshwar Sharma, Scientific Officer is concerned, this witness has admitted in his cross examination that admitted signatures of the present petitioner were, in fact, carbon signatures. In other words, the so called expert has not examined the signatures of present petitioner on the alleged forged documents with original

admitted signature of the present petitioner because as per the admission of this expert, the alleged admitted signatures which were made available to him were carbon copy signatures only. It is settled law that opinion of handwriting expert is a weak kind of evidence and is only corroborative in nature. Neither the prosecution could link the present petitioner with A.K. Chaudhary or the offences allegedly committed and in the absence of same, accused could not have been be convicted solely on the basis of testimony of a handwriting expert.

33. Not only this, it has not been appreciated by the learned Courts below that the ground on which the Handwriting Expert purportedly formed his opinion to the effect that the forged signatures were those of the present petitioner were not mentioned in the report of the expert. This is more so when the expert has himself admitted in the Court that he applied no chemical or water test. Even otherwise as I have already discussed above, the report of a handwriting expert is only corroborative evidence and in the absence of there being other substantive cogent material on record to prove the guilt of a person, an accused cannot be convicted on the basis of the report of a handwriting expert.

34. It has been held by the Hon'ble Supreme Court in ***Magan Bihari Lal v. The State of Punjab, 1977 Cri. L.J. 711*** that it is now well settled that expert opinion must always be received with great caution and perhaps none so with more caution than the opinion of a handwriting expert. Hon'ble Supreme Court further held that there is a profusion of precedential authority which holds that it is unsafe to base a conviction solely on expert opinion without substantial corroboration and that this rule has been universally acted upon and it has almost become a rule of law.

35. It has been held by the Hon'ble Supreme Court in ***Jagmal Singh Yadav Versus Aimaduddin Ahmed Khan, 1994 Supp (2) Supreme Court Cases 308***:

> *"We have examined the opinions given by the two experts. Even if we agree with the High Court that the opinion expressed by Shri Sarwate is more convincing than that of Shri Kapur, it would not be possible for us to hold that the signatures on Ex. PW 1/9 are of the appellant. It is settled proposition of law that the charge of corrupt practice against a returned candidate has to be proved like a criminal charge and unless there is cogent evidence to take the case beyond reasonable doubt the election cannot be set aside. Maurya (DW 20) having been proved wholly unreliable witness, the source of the letter Ex. PW 1/9 becomes highly tainted and as such doubtful. It is no doubt correct that the signatures on the letter Ex. PW 1/9 have to be proved independently and irrespective of the source from which the document is produced but keeping in view the totality of the circumstances in this case it would be difficult for us to hold the charge proved against the appellant only on the testimony of the handwriting expert.*

36. In ***Alamgir Versus State (NCT, Delhi), (2003) 1 Supreme Court Cases 21***, Hon'ble Supreme Court while reiterating the aforesaid legal position held that handwriting expert opinion simply corroborates the circumstantial evidence.

37. In ***Fakhruddin v. The State of Madhya Pradesh, AIR 1967 Supreme Court 1326***, Hon'ble Supreme Court held:

> *" Evidence of the identity of handwriting receives treatment in three sections of the Indian Evidence Act. They are Sections 45, 47 and 73. Handwriting may be proved on admission of the writer, by the evidence of some witness in whose presence he wrote. This is direct evidence and it is is available the evidence of any other kind is rendered unnecessary. The evidence Act also makes relevant the opinion of a handwriting expert (S.45) or of one who is said to have written a particular writing. Thus besides direct evidence which is of course the best method of proof, the law makes relevant two other modes. A writing may be proved to be in the handwriting of a particular individual by the evidence of a person familiar with the handwriting of that individual or by the testimony of an expert competent to the*

comparison of handwritings on a scientific basis. A third method (S. 73) is comparison by the Court with a writing made in the presence of the Court or admitted or proved to be the writing of the person.

Both under S. 45 and S. 47 the evidence is an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience. In either case the Court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the Court is to apply its own observation to the admitted or proved writings and to compare them with the disputed one, not to become an handwriting expert in the one case and to appraise the value of the opinion in the other case. This comparison depends on an analysis of the characteristics in the admitted or proved writings and the finding of the same characteristics in large measure in the disputed writing. In this way the opinion of the deponent whether expert or other is subjected to scrutiny and although relevant to start with becomes probative. Where an expert's opinion is given, the Court must see for itself and with the assistance of the expert come to its own conclusion whether it can be safely be held that the two writings are by the same person. This is not to say that the Court must play the role of an expert but to say that the Court may accept the fact proved only when it has satisfied itself on its own observation that it is safe to accept the opinion whether of the expert or other witness."

38. Thus, in view of the above settled legal position, in my considered view, both the learned Courts below failed to appreciate that the conviction of the petitioner could not have been based on the opinion of the handwriting expert in the absence of there being any other substantive evidence available on record to substantiate that the alleged signatures on the forged documents were that of the petitioner only and he had entered into criminal conspiracy with A.K. Chaudhary to forge the documents.

39. It is settled law that criminal conspiracy is an agreement between two or more persons to do or cause to be done an illegal act or a legal act by illegal means. The offence of criminal conspiracy consists in meeting of minds of two or more persons for agreeing to do or caused to be done an illegal act or legal act by illegal means and the performance of an act in terms thereof. In order to establish a charge of conspiracy knowledge about the indulgence in either an illegal act or a legal act by illegal means is necessary. Thus, it is manifest that the meeting of minds of two or more persons for doing an illegal act or a legal act by illegal means is *sine qua non* of the criminal conspiracy. The Hon'ble Supreme Court in ***Kehar Singh and Ors. V. State (Delhi Administration), (1988) 2 SCC 609*** has held:

"The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties. Agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se, enough."

40. The Hon'ble Supreme Court in ***State of Maharashtra and Ors. V. Som Nath Thapa and Ors. (1996) 4 SCC 659*** has held that to establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. None for the above ingredients have been proved by the prosecution against the petitioner in the present case.

41. Therefore, in view of above discussion, in my considered view, learned trial Court, in fact erred in convicting the present petitioner for commission of offences punishable under Sections 419, 466, 468, 471 and 120-B of IPC and the findings which have been returned in this regard by learned trial Court are in fact not borne out from the records of the case. Even the findings returned in the judgment passed by learned Appellate Court in appeal so filed by the present petitioner are not sustainable. Learned Appellate Court also failed to appreciate that there was no link evidence produced on record by the prosecution, linking the present petitioner with the commission of offences, for which he was charged. Learned Appellate Court concluded

that the documents on which purported signatures of the present petitioner existed representing himself to be additional authorized signatory on behalf of President of India were prepared by him without appreciating that this document was neither produced by the present petitioner nor prosecution had placed on record anything from which it could be deduced or inferred that said document was prepared by present petitioner for A.K. Chaudhary and purported signature on the same were those of present petitioner.

42. Therefore, in my considered view, there is merit in the contention of the learned counsel for the petitioner that the findings conviction against present petitioner returned by the learned trial Court are perverse and there is infirmity in the same because the findings so recorded are not borne out from the records of the case and even the learned Appellate Court erred in not appreciating this very important aspect of the matter.

Accordingly, the present petition is allowed and the judgment of conviction passed against the present petitioner by learned trial Court in Cr. Case No. 122/2 of 2006/2005, dated 31.01.2007, is quashed and set aside so is the judgment passed in appeal by the learned Appellate Court in Criminal Appeal No. 12-S/10 of 2007, dated 28.06.2007. Fine amount, if any, deposited by the petitioner, is ordered to be released to him. Pending miscellaneous application(s), if any, also stand disposed of.

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

M/S Bhai Karam Singh & Co. & ors. .....Petitioners.

Versus

Raminder Pal Singh & ors. .....Respondents.

C. Revision No. 110 of 2005.
Reserved on: 7.9.2016.
Decided on: 8.9.2016.

Specific Relief Act, 1963- Section 6- Plaintiffs filed a civil suit for restoration of the possession and for permanent prohibitory injunction for restraining the defendants from using any portion of the cabin by making additions and alterations- it was pleaded that plaintiffs were put in possession – plaintiff No. 1 had gone out of station and when he returned, he found that locks were changed- suit was dismissed by the trial Court- held, that plaintiff had not disclosed the name of the employee who had told him about the possession- plaintiff No. 3 had left the country- FIR was registered after 6 days – trial Court had rightly come to the conclusion that plaintiff No. 3 had delivered the possession and it was not a case of forcible dispossession- petition dismissed. (Para- 7 to 10)

For the petitioners: Mr. R.K.Bawa, Sr. Advocate with Mr. Jeevesh Sharma, Advocate.
For the respondents: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition is instituted against the judgment and decree dated 24.5.2005, rendered by the learned Civil Judge (Sr. Divn.), Shimla, H.P. in case No. 38/1 of 2004/2001.

2. "Key facts" necessary for the adjudication of this petition are that the petitioners-plaintiffs (hereinafter referred to as the plaintiffs) have filed a suit for restoration of possession under Section 6 of the Specific Reliefs Act, 1963, of rear cabin portion of Shop No. 25, measuring 60 sq. feet situated at Lakkar Bazar, Shimla, described as "ABCD" in the plan and also for permanent prohibitory injunction restraining the defendants from using any portion of the cabin

by making additions and alterations changing its nature. According to the averments made in the plaint, defendant No. 1 was co-owner of the premises known as Shop No. 25, Lakkar Bazar Shimla and defendant No. 1 constructed a cabin measuring approximately 7 ft. by 8 ft. and 6 inches in the back portion of the shop. On 10.2.1998, the plaintiffs have entered into an agreement with defendant No. 1 whereby defendant No. 1 had agreed to let out the rear portion of the shop to the plaintiff-firm through its partners i.e. plaintiffs No. 2 & 3 on monthly rent of Rs. 2000/-. The plaintiffs were enjoying the continuous and peaceful possession of the premises since February, 1998 and running a business of Media Marketing, Tour and Travels and Financing in the premises. Fax machine, computer, television, music system etc. were also installed in the premises. The plaintiffs instituted a civil suit for injunction bearing case No. 15/1 of 2001 on 19.1.2001 in the Court of learned Senior Sub Judge, Shimla along with an application under Order 39 Rules 1 & 2 CPC. The plaintiffs withdrew the suit on 20.1.2001. Plaintiff-Manvir Singh was out of station and when he visited Shop No. 25, he was shocked to note that defendant No. 1 had changed the locks of outer shutter on 24.2.2001 in the mid night. On enquiry from the employees employed by the plaintiff, it revealed that defendant No. 1 along with his wife and other unknown persons forcibly and unlawfully entered in the rear cabin portion of Shop No. 25 by opening the lock with duplicate key. The furniture lying in the Cabin was also unlawfully removed. FIR No. 51/2001 dated 2.3.2001 was registered in the Police Station. It is also averred that defendant No. 1 unlawfully entered into the lease agreement with defendants No. 2 & 3 in respect of entire Shop No. 25, including rear cabin portion of Shop No. 25 after illegally dispossessing the plaintiffs from the premises. The defendants were thus liable to restore the possession of the rear cabin portion of Shop No. 25. The plaintiffs have also been deprived of the income and *mesne* profits of the business at the rate of Rs. 500/- per day w.e.f. 2.3.2001. The defendants were liable to be evicted from the rear cabin portion of Shop No. 25 and possession be restored to the plaintiffs.

3. The suit was contested by the defendants. Defendant No. 1 filed separate written statement. Defendants No. 2 & 3 filed a joint written statement. Defendant No. 1 admitted himself to be co-owner of the suit property. It was claimed that the premises were let out for fixed period of 11 months to plaintiffs No. 2 & 3 as joint and composite tenancy. The defendant No. 1 received rent of the premises only for one month. He did not receive any rent after the initial payment of Rs. 2,000/-. In December, 2000, plaintiff No. 3, namely Charanjit Singh voluntarily surrendered the tenancy in favour of defendant No. 1 on his behalf and on behalf of plaintiff No. 2. The plaintiffs had not paid any rent and plaintiff No. 3 on his behalf and on behalf of remaining plaintiffs had agreed to leave possession in lieu of the arrears of rent. It is denied that defendant No. 1 had taken forcible possession of the suit property. Though, it is admitted that the premises were let out to defendants No. 2 & 3 as per agreement entered *inter se* defendant No. 1 and defendants No. 2 & 3. The case of defendant No. 1 was duly supported by defendants No. 2 & 3.

4. The plaintiffs filed separate replication to the written statements filed by the defendants. The issues were framed by the Civil Judge, Shimla on 1.6.2002. He dismissed the suit on 24.5.2005. Hence, this petition.

5. Mr. R.K.Bawa, Sr. Advocate has vehemently argued that his clients were in continuous and peaceful possession of the premises and were paying the rent regularly. The plaintiff No. 3 has never surrendered the tenancy rights in favour of defendant No. 1. The forcible possession of the premises could not be taken over by defendant No. 1. The Civil Suit filed by plaintiff No. 1 was withdrawn only on the assurance of the defendants. The learned trial Court below has misread, misconstrued and mis-appreciated the statements of the witnesses. He lastly contended that his clients were thus entitled for restoration of the possession. On the other hand, Mr. Neeraj Gupta, Advocate has supported the judgment of the trial Court dated 24.5.2005.

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

7. The rent agreement is dated 10.2.1998. It was executed between plaintiffs No. 2 & 3 in the individual capacity with defendant No. 1. The rent was to be paid on 10th of every month. According to the plaintiffs, the rent was regularly adjusted, thus no rent was paid by the plaintiffs. There was no clause for payment of advance rent as per agreement Ext. D-1. According to PW-5, Manvir Singh the rent was adjusted but he also claimed that the advance rent was paid. Defendant No. 1 has duly proved that plaintiffs were in arrears of rent. The rent was only paid for the month of February, 1998. According to the averments made in the plaint, the plaintiffs came to know from the employees that defendant No. 1 has taken forcible possession of the shop. The plaintiffs had neither disclosed the names of the employees employed by the plaintiffs nor cited them as witnesses.

8. PW-5, Manvir Singh deposed that he came back from marriage on 2.3.2001. According to the averments made in FIR Ext. PW-2/A, Manvir Singh came to know about the forcible taking over the possession of the shop from his relatives. The relatives, as referred to in FIR Ext. PW-2/A have not been examined by the plaintiffs. It has come on record that plaintiff No. 3, namely, Charanjit Singh has left the country. According to PW-6 ASI Sohan Lal, who investigated FIR Ext. PW-2/A, Charanjit Singh used to conduct business in the shop. According to PW-6 ASI Sohan Lal, neither fax machine nor computer etc. were kept in the suit property which were allegedly stated to have been removed by defendant No. 1. The defendants have led evidence that Charanjit Singh used to sit in the cabin and not PW-5, Manvir Singh. The plaintiffs have not led evidence that plaintiff No. 3 was doing any business other than operating from the Cabin.

9. In case the incident was witnessed by PW-7 Pritpal Singh, he should have also lodged the report with the police. The firm i.e. plaintiff No. 1 came into existence on 20.3.1999 and the rent agreement is dated 10.2.1998. PW-4 Paras Ram in his cross-examination has admitted that prior to 20.3.1999, there was no partnership firm. Charanjit Singh has not appeared as a witness. The incident has taken place on 24.2.2001 mid night. However, the FIR was registered after six days i.e. on 2.3.2001, though, the Police Station was in close proximity from the premises in question.

10. The learned trial Court has rightly come to the conclusion that it was not a case of forcible dispossession but plaintiff No. 3 had handed over the possession voluntarily to defendant No. 1 in lieu of arrears of rent.

11. Accordingly, there is no merit in this petition, the same is dismissed so also the pending application(s), if any.

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

Sardar Singh and another .....Appellants

Versus

Puran Chand and others .....Respondents

RSA No. 286/2015
Reserved on: September 7, 2016
Decided on: September 8, 2016

Specific Relief Act, 1963- Section 34, 38 and 39- Plaintiff filed a civil suit for declaration, possession and injunction pleading that G was father of plaintiff No. 1, proforma defendant and one S- plaintiff No. 2 was sister of G- G, S and plaintiff No. 2 were owners in possession of the suit land- G had mortgaged his share to predecessor-in-interest of the defendants No. 1 to 4 - revenue petition was filed for redemption, which was dismissed on the death of G- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that mortgage was proved by Rojnamcha Vakyati - possession was delivered to predecessor-in-

interest of the defendants- defendants had failed to prove their adverse possession- suit was filed within a period of 30 years and is within limitation- petition before revenue Authorities was summary in nature and will not bar the civil suit- appeal dismissed. (Para-10)

For the Appellants : Mr. D.S. Nainta, Advocate.
For the Respondents : Mr. B.C. Verma, Advocate for R-1 to 3 and 6 to 8.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

This Regular Second Appeal has been instituted against judgment and decree dated 21.2.2015 rendered by learned Additional District Judge-1, Shimla, camp at Rohru in Civil Appeal No. 10-R/13 of 2008.

2. "Key facts" necessary for the adjudication of the present appeal are that respondents-plaintiffs (hereinafter referred to as 'plaintiffs' for convenience sake) have filed a suit for declaration, possession and for permanent prohibitory injunction against the appellants-defendants and proforma defendants (hereinafter referred to as 'defendants' and 'proforma defendants', for convenience sake). According to the averments made in the plaint, Girja Nand who was father of plaintiff No.1 and proforma defendants and one Shiv Saran, were brothers. Similarly, Banasi Devi who was original plaintiff No.2 was sister of Girja Nand. Girja Nand, Shiv Saran and Banasi were owners-in-possession of land comprising of Khasra No. 276 measuring 6 Bigha 16 Biswas bearing Khewat No. 52/Khatauni No. 75, as per Jamabandi for the year 1978-79 (Ext. PW-1/F). Both, Girja Nand and Shiv Saran were owners to the extent of 7/18th share each, whereas Banasi was owner to the extent of 4/18th share. During the course of settlement, land comprising Khasra No. 276 was bifurcated into three Khasra Nos. 387, 387/1 and 390 as recorded in *Misal Hakiat Bandobast* for the year 1996 (Ext. PW-1/C). In the meanwhile, Girja Nand mortgaged his share in the suit land to one Gulab Singh, who was predecessor-in-interest of defendants No.1 to 4, for a consideration of Rs.1200/- and mutation No. 1663 was attested in this behalf. Shiv Saran, who was owner of 7/18th share of suit land, wrongly and illegally transferred in favour of defendants No. 1 to 3, 3 Bigha 9 Biswa of land i.e. 1 Bigha more than his share. In July, 1994, when plaintiff No.1 came to know about the mortgage of suit land in favour of Gulab Singh, who was predecessor-in-interest of defendants No. 1 to 4, he requested Gulab Singh to take the mortgage money and hand over the possession of the suit land to the extent of share of Girja Nand but to no avail. A revenue petition was filed before the Revenue Collector Rohru on 13.7.1994 for redemption of the land but during the pendency of the petition, Gulab Singh passed away and petition was dismissed because plaintiff could not ascertain the names of the legal representatives of Gulab Singh. Plaintiff No.2 was married and resided at Village Tikkari for more than 40 years and came to know about the factum of mortgage and possession of defendants No.1 to 3 as well as late Gulab Singh over the suit land only on 20.2.2004, when plaintiff No.1 informed her. Plaintiffs offered mortgage money to the defendants. It is also averred in the plaint that since Banasi Devi who was predecessor-in-interest of plaintiffs No.2 and 3, had never sold her share to the defendants No.1 to 3 or their predecessor-in-interest, hence she was entitled to take back the possession of the land from defendants No.1 to 4. It is in these circumstances that the suit was filed by the plaintiffs.

3. Suit was contested by the defendants. Relationship of plaintiffs and proforma defendants has not been disputed. Shiv Saran is stated to have sold land comprising Khasra No. 276/1 out of land comprising old Khasra No. 276 to the father of the replying defendants on 24.6.1983. During the settlement, this Khasra number was converted into new Khasra No. 387/1 and 390. According to them, previously the suit land was mortgaged to them by Girja Nand and mutation to this effect was attested on 18.2.1974.

4. Plaintiffs filed replication. Learned Civil Judge (Junior Division) framed issues on 2.11.2006. He partly allowed the suit. Plaintiffs were held to be entitled to redeem the share of

suit land of Plaintiff No.1 and proforma defendants from the defendants No.1 to 4 on making payment of Rs.1200/- in favour of the defendants. Plaintiffs were directed to deposit the mortgage amount of Rs.1200/- before the Court within a period of two months from the date of passing of judgment and decree dated 25.2.2008. Defendants namely Sardar Singh and Ishwari Nand filed an appeal against judgment and decree dated 25.2.2008 before the Additional District Judge. He dismissed the appeal on 21.2.2015. Hence, this Regular Second Appeal.

5. The Regular Second Appeal was admitted on 20.6.2015, on the following substantial questions of law:

> "1. Whether the suit filed by the Plaintiffs for redemption of the suit land was not maintainable because as per their owner claim, their Petition for redemption of the suit land was dismissed by the Ld. Collector, Rohru for want of impleading legal representatives of late Sh. Gulab Singh on 13.7.1994.
>
> 2. Whether on the Principle of Resjudicata since proceeding for redemption was earlier dismissed by Collector Rohru, therefore, present suit was not maintainable.
>
> 3. Whether there are material admission on the part of the Respondents about the claim of Appellants, therefore, suit was required to be dismissed.
>
> 4. Whether the suit for redemption was barred by limitation because of transaction of mortgage has taken place between the mortgagor and mortgagee in the year 1967, and similarly since Sh. Shiv Saran has executed a sale Deed of his share out of the suit land, through a registered sale deed no. 146/83 on 24.6.1984, therefore, the present suit having been filed on 2.3.2004 was hopelessly barred by limitation.
>
> 5. Whether the suit as filed is not maintainable as the same being bad for mis joinder and non joinder of different causes of action and joinder and non joinder of necessary parties and the validity of sale deed dated 24.6.1984 and the claim of redemption could not be clubbed together.
>
> 6. Whether the findings are vitiated on account of misreading and misappreciation of the pleadings of the parties as well as oral and documentary evidence on record."

6. Mr. D.S. Nainta, Advocate, on the basis of substantial questions of law framed, has vehemently argued that the suit filed for redemption of suit land was not maintainable. He also contended that the suit was not filed within limitation. Suit was bad for mis-joinder and non-joinder. Suit was barred by the principle of *res judicata* since the Collector Rohru had also decided similar petition.

7. Mr. B.C. Verma, Advocate, appearing for respondents No.1 to 3 and 6 to 8, has supported the judgments and decrees passed by the learned Courts below.

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

9. Since all the substantial questions of law are interconnected and interlinked, the same are taken together for determination to avoid repetition of discussion of evidence.

10. According to *Rojnamcha Vakyati*, Ext. PW-3/A, which was duly proved by PW-3 Shri Surat Ram, mortgage was made on 12.3.1974. Factum of mortgage of share of land by Girja Nand in favour of Gulab Singh on 12.3.1974 is proved on record. Mutation No. 1667 Ext. PW-1/D was attested on 16.3.1974. It is also evident from the copy of *Misal Hakiyat* for the year 1996, Ext. PW-1/C, copy of Jamabandi for the year 1997-98 Ext. PW-1/A that only the share of Girja Nand was mortgaged with Gulab Singh. According to the revenue record, possession of the share of land was also delivered to the predecessor-in-interest of the defendants namely Gulab Singh. Defendants have failed to prove their adverse possession over the suit land. It was necessary for them to prove the ingredients of adverse possession. Defendants have examined DW-2 Amar Sain, DW-3 Nirkhu Ram and DW-4 Dhanvir. However, these witnesses could not state Khasra numbers

as well as Khata Khatauni numbers of the land in possession of the defendants. Witnesses have also failed to point out the exact date of commencement of possession of the defendants or their predecessor-in-interest Gulab Singh. Defendants have miserably failed to prove that land was mortgaged in the year 1967. It is reiterated that the plaintiffs have proved that the suit land was mortgaged on 12.3.1974. Instant suit was filed on 2.3.2004, i.e. within a period of thirty years. Plaintiffs have earlier filed a petition before Collector Rohru under HP Redemption of Mortgage Act. Learned trial Court has rightly observed that proceedings before the Collector were summary in nature thus the present suit for redemption of mortgage was maintainable. Defendants, moreover, have not objected in the written statement that the present suit was not maintainable. It is also made clear that during the course of proceedings before the Collector, Gulab Singh died and his legal heirs could not be brought on record. Plaintiffs were aggrieved primarily of the possession of the defendants over the suit land. It is, in these circumstances that suit was filed by the plaintiffs for redemption of mortgaged land, injunction and possession against the defendants. Present suit was not barred for mis-joinder of the causes of action. Suit was not barred under the principle of *res judicata*.

11. The substantial questions of law are answered accordingly.

12. Accordingly, in view of the discussion and analysis made hereinabove, the present appeal is devoid of merit and the same is dismissed. Pending application(s), if any, also stand disposed of. No costs.

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

State of H.P. .....Appellant.

Versus

Pawan Kumar .....Respondent.

Cr. Appeal No. 4276 of 2013
Reserved on : 2.9.2016
Decided on : 08.09.2016

Indian Penal Code, 1860- Section 376 and 506- Prosecutrix was subjected to forcible sexual intercourse by her brother-in-law during her stay at the house of her maternal grandmother – accused threatened to kill her in case of disclosure of incident to any person- prosecutrix was carrying eight months pregnancy- accused was tried and acquitted by the trial Court- held, in appeal that prosecutrix was more than 16 years of age at the time of incident- matter was reported to police belatedly without any satisfactory explanation- she had not disclosed the incident to her grandmother where she was residing and she continued to attend the school normally- this shows the consent on the part of the prosecutrix- trial Court had rightly acquitted the accused- appeal dismissed. (Para-9 to 14)

For the Appellant: Mr. Ramesh Thakur, Deputy Advocate General.
For the Respondent: Mr. Devinder K Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed against the impugned judgment of 19.2.2013 rendered by the learned Additional Sessions Judge, Mandi, District Mandi, H.P. in Sessions trial No. 21 of 2010, whereby the learned trial Court acquitted the respondent (for short "accused") for the offences charged.

2. Brief facts of the case are that on 8.1.2010 an apposite FIR under Sections 376 and 506 of IPC stood registered by the prosecutrix against the accused alleging therein that she is 17 years of age and in the month of May, 2009 the accused i.e her "jija" subjected her to forcible sexual intercourse 7-8 times during her stay at the house of her maternal grandmother at village Sakroha. She further alleged that the accused also threatened her to do away with her life if she disclosed anything about it to anyone. It is further alleged by her that she is carrying about 8 month pregnancy owing to illicit intercourse with her by the accused. It is further alleged by her that the accused provided her medicine to get foetus aborted. After registration of the FIR the police agency conducted the investigation into the matter. On completion of all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. The accused stood charged by the learned trial Court for his committing offences punishable under Sections 376 and 506 of the Indian Penal Code to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 15 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded in which he claimed false implication. However he does not choose to lead evidence in defence.

5. On an appraisal of 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.

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

9. Qua the occurrence which took place in the month of May, 2009 an apposite FIR comprised in Ex.PW-1/A holding a narrative therein of the accused subjecting the prosecutrix to forcible sexual intercourse during the spell of her stay at the house of her maternal grand mother at Sakroha stood recorded on 8.1.2010. The accused is the 'Jija' of the prosecutrix. For determining the trite factum of the prosecutrix, at the time contemporaneous to hers standing subjected to forcible sexual intercourse, holding the relevant capacity to mete consent to his sexual overtures, an allusion to Ex. PW-7/C and PW-7/D is imperative wherewithin revelations stand encapsulated of the prosecutrix at the relevant time standing aged 16 years. Consequently, with the prosecutrix at the time contemporaneous to the alleged incident holding the relevant age besides the apposite capacity to mete consent to the accused for his holding her to coitus would not perse besides ipso-facto render the alleged sexual encounter which occurred inter-se both to be bereft of any penally inculpable mens rea unless evidence surges forth qua the prosecutrix while holding coitus with the accused hers meteing volitional consent to him. The meteing of volitional consent by the prosecutrix to the accused for the latter holding her to coitus would emanate only on a close and incisive perusal of her testimony.

10. The imminent factum of hers disclosing in the FIR of hers during the spell of her stay in the month of May, 2009 at the house of her maternal grandmother at Sakroha standing subjected thereat to forcible sexual intercourse by the accused whereas with belatedly lodging an apposite FIR qua the incident aforesaid on 8.1.2010 without hers purveying visibly a plausible explanation therein for the inordinate delay which has occurred since the alleged incident vis-à-vis the lodging of the aforesaid FIR qua it by her, gives amplifying vigor to a firm inference of the prosecutrix meteing volitional consent to the accused for his holding her to coitus.

11. Moreover with hers omitting to make an apt disclosure to her grandmother whereat she stood subjected to forcible sexual intercourse by the accused also hers clothes not suffering any tearings nor hers in quick spontaneity thereto asking for her medical examination standing conducted by the Doctor concerned for facilitating the latter to unearth the relevant fact qua hers resisting the sexual overtures of the accused rather hers continuing to attend school normally, is a visible pronouncement of hers volitionally consenting to the accused for his holding her to sexual intercourse.

12. Be that as it may, the prosecutrix delivered a male child who stands opined by the expert concerned to be the biological son of the accused and the biological son of the prosecutrix. Even during the entire course of the prosecutrix conceiving a baby in her womb also thereafter upto 8 months when the incident stood unraveled by her to the police station concerned she given the aforesaid protuberance of hers belly omitted to disclose the relevant incident to the police agency concerned nor her parents concerted to elicit from her qua the alleged incident throughout the course of her belly exemplifying a visible protuberance cumulatively hold a loud echoings of the prosecutrix while holding the relevant capacity to mete consent to the accused for his holding her to coitus hers meteing volitional consent to the accused.

13. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned trial Court does not suffer from any perversity and absurdity nor it can be said that the learned trial Court in recording findings of acquittal has committed 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 that the findings of acquittal recorded by the learned trial Court merit interference.

14. In view of the above discussion, we find no merit in this appeal, which is accordingly dismissed and the judgment of the learned trial Court is maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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

State of H.P. ...Appellant.
Versus
Shiv Chand ...Respondent.

Cr. Appeal No.440 of 2011.
Date of Decision: 8th September, 2016.

Code of Criminal Procedure, 1973- Section 299- Application was filed against the accused S and L- accused S absconded and was declared proclaimed offender- trial Court continued against accused L- accused L was convicted - in the meantime accused S was apprehended- statement was made on his behalf that statements of prosecution witnesses recorded in his absence be read against him- held, that statement recorded in the absence of the proclaimed offender can only be read in the event of deponents being dead, incapable of giving evidence, being not found and their presence being not procurable without an amount of delay, expense or inconvenience which under the circumstances of the case, appears to be unreasonable- it was not permissible to rely upon statements recorded in absence of the accused without satisfying the ingredients of Section 299 of Cr.P.C. – judgment passed by the trial Court set aside- case remanded for disposal in accordance with the law. (Para-3 to 9)

For the Appellant: Mr. M.A. Khan, Additional A.G.
For the Respondent: Mr. N. S. Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

This appeal is directed against the judgment, rendered on 5.8.2011, by the learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr, H.P., in Sessions Trial No.26 of 2002/2010, whereby the appellant has been acquitted of the offence punishable under Sections 120-B, 363, 366, 368, IPC and under Section 6 of the Immoral Traffic (Prevention) Act, 1956 (hereinafter referred to as the Act).

2. The brief facts, of the case, are, that the accused, namely, Shiv Chand and Lalita Tamang, are alleged to have committed offences under Sections 363, 366, 368, 120-B of the Indian Penal Code and Section 6 of the Immoral Traffic (Prevention) Act, 1956 recorded, in, FIR No.16 of 2002, registered on 24.3.2002. However, accused Shiv Chand absconded and could not be apprehended. He was under orders rendered on 19.8.2003 declared a proclaimed offender. On accused Shiv Chand standing declared a proclaimed offender, the learned committal Court proceeded to, in the absence of accused Shiv Chand, on the Investigating Officer filing a report under Section 173 of the Code of Criminal Procedure, commit co-accused Lalita Tamang to face trial before the learned Sessions Judge, Kinnuar at Rampur qua hers allegedly committing offences under Sections 363, 366, 368, 120-B of the Indian Penal Code and Section 6 of the Immoral Traffic (Prevention) Act, 1956. She faced the ordeal of trial and on conclusion besides consummation of trial to which she stood subjected to, she was convicted and sentenced qua hers committing offences punishable under Sections 363, 366, 368, 120-B/34 of the IPC and under Section 6 of the Immoral Traffic (Prevention), Act, 1956. In the meantime, co-accused Shiv Chand was apprehended and produced for the first time on 06.8.2010 before the Learned Sessions Judge, Kinnaur Division, at, Rampur Bushahr. On apprehension and production of co-accused Shiv Chand, who during the trial of co-accused Lalita Tamang had remained under absconsion besides given his non-apprehension, during the entire criminal proceedings launched against co-accused Lalita Tamang, he , hence, stood not subjected to trial, obviously, on his apprehension and production on 26.8.2010 before the Court of the learned Sessions Judge, Kinnaur Division at Rampur Bushahr, the latter Court requisitioned the case file and fixed the case for framing of charge against him.

3. When the stage of recording of prosecution evidence arrived, co-accused Shiv Chand, on 28.2.2011, recorded, a, statement before the learned Sessions Judge to the effect that the statements of the prosecution witnesses as stood recorded, in his absence, be read against him in the same manner as if their respective examinations-in-chief, stood recorded in his absence. Given the statement of co-accused Shiv Chand, who, stood declared a proclaimed offender and in whose absence the statements of prosecution witnesses stood recorded wherewithin he portrayed his acquiescence qua theirs being read as evidence, constrained the learned Sessions Judge to acquit accused Shiv Chand.

4. Without going into the merits of this appeal, the moot point, which is to be decided is qua the procedure and exercise adopted by the learned Sessions Judge in proceeding to read the testimonies of prosecution witnesses, recorded during the trial of co-accused Lalita Tamang and in the absence of accused Shiv Cahnd, merely, on the basis of his acquiescence to the statements recorded in his absence, being read as evidence, comprises infraction of the procedure ordained by law. Consequently, it has to be determined whether the trial vis-à-vis Shiv Chand, stands vitiated, hence, necessitating or warranting interference by this Court with the impugned judgment rendered qua co-accused Shiv Chand, with a sequeling rendition of a direction for the remanding of the matter to the learned Sessions Judge, for the re-recording afresh of the testimonies of the prosecution witnesses.

5. In the face of co-accused Shiv Chand remaining under absconsion , hence, his standing declared a proclaimed offender on 15.3.2003 by the Committal Court, set afoot proceedings, for, the trial of the co-accused Lalita Tamang, even in the absence of co-accused Shiv Chand. Naturally and obviously, on completion of committal proceedings, vis-à-vis co-

accused Lalita Tamang, the learned Sessions Judge, while adopting the procedure envisaged under Section 299 of the Cr.P.C., procedure whereof envisaged a contemplation qua permissibility of recording of evidence against co-accused standing/facing trial, even in the absence of co-accused Shiv Chand, given his standing declared a proclaimed offender, it hence proceeded to record evidence qua co-accused Lalita Tamang. Besides, the provisions aforesaid mandate, permissibility qua reading as evidence, the pre-recorded statements of prosecution witnesses, statements whereof stood recorded in the absence of the proclaimed offender, on occurrence of apprehension of the proclaimed offender, only in the event of (a) deponents being dead; (b) incapable of giving evidence; (c) being not found and (d) their presence being not procurable without an amount of delay, expense or inconvenience which under the circumstances of the case, appears to be unreasonable.

6. The provisions engrafted and ingrained in Section 299 of the Cr.P.C., besides the application and adoption of the provisions engrafted therein is also the fulcrum and nerve centre, to, test the legality of the procedure adopted by the learned Sessions Judge, in proceeding to, on appearance/production before him of co-accused Shiv Chand, to read such previously recorded prosecution evidence, merely on the strength of his statement, wherein he acquiesces qua the reading of prerecorded prosecution evidence, on reading whereof, it proceeded to record findings of acquittal qua co-accused Shiv Chand.

7. Co-accused Shiv Chand, recorded a statement on 28.2.2011, wherein, he, acquiesced qua the reading vis-a-vis him the testifications of the prosecution witnesses, comprised in their respective examinations-in-chief, testifications whereof stood recorded during the course of trial of co-accused Lalita Tamang. Therefore, the acquiescence of co-accused Shiv Chand, prodded the learned Sessions Judge, to rely upon the previously recorded testimonies of prosecution witnesses, comprised in their respective examinations-in-chief, thereupon it anvilled its findings of acquittal vis-a-vis co-accused Shiv Chand. However, to the considered mind of this Court, even though, the apposite acquiescence of co-accused Shiv Chand does not either trammel or fetter the jurisdiction of the learned Sessions Judge to proceed to, on the strength of the statement of co-accused Shiv Chand wherein he portrayed his acquiescence to the reading qua him the previously recorded depositions of prosecution witnesses, statements whereof stood recorded during the trial of co-accused Lalita Tamang, to, omit to record afresh the evidence of prosecution witnesses, unless, satisfaction stood recorded by the learned Sessions Judge, qua existence of exigencies and contingencies contemplated or envisaged under Section 299 of the Cr.P.C., besides only on its recording satisfaction qua proof of existence of such statutorily contemplated exigencies and contingencies, the learned trial Court could waive or abandon its jurisdiction, to recall for re-examination the prosecution witnesses. Further, even otherwise, there is no evidence on record displaying recording of satisfaction by the learned Court below qua evident existence of such contingencies or statutory exigencies, on existence whereof alone, the re-recording afresh of the testimonies of the prosecution witnesses could stand waived or abandoned by it, in as much, as, there is no evidence displaying the fact (a) deponents being dead; (b) incapable of giving evidence; (c) being not found and (d) their presence being not procurable, without an amount of delay, expense or inconvenience which under the circumstances of the case, appears to be unreasonable.

8. Consequently, the acquiescence of co-accused Shiv Chand, manifested in his statement and its reading, unraveling the fact of his conceding to the deposition of prosecution witnesses recorded during the course of trial of the co-accused Lalita Tamang, being readable against him, did not give leverage to the learned Sessions Judge, to, omit to per se, hence, draw satisfaction qua the evident existence of exigencies and contingencies, as, envisaged under Section 299 of the Cr.P.C. Rather, when on strict proof qua their existence, the learned Sessions Judge, could proceed to read the evidence of prosecution witnesses as stood previously recorded during the course of trial of Lalita Tamang, dehors the acquiescence of co-accused Shiv Chand, his, omitting to afford any reason for his countervailing or circumventing the provisions of Section 299 of the Cr.P.C., in as much, as, without eliciting proof or, hence his drawing satisfaction qua existence of exigencies and statutory contingencies, on whose proof alone, the

learned Sessions Judge could proceed to read the evidence of the prosecution witnesses recorded during the trial of co-accused Lalita Tamang, as evidence against the co-accused Shiv Chand, on the latter's apprehension, contrarily his apposite waiver dependent upon the acquiescence of co-accused Shiv Chand whereupon he recorded findings of acquittal vis-a-vis Shiv Chand renders the entire judgment of acquittal recorded vis-a-vis co-accused Shiv Chand, hence, while anchored upon procedural infraction, to be wholly vitiated.

9. As a concomitant, for reiteration, the learned Sessions Judge, merely on the apposite acquiescence of co-accused Shiv Chand, without his recording satisfaction qua the existence of preponderant exigencies and contingencies displayed in Section 299 of the Cr. P. C., hence, proceeding to read the testimonies of prosecution witnesses, recorded during the course of trial of co-accused Lalita Tamang, as evidence against co-accused Shiv Chand, has caused a pervasive and deep infraction of the mandatory statutory provisions. It has also caused incalculable miscarriage of justice. Consequently, the trial stands vitiated and the judgment of acquittal recorded vis-a-vis co-accused Shiv Chand, necessitates, it, being set aside. The matter is remanded to the learned Sessions Judge, Kinnaur Division at Rampur Bhushahr for the re-recording afresh by him of prosecution evidence against co-accused Shiv Chand. It is loudly made clear that only and in case of satisfaction coming to be recorded by the learned Sessions Judge qua the availability or attainment besides accomplishment of the exigencies and contingencies stipulated in Section 299 of the Cr.P.C., would, he be empowered to proceed, to, read in evidence, the depositions and statements of prosecution witnesses, as stood previously recorded during the course of trial of co-accused Lalita Tamang. However, when, no, material on record displays such satisfaction being drawable by the learned Sessions Judge, it shall proceed to re-record afresh the evidence of prosecution witnesses. Accordingly, the appeal is allowed and judgment dated 5.8.2011 passed by the learned Session Judge is set aside and the case is remanded back for the re-recording afresh by him the statements/evidence of the prosecution witnesses, his keeping in mind the aforesaid directions. The learned trial Court is directed to complete the trial within six months from today.

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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
Karnail Singh alias Kaila .....Respondent.

Cr. Appeal No. 71 of 2013
Date of decision: September 8, 2016.

N.D.P.S. Act, 1985- Section 15- Two gunny bags and three plastic bags were recovered from the house of the accused, which were containing poppy husk and poppy straw- the accused was tried and acquitted by the trial Court- held, in appeal that the place of recovery was a newly constructed house having no doors and windows – the land is owned by various co-owners – no satisfactory evidence was led to prove that house belonged to accused and not to any other person- independent witnesses did not support the prosecution version- thus, two version are appearing on record- the benefit of which has to be given to the accused- appeal dismissed. (Para-11 to 20)

Case referred:
Rubyana alias Smita Sanjib Bali Vs. State of Maharashtra and others, 1996 Crl. L.J.148

For the appellant Mr. D.S. Nainta and Mr. Virender Verma, Addl. AGs.
For the respondents Mr. N. K. Thakur, Sr. Advocate with Ms. Jamuna Kumari, Advocate.

The following judgment of the Court was delivered:

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

State of Himachal Pradesh is in appeal before this Court. The complaint is that learned Special Judge, Fast Track Court, Una had erroneously acquitted the respondent, hereinafter referred to as 'the accused' of the charge under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985, hereinafter referred to as 'the NDPS Act' in short vide impugned judgment dated 13.9.2012 passed in Sessions trial No. 04-VII-2011.

2. It is seen that FIR No. 274/2010 dated 13.9.2010 Ext.PW1/B came to be registered against the accused in Police Station, Haroli, District Una under Section 15 of the NDPS Act with the allegations that on 13.9.2010 when a police party headed by PW22 HC Sanjay Kumar reached at his newly constructed house in village Nangal Khurd, Tehsil Haroli District Una at about 4:15 A.M. recovered two gunny bags whereas three plastic bags containing poppy husk and poppy straw (doda). In first gunny bag poppy husk weighing 45 KG and second plastic bag poppy husk weighing 25 kg, in third plastic bag poppy husk weighing 25 Kg, in fourth plastic bag poppy husk weighing 23kg and in fifth gunny bag poppy straw (doda) weighing 18 Kg was allegedly recovered from the exclusive and conscious possession of the accused.

3. The police party headed by PW22 HC Sanjay Kumar, HC Ramesh Chand, HHC Gurvir Singh PW2 and constable Ram Gopal PW1 left police station on patrol duty vide rapat Ext.PW7/A entered in rapat rojnamcha by PW7 LC Sudha Rani. In the early morning i.e. 13.9.2010 around 4:15 A.M. PW22 has received a secret information that the accused is dealing in the business of poppy husk and poppy straw by bringing the same from out side the State and that he has stacked poppy husk and poppy straw in his house at village Nangal Khurd. On the receipt of information, PW22 has prepared the Rukka Ext.PW1/A and it was sent to Police Station, Haroli through PW1 C. Ram Gopal around 4:25 A.M. On the basis of this document FIR Ext.PW1/B came to be registered in the police station. PW22 has also taken down in writing the secret information so received and reason of his belief Ext.PW16/A and it was sent to the Superintendent of Police Una through PW2 HC Gurbir Singh at 4:35 A.M. Around 4:40 A.M. he sought for additional police force from police Station, Haroli over telephone. On the basis thereof rapat Ext.PW12/A was entered in the rapat rojnamcha whereby HC Harish Kumar, HC Balbir Singh, HC Santosh Kumar, HHG/PC Vijay Kumar were deputed to the spot in Government vehicle driven by Constable-driver Vikas Kumar. They joined PW22 at link road leading to village Nangal Khurd. PW22 had also apprised them about the secret information he received and the purpose of laying raid. The Pradhan of the Gram Panchayat Smt. Krishna Devi, one Jagiri Ram PW3, Up Pradhan of the gram Panchayat and PW4 Badev Raj ward panch, ward panch Ram Krishan and Shadi Lal were also associated in the raiding party. They were also apprised of the purpose of raiding the house of the accused.

4. The police party when reached in the house of the accused at 7:10 A.M. he came out at his own. He was apprised about the propose to raid his house by PW22 in the presence of witnesses. Before entering inside the house each and every one gave their personal search to the accused. However, nothing incriminating recovered from them. It is thereafter the search of the house was conducted and five bags i.e. two jute bags and three plastic bags were recovered from the middle of a room of the house. The same were found containing poppy husk and poppy straw. HC Balbir Singh was deputed to bring weighing scale. The bags containing poppy husk and poppy straw were brought out to lobby of the house. PW5 Prakash Chand brought weighing equipments to the spot. The bags containing poppy husk and poppy straw were weighed turn by turn and found containing poppy husk and poppy straw as already pointed out at the outset. The I.O. thereafter has drawn samples mark PA-1 to PE-2 and sealed in parcel with seal 'J'. All the five bags were also sealed with the same seal. Columns 1 to 8 of NCB-I form Ext.PW8/A were filled up on the spot and facsimile of seal 'J' were also obtained thereon. The sample of seal Ext.PW3/B was also drawn separately and the seal after its use was handed over to Jagiri Lal PW3. The bags and sample parcels duly sealed were taken in possession vide seizure memo

Ext.PW3/A in the presence of PW Jagiri Lal and Baldev Raj PW4. A copy thereof was supplied to the accused and his signature obtained thereon. Site plan Ext.PW22/A was prepared by the I.O. The I.O. had also got clicked the photographs Ext.PX-1 and Ext.PX-2 from Rakesh Kumar PW6. This witness has also clicked the photographs Ext.PW6/A and Ext.PW6/B inside the room. In Ext.PW6/B and Ext.PX-1 and Ext.PX-2 the accused can also be seen standing. The statements of the witnesses including that of Prakash Chand, Jagiri Ram and Baldev Raj Ext.PW22/C, Ext.PW22/D and Ext.PW22/E respectively were recorded by the I.O. PW22.

5. The accused was arrested and the ground of arrest disclosed to him vide memo Ext.PW22/B. In order to prepare the inventory application Ext.PW21/A was filed in the Court of learned Judicial Magistrate Ist class. Court No. II, Una and the inventory peppered on the basis thereof. The Magistrate after preparing the inventory handed over the sealed bags vide order Ext.PW21/D to the police. PW16 ASI Surjeet Singh, Reader to Superintendent of Police Una has proved the report under Section 42(2) of the Act Ext.PW16/A and the special report Ext. PW16/B. PW10 Subhash Chand Kanungo had conducted the demarcation of the land bearing Khasra No. 448 over which the house of the accused from where recovery made vide demarcation report Ext.PW10/A. Rapat Ext.PW12/A, Ext.PW12/D, Ext.PW12/E and Ext.PW12/F were also entered in the rapat rojnamcha qua the investigation having taken place in this case. The case property was produced before ASI Ashok Kumar PW8 who after resealing the same with seal 'M' had deposited in the malkhanna. The case property was sent to Forensic Science Laboratory, Junga through Ashok Kumar. The report Ext.PW22/L was received from the Laboratory.

6. On the completion of investigation, the police has prepared the challan and filed in the Court. On hearing learned Public Prosecutor and also learned defence Counsel as well as going through the police report, learned Special Judge has prima-facie found a case under Section 15 of the NDPS Act made out against the accused. Charge against him was framed accordingly. The accused, however, pleaded not guilty to the charge and claimed trial.

7. In order to sustain the charge against the accused the prosecution has examined 22 witnesses in all. The material prosecution witnesses are PW3 Jagiri Ram, PW4 Baldev Raj and PW5 Prakash Chand. PWs 3 and 4 have not supported the prosecution case and as such were declared hostile. PW5 Prakash Chand no doubt has deposed that scale and weights were brought by him to the spot however not supported the rest of the prosecution case qua the recovered contraband weighed in his presence. He was also declared hostile. PW1 Ram Gopal is formal as he had carried Rukka Ext.PW1/A to the police station. PW5 Rakesh Kumar is photographer who has proved the photographs Ext.PX-1 and Ext.PX-2. PW7 LC Sudha Rani has proved the rapat Ext.PW7/A. PW10 Subhash Chand is Kaunungo and PW11 Joginder Kumar is Patwari, hence formal because they had given the demarcation report of the land bearing Khasra No. 448 vide Ext.PW10/A. The remaining prosecution witnesses PW8 ASI Ashok Kumar, PW9 HC Ramesh Chand, PW12 C. Balwinder, PW13 MHC Ashwani Kumar, PW14 HC Sukhpal, PW15 the then SHO S.S. Pathania, PW16 ASI Surjeet Singh, PW17 HC Harish Chander, PW18 HC Balbir Singh, PW19 C. Ashok Kumar, PW20 HC Vipan Kumar, PW21 Shri Yajuvinder Singh, the then Judicial Magistrate Ist Class, Court No. II, Una are also formal. The I.O. is PW22 HC Sanjay Kumar.

8. The accused was also examined under Section 313 of the Code of Criminal procedure and he has examined Dr. Kapil Sharma, Assistant Director and Assistant Chemical Examiner, NDPS Division, State Forensic Science Laboratory, Junga as DW1 in his defence.

9. Learned Special Judge on appreciation of oral as well as documentary evidence has concluded that no tangible evidence showing the recovery of the contraband i.e. poppy husk and poppy straw from the exclusive and conscious possession of the accused is not available on record. The prosecution was not found to have proved its case against the accused beyond all reasonable doubt. He as such was acquitted of the charge.

10. The impugned judgment has been challenged in this appeal on several grounds.

11. Learned Additional Advocate General has vehemently argued that the testimony of witnesses comprising independent as well as official fully establish the prosecution case that the poppy husk and poppy straw was recovered from the house of the accused, hence from his exclusive and physical possession. The findings to the contrary according to learned Additional Advocate General are based upon hypothesis conjectures and surmises. Learned trial Court has committed illegality in brushing aside the cogent and reliable evidence produced by the prosecution. Mr. Nainta has also emphasized that the link evidence is complete which also substantiate the prosecution case.

12. On the other hand, Mr. N.K. Thakur, learned senior Advocate assisted by Ms. Jamuna Kumari Advocate has argued that the independent witnesses namely PW3 Jagiri Ram, PW4 Baldev Raj and PW5 Prakash Chand have not supported the prosecution case and rather turned hostile. Their testimony contrary to that of the police official has caused major dent in the prosecution case. In view of such evidence available on record there emerge two possible views and in a case of this nature the view of the matter favouring the accused has rightly been taken in consideration by the trial Court. The recovery of the incriminating substance according to Mr. Thakur is not at all proved from the physical and conscious possession of the accused. Mr. Thakur while supporting the judgment under challenge has further argued that the appeal being devoid of merits deserves to be dismissed.

13. In a case of this nature the recovery of narcotic drugs and psychotropic substance from the exclusive and physical possession of the accused is *sine qua non* for recording findings of conviction against an offender booked under the Act. We may refer here the judgment of Bombay High Court in ***Rubyana alias Smita Sanjib Bali*** Vs. ***State of Maharashtra and others, 1996 Crl. L.J.148*** which reads as follows:

> *"The sine qua non for attracting the penal provisions, viz. Sections 20 and 21 of the N.D.P.S. Act, and Section 25 read with Section 7 of the Arms Act is that the appellant must be found in possession of the contrabands and the fire arms. The term "possession" is not defined in the N.D.P.S. Act. The term "possession" has been judicially construed to mean, in various decisions, as under :-*
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> > *'Possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and that he can exercise it. Possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity to the object.*
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> *(See in this connection Dula Singh v. Emperor, AIR 1928 Lahore 272 : (1928 (29) Cri LJ 481), Kuldip Chand v. Emperor, AIR 1934 Lahore 718 : (1935 (36) Cri LJ 300), Sunder Singh v. Emperor, AIR 1936 Lahore 738 : (1936 (37) Cri LJ 939), and Ram Charan v. Emperor, AIR 1933 All 437 : (1933 (34) Cri LJ 930)).*
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> *The Apex Court in Supdt. and L.R. v. Anil Kumar Bhunja, (1979) 4 SCC 274 : (1979 Cri LJ 1390), observed that the test for determining "whether a person is in possession of anything is whether he is in general control of it." The Apex Court, after examining Salmond's jurisprudence and other earlier decisions rendered by the Court, observed thus (at pp 1392-93 of Cri LJ) :-*
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> > *"13. 'Possession' is a polymorphous term which may have different meanings in different contexts. It is impossible to work out a completely logical and precise definition of 'possession' uniformally applicable to all situations in the contexts of all statutes. Dias and Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorising it is that of 'possession'. Much of this difficulty and confusion is (as pointed out in Salmond's Jurisprudence, 12th Ed. 1966) caused by the fact that possession is not purely a legal concept. 'Possession', implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It*

involves power of control and intent to control. (See Dias and Hughes, 11th Ed.)

14. According to Pollock and Wright, when a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him or in any receptacle belonging to him and under his control, he is in physical possession of the thing.

15. While recognising that 'possession' is not a purely legal concept but also a matter of fact, Salmond (12th Ed. page 52) describes 'possession, in fact", as a relationship between a person and a thing. According to the learned author the test for determining 'whether a person is in possession of anything is whether he is in general control of it'.

16. In Gunwantilal v. State of M.P. (1973) 1 SCR 508 : (1972 Cri LJ 1187), this Court while noting that the concept of possession is not easy to comprehend, held that, in the context of Section 25(a) of the Arms Act, 1959, the possession of a firearm must have, firstly, the element of consciousness or knowledge of that possession in the person charged with such offence, and secondly, he has either the actual physical possession of the firearm, or where he has not such physical possession, he has nonetheless a power or control over that weapon. It was further recognized that whether or not the accused had such control or dominion to constitute his possession of the firearm, is a question of fact depending on the facts of each case. In that connection, it was observed (at p. 1189 of Cri LJ) :

In any disputed question of possession, specific facts submitted or proved will alone establish the existence of the de facto relation of control or the dominion of the person over it necessary to determine whether that person was or was not in possession of the thing in question."

14. Now if coming to the evidence qua this aspect of the matter available on record admittedly the house from where the contraband allegedly poppy husk and poppy straw recovered has been shown in the photographs Ext.PX-1 and Ex.PX-2. It is a newly constructed house having no doors and windows as the same at the time of raid were not affixed. It is not even covered by boundary wall. In case the jamabandi Ext.PW22/G/Ext.PW11/B is concerned this house has been constructed over land bearing Khasra No. 448 situate in Muhal Theh, Mauja Nangal Khurd Tehsil Haroli District Una. Jamabandi Ext.PW22/G/Ext.PW11/B further reveal that besides accused Karnail Singh there are other co-sharers who are also in possession of the land over which the house in question has been constructed. The tatima of this land is Ext.PW11/A. The jamabandi Ext.PW11/B and tatima Ext.PW11/A even prepared by Joginder Kumar Patwari, Patwar Circle Nangal Khurd. This witness tells us in his cross-examination that the persons who were present at the time of preparation of tatima on the spot had also claimed the ownership of the suit land. Meaning thereby that there is no clinching and conclusive proof that the house in question belongs to accused Karnail Singh alone and none else. No other evidence is produced to show that it is accused Karnail Singh who had constructed the house in question and that the other co-sharers in the land over which the same is constructed have nothing to do therewith. The house is open from all sides and easily accessible to each and every one. The photographs of the house make it crystal clear that the same at that time was lying vacant and not occupied by any one. In this view of the matter, it cannot be said by any stretch of imagination that the contraband i.e. poppy husk and poppy straw was recovered from the house which belongs to the accused alone and none else. Therefore, the present is not a case where it can be said that the poppy husk and poppy straw is recovered from the exclusive and conscious possession of the accused.

15. The so called independent witnesses PW3 Jagiri Ram, PW4 Baldev Raj and PW5 Prakash Chand have not supported the prosecution case. PW3 Jagiri Ram tells us that though

he was called by the police, however, residential house of accused Karnail Singh was not searched in his presence nor poppy husk or poppy straw recovered therefrom. Similarly, as per version of PW4 though he was called by the police to the house of Karnail Singh, however, they all left behind in the verandah whereas the police entered inside the room. Though, he said that bags Ext.P1 to Ext.P5 were recovered in his presence however, in the same breath expressed his ignorance in this regard as according to him bags of sand were also lying there. He, however, has denied the bags having been opened in his presence nor he had seen poppy husk and poppy straw in the bags. PW4 only tells us that on asking by police he has taken weighing scale and weights. He unloaded the weights and scale from the vehicle and did not see the bags of contraband nor the bags were weighed in his presence. True it is, that PW3 had been Up Pradhan of local Gram Panchayat and admit that he always signs documents after readings the contents thereof. The accused is resident of his village. In his cross-examination he admit the search of the house having been conducted in his presence and PW4 Baldev Raj however, denied the suggestion that contraband was recovered from middle room of the house. He has also denied the recovery of poppy husk and poppy straw in his presence in the manner as claimed by the prosecution. He has also denied that PW Prakash Chand had come to the spot with weight and scale. He has also denied that the contraband was weighed in his presence. He, however, admit his signature on the document. If the testimony of PW4 Baldev Raj in cross-examination is seen he claimed himself to be illiterate. However, admit that the documents of the panchayat proceedings he used to sign after getting it translated and reading out its contents for him by someone else. He has admitted his signature on the seizure memo. However, expressed his inability to identify as to in which bag poppy husk was kept and in which poppy straw as according to him the bags were already sealed by the police. He has denied the sampling and sealing process, however, weighing scale according to him was brought in his presence from the shop of PW Prakash Chand. He has denied that the contraband was collected in his presence. His signatures on the documents were taken in a khud (rivulet) at a distance of one K.M. from the house of accused. In his further cross-examination conducted by learned defence counsel it is admitted that he was not ward panch at that time and that 2-3 vehicles were standing out side the house of the accused at the relevant time. Some of police officials were in uniform and others were in civil dress. He admit that they were taking the bags from the vehicle inside the house.

16. If coming to the testimony of PW5 Prakash Chand in his cross-examination he admit the presence of PWs 3 and 4 on the spot, however, denied that the recovered poppy husk and poppy straw was weighed in his presence. He has also denied the sealing and sampling process.

17. It is seen from the testimonies of PWs 3,4 and 5 as discussed hereinabove that though they admit their presence in the house from where poppy husk and poppy straw was recovered and also that the documents bears their signatures however, according to them the contraband was not recovered from the house in their presence. They have also denied the sampling and sealing process. They have also denied the poppy husk and poppy straw having taken into possession in their presence.

18. If coming to the evidence as has come on record by way of the testimony of official witnesses, i.e. HC Ramesh Chand PW9, HC Harish Chander PW17, HC Balbir Singh PW18 and the I.O. PW22 HC Sanjay Kumar no doubt they all have supported the recovery of poppy husk and poppy straw in the manner as claimed by the prosecution as well as the sealing and sampling process, however, the testimony of the independent witnesses PWs 3 to 5 discussed hereinabove renders the statements of the official witnesses highly doubtful. The present, therefore, is a case where two version of the occurrence emerges on record. In a case of this nature the benefit of doubt is always given to the accused and not to the prosecution. Learned trial Court has, therefore, rightly concluded that the prosecution has failed to prove its case against the accused beyond all reasonable doubt.

19. The evidence as discussed hereinabove makes it crystal clear that the house in question is not in exclusive possession of the accused. The independent witnesses are not from the same locality. As a matter of fact, no one has been associated during the search and seizure belonging to that very locality where the house in question is situated. It is not the case of the prosecution that inspite of best efforts made by the I.O. no one from neighbourhood could be associated to witness the search and seizure and also prove that the house belongs to the accused alone and none else. Nothing tangible has also come on record to show that it is the accused who had kept the poppy husk and poppy straw in that house. On the other hand as per the admitted case of parties the house in question is without doors and windows and as such accessible to each and every one. In these circumstances, the only inescapable conclusion would have been that the prosecution has failed to prove its case against the accused beyond all reasonable doubt. The link evidence available on record is hardly of any help to the prosecution because the recovery of the contraband i.e. poppy husk and poppy straw is not at all proved from the exclusive and conscious possession of the accused. Being so, in our considered opinion, learned trial Court has rightly acquitted the accused of the charge on appreciation of the evidence available on record in its right perspective. The findings so recorded cannot be said to be legally and factually unsustainable. The judgment as such deserves to be affirmed.

20. In view of what has been said hereinabove, this appeal fails and the same is accordingly dismissed. Personal bond furnished by the accused shall stand cancelled and surety discharged.

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

Ved Parkash. .....Petitioner.
Versus
Mool Raj Padha. .....Respondent.

CMPMO No. 19 of 2013
Date of decision: September 8, 2016.

Code of Civil Procedure, 1908- Order 26 Rule 9- Suit was decreed as having been compromised- parties were directed to maintain status quo qua the suit land till its partition- suit land has not been partitioned and the parties are in possession of the their respective shares- petitioner initiated proceedings pleading that path in existence was blocked by the respondent by laying slate tiles – respondent denied the existence of any such path- application for appointment of Local Commissioner was filed to determine the blockade of path- application was dismissed by the trial Court- held, that it was for the petitioner to prove the existence of the path and its blockage- allowing the application will amount to collection of the evidence by Court, which is not legally permissible- trial Court had rightly dismissed the application- petition dismissed.

(Para-5 to 9)

Case referred:
Liaquat Ali vs. Amir Mohammad & ors., Latest HLJ 2016 (HP) 831

For the petitioner :Mr. Ajay Sharma, Advocate with Mr. Kishore Pundeer, Advocate.
For the respondent :Mr. N.K. Thakur, Sr. Advocate with Ms. Jamuna Kumari, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. *(Oral)*

Order passed on 4.1.2013 in an application filed under Order 26 Rule 9 read with Section 151 of the Code of Civil Procedure in Execution RBJ No. 34/07/06 by learned Civil

Judge (Senior Division) Kangra at Dharamshala is under challenge in this petition on the grounds, inter alia, that since the proceedings under Order 21 Rule 11 and 32 of the Code of Civil Procedure with allegations of breach of decree by the respondent have been initiated by him, therefore, it was for him to have produced evidence to substantiate such allegations he levelled against the respondent.

2. Order dated 5.7.2004 Annexure P-1 passed in case No. 78/2003 titled Ved Prakash Vs. Mool Raj reveal that the suit filed by the petitioner herein was compromised and the parties were directed to maintain status quo qua the suit land till its partition under due process of law. The record reveal that the suit land now stands partitioned under due process of law and the parties are in possession of the land in their respective shares.

3. The petitioner, however, has initiated the proceedings (Execution RBJ No. 34/06/07) under Order 21 Rules 11 and 32 of the Code of Civil Procedure against the respondent on the ground that the path in existence and being used by him to have access to his cow shed has been blocked by the respondent by laying slate tiles and thereby trying to usurp more and more land over and above his share. The respondent, however, has denied the existence of any such path and came forward with the version that the applicant and his brother have another path to have access to their cow shed. On such pleadings of the parties learned trial Judge has framed the issues and also taken on record the evidence as produced by the parties on both sides.

4. The petitioner moved an application under Order 26 Rule 9 read with Section 151 of the Code of Civil Procedure with a prayer to allow local inspection to find out the so called blockade of the path by the respondent.

5. The application was contested and resisted by the respondent. Learned trial Court on appreciation of the pleadings of the parties and also the evidence produced as well as taking note of the submissions made by the Pradhan, Gram Panchayat RW3 that there exit a public path which is being used by the applicant and his brother to have access to their cow sheds and also that to allow the application at a stage when both parties have led evidence would amount to collection of evidence by the court in favour of a party to the *lis* which is not legally permissible has dismissed the application vide order under challenge in this Court.

6. It is worth mentioning that the complaint qua violation of compromise decree passed in the suit was brought to the Court by the petitioner in the petition under Order 21 Rules 11 and 32 of the Code of Civil Procedure. It was for him to have proved the existence of the so called path and the same having been now obstructed by the respondent. He has produced the evidence. The respondent has also produced the evidence. Therefore, allowing the local inspection at this stage would amount to collect evidence by the Court which is not legally permissible. In similar set of facts and circumstances, this Court has held as follows in ***Liaquat Ali*** vs. ***Amir Mohammad & ors., Latest HLJ 2016 (HP) 831*** has held as under:-

> *"4. Petitioner has assailed the aforesaid order on various grounds taken in the petition. Before proceeding to the merits of the matter, it needs to be reiterated that the object of local investigation is not to collect evidence, but to obtain such material, which from its peculiar nature, can be had only at the spot. The object of order 29 Rule 9 CPC is not to assist a party to collect evidence.*
>
> *5. What is the measurement of the suit passage and whether the same has been obstructed or encroached upon are matters which were required to be proved by the petitioner by leading cogent and convincing evidence to this effect and, therefore, recourse to the appointment of Local commissioner for demarcating the suit land at this stage is impermissible as both the parties have led their evidence. Obviously the application now preferred by the petitioner is mischievous as the petitioner wants the court to collect evidence for him through the Local commissioner."*

7. It is seen that the point in issue as brought to this Court in this petition is squarely covered against the petitioner by the ratio of the judgment *supra*. I, therefore, find no merit in this petition and the same is accordingly dismissed.

8. Pending application(s), if any, shall also stand dismissed and the interim order vacated.

9. The parties through learned Counsel representing them are directed to appear in the trial Court on ***4.10.2016.*** The record be sent back forthwith so as to reach in the trial Court well before the date fixed.

10. With the above observations, the petition is accordingly disposed of.

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

Vivek Sharma and others ..Petitioners/Plaintiffs

Vs

Ram Rakha and others ..Respondents/Defendants.

CMPMO No. 238 of 2016
Date of decision: 8th September, 2016

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiffs filed a civil suit for declaration pleading that they are in joint possession of the suit land- suit land is coparcenery in which plaintiffs has a right by birth - defendant No. 1 had executed a gift deed in favour of defendants No. 2 and 5, which is illegal, null and void- suit was opposed by the defendants asserting that suit property was self acquired property of defendant No. 1- application was allowed by the trial Court- an appeal was filed, which was allowed- it was contended that documents proved on record that ancestral land of the parties was acquired for the construction of Bhakra Dam and the land was purchased from the proceeds of such acquisition- however, no such plea was made in the pleading of the parties- documents cannot be considered in absence of the pleadings - Appellate Court had rightly held that in absence of the pleadings, documents cannot be considered to establish the ancestral nature of the property- petition dismissed. (Para-6 to 9)

Cases referred:
Ritesh Tewari & Anr. v. State of Uttar Pradesh & Ors., (2010) 10 SCC 677
Amar Singh v. Union of India and others (2011) 7 SCC 69

For the Petitioners : Mr.V.B.Verma, Advocate.
For the Respondents : Mr. Neeraj Gupta, Advocate, for respondents No. 1 to 4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge *(Oral)*

This petition under Article 227 of the Constitution of India takes exception to the judgment rendered by learned District Judge, Una, District Una, on 4.6.2016 in Civil Misc. Appeal No. 42/2015 whereby he set-aside the order of ad-interim injunction granted by learned Civil Judge (Jr. Division), Court No.1, Una, H.P. on 19.6.2015 in favour of the petitioners/plaintiffs.

2. The facts as necessary for determination of this lis are that the petitioners/plaintiffs filed a suit for declaration that they are co-owners in joint possession of the suit land and the same was held by respondent No.1as coparcenary property in which the

petitioners have right by virtue of their birth in the family. The parties are Brahmins by caste and in matters of alienations they are governed by customary law. The defendant/respondent No.1 with ulterior motive illegally entered into sham transaction vide registered gift deeds in favour of defendants No. 2 to 5 vide Basika Nos. 25, 26 and 27 which are illegal, null and void, inoperative and ineffective against the rights of the petitioners/plaintiffs. The petitioners prayed for declaring the aforesaid gift deeds as illegal, null and void and by way of consequential relief, a prayer for injunction was made. Alongwith the suit, an application for temporary injunction was filed before the learned trial Court.

3. The respondents/defendants resisted and contested the suit as well as application by filing written statement and reply wherein it was categorically denied that the suit land was ancestral and coparcenary property in the hands of respondent No.1. According to the respondents, the suit land was self acquired property of respondent No.1 and as such, he was free to deal with the same in the manner he liked. The execution of the gift deeds was not denied, however, it was emphatically denied that these deeds were in any manner wrong, illegal, null and void as alleged.

4. The learned trial Court granted injunction in favour of the petitioners, against which order the respondents filed an appeal that has been allowed by learned District Judge, Una vide order dated 4.6.2016. It is this order which has been assailed in this petition.

5. It is vehemently argued by Mr. V.B.Verma, learned counsel for the petitioners that the impugned order under challenge is the result of misreading and misunderstanding of the facts inasmuch as the learned lower Appellate Court has failed to consider that the ancestral land of the parties was acquired by the State of Haryana for the construction of Bhakra Beas Dam on 9.10.1958 and the land under dispute was purchased by the predecessor-in-interest of the parties in the year 1959 out of the proceeds received by way of compensation in lieu of the aforesaid acquisition. It is also argued that though the relevant record was placed before the learned lower Appellate Court to substantiate this fact, but the same has virtually been ignored by the learned Court below.

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

6. The petitioners have placed on record the copy of the suit instituted by them and it would be evident from a perusal thereof that the pleas being put forth before this Court and the learned Courts below have in fact not been raised in the suit. When confronted with this, learned counsel for the petitioners would argue that there are number of documents placed on record which clearly prove beyond any doubt that the ancestral land of the parties was acquired for the construction of Bhakra Beas Dam and the land under dispute had been purchased from the proceeds of such acquisition.

7 I am afraid that such contention of the petitioners cannot be accepted as it is more than settled that the pleadings of the parties form the foundation of their case and it is not open for them to give up the case set up in the pleadings and propound a new and different case. The documents accompanying the plaint at best can be considered as evidence, that too, if proved in accordance with law. Therefore, in absence of pleadings, evidence, if any, produced by the parties cannot be considered. It needs no reiteration that no party can travel beyond its pleadings and no amount of evidence which is contrary to the pleadings of the parties can be looked into. Therefore, in such circumstances, it was necessary for the petitioners to have led proper foundation of their case in the pleadings itself.

8. As observed earlier, the case now being put forth by the petitioners is not even their pleaded case and, therefore, the learned lower Appellate Court committed no illegality or irregularity while making the following observations:

> *"11. Admittedly, in the latest revenue record Sh. Ram Rakha, defendant No.1, has been recorded as absolute owner in possession of the suit land as is evident from*

the copy of jamabandi for the year 2011-12. There is not even an iota of evidence on record which prima-facie shows that the suit land had devolved upon Sh. Ram Rakha from his father or father's father by way of natural succession. On the other hand from the perusal of jamabandi for the year 1957-58 it is revealed that the suit land was owned by one Sh. Bhagat Ram and the same was purchased by Sh. Ram Rakha from him for consideration of Rs.9500/- regarding which the mutation No.333 was sanctioned on 20.4.1959. The plaintiffs have neither pleaded nor produced any prima facie evidence to show that this land was purchased by Sh. Ram Rakha from the award amount of his land acquired for construction of Bhakara Dam. The plaintiffs have also neither pleaded nor produced any prima-facie evidence to show that the land which was acquired for construction of Bhakara Dam was ancestral and coparcenary land in the hands of Sh. Ram Rakha qua the plaintiffs. Therefore, simply because the plaintiffs are grandsons of Sh. Ram Rakha would not make the suit land in his hands as ancestral and coparcenary without any evidence showing that the same was devolved upon him from his lineal male ancestors by way of natural succession or acquired from the joint family funds."

9. An action at law is not a game of chess, therefore, a litigant cannot prevaricate and take inconsistent positions. It is one of those fundamental principles of jurisprudence that litigants must observe total clarity and candour in their pleadings. (Vide: ***Ritesh Tewari & Anr. v. State of Uttar Pradesh & Ors., (2010) 10 SCC 677;*** and ***Amar Singh v. Union of India and others (2011) 7 SCC 69)***.

10. Having said so, I find no merit in this petition and the same is accordingly dismissed, so also the pending application(s), if any, leaving the parties to bear their own costs. Interim order granted on 17.6.2016 is vacated.

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

Ashish Bhuppal @ Gigi son of Shri Yuvraj Bhuppal....Petitioner/Co-accused

Versus

State of H.P. ....Non-petitioner

Cr.MMO No. 354 of 2015
Order reserved on 29th June 2016
Date of Order 9th September 2016

Code of Criminal Procedure, 1973- Section 482- Petition was filed for cancellation of FIR registered for the commission of offences punishable under Sections 389 and 411 read with Section 34 of I.P.C on the ground of false implication- held, the plea whether petitioner has been falsely implicated or not cannot be gone into at this stage but it will be decided after the trial- complicated question of fact cannot be determined while quashing the FIR- the power to quash FIR should be exercised sparingly by the High Court with circumspection- normal process of criminal trial should not be cut short in a casual manner- FIR should not be quashed when charge-sheet has been filed - settlement between the informant and the co-accused will not help in quashing of the FIR as offence has been committed against the society- petition dismissed.

(Para-5 to 12)

Cases referred:

State of T.N. vs. Thirukkural Perumal, (1995)2 SCC 449
State of Haryana vs. Bhajan Lal, (1992) Supp 1 SCC 335
Taramani Parakh vs. State of M.P. JT (2015)3 SC 185

State of M.P. vs. Surendra Kori, (2012)10 SCC 155
Mosiruddin Munshi vs. Md. Siraj and another, AIR 2014 SC 3352
R. Kalyani vs. Janak C. Mehta, (2009)1 SCC 516
Mahesh Chaudhary vs. State of Rajasthan, (2009)4 SCC 439
Lalita Kumari vs. Govt. of U.P. AIR 2014 SC 187
Rishi Pal Singh vs. State of U.P., AIR 2014 SC 2567
Gian Singh vs. State of Punjab (2012)10 SCC 303
State of M.P. vs. Awadh Kishore Gupta. (2004)1 SCC 691
Ishwar Singh vs. State of M.P. AIR 2008 SCW 7865
Mohan Singh vs. State (FB) Rajasthan,1993 Cr.L.J. 3193

For the Petitioner: Mr. Rahul Singh Verma Advocate.
For Non-petitioners: Mr. M.L. Chauhan Addl. Advocate General with Mr.R.K.Sharma Deputy Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Section 482 of Code of Criminal Procedure to quash FIR No. 122 of 2014 dated 18.8.2014 registered under Sections 379, 411 read with Section 34 IPC at P.S. Bhoranj and also to quash criminal proceedings pending before learned Judicial Magistrate 1st Class Court No. 2 Hamirpur H.P. in case No. 136/1 of 2014 title State vs. Parveen Kumar and others.

Brief facts of the case

2. It is alleged that in the month of August 2014 during night period maruti car No. HP-23-0247 owned by Dharam Chand son of Sukhia Ram was stolen by co-accused Parveen Kumar @ Rinku and Vijay Kumar @ Kakku and same was sold to co-accused Ashish Bhuppal @ Gigi petitioner. It is alleged that statement of Ashish Bhuppal co-accused was recorded under Section 27 of Indian Evidence Act 1872 and co-accused Ashish Bhuppal @ Gigi has given disclosure statement under Section 27 of Indian Evidence Act 1872 that maruti car No. HP-23-0247 was purchased by co-accused Ashish Bhuppal on 18.8.2014 from co-accused Parveen Kumar @ Rinku and co-accused Vijay Kumar @ Kakku. It is alleged that co-accused Ashish Bhuppal also disclosed that maruti car No. HP-23-0247 was left by him for repair in workshop of Daya Ram situated at Manikaran road near Bhuntar. Maruti car No. HP-23-0247 was recovered as per disclosure statement given by accused persons. After investigation charge sheet filed against accused persons before competent Court of law under Sections 379 and 411 IPC read with Section 34 of Indian Penal Code and criminal case No. 136/1 of 2014 title State of H.P. vs. Parveen Kumar is pending before learned Judicial Magistrate Court No. 2 Hamirpur H.P. for consideration upon charge.

3. Response filed on behalf of State of H.P. Court heard learned Advocate appearing on behalf of petitioner and learned Additional Advocate General appearing on behalf of State and also perused the record carefully.

4. Following points arise for determination in present petition:-

Point No.1

Whether petition filed under Section 482 of Code of Criminal Procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of petition?

Point No.2

Final order.

Findings upon Point No. 1 with reasons

5. Submission of learned Advocate appearing on behalf of petitioner that co-accused Parveen Kumar @ Rinku and co-accused Vijay Kumar @ Kakku have falsely implicated co-accused Ashish Bhuppal in present case and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Whether co-accused Parveen Kumar @ Rinku and co-accused Vijay Kumar @ Kakku have falsely implicated co-accused Ashish Bhuppal in present case or not is complicated issue of facts. Judicial findings relating to complicated issue of facts at this stage of case cannot be given by Court unless opportunity is granted to both the parties to lead evidence in support of their case.

6. Submission of learned Advocate appearing on behalf of petitioner that petitioner did not receive any amount of sale of stolen car and petitioner did not hand over the stolen car to Daya Ram Auto Works for repair as alleged by prosecution and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Facts whether petitioner received consideration amount of stolen car or not and facts whether petitioner did not hand over the stolen car for repair in Daya Ram Auto Works is also complicated issue of facts. Judicial findings relating to complicated issue of facts cannot be given at this stage of case unless opportunity is granted to both parties to lead evidence in support of their case.

7. Submission of learned Advocate appearing on behalf of petitioner that petitioner only accompanied co-accused Parveen Kumar @ Rinku and co-accused Vijay Kumar @ Kakku when vehicle was given for repair at their instance and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Judicial findings whether petitioner only accompanied co-accused Parveen Kumar @ Rinku and co-accused Vijay Kumar @ Kakku when vehicle was given for repair at their instance is a complicated issue of facts. Judicial findings relating to complicated issue of facts cannot be given at this stage of case unless opportunity is granted to both parties to lead evidence in support of their case.

8. Submission of learned Advocate appearing on behalf of petitioner that investigating agency failed to recover the sale consideration amount of Rs.11000/- (Rupees eleven thousand) from co-accused Ashish Bhuppal and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Investigating Agency has recorded disclosure statement of co-accused Ashish Bhuppal placed on record that he has received stolen car and investigating agency also recorded disclosure statement of co-accused Parveen Kumar @ Rinku and co-accused Vijay Kumar @ Kakku that they have sold the stolen car to co-accused Ashish Bhuppal. Judicial findings relating to evidentiary value of disclosure statement given by co-accused Parveen Kumar @ Rinku and co-accused Vijay Kumar @ Kakku and co-accused Ashish Bhuppal @ Gigi cannot be given at this stage of case and judicial findings relating to disclosure statement will be given by Court after giving opportunity to both parties to lead evidence in support of their case.

9. It is well settled law that power to quash FIR and criminal proceedings should be exercised sparingly by High Court with circumspection. It is well settled law that normal process of criminal trial should not be cut short in casual manner. It is also well settled law that when charge sheet is filed against accused persons then FIR could not be quashed because after filing of charge sheet FIR culminated into charge sheet. ***See (1995)2 SCC 449 State of T.N. vs. Thirukkural Perumal. See (1992) Supp 1 SCC 335 title State of Haryana vs. Bhajan Lal. See JT (2015)3 SC 185 title Taramani Parakh vs. State of M.P. See (2012)10 SCC 155 title State of M.P. vs. Surendra Kori. See AIR 2014 SC 3352 title Mosiruddin Munshi vs. Md. Siraj and another. See (2009)1 SCC 516 title R. Kalyani vs. Janak C. Mehta. See (2009)4 SCC 439 title Mahesh Chaudhary vs. State of Rajasthan. AIR 2014 SC 187 title Lalita Kumari vs. Govt. of U.P. AIR 2014 SC 2567 title Rishi Pal Singh vs. State of U.P. See (2012)10 SCC 303 title Gian Singh vs. State of Punjab. See (2004)1 SCC 691 title State of M.P. vs. Awadh Kishore Gupta.*** There are positive and direct allegations against co-accused Ashish Bhuppal @ Gigi in present case relating to criminal offence punishable under Section 411 IPC relating to receiving of stolen property by way of disclosure statement of co-accused Parveen

Kumar @ Rinku and co-accused Vijay Kumar @ Kakku and co-accused Ashish Bhuppal @ Gigi recorded under Section 27 of Indian Evidence Act 1872 placed on record.

10. Submission of learned Advocate appearing on behalf of petitioner that out of Court settlement executed between complainant and co-accused Ashish Bhuppal placed on record and on this ground present petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the compromise deed dated 14.3.2016 executed between Dharam Chand complainant and co-accused Ashish Bhuppal. In present case valuation of stolen property is Rs.11000/-(Rupees eleven thousand). As per Section 320 of Code of Criminal Procedure compounding of criminal offence with permission of Court could be granted only when value of stolen property is not exceeding Rs.2000/- (Rupees two thousand). Theft of movable properties is increasing day by day during night period in the society. In order to curb theft of movable properties during night period it is not expedient in the ends of justice to allow the petition on the basis of out of Court settlement placed on record. It is well settled law that order of compounding criminal offence which are non-compoundable under statutory provision of Code of Criminal Procedure is improper. It is also well settled law that it is against public policy to compound a non-compoundable criminal offence. ***See AIR 2008 SCW 7865 title Ishwar Singh vs. State of M.P. See 1993 Cr.L.J. 3193 title Mohan Singh vs. State (FB) Rajasthan.***

11. Judicial findings relating to absence of *mensrea* or *actus reus* cannot be given at this stage of case. Judicial findings relating to absence of *mensrea* or *actus reus* would be given by learned Trial Court during trial of case after giving due opportunity to both parties to prove their case. Point No. 1 is answered in negative.

Point No.2(Final Order)

12. In view of findings upon point No.1 petition filed under Section 482 Cr.P.C, is dismissed. Parties are directed to appear before learned Trial Court on ***30.9.2016.*** Observations will not effect merits of case in any manner and will be strictly confine to disposal of present petition. File of learned Trial Court along with certify copy of order be sent back forthwith. Cr.MMO No. 354 of 2015 is disposed of. Pending miscellaneous application(s) if any also stands disposed of.

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

Bholi Devi and others .....Appellants

Versus

Avtar Singh and others .....Respondents

FAO(MVA) NO.22 of 2011
Decided on: 09.09.2016

Motor Vehicles Act, 1988- Section 166- Tribunal dismissed the claim petition after holding that accident had taken place due to the negligence of the deceased- respondent No. 1 had not driven the truck rashly and negligently at the relevant point of time- FIR was got registered against the deceased- a closure report was filed against him, which was accepted after hearing the complainant- claimants have to plead and prove that accident was outcome of the rash and negligent driving of the respondent No. 1, in which they failed, however, claimants are entitled to Rs. 50,000/- under no fault liability. (Para-5 to 7)

For the appellants: Mr.Jagdish Thakur, Advocate.

For the respondents: Mr.Tara Singh Chauhan, Advocate for respondents No.1 and 2.
Mr.Ratish Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice(Oral)

This appeal is directed against the award, dated 8th December, 2010, passed by the Motor Accident Claims Tribunal-II, Una, H.P., (for short, the Tribunal), in Claim Petition No.23 of 2008, titled Bholi Devi and others vs. Avtar Singh and others, whereby the claim petition, filed by the claimants, was dismissed, (for short the "impugned award").

2. Feeling aggrieved, the claimants filed the instant appeal.

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

4. The Tribunal has dismissed the claim petition on the ground that the accident was the outcome of rash and negligent driving of deceased Ram Lal himself and that respondent No.1 Avtar Singh had not driven the truck rashly and negligently at the relevant point of time.

5. In order to ascertain whether the claim petition was rightly dismissed by the Tribunal, this Court vide order dated 17th June, 2016, directed the Police Agency to file case diary in regard to FIR No.178, dated 15th August, 2008, registered at Police Station, Amb, District Una, H.P., qua the accident in question. The concerned Agency filed the report (pages 21 to 44 of the appeal), which does disclose that FIR was registered against the deceased Ram Lal and closure report in terms of Section 173 of the Code of Criminal Procedure was filed before the court of competent jurisdiction, which was accepted on 10th April, 2009 after hearing the complainant.

6. The claimants have to plead and prove that the accident was the outcome of rash and negligent driving of the driver, namely, Avtar Singh respondent No.1, in which, in the given circumstances, they have failed.

7. At this stage, the learned counsel for the appellants stated that the appellants/claimants are entitled to compensation under Section 140 of the Motor Vehicles Act, 1988 (for shot, the Act), under the head no fault liability, which has not been awarded to them by the Tribunal. Accordingly, the appeal is disposed of by holding the claimants entitled to Rs.50,000/- under the head no fault liability. The insurer is directed to deposit the amount within a period of six weeks from today and on deposit, the amount be released in favour of the claimant Bholi Devi, through her bank account. In case the insurer fails to deposit the amount within the stipulated period, the amount shall carry interest at the rate of 7.5% per annum from today till deposit.

8. The appeal is disposed of and the impugned award is modified accordingly.

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

Smt. Bimla Devi and others ...Appellants.

Versus

The Oriental Insurance Co. Ltd. and others ...Respondents.

FAO No. 444 of 2011
Reserved on: 02.09.2016
Decided on: 09.09.2016

Motor Vehicles Act, 1988- Section 166- Tribunal held that accident had not taken place due to any negligence but due to inept handling of the vehicle by the mechanic or some inherent manufacturing defect existing in the vehicle- findings recorded by the Tribunal are not proper – claimants had specifically pleaded that deceased was travelling in the vehicle as conductor- one tyre of the vehicle was being repaired when another tyre burst- its rim hit the deceased, who

sustained injuries – owner/insured and the driver have not denied these facts- strict proof is not required in the motor accident case, discrepancies in the pleadings cannot be made ground to dismiss the claim petition- Tribunal has to follow the principles of justice, equity and good conscience – deceased had sustained injuries out of the use of the motor vehicle- income of the deceased was claimed to be Rs. 8,000/- per month - by guess work, it can be safely held that deceased was not earning less than Rs. 4,000/- per month- 1/4th amount was to be deducted towards his personal expenses- thus, it can be held that claimants have lost source of dependency of Rs. 3,000/- per month- deceased was 29 years of age- multiplier of 16 is just and appropriate- compensation of Rs. 3,000 x 12 x 16= Rs. 5,76,000/- awarded towards loss of dependency- claimants are also entitled to Rs. 10,000/- each under the head loss of 'love and affection', 'loss of estate' and 'funeral expenses'- insurance was admitted and insurer is liable to indemnify the insured - claimants are entitled to compensation of Rs. 6,06,000/- with interest @ 7.5% per annum from the date of filing the claim petition till its realization. (Para-12 to 51)

Cases referred:

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

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

Dulcina Fernandes and others versus Joaquim Xavier Cruz and another, (2013) 10 Supreme Court Cases 646

Madan Gopal Kanodia versus Mamraj Maniram and others, (1977) 1 Supreme Court Cases 669

United India Insurance Company Ltd. Versus Sh. Talaru Ram and others, decided on 18th December, 2015

Sharestha Devi and others versus Kishori Lal and others, decided on 1st July, 2016

B. Fathima versus S.M. Umarabba & ors., II (2007) ACC 613 (DB)

Rajan versus John, 2009 (2) T.A.C. 260 (Ker.

nsurance Co. Ltd., through its Senior Divisional Manager, Jammu versus Smt. Nirmala Devi and others, 2009 (3) T.A.C. 684 (J&K)

Mst. Param Pal Singh through father vs M/s National Insurance Co. and another, 2013 AIR SCW 283

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

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

Munna Lal Jain & another versus Vipin Kumar Sharma & others, 2015 AIR SCW 3105

For the appellants: Mr. Bimal Gupa, Senior Advocate, with Ms. Kusum Chaudhary, Advocate.

For the respondents: Ms. Seema Sood, Advocate, for respondent No. 1.
Nemo for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

The appellants-claimants have invoked the jurisdiction of this Court in terms of the mandate of Section 173 of the Motor Vehicle Act (for short "MV Act") and have questioned the award, dated 5th August, 2011, made by the Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P. (for short "the Tribunal") in MAC Petition No. 66-MAC/2 of 2008, titled as Smt. Bimla Devi and others versus Shri Vijender Kumar and others, whereby the claim petition filed by the appellants-claimants came to be dismissed (for short "the impugned award").

2. In order to determine this appeal, it is necessary to give a brief resume of the case, the womb of which has given birth to the appeal in hand.

3. The appellants-claimants invoked the jurisdiction of the Tribunal by the medium of the claim petition for grant of compensation to the tune of ₹ 10,00,000/-, as per the break-ups given in the claim petition, on the ground that their sole bread earner, namely Shri Puran Singh @ Kaka, son of appellants-claimants No. 1 & 2, brother of appellant-claimant No. 3 and father of appellant-claimant No. 4, became victim of the accident arising out of use of the motor vehicle, i.e. truck, bearing registration No. HP-16-9135, on 28th July, 2005, at about 12.00 midnight at Kabir Petrol Pump near Zirakpur, Punjab.

4. It has been averred in the claim petition that when the deceased, who was 28 years of age at the time of the accident, was travelling in the offending vehicle as conductor and they reached at Kabir Petrol Pump Near Zirakpur, Punjab, the offending vehicle developed some defect and while its one of the tyres was being repaired, the another tyre of the said vehicle burst and its rim hit deceased-Puran Chand @ Kaka, who sustained injuries, was admitted in Government Medical College & Hospital, Sector-32, Chandigarh, where he succumbed to the said injuries on 30th July, 2005.

5. It has also been pleaded that deceased-Puran Chand @ Kaka was working as a conductor/labourer with the offending vehicle and was earning ₹ 8,000/- per month from all sources, i.e. as conductor/labourer, driver and agriculturist.

6. The claim petition was resisted by the owner-insured, driver and the insurer of the offending vehicle on the grounds taken in the respective memo of objections.

7. The owner-insured and the driver of the offending vehicle have filed the joint reply and admitted the factum of accident, death and cause of death of deceased-Puran Chand @ Kaka. They have also admitted that deceased-Puran Chand @ Kaka was working as a conductor with the offending vehicle.

8. On the pleadings of the parties, following issues came to be framed by the Tribunal on 21st March, 2009:

> *"1. Whether Puran Chand died in the accident due to rash and negligent driving of truck No. HP-16-9135 by respondent No. 2 Madhi Ali on 28-7-2005 at about 12.00 midnight at place Kabir Petrol Pump near Zirakpur, as alleged? OPP*
>
> *2. In case issue No. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled to and from whom? OPP*
>
> *3. Whether the petition is not maintainable in the present form, as alleged? OPR-3*
>
> *4. Whether the driver of the vehicle in question did not possess a valid and effective driving licence at the time of accident, as alleged? OPR-3*
>
> *5. Whether the vehicle in question was being plied in violation of the terms and conditions of the insurance policy and valid route permit, as alleged? OPR-3*
>
> *6. Whether the petition has been filed by the petitioners in collusion with respondents No. 1 and 2, as alleged? OPR-3.*
>
> *7. Relief."*

9. The appellants-claimants have examined Shri Hajara Singh as PW-1; Shri Anil Kumar PW-2; Shri Tota Ram as PW-3; HC Krishan Dutt as PW-4; Shri Chander Bose as PW-6; Shri Trilok Nath as PW-7 and one of the claimants, namely Smt. Bimla Devi, herself appeared in the witness box as PW-5.

10. The respondents have not led any evidence. However, driver, namely Shri Madi Ali Shah appeared in the witness box and has admitted that the deceased was working as a conductor with the offending vehicle at the time of the accident.

11. The Tribunal, after scanning the evidence, oral as well as documentary, held that the mishap was not on account of any negligence on the part of the owner and driver of the offending vehicle, but was on account of the inept handling of the vehicle by the mechanic or

some inherent manufacturing defect existing in the vehicle and dismissed the claim petition in terms of the impugned award.

Issue No. 1:

12. The moot question is – whether the Tribunal has rightly determined issue No. 1 and dismissed the claim petition? The answer is in the negative for the reasons to be recorded hereinafter.

13. The appellants-claimants have specifically averred in the claim petition that at the time of the relevant point of time, deceased-Puran Chand @ Kaka was travelling in the offending vehicle as conductor and when they reached at Kabir Petrol Pump Near Zirakpur, Punjab, the offending vehicle developed some defect and while its one of the tyres was being repaired, the another tyre of the said vehicle burst and its rim hit deceased-Puran Chand @ Kaka, who sustained injuries and succumbed to the said injuries. The appellants-claimants have also led evidence to this effect.

14. The owner-insured and the driver of the offending vehicle have not denied the factum of employment of deceased-Puran Chand @ Kaka with the offending truck as conductor, cause of the injuries sustained by him which resulted into his death. It is also admitted fact that the offending vehicle was stationery for the purpose of repairing the tyre, as discussed hereinabove.

15. The owner-insured and insurer of the offending vehicle have not led any evidence in support of their pleadings/defence. Thus, the evidence led by the appellants-claimants has remained unrebutted and the owner-insured and the insurer have failed to prove their defence.

16. Thus, the question is – whether the claim petition was maintainable?

17. The compensation was to be granted under Section 166 of the MV Act for the following reasons:

18. The MV Act has gone through a sea change in the year 1994 and in terms of Sections 158 (6) and 166 (4) of the MV Act, the Tribunal can treat even a police report as a claim petition.

19. The purpose of granting compensation is just to ameliorate the sufferings of the victims of the motor vehicular accident and the niceties, hypertechnicalities, procedural wrangles and tangles and mystic maybes have no role to play and that should not be a ground to dismiss the claim petition and to defeat the rights of the claimants.

20. The same principle has been laid down by the Apex Court in the cases titled as **N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354; Sohan Lal Passi versus P. Sesh Reddy and others,** reported in **AIR 1996 Supreme Court 2627;** and **Dulcina Fernandes and others versus Joaquim Xavier Cruz and another**, reported in (**2013) 10 Supreme Court Cases 646.**

21. This Court has also laid down the same principle in a series of cases.

22. It is the duty of the Tribunal/Appellate Court to achieve the aim and object of the granting of compensation. The strict proof is not required and discrepancies or pleadings or loose pleadings cannot be made a ground to dismiss the claim petition. These proceedings are summary in nature, do not require strict compliance of the rules of evidence and pleadings. The Tribunal has to see that innocent victims do not suffer and it cannot wash its hands of the responsibility and duty by dismissing the claim petition. It is to be kept in mind by the Tribunal that it is dealing with a claim petition which is outcome of social welfare legislation.

23. It is well established principle of law that the Tribunal, while dealing with claim petition, has to keep in mind that it is outcome of a social legislation, has to follow the principles of justice, equity and good conscience and has to apply a more realistic, pragmatic and liberal approach.

24. The Apex Court in a case titled as **Madan Gopal Kanodia versus Mamraj Maniram and others,** reported in **(1977) 1 Supreme Court Cases 669,** held that the Courts should not scrutinize the pleadings with such meticulous care resulting in genuine claims being defeated on trivial grounds. It is apt to reproduce para 13 of the judgment herein:

> *"13. ..... It is well-settled that pleadings are loosely drafted in the Courts and the Courts should not scrutinise the pleadings with such meticulous care so as to result in genuine claims being defeated on trivial grounds. In our opinion the finding of the High Court that there was wide gap between the pleadings and the proof is not at all borne out from the record of the present case."*

25. Having glance of the above discussions, one comes to an inescapable conclusion that the deceased sustained injuries while one of the tyres of the offending vehicle burst and its rim hit the deceased. Thus, it is a case of accident arising 'out of use of motor vehicle'.

26. This Court was dealing with cases of similar nature in **FAO No. 537 of 2008,** titled as **United India Insurance Company Ltd. Versus Sh. Talaru Ram and others,** decided on 18th December, 2015, and **FAO No. 465 of 2009,** titled as **Smt. Sharestha Devi and others versus Kishori Lal and others,** decided on 1st July, 2016; and while relying upon various decisions rendered by the Apex Court, held that claim petition is maintainable.

27. The same question came up for consideration before the Hon'ble Karnataka High Court in a case titled as **B. Fathima versus S.M. Umarabba & ors.,** reported in **II (2007) ACC 613 (DB),** wherein wooden logs were being unloaded from a lorry at a saw-mill, the rope tied as a grip to the said logs was untied negligently, due to which a wooden log fell on the deceased who was near the lorry for the purpose of unloading. It was held that the accident occurred when the lorry was in use, deceased was a third party and the insurer was saddled with liability.

28. The Hon'ble Kerala High Court in a case titled as **Rajan versus John,** reported in **2009 (2) T.A.C. 260 (Ker.),** wherein the claimant sustained injury while unloading marble from a stationed truck, held that any accident arising during loading and unloading is an accident arising on account of use of vehicle and claim petition was maintainable.

29. The High Court of Jammu and Kashmir in the case titled as Oriental **Insurance Co. Ltd., through its Senior Divisional Manager, Jammu versus Smt. Nirmala Devi and others,** reported in **2009 (3) T.A.C. 684 (J&K)** has laid down the same principle.

30. The Apex Court in the case titled as **Mst. Param Pal Singh through father versus M/s National Insurance Co. and another,** reported in **2013 AIR SCW 283,** has recorded that a claim is maintainable for grant of compensation, if a driver while driving the vehicle for long distance and thereafter holding the vehicle, taking rest, has lost his life. The Apex Court has further held that the accident is an outcome of the use of motor vehicle and during the course of the employment. It is apt to reproduce para 27 of the judgment herein:

> *"27. Applying the various principles laid down in the above decisions to the facts of this case, we can validly conclude that there was CASUAL CONNECTION to the death of the deceased with that of his employment as a truck driver. We cannot lose sight of the fact that a 45 years old driver meets with his unexpected death, may be due to heart failure while driving the vehicle from Delhi to a distant place called Nimiaghat near Jharkhand which is about 1152 kms. away from Delhi, would have definitely undergone grave strain and stress due to such long distance driving. The deceased being a professional heavy vehicle driver when undertakes the job of such driving as his regular avocation it can be safely held that such constant driving of heavy vehicle, being dependant solely upon his physical and mental resources and endurance, there was every reason to assume that the vocation of driving was a material contributory factor if not the sole cause that accelerated his unexpected death to occur which in all fairness should be held to be an untoward mishap in his life span. Such an 'untoward mishap' can therefore be reasonably described as an 'accident' as having been caused solely*

attirubutable to the nature of employment indulged in with his employer which was in the course of such employer's trade or business."

31. Having said so, it is held that deceased-Puran Chand @ Kaka died 'in the use of motor vehicle'.

32. Now, the question is – whether the claimants are entitled to compensation?

33. Admittedly, the deceased was working as a conductor with the offending vehicle. Thus, the claimants have a legal right to claim compensation in terms of the Workmen's Compensation Act, 1923 (for short "WC Act") because the deceased was conductor under employment of the owner-insured, insurer had to indemnify as per the terms and conditions contained in the Policy and the compensation was to be granted as per the Schedule attached with the said Act. Section 167 of the MV Act provides an option to lay a claim petition either before an authority under the WC Act or before the Tribunal. It is apt to reproduce Section 167 of the MV Act:

> *"167.* ***Option regarding claims for compensation in certain cases****.- Notwithstanding anything contained in the Workmen's Compensation Act, 1923 (8 of 1923) where the death of, or bodily injury to, any person gives rise to a claim for compensation under this Act and also under the Workmen's Compensation Act, 1923, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both."*

34. While going through the provisions of law, one comes to an inescapable conclusion that the claimants being the legal representatives of the employee-deceased, have two remedies to claim compensation and in terms of Section 167 of the MV Act, they can seek compensation at higher side. It is not disputed that the claimants are not legal representatives of the deceased and the dependants. Thus, the claimants are entitled to compensation.

35. Viewed thus, the findings returned by the Tribunal on issue No. 1 are set aside and is determined accordingly.

36. Before dealing with issue No. 2, I deem it proper to determine issues No. 3 to 6.

Issue No. 3:

37. It was for the respondents, i.e. the owner-insured, driver and insurer of the offending vehicle, to prove that the claim petition was not maintainable, have not led any evidence, thus, have failed to discharge the onus. In view of the findings returned on issue No. 1 (supra), the claim petition was maintainable. Accordingly, the findings returned by the Tribunal on issue No. 3 are set aside and it is held that the claim petition was maintainable.

Issue No. 4:

38. It was for the insurer to plead and prove that the driver of the offending vehicle was not having a valid and effective driving licence to drive the same, has not led any evidence, thus, has failed to discharge the onus.

39. In the given facts and circumstances of the case, the question whether the driver of the offending vehicle was not having a valid and effective driving licence is irrelevant for the reason that at the relevant point of time, the driver was not driving the offending vehicle, but, the same was parked and stationary in order to get the vehicle repaired. The question of valid and effective driving licence has no connection with the death of the deceased. However, the driving licence is on the record as Ext. P-1, the perusal of which does disclose that the driver of the offending vehicle was having a valid and effective driving licence to drive the same at the relevant point of time. Thus, the findings returned by the Tribunal on issue No. 4 are set aside and the same is decided in favour of the driver and owner-insured and against the insurer.

Issue No. 5:

40. It was for the insurer to plead and prove that the offending vehicle was being plied in violation of the terms and conditions of the insurance policy and valid route permit and

the owner-insured has committed willful breach. Though, it has been pleaded, that is why this issue came to be framed, but has not led any evidence to prove any breach, not to speak of willful breach, and has failed to discharge the onus. Thus, the findings returned by the Tribunal on issue No. 5 are set aside and the same is decided in favour of the owner-insured and against the insurer.

Issue No. 6:

41. The insurer has not led any evidence to prove that there was any collusion between the appellants-claimants and the owner-insured and driver of the offending vehicle. Thus, the findings returned by the Tribunal on issue No. 6 are set aside and the same is decided against the insurer.

Issue No. 2:

42. The appellants-claimants have pleaded that the monthly income of the deceased was ₹ 8,000/- per month. Admittedly, the deceased was working as a conductor. Thus, by guess work, it can be safely held that the deceased was earning not less than ₹ 4,000/- per month. One fourth is to be deducted towards his personal expenses keeping in view para 30 of the judgment rendered by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120.** Thus, it can be safely said and held that the claimants have lost source of dependency to the tune of ₹ 3,000/- per month.

43. The claimants have pleaded that the deceased was 28 years of age at the time of the accident. The perusal of the Parivar Register, Ext. PW-3/A, does disclose that the deceased was 29 years of age at relevant point of time.

44. The Apex Court in the case titled as **Munna Lal Jain & another versus Vipin Kumar Sharma & others,** reported in **2015 AIR SCW 3105,** held that the multiplier has to be applied while keeping in view the age of the deceased.

45. In view of the law laid down by the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** and **Munna Lal Jain's case (supra)** read with Second Schedule appended with the MV Act, multiplier of '16' is just and appropriate even if the age of the deceased is taken as 29 years at the relevant point of time.

46. Having said so, the appellants-claimants are held entitled to compensation under the head 'loss of dependency' to the tune of ₹ 3,000/- x 12 x 16 = ₹ 5,76,000/-.

47. The appellants-claimants are also held entitled to compensation to the tune of ₹ 10,000/- each under the heads 'loss of love and affection' 'loss of estate' and 'funeral expenses'.

48. The question is – who is to be saddled with liability?

49. The factum of insurance is admitted. The offending vehicle was insured at the relevant point of time and the risk of employee was covered. Thus, the insurer was to be saddled with liability. Issue No. 2 is decided accordingly.

50. Having glance of the above discussions, the impugned award is set aside, the claim petition is granted, the appellants-claimants are held entitled to compensation to the tune of ₹ 5,76,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- = ₹ 6,06,000/- with interest @ 7.5% per annum from the date of the claim petition till its realization and the insurer is saddled with liability.

51. The insurer is directed to deposit the awarded amount before the Registry of this Court within eight weeks. On deposition, the same be released in favour of the claimants in equal shares through payee's account cheque or by depositing the same in their respective bank accounts. In case claimant No. 4 is minor, her share be deposited in Fixed Deposit for a period of five years.

52. The appeal is allowed accordingly.

53. Send down the records after placing copy of the judgment on the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Gurbachan Singh. .....Petitioner.

Versus

State of Himachal Pradesh & another. .....Respondents.

CWP No. 1224 of 2016
Reserved on: 05.09.2016
Decided on: 09.09.2016

Land Acquisition Act, 1894- Section 18- Land of the father of the petitioner was acquired for the purpose of setting up a tube well- an award was passed- petitioner sought reference but no reference was made- respondents stated that no person had objected to the award and the petition is not maintainable- held, that amount was received without any bill – attempts made subsequently to get something more without any basis and foundation- petitioner is not explained the delay, which cannot be brushed aside without any reason- mere participation will not assist the petitioner- petition dismissed with cost of Rs.10,000/-. (Para-6 to 23)

Cases referred:

R & M Trust vs. Koramangala Residents Vigilance Group and others, (2005) 3 SCC 91
Bhakra Beas Management Board vs. Kirshan Kumar Vij & another, AIR 2010 SCC 3342
State of Jammu & Kashmir vs. R.K. Zalpuri and others, JT 2015 (9) SC 214
Delhi Administration and Others vs. Kaushilya Thakur and another, AIR 2012 SCC 2515
Chennai Metropolitan Water Supply and Sewerage Board and others vs. T.T. Murali Babu, (2014) 4 Supreme Court Cases 108
HIMURJA and another vs. Bikram Singh, and other connected matters, ILR 2016 (III) HP 921 (D.B.)
State of Tripura and others vs. Arabinda Chakraborty and others, (2014) 6 SCC 460
Wardington Lyngdoh and others vs. The Collector, Mawkyrwat, AIR 1995 Supreme Court 2340
Land Acquisition Officer vs. Shivabai and others, AIR 1997 SCC 2642
Bhagwan Das & others vs. State of U.P. and others, 2010 AIR SCW 1629
State of Karnataka vs. Laxuman, AIR 2006 Supreme Court 24

For the petitioner: Mr. Dheeraj K. Vashisht, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General, Mr. Anup Rattan, Mr. Romesh Verma, Mr. Varun Chandel, Additional Advocate Generals and Mr. Kush Sharma, Deputy Advocate General.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioner for directing the respondents to make reference under Section 18 of the Land Acquisition Act, 1894 (hereinafter referred to as 'the Act') to the learned District Judge, Una, after setting aside the order passed by the Land Acquisition Collector, H.P.P.W.D., (North Zone) Kangra. Respondent No. 2 refused to make reference with respect to Award No. 20, dated 16.08.2007, qua the land alongwith trees of the

petitioner in Village Bhadhori, Tehsil Haroli, District Una, H.P., for enhancing the compensation alongwith all consequential benefits available to the petitioner under the Act.

2. The petitioner pleaded that his father was owner of 14 kanals, 10 marlas of land, situate in Village Bhadhori, Tehsil Haroli, District Una, H.P., comprised in Khasra No. 352, measuring 0-13-80 hectares. As per the petitioner, for the purpose of setting up a tubewell, the State of Himachal Pradesh, through the officials of Irrigation and Public Health Department approached his father, who agreed for 5 marlas of land for setting up a tubewell. Thereafter, respondent No. 2 passed Award No. 20 on 16.08.2007 and the compensation was assessed without associating the petitioner or his father in the proceedings at any point of time and only in the month of September, 2008, the petitioner got the knowledge of the said award, when he was asked to receive the compensation. As per the petitioner, he showed his dissatisfaction about the award, being on the lesser side, as the compensation was not paid with respect to trees standing on the land.

3. It is further pleaded by the petitioner that he wrote letter dated 09.09.2008, but the same was not replied and subsequently the petitioner wrote letters on 13.10.2010, 25.04.2011 and 26.04.2011. When no compensation was paid to the petitioner, he moved a petition before the learned Land Acquisition Collector, H.P.P.W.D., (North Zone), Kangra, for making reference to learned District Judge, Una, and vide impugned order, the petition of the petitioner was dismissed by the Land Acquisition Collector, H.P.P.W.D. (North Zone), Kangra, hence the present petition.

4. Reply, on behalf of respondent No. 1, to the petition was filed and the replying respondent denied the contents of the petition. It is averred therein that an amount of Rs.1,13,029/- (rupees one lac thirteen thousand and twenty nine) was paid to the petitioner, Shri Gurbachan Singh, and other co-owner, Shri Parkash Singh, in equal shares. As none of them has objected to the award at the time of receipt of award amount, the present petition is not maintainable. It is further averred that at the time of passing of the award, the petitioner was present. As he was also present at the time of receiving the award amount in the year 2008, if any tree was uprooted he could have objected at that time, but he received the compensation alongwith other co-sharer without any protest.

5. The only question which arose for consideration and determination before this Court is whether the petition is maintainable after such a long delay?

6. It is admitted that the award was announced in the year 2007 and the petitioner alongwith his co-sharer received the amount in the year 2008 without any protest. He only after considerable delay tried to make vain attempts to get something more without any basis and foundation. The petition was presented before the learned Land Acquisition Collector, H.P.P.W.D (North Zone), Kangra, for enhancing the award amount, in 2013.

7. In the given circumstances, the petitioner has not explained the delay, which has crept in. It is apt to record herein that the other co-sharer has not questioned the adequacy of compensation nor sought any remedy. The petitioner has, in fact, tried to misuse the process of law only with an object to grab more money. It has also come in the petition that as the tubewell was being installed for the welfare of the local people, including the petitioner, for supplying the water for agriculture purpose, his father agreed for the acquisition of the land. Whether his father agreed for the acquisition or for giving the land for the welfare purpose is still a point which can only be answered, had the father of the petitioner been alive, but the respondents at their own paid handsome amount of compensation to the petitioner and other co-sharer. The petitioner after six years approached the Land Acquisition Collector, H.P.P.W.D (North Zone), Kangra, to make a reference to the Court of learned District Judge, Una, and the same was dismissed by the Land Acquisition Collector on 21.02.2014 and even thereafter he waited for more than two years to maintain the present petition before this Court under Article 226 of the Constitution of India.

8. In our view the delay, in absence of plausible explanation, is not to be brushed aside cursorily. Our view is fortified by the decision of Hon'ble Supreme Court in ***R & M Trust vs. Koramangala Residents Vigilance Group and others, (2005) 3 Supreme Court Cases 91,*** wherein in para 34 of the judgment, the facet of delay is discussed as under:

> *"34. There is no doubt that delay is very important factor while exercising extraordinary jurisdiction under Article 226 of the constitution. We cannot disturb the third party interest created on account of delay. Even otherwise also why should the Court come to the rescue of a person who is not vigilant of his rights?"*

9. The question qua delay and laches has been aptly discussed by Hon'ble Supreme Court in ***Bhakra Beas Management Board vs. Kirshan Kumar Vij & another, AIR 2010 Supreme Court 3342,*** para 39 thereof is reproduced hereinbelow in extenso:

> *"39. Yet, another question that draws our attention is with regard to delay and laches. In fact, respondent No. 1's petition deserved to be dismissed only on that ground but surprisingly the High Court overlooked that aspect of the matter and dealt with it in a rather casual and cursory manner. The appellant had categorically raised the ground of delay of over eight years in approaching the High Court for grant of the said relief. But the High Court has simply brushed it aside and condoned such an inordinate, long and unexplained delay in casual manner. Since, we have decided the matter on merits, thus it is not proper to make avoidable observations, except to say that the approach of the High Court was neither proper nor legal."*

10. The Hon'ble Supreme Court in ***State of Jammu & Kashmir vs. R.K. Zalpuri and others, JT 2015 (9) SC 214,*** explicated that Courts have to remain alive to the nature of claim and unexplained delay by the writ petitioner. Apposite paras 26 to 28 of the judgment are reproduced hereunder for ready reference:

> *"26. In the case at hand, the employee was dismissed from service in the year 1999, but he chose not to avail any departmental remedy. He woke up from his slumber to knock at the doors of the High court after a lapse of five years. The staleness of the claim remained stale and it could not have been allowed to rise like a phoenix by the writ Court.*
>
> *27. The grievance agitated by the respondent did not deserve to be addressed on merits, for doctrine of delay and laches and already visited his claim like the chill of death which does not spare anyone even the one who fosters the idea and nurtures the attitude that he can sleep to avoid death and eventually proclaim "Deo gratias" 'thanks to God'.*
>
> *28. Another aspect needs to be stated. A writ court while deciding a writ petition is required to remain alive to the nature of the claim and the unexplained delay on the part of the writ petitioner. Stale claims are not to be adjudicated unless non interference would cause grave injustice. The present case, nee less to emphasize, did not justify adjudicate. It deserved to be thrown overboard at the very threshold, for the writ petitioner had accepted the order of dismissal for half a decade and cultivated the feeling that he could freeze time and forever remain in the realm of constant present."*

11. In yet another case the Hon'ble Supreme Court in ***Delhi Administration and Others vs. Kaushilya Thakur and another, AIR 2012 Supreme Court 2515,*** it has been held as under:

> *"10. We have heard Shri H.P. Raval, learned Additional Solicitor General and Shri Rishikesh, learned counsel for respondent No. 1 and perused the record. In our view, the impugned order as also the one passed by the learned Single Judge are liable to be set aside because;*
>
> *(i) While granting relief to the husband of respondent No. 1, the learned Single Judge overlooked the fact that the writ petition had been filed after almost 4 years of the*

rejection of an application for allotment of 100 sq. yards plot made by Ranjodh Kumar Thakur. The fact that the writ petitioner made further representations could not be made a ground for ignoring the delay for more than 3 years, more so because in the subsequent communication the concerned authorities had merely indicated that the decision contained in the first letter would stand. It is trite to say that in exercise of the power under Article 226 of the Constitution, the High Court cannot entertain belated claims unless the petitioner offers tangible explanation State of M.P. v. Bhailal Bhai (1964) 6 SCR 261."

12. It has been held by the Hon'ble Supreme Court in ***Chennai Metropolitan Water Supply and Sewerage Board and others vs. T.T. Murali Babu, (2014) 4 Supreme Court Cases 108,*** after deliberating upon the whole conspectus of law, that delay cannot be brushed aside without any reason. Paras 13 to 17 of the judgment, being relevant, are extracted below for ready reference:

"13. First, we shall deal with the facet of delay. In Maharashtra SRTC v. Balwant Regular Motor Service, AIR 1969 SC 329, the Court referred to the principle that has been stated by Sir Barnes Peacock in Lindsay Petroleum Co. v. Hurd, (1874) LR 5 PC 221, which is as follows: (Balwant Regular Motor Service case, AIR 1969 SC 329, AIR pp. 33536, para 11)"

"11. .Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.' (Lindsay Petroleum Co. case, PC pp/ 239 40)"

14. In State of Maharashtra v. Digambar, (1995) 4 SCC 683, while dealing with exercise of power of the High Court under Article 226 of the Constitution, the Court observed that:

(SCC p. 692, para 19)

"19. Power of the High Court to be exercised under Article 226 of the Constitution, if is discretionary, its exercise must be judicious and reasonable, admits of no controversy. It is for that reason, a person's entitlement for relief from a High Court under Article 226 of the Constitution, be it against the State or anybody else, even if is founded on the allegation of infringement of his legal right, has to necessarily depend upon unblameworthy conduct of the person seeking relief, and the court refuses to grant the discretionary relief to such person in exercise of such power, when he approaches it with unclean hands or blameworthy conduct."

15. In State of M.P. v. Nandlal Jaiswal, (1986) 4 SCC 566 : AIR 1987 SC 251, the Court observed that : (SCC p. 594, para 24)

" 24. .....it is well settled that power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic."

It has been further stated therein that:

(Nandlal Jaiswal case, (1986) 4 SCC 566: AIR 1987 SC 251, SCC p. 594, para 24)"

"24. .....If there is inordinate delay on the part of the petitioner in filing a petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction."

Emphasis was laid on the principle of delay and laches stating that resort to the extraordinary remedy under the writ jurisdiction at a belated stage is likely to cause confusion and public inconvenience and bring in injustice.

16. Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the Court would be under legal obligation to scrutinize whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the Court. Delay reflects inactivity and inaction on the part of a litigant – a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis.

17. In the case at hand, though there has been four years' delay in approaching the court, yet the writ court chose not to address the same. It is the duty of the court to scrutinize whether such enormous delay is to be ignored without any justification. That apart, in the present case, such belated approach gains more significance as the respondent employee being absolutely careless to his duty and nurturing a lackadaisical attitude to the responsibility had remained unauthorisedly absent on the pretext of some kind of ill health. We repeat at the cost of repetition that remaining innocuously oblivious to such delay does not foster the cause of justice. On the contrary, it brings in injustice, for it is likely to affect others. Such delay may have impact on others' ripened rights and may unnecessarily drag others into litigation which in acceptable realm of probability, may have been treated to have attained finality. A court is not expected to give indulgence to such indolent persons who compete with 'Kumbhakarna' or for that matter 'Rip Van Winkle'. In our considered opinion, such delay does not deserve any indulgence and on the said ground alone the writ court should have thrown the petition overboard at the very threshold."

13. This Court in ***LPA No. 228 of 2012, HIMURJA and another vs. Bikram Singh,*** and other connected matters, decided on 17.05.2016, has held as under:

"23. The same principle has been laid down by this Court in LPA No. 48 of 2011, titled as Shri Satija Rajesh N versus State of Himachal Pradesh and others, decided on 26th August, 2014; LPA No. 150 of 2014, titled as Mr. Inderjit Kumar Dhir versus State of H.P. and others, decided on 17th September, 2014; LPA No. 107 of 2014, titled as Amit Attri and others versus Anil Verma and others, and other connected matters, decided on 3rd December, 2014; and LPA No. 270 of 2010, titled as Bhim Sen Sharma versus H.P. University and another, decided on 2nd May, 2016.

24. Having said so, it can be safely held that the mandate of Limitation Act cannot be given a slip by filing representations, that too, at belated stage."

14. In the instant case, as noticed above, the petitioner wrote four letters to the respondents qua his claim, but he did not prefer the petition before respondent No. 2 for six

years, therefore, his claim has become time barred and now he cannot take advantage of communication exchanged *inter se* the petitioner and the respondents. In a like case, ***State of Tripura and others vs. Arabinda Chakraborty and others, (2014) 6 Supreme Court Cases 460,*** the Hon'ble Supreme Court has held that simply by making representations in absence of any statutory provision/appeal, period of limitation would not get extended. Relevant para 18 of the judgment is reproduced hereunder:

> *"18. It is a settled legal position that the period of limitation would commence from the date on which the cause of action takes place. Had there been any statute giving right of appeal to the respondent and if the respondent had filed such a statutory appeal, the period of limitation would have commenced from the date when the statutory appeal was decided. In the instant case, there was no provision with regard to any statutory appeal. The respondent kept on making representations one after another and all the representations had been rejected. Submission of the respondent to the effect that the period of limitation would commence from the date on which his last representation was rejected cannot be accepted. If accepted, it would be nothing but travesty of the law of limitation. One can go on making representations for 25 years and in that event one cannot say that the period of limitation would commence when the last representation was decided. On this legal issue, we feel that the courts below committed an error by considering the date of rejection of the last representation as the date on which the cause of action had arisen. This could not have been done."*

15. It has further come in the pleadings of this writ petition, that the father of the petitioner consented for 5 marlas of land for installing a tubewell, which was installed for the welfare of the public, including the petitioner's land.

16. From the above, it seems that first of all the father of the petitioner made the department to install a tubewell, however, the State of Himachal Pradesh paid handsome compensation of Rs.1,13,029/- (one lac thirteen thousand twenty nine) to the petitioner and other co-sharer in two equal shares, which the petitioner did not object at that time, but with greed to have more money without any basis the petitioner approached the Land Acquisition Collector after six years to make reference to the learned District Judge and when the learned Land Acquisition Collector refused to make the reference, after two years the petitioner approached this Court. From the pleadings it is clear that the petitioner is a vigilant and literate man, therefore, the petition is not maintainable due to delay, laches, waiver and acquiescence. The conduct of the petitioner assumes great importance, is suggestive of the fact that he has misused the process of law without there being any cause in his favour and the petition is required to be dismissed alongwith costs.

17. The Hon'ble Supreme Court in ***Wardington Lyngdoh and others vs. The Collector, Mawkyrwat,*** reported in ***AIR 1995 Supreme Court 2340,*** has held that no person who had received the amount without any protest would be entitled to make application under Section 18 of the Act. It is apt to reproduce paragraph 5 of the said judgment hereunder:

> *"5. It will thus be clear that the persons interest in the land are entitled to receive compensation awarded by the Collector under S. 11 under protest and entitled to object to the compensation determined by the Collector. No person who had received the amount otherwise than under protest should be entitled to make the application under S. 18. In other words, the receipt of the amount under protest is a condition precedent to make an application under S. 18 within the limitation prescribed under the proviso to sub-s. (2) of S. 18 together with the grounds on which the objections have been taken. Thereon the Collector is enjoined to make a reference to the Civil Court with the statement in the manner stated in S. 19"*

18. The Hon'ble Supreme Court in ***Land Acquisition Officer vs. Shivabai and others,*** reported in ***AIR 1997 Supreme Court 2642,*** has held in paragraph 8 of the said judgment as under:

> *"8. Shri C. Sitaramiah, learned senior counsel appearing for the respondents, contends that on the Division Bench's direction to make an enquiry into the matter, the Land Acquisition Officer himself has referred the matter. Unless there is a proof of service of the notice of the award under sub-section (2) of Section 12, the limitation does not start. We are unable to agree with the learned counsel. It is now settled law that it is not necessary that the award or its copy should be served on the claimant along with notice under Section 12(2) of the Act. If the parties are not present on the date the award came to be passed, then Collector/Land Acquisition Officer shall give immediate notice of his award. The limitation begins to run from the date of the notice as per proviso to Section 18(2). The date of the award and the date of the receipt of the compensation was incidentally the same date. Under these circumstances, it must be presumed that they were present on the date when the award was made and the compensation was received without any protest. Under these circumstances, they are not entitled to seek any reference."*

19. The Hon'ble Supreme Court in ***Bhagwan Das & others vs. State of U.P. and others,*** reported in ***2010 AIR SCW 1629,*** has expounded the similar principle.

20. Section 18(3)(b) of the Act provides limitation period for seeking reference, which reads as under:

> *"18(3)(b). If the Deputy Commissioner does not make a reference to the court within a period of ninety days from the date of receipt of the application, the applicant may apply to the court to direct the Deputy Commissioner to make the reference, and the Court may direct the Deputy Commissioner to make the reference within such time as the Court may fix."*

21. At the cost of repetition the petitioner has not availed the remedy as prescribed under Section 18(2) of the Act, as discussed above, and his right has already extinguished. Even otherwise the same was not available to him.

22. In ***State of Karnataka vs. Laxuman,*** reported in ***AIR 2006 Supreme Court 24,*** the Hon'ble Supreme Court held that in case the claimant does not enforce the right available to him within the time prescribed by law in that eventuality the remedy of the claimant to have reference gets extinguished. It is apt to reproduce paragraphs No. 14, 15 and 21 of the said judgment hereunder:

> *"14. Extinguishment of a right can be expressly provided for or it can arise by the implication from the statute. Section 18 of the Act as in Karnataka sets out a scheme. Having made an application for reference within time before the Deputy Commissioner, the claimant may lose his right by not enforcing the right available to him within the time prescribed by law. Section 18(3)(a) and Section 18(3)(b) read in harmony, casts an obligation on the claimant to enforce his claim within the period available for it. The scheme brings about a repose. It is based on a public policy that a right should not be allowed to remain a right indefinitely to be used against another at the will and pleasure of the holder of the right by approaching the court whenever he chooses to do so. When the right of the Deputy Commissioner to make the reference on the application of the claimant under Section 18(1) of the Act stands extinguished on the expiry of 3 years and 90 days from the date of application for reference, and the right of the claimant to move the Court for compelling a reference also stands extinguished, the right itself looses its enforceability and thus comes to an end as a result. This is the scheme of Section 18 of the Act as adopted in the State of Karnataka. The High Court is, therefore, not correct in searching for a specific provision bringing about an extinguishment of the right to have a reference and on not finding it, postulating that the right would survive for ever.*

15. Under the scheme of Section 18 of the Act as in Karnataka, thus the claimant loses his right to move the Court for reference on the expiry of three years and 90 days from the date of his making an application to the Deputy Commissioner under Section 18 (1) of the Act within the period fixed by Section 18(2) of the Act. This position is now settled by the decision of this Court in The Addl. Spl. Land Acquisition Officer, Bangalore vs. Thakoredas, Major and others (supra). This loss of right to move the court precludes him from seeking a remedy from the court in terms of Section 18 of the Act. This loss of right in the claimant puts an end to the right of the claimant to seek an enhancement of compensation. To say that the Deputy Commissioner can make a reference even after the right in that behalf is lost to the claimant, would be incongruous. Once the right of the claimant to enforce his claim itself is lost on the scheme of Section 18 of the Act, there is no question of the Deputy Commissioner who had violated the mandate of sub-Section 3(a) of Section 18 of the Act, reviving the right of the claimant by making a reference at his sweet-will and pleasure, whatever be the inducement or occasion for doing so. On a harmonious understanding of the scheme of the Act in the light of the general principle that even though a right may not be extinguished, the remedy may become barred, it would be appropriate to hold that on the expiry of three years and 90 days from the date of an application for reference made within time under Section 18(1) of the Act, the remedy of the claimant to have a reference gets extinguished and the right to have an enhancement becomes unenforceable. The Deputy Commissioner would not be entitled to revive a claim which has thus become unenforceable due to lapse of time or non-diligence on the part of the claimant.

21. Then the question is, whether in the context of Section 18 of the Karnataka amendment, the decision of this Court in Thakoredas (supra) and our discussion as above, Section 5 of the Limitation Act could be invoked or would apply to an application under Section 18(3)(b) of the Act. This Court has held that Section 5 of the Limitation Act has no application to proceedings before the Collector or Deputy Commissioner here, while entertaining an application for reference. We see no reason not to accept that position. Then arises the question whether Section 5 could be invoked before the Land Acquisition Court while making an application under Section 18(3)(b) of the Act. We have held in agreement with the earlier Division Bench of the Karnataka High Court, that the right to have a reference enforced through court or through the Deputy Commissioner becomes extinguished on the expiry of three years and 90 days from the date of the application for reference made in time. Consistent with this position it has necessarily to be held that Section 5 of the Limitation Act would not be available since the consequence of not enforcing the right to have a reference made on the scheme of Section 18 of the Act as obtaining in Karnataka, is to put an end to the right to have a reference at all. Since in that sense it is an extinguishment of the right, the right cannot be revived by resorting to Section 5 of the Limitation Act. We may incidentally notice that in Thakoredas (supra) this Court rejected the application under Section 18(3)(b) of the Act which was beyond time, though, of course, there was no specific discussion on this aspect."

23. As a result of the above discussion, the petition is not maintainable being without any merit. Accordingly, the petition is dismissed and the petitioner is saddled with costs of Rs. 10,000/- (rupees ten thousand) to be deposited within two months from today, payable to the respondents. Pending application(s), if any, shall also stand(s) disposed of.

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

Harjinder Singh alias Nirmal Singh & others .....Appellants.
Versus
State of H.P. ....Respondent.

Cr. Appeal No. 267 of 2016.
Reserved on : 1st September, 2016.
Date of Decision: 9th September, 2016.

Indian Penal Code, 1860- Section 302, 323 and 324- Informant had solemnized love marriage with the sister-in-law of his maternal uncles N and S, which was not approved- N and S nourished ill will against him- he along with his friends D and B had come to maternal house of the informant to meet his maternal grandmother- N and S hurled abuses at the informant-informant and his two friends left the place on their motorcycles- B stated that he had dropped his purse somewhere and started looking for the purse- N and S came at the spot with R and started beating the informant and his friends- S gave danda blows, R Kicks and fist blows to the informant and his friends and N gave blows with a darat to the informant and D- the informant suffered injuries on his left hand as a result of the blow from the darat- D received darat blow on his face near left side of his neck and also on the right hand- informant and his friend ran away from the spot but D died at the spot- accused were tried and convicted by the trial Court- held, in appeal that PW-1 has supported the prosecution version- there are no contradictions in his testimony- his version is duly corroborated by MLC and the recovery of darat at the instance of N- PW-7 did not support the prosecution version but that is not sufficient to discard the same- blood group of the deceased was found on the darat- accused had motive to commit crime - all the accused were acting together and are liable jointly- trial Court had rightly convicted the accused- appeal dismissed. (Para-10 to 17)

For the Appellants: Mr. N.K. Thakur, Senior Advocate with Ms. Jamna Devi, Advocate.
For the Respondent: Mr. M.A. Khan, Additional Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the judgment rendered on 07.04.2016 by the learned Additional Sessions Judge (II), Una, District Una, H.P. in Sessions trial No.40 of 2014, whereby, the learned trial Court convicted and sentenced the appellants/accused as under:

Sr. No.	Sections	Sentence imposed
1.	302/34, IPC	Sentenced each of the accused to undergo rigorous life imprisonment and to pay a fine of Rs.15,000/- each. In default of payment of fine, the convicts shall further undergo simple imprisonment for a period of one year.
2.	323/34, IPC	Sentenced each of the accused to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs.1000/- each. In default of payment of fine amount, the convicts shall further undergo simple imprisonment for a period of three months .
3.	324, IPC	Sentenced each of the accused to undergo rigorous imprisonment

		for a period of 3 years and to pay a fine of Rs.3000/- each. In default of payment of fine amount, the convicts shall further undergo simple imprisonment for a period of six months.

2. Brief facts of the case which are necessary to determine the appeal are that on 18.3.2014, SHO, Police Station, Haroli received an information on his mobile phone that a person had died in a scuffle at village Baliwal. Upon this, the SI/SHO along with HHC Dilbari Lal reached Baliwal at about 11.00 p.m. where ASI Paras Ram was already present along with other police officials and had secured the spot. One Sukhwinder Singh, son of late Sh. Narinder Singh got his statement recorded under Section 154 Cr.P.C. stating that he was a resident of village Pubowal. He had lost his parents whereafter he as well as his younger brother had been brought to the house of his maternal grand parents. About four months ago, he had solemnized love marriage with one Puja, who was the sister-in-law of his maternal uncle, Nirmal Singh. On account of the fact that his maternal uncles did not approve his marriage with Puja, both of his uncles namely Nirmal Singh and Sadhu Singh nourished ill will against him. He further stated that he was a crane operator at Baddi and had come home from Baddi on 18.3.2014. At about 8.30 p.m., he along with his friends, Daljit Singh alias Deepu and one Babbi had come to the maternal house of the complainant at Baliwal, to meet his maternal grandmother. They had come on a motorcycle make Pulsar PB-08-BL-1390. When they reached the maternal house of the complainant, both the maternal uncles were present there. When the complainant tried to touch the feet of his maternal uncles, they started hurling abuses at him and also tried to assault him. Considering the sensitivity of the situation, the complainant along with his two friends left the place on their motorcycle. When they had reached near Senior Secondary School Baliwal, Babi stated that his purse had been dropped somewhere, upon which all of them got down and started looking for the purse. Suddenly, the maternal uncles of the complainant, namely Sadhu Singh and Nirmal Singh along with truck driver Ramesh, came to the spot riding motor cycle No. HP-20C-3641, which was being driven by Sadhu Singh. They suddenly got down from the motorcycle and started assaulting the complainant and his friends. Sadhu Singh gave danda blows, Ramesh Kicks and fist blows to the complainant and his friends and Nirmal Singh gave blows with a darat to the complainant and Daljit Singh. The complainant suffered injuries on his left hand as a result of the blow from the darat. Daljit Singh received darat blow on his face near left side of his neck and also on the right hand. The complainant Sukhwinder Singh and his friend Babi ran away from the spot to save their life, but Daljit Singh could not do so and fell down. As a result of the injuries received by Daljit Singh he died on the spot. It was thus stated that Nirmal Singh, Sadhu Singh and Ramesh had caused injuries to complainant and Babi and murdered Daljit Singh. On the basis of the statement of the complainant, FIR was registered at the police station concerned. After the registration of the FIR, the police started the investigation in the case and concluded all the formalities thereto.

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

4. The accused were charged by the learned trial Court for theirs committing offences punishable under Sections 302, 323 and 324 read with Section 34 of the IPC to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 28 witnesses. On closure of prosecution evidence, the statements of accused, under Section 313 of the Code of Criminal Procedure, were recorded in which they pleaded innocence. However, they have not led any defence evidence.

6. On an appraisal of evidence on record, the learned trial Court, returned findings of conviction against the accused/appellants.

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

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

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. Preceding the ill-fated occurrence which occurred on 18.3.2014 near Senior Secondary School, Baliwal, PW-1, an ocular witness thereto testifies qua his along with deceased Daljit Singh and PW-7 Babi visiting the house of his maternal grand mother at Village Baliwal. Whereat he testifies qua his maternal uncles, accused Nirmal Singh and accused Sadhu Singh being also present. He testifies qua both his maternal uncles arraigned as accused, nursing ill will against him on account of his contracting a love marriage with one Puja Devi, who stands related to accused Nirmal Singh being his sister-in-law (sali). He proceeds to testify qua despite his proceeding to seek blessings of his uncles by touching their feet, both yet proceeding to abuse him and quarrel with him, in course whereof, the shirt of Babi (PW-7) was torn. The incident aforesaid which occurred at Baliwal, constrained PW-1 to along with his friends, one amongst whom was deceased Daljit Singh, to depart therefrom on motor cycle bearing No. PB-08-BL-1390 driven by deceased Daljit Singh. However, he testifies of, on their arriving at Senior Secondary School, Baliwal, a communication stand made by PW-7, Babi to him qua his dropping his purse whereupon they by alighting from the motorcycle proceeded to make a search for it. However, during the course of theirs launching a search for locating the purse of PW-7, the accused atop a motor cycle bearing No. HP-20C-3641 driven by accused Sadhu Singh abruptly arrived thereat. He deposes of all the aforesaid on alighting from the motorcycle proceeded to assault them with danda and fist blows. Sadhu Singh stands testified by PW-1 to wield a danda whereas accused Nirmal Singh is testified by him to be wielding a darat (sickle). He makes a communication in his deposition of accused Nirmal Singh assaulting him with a darat in sequel whereof his finger was injured whereafter he deposes of accused Nirmal Singh delivering a blow with a sickle on the arm of Daljit Singh, assault whereof thereon, stood succeeded by his delivering a blow with darat, Ex. S-1, on the neck of deceased Daljit Singh. However, he deposes of his fleeing from the site of occurrence and hiding himself in bushes wherefrom he witnessed of accused Nirmal Singh and Sadhu Singh administering fist blows on PW-7 Babi and Daljit Singh. He continues to depose of PW-7 also fleeing from the spot besides of accused Ramesh fleeing from the site of occurrence and on the latter raising outcries, in response whereof people gathered at the spot.

11. The aforesaid ocular narrative qua the occurrence bespoken by PW-1 holds absolute concurrence vis-a-vis his previous statement recorded in writing. His testimony qua the occurrence when bereft of any taint of any gross, blatant besides stark contradictions embodied in his examination-in-chief vis-a-vis his cross-examination gives a firm impetus to this Court to erect thereupon a formidable conclusion of his rendering a truthful ocular rendition qua the occurrence. His ocular account qua the ill-fated occurrence significantly qua the factum of his standing struck with danda blows by accused Sadhu Singh besides qua other co-accused belabouring him with fist blows also his rendering an untainted ocular rendition qua the trite factum of accused Nirmal Singh with sickle (darat), Ex.S-1 striking a fatal blow on the neck of deceased Daljeet Singh is a potent display of his proving the inculpatory role of the accused in the ill-fated occurrence. His truthful ocular rendition qua the ill-fated occurrence stands firmly corroborated by the apposite MLC prepared qua him by the doctor concerned, MLC whereof

stands embodied in Ex.PW15/A. Furthermore, with PW-27, Dr. Piyush Nanda, Medical Officer, who subjected the deceased Daljit Singh to postmortem examination in sequel whereof he prepared postmortem report comprised in Ex.PW27/B vividly pronouncing in his testification of the relevant injuries noticed by him to be occurring on the body of the deceased being sequelable by user thereon of Darat, Ex. S-1 recovered at the instance of accused Nirmal Singh under memo Ex.PW8/D, preceding whereof his apposite disclosure statement comprised in Ex.PW 8/A stood recorded, gives a vigorous clout to a tenacious inference qua the ocular testimony qua the occurrence rendered by PW-1 attaining a sacrosanct virtue of truth by probative corroborative evidence aforesaid besides hence its warranting credibility being fastened thereto.

12. The ocular account qua the occurrence rendered by PW-1 though concerted to be corroborated by PW-7, Babi, also an ocular witness thereto yet PW-7 reneged from his previous statement recorded in writing whereupon the defence endeavours to impute incredibility to the testification of PW-1 arousable from the factum of the testification of the PW-1 standing omitted to be corroborated by PW-7. However, the testification of PW-7, who reneged from his previous statement recorded in writing hence in his examination-in-chief unfolds echoings qua the ill-fated occurrence adversarial to the success of the prosecution case, would not beget the sequel of its yet suffering the ill-fate qua its standing omnibusly axed nor his testification embodied in in his examination-in-chief alone would dispel the vigour in its entirety of his testimony unless he in his cross-examination akin to his examination-in-chief makes alike unfoldments qua the occurrence, unfoldments whereof are adversarial to the success of the prosecution case. Consequently, only on a wholesome reading of his testimony would an apt conclusion be garnerable therefrom qua whether his meteing or omitting to mete corroboration qua the relevant factum probandum unfolded by PW-1. Also there is no trite exposition of law, of the testimony of a hostile prosecution witness being omnibusly discardable. Contrarily, the principle of law enjoined to be borne in mind while evaluating the testimony of a hostile prosecution witness, is of it standing read in a wholesome manner, reading whereof when unfolds qua his on material particulars supporting the prosecution case, especially qua the factum probandum besides the trite factum deposed by PW-1, his testification occurring in his examination-in-chief though adversarial to the prosecution case being discardable. Contrarily, his relevant testification qua the fulcrum of the the ill-fated occurrence embodied in his cross-examination, if corroborative vis-a-vis the rendition of an ocular account thereto by PW-1, warranting deference. Bearing in mind the trite principle aforesaid, this Court proceeds to incisively besides with keen discernment appraise his testimony. In his cross-examination, he corroborates PW-1 qua accused Sadhu Singh holding him by his collars sequeling his shirt getting torn also he corroborates PW-1 qua on their arriving near Government Senior Secondary School, Baliwal, on his thereat detecting his purse located in his pocket not occurring therein, theirs launching a search for its location. Though, he contradicts PW-1 qua the accused while standing armed with danda and sickle (darat) theirs on a motorcycle abruptly arriving thereat also he contradicts PW-1 of the accused belabouring PW-1 with stick besides darat, Ex. S-1. He further contradicts PW-1 of the accused belabouring PW-1 with fist blows. In addition, he contradicts PW-1 qua accused Nirmal Singh inflicting a sickle blow on the neck of deceased Daljit Singh. However, he attributes the occurrence to some unknown persons. Nonetheless, the effect, if any, of his qua the aforesaid facet contradicting PW-1 stands benumbed rather negated by his acquiescing to the suggestion put to him by the PP concerned while holding him to cross-examination qua his fleeing from the spot for saving himself from the assault perpetrated by the accused. His acquiescence qua the facet aforesaid is a visible loud display of his ascribing an incriminatory role vis-a-vis the accused. Besides he also acquiesces qua the factum of PW-1 fleeing from the spot. The further effect qua his acquiescences qua the factum of his receiving injuries on his back and arm besides of his acquiescing in his cross-examination qua his departing from the site of occurrence for obviating his standing assaulted by the accused, is qua theirs cumulatively besides tellingly hold an effect qua his thereupon corroborating PW-1 qua the assault at the relevant site of occurrence standing perpetrated by the accused. Also hence it subsumes the factum of his attribution in his testification embodied in his examination-in-chief qua the relevant assault standing perpetrated by some unknown persons. Contrarily, the effect of his acquiescences to the suggestions put to

him by the PP concerned while holding him to cross-examination embodying therewithin the factum of his in the relevant occurrence standing inflicted with injuries on his back and arm by the accused is an abundant portrayal of his lending corroboration to the ocular rendition qua the occurrence by PW-1, wherein the latter efficaciously besides emphatically proves the genesis of the prosecution case. Since the effect of the aforesaid acquiescences made by PW-7 hold tenacity for giving corroborative vigour to the ocular rendition qua the occurrence by PW-1, hence reverence is enjoined to be meted thereto, despite his in the earlier portion of his testification rendering a version qua the occurrence contradictory to the one deposed qua it by PW-1. Conspicuously, when it is the trite expostulation of law, of with a hostile prosecution witness on material particulars lending succor to the genesis of the prosecution case, his corroborative testimony qua the relevant facets ocularly testified by PW-7 warranting imputation of credibility thereto. In sequel, when on a wholesome reading of the testimony of PW-7, it stands concluded qua his testimony imputing vigorous corroborative succor to the rendition of an ocular account qua the occurrence by PW-1 whereupon hence an invincible conclusion qua the prosecution succeeding to prove the guilt of the accused is unfailingly ensuable. As an apt sequitur thereto, the contention of the learned counsel for the appellants of with PW-7 reneging from his previous statement recorded in writing, hence, his not corroborating the ocular rendition qua the occurrence by PW-1 effacing the credibility of PW-1 stands negated also warrants its standing discountenanced by this Court.

13. The factum of efficacy of recovery of darat, Ex.S-1 by the Investigating Officer at the instance of accused Nirmal Singh under recovery memo Ex.PW8/B, preceding whereof his apposite disclosure statement stood recorded comprised in Ex.PW8/A, stands evinced from apposite credible testifications of recovery witnesses thereto. The aforesaid efficacious proof of recovery of the relevant weapon of offence firmly connects the accused in the commission of the offences alleged.

14. Be that as it may, with revelations occurring in Ex.PW28/J, exhibit whereof constitutes the apposite report of the FSL concerned qua the occurrence of blood group 'O' on darat, Ex.S-1, blood group whereof belonged to deceased Daljit Singh, does also unfailingly connect the accused in the commission of the offences alleged. Prominently, darat, Ex. S-1 stands deposed by PW-1 to be the relevant weapon of offence with user whereof accused Nirmal Singh inflicted a fatal blow on the neck of deceased Daljit Singh also consequently when its evident efficacious recovery stood effectuated by the Investigating Officer at the instance of accused Nirmal Singh besides with Ex.PW28/J making articulations qua the occurrence of blood on the clothes of accused also qua occurrence of blood on the relevant weapon of offence, occurrence whereof thereon stands not explicated by the accused, hence firmly connects him with the commission of the offences alleged also lends sustainable vehement force to the conclusion as formed by the trial Court qua the testimony of PW-7 even when he in his examination-in-chief contradicts PW-1, his aforesaid relevant admissions, on material accounts qua the factum probandum qua the genesis of the prosecution case occurring in his cross-examination when mete vigorous corroboration to the ocular renditions qua the occurrence by PW-1, hence enjoying probative tenacity.

15. With the accused on motorcycle bearing No. HP-20C-3641 driven by accused Sadhu Singh chasing PW-1, PW-7 besides Daljit Singh upto Senior Secondary School, Baliwal whereat they stood armed also with accused Nirmal Singh and Sadhu Singh, the maternal uncles of PW-1 evidently nursing ill will against him on account of his marrying the sister-in-law (sali) of accused Nirmal Singh, hence with theirs holding incendiarised frayed tempers against PW-1 is a palpable display of theirs holding a premeditated mensrea to commit the offence alleged. Consequently, with theirs in unison assaulting PW-1, PW-7 besides deceased Daljit Singh, hence, even if the relevant fatal injury on the person of deceased stood delivered by accused Nirmal Singh would not per se render the other co-accused unamenable to conviction. Contrarily with theirs in unison chasing the aforesaid uptill the Senior Secondary School, Baliwal, hence unfolding their premeditated mansrea to launch an assault upon them besides when on their abrupt arrival at the site of occurrence they in unison assaulted PW-1, PW-7 and deceased Daljit

Singh, they are all to be construable to be amenable to theirs holding a joint or a common premeditated mensrea to commit the offences alleged. Even though Ramesh did not carry any weapon of offence yet with his joining the company of other co-accused from the latters home upto the site of occurrence, he is to be hence construed to be since his joining the company of other co-accused upto the site of occurrence all throughout besides at the site of occurrence holding both knowledge besides a joint inculpable mensrea with them to commit the relevant offences. Conspicuously, when he arrived upto the site of occurrence with other co-accused, with the latter holding the relevant weapons of offences, he is to be concluded qua his sharing a premeditated joint mensrea along with them to commit the offences alleged. In sequel, he is amenable for vicarious criminal inculpation with them.

16. The summom bonum of the aforesaid discussion is that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of the evidence on record, rather it has aptly appreciated the material available on record.

17. Consequently, there is no merit in the instant appeal and it is accordingly dismissed. In sequel, the judgment impugned before this Court is maintained and affirmed. Records be sent back forthwith.

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

Himachal Road Transport Corporation and another ...Appellants.

Versus

Shri Nand Lal and others ...Respondents.

FAO No. 297 of 2011
Decided on: 09.09.2016

Motor Vehicles Act, 1988- Section 171- Tribunal had awarded interest from the date of the claim petition, whereas, it was to be awarded from the date of the award- order modified and interest awarded from the date of the award till realization. (Para-4 and 5)

For the appellants: Mr. Jagdish Thakur, Advocate.

For the respondents: Mr. Nimish Gupta, Advocate, for respondent No. 1.
Nemo for respondents No. 2, 3 and 6.
Mr. Kulbhushan Khajuria, Advocate, for respondent No. 4.
Mr. Ratish Sharma, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

This appeal is directed against award, dated 16th June, 2011, made by the Motor Accident Claims Tribunal, Fast Track Court, Chamba (HP) (for short "the Tribunal") in M.A.C. No. 70 of 2008, titled as Nand Lal versus General Manager HRTC and others, whereby compensation to the tune of ₹ 1,95,067/- with interest @ 7.5% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimant-injured and against the respondents (for short "the impugned award").

2. The claimant-injured and the other respondents in the claim petition except the appellants herein have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The appellants have questioned the impugned award on the grounds taken in the memo of the appeal.

4. I have gone through the impugned award. The amount awarded is meagre, but, unfortunately, the claimant-injured has not questioned the same, is reluctantly maintained. However, the Tribunal, has fallen in an error in awarding interest on the amount of compensation awarded under the head 'loss of future income' from the date of the claim petition, was to be awarded from the date of the impugned award.

5. Having said so, the impugned award is modified to the extent that the amount of compensation awarded under the head 'loss of future income' shall carry interest @ 7.5% per annum from the date of impugned award till its realization. The appeal is disposed of accordingly.

6. Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in his bank account.

7. Excess amount, if any, be released in favour of the appellants through payee's account cheque.

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

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

Jitender Kumar and another .....Petitioners.

Vs.

The Financial Commissioner (Appeals) and others .....Respondents.

CWP No.: 4127 of 2010
Reserved on: 07.09.2016
Date of Decision: 09.09.2016

Constitution of India, 1950- Article 226- Predecessor-in-interest of the petitioner applied for grant of Nautor land in the year 1960- Nautor was sanctioned in his favour- T filed objections and the grant of Nautor was set aside on the ground that portion of sanctioned land was not suitable for horticultural purpose- Deputy Commissioner, Mandi/ Sub Divisional Officer (Civil) was directed to give alternative land to the petitioner- mutation was entered- jamabandi was prepared- names of the petitioners were shown as owners in possession- grant was challenged by one P by filing an appeal, which was dismissed- further, appeal was filed and the case was forwarded to the Financial Commissioner (Appeals)- Financial Commissioner remanded the case to Sub Divisional Officer (Civil) to decide the same afresh in the light of observations made by him- aggrieved from the order, present writ petition has been filed- held, that Commissioner had treated the appeal as revision and had recommended that Financial Commissioner (Appeals) should pass an appropriate order-Financial Commissioner had agreed with the recommendation and had set aside the order passed by Appellate Authority – powers of appeal and revision have been conferred upon different authorities and Commissioner has no power to convert the appeal into revision- power exercised by him is non-est and not sustainable in law- writ petition allowed-case remanded to Divisional Commissioner, Mandi for adjudication afresh in accordance with the law. (Para-9 to 13)

For the petitioners: Mr. Sanjeev Kuthiala, Advocate.
For the respondents: Mr. Pankaj Negi, Deputy Advocate General, for respondents No. 1 to 3.
Mr. Rajnish K. Lal, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge :

By way of the present writ petition, the petitioners have prayed for the following reliefs:

> *"(i) To call for the records of the case pertaining to revision Petition No. 112 of 2009, titled Pankaj Kumar versus Jitender Kumar and others and after examining the legality and propriety of the impugned order Annexure P-8, to set aside the same.*
>
> *(ii) That in the alternative, to direct respondent No. 3 to decide the matter in a time bound schedule with respect to the grant of Nautor of the land in question and also ensure the protection of the rights of the petitioner during this period and also the status with respect to the ownership and possession and the revenue entries.*
>
> *(iii) Any other 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 as against the respondent."*

2. Brief facts necessary for the adjudication of the present case are that predecessor of the petitioners, namely Shri Gosain applied for grant of Nautor land in the year 1960, which Nautor was sanctioned in favour of Shri Gosain vide order dated 10.01.1975. Pursuant to objections filed by one Shri Tawaira against the said sanction, the same was set aside by respondent No. 1 vide order dated 07.08.1992 on the ground that the portion of sanctioned land was not suitable for horticulture purpose. Respondent No. 1 directed Deputy Commissioner, Mandi/Sub Divisional Officer (Civil), Chachiyot to give alternative land to the petitioners. Pursuant to the said order, Sub Divisional Officer (Civil) sanctioned 4-3-10 bighas of land comprised in Khasra Nos. 620,1682/633/2, 1682/633/3, 1584/1171/1, 296/1, 1724/1588/2, 1703/1316/1, Kita 8, situated in Mohal Gohar, Tehsil Chachiot in favour of the petitioners. Thereafter, mutation was also entered in favour of the petitioners and consequent upon the mutation of grant of Nautor land, jamabandi for revenue estate was also prepared and in the jamabandi for the year 2000-2001, names of the petitioners were shown as owners in possession pertaining to the land in issue. As per the petitioners, on the basis of said grant, they had developed the land and also made it cultivable. They were growing crops on the same by way of barricading and fencing by barbed wires.

3. The grant of above land by way of Nautor in the year 1992 was again challenged by way of an appeal filed under Rule 28 of the Himachal Pradesh Nautor Land Rules, 1968 before the Court of Deputy Commissioner, Mandi in the year 2006 by one Pankaj Kumar (present respondent No. 4). Deputy Commissioner, Mandi vide order dated 27.11.2006 dismissed the appeal so filed by *inter alia* holding that there was no infirmity in the grant of said land by way of Nautor in the year 1992 in favour of the petitioners and by further holding that the appeal was also hopelessly barred by limitation.

4. Feeling aggrieved by the said order passed by Deputy Commissioner, Mandi dated 27.11.2006, Pankaj Kumar filed an appeal before the next appellate authority provided under Rule 28 of the Himachal Pradesh Nautor Land Rules, 1968, i.e. Divisional Commissioner, Mandi Division. Divisional Commissioner, Mandi forwarded the case to the Financial Commissioner (Appeals), Himachal Pradesh by way of recommendation on the basis of reasonings returned by the said authority vide order dated 23.07.2009 passed in Case No 95/2007, which order with the consent of parties was taken on record by this Court on 07.09.2016 as the same was necessary for the purpose of adjudication of the case. Learned Financial Commissioner (Appeals) vide decision dated 04.05.2010 agreed with the recommendation of Divisional Commissioner, Mandi Division and set aside order dated 27.11.2006 passed by Deputy Commissioner, Mandi in File No. 2 of 2006 as well as order of Sub Divisional Officer (Civil), Chachiyot at Gohar sanctioning grant of Nautor land in favour of the petitioners. Financial

Commissioner (Appeals) also remanded the case back to Sub Divisional Officer (Civil) to decide the case afresh in light of the observations made by him in order dated 04.05.2010. This order passed by Financial Commissioner (Appeals) is under challenged by way of the present writ petition.

5. I have heard the learned counsel for the parties and have also carefully gone through the documents produced on record by the respective parties.

6. Order dated 27.11.2006 passed by Deputy Commissioner, Mandi in File No. 2 of 2006 was an adjudication done by the said authority in an appeal which was filed by Pankaj Kumar (i.e. respondent No. 4 in the present writ petition) under Rule 28 of the Himachal Pradesh Nautor Land Rules, 1968. Under the provisions of Rule 28 of the Himachal Pradesh Nautor Land Rules, 1968 (hereinafter referred to as 'the Nautor Rules'), further appeal from the appellate order of Deputy Commissioner lies to the Commissioner within 30 days from the date of the order. It is an admitted fact that feeling aggrieved by the order dated 27.11.2006 Pankaj Kumar filed an appeal before Divisional Commissioner, Mandi Division against the appellate order passed by Deputy Commissioner. However, Commissioner rather than deciding the said appeal as an appellate Court, ordered the appeal to be treated as Revision under the Nautor Rules and thereafter went upon to recommend Financial Commissioner (Appeals), Himachal Pradesh for passing of an appropriate order as it deemed fit. This is evident from perusal of order dated 23.07.2009, last part of which is quoted hereinbelow:

> *"In view of the above observations, the present appeal, which has been ordered to be treated as a revision under the H.P. Nautor Land Rules, 1968, is recommended to the learned Financial Commissioner (Appeals), Himachal Pradesh, Shimla (HP) for passing an appropriate order as deems fit in the present revision. All relevant record files be submitted along with this recommendation. Since, the order in this appeal was kept reserve as such a copy of this order be communicated to he parties through a registered post. A copy of the order be sent to the lower courts for information."*

7. The factum of Pankaj Kumar having filed an appeal against the appellate order passed by the Deputy Commissioner is also evident from Annexure P-7 in which the type of case is mentioned as 'Nautor Appeal'. In fact Annexure P-7 is the official communication through which the matter was sent by way of recommendation for further adjudication to Financial Commissioner (Appeals), Himachal Pradesh. Financial Commissioner (Appeals) acting on the recommendation so made by Commissioner, Mandi Division in Case No. 95/2007 dated 23.07.2009 passed order dated 04.05.2010, impugned in the present petition, and vide said order, while agreeing with the recommendation of Commissioner, Mandi Division, said authority set aside order passed by Deputy Commissioner, Mandi dated 27.11.2006 passed in File No. 2 of 2006 as well as order of Sub Divisional Officer (Civil), Chachiyot at Gohar sanctioning grant of Nautor land in favour of the present petitioners. Financial Commissioner (Appeals) further ordered the case to be remanded to Sub Divisional Officer (Civil) with a direction to decide the case afresh in the light of observations made in the order after following proper procedure as laid down in Nautor Rules.

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

9. In my considered view, the act of Divisional Commissioner, Mandi Division of treating the appeal filed by Pankaj Kumar against the appellate order of Deputy Commissioner as a Revision under the Himachal Pradesh Nautor Land Rules, 1968 and thereafter recommending the case to Financial Commissioner (Appeals), Himachal Pradesh for passing appropriate order was totally unjustified and illegal. The power of appeal and the power of revision conferred upon different authorities under the provisions of Nautor Rules are totally different and distinct. Rule 28 of the said Rules deals with power of appeal, whereas Rule 30 deals with power of revision. Both these Rules are quoted hereinbelow:

*"**28.** An appeal from the order of the S.D.O. (C) under rule 16 shall lie to the Deputy Commissioner within 60 days from the date of the order. A further appeal from the appellate order of the Deputy Commissioner shall lie to the Commissioner within 60 days from the date of the order. In the case of original grant made by the Deputy Commissioner, an appeal from his order shall lie to the Commissioner within 60 days from the date of order and a second appeal to the Financial Commissioner within 90 days from the date of order;*

Provided that no second appeal shall lie when the original order is confirmed on first appeal.

***30. Revision**.-(1) The Financial Commissioner may at any time call for the record of any case pending before, or disposed of by any officer subordinate to him.*

(2) The Commissioner may at any time call for the record of any case pending before, or disposed of by any officer subordinate to him.

(3) If, in any case, in which the Commissioner has called for the record, he is of the opinion that the proceeding taken order made should be modified or reversed, he shall report the case with his opinion thereon for the orders of the Financial Commissioner.

(4) The Financial Commissioner may in any case called for by himself under sub-rule (i) or reported to him under sub-rule (iii) pass such order as he thinks fit.

Provided that he shall not under this rule pass any order reversing or modifying any proceedings or orders of the subordinate Revenue Officer without giving the parties concerned an opportunity of being herd."

10. A perusal of the provisions of Rule 30 demonstrate that in exercise of its revisional powers, Commissioner may at any time call for the record of any case pending or disposed of by any officer subordinate to him and if in any case in which Commissioner has called for the record he is of the opinion that the said proceeding should be modified or reversed, then he shall report the case with his opinion thereon for the orders of the Financial Commissioner.

11. In the present case, the proceedings before the Commissioner were not by way of Revision. The proceedings with which the Commissioner was seized were appellate proceedings. Rule 28 of the Nautor Rules does not contain any such provision that while exercising its appellate powers, Commissioner can convert the said appeal into a revision and thereafter proceed with the matter as if he was hearing a revision petition.

12. Therefore, in my considered view, the act of the Commissioner of converting the appeal into a revision petition and thereafter recommending the same for further action to the Financial Commissioner (Appeals) as per the provisions of Rule 30 of the Nautor Rules rather than adjudicating upon the same as an appellate Court was an act without jurisdiction. As the recommendation made by Divisional Commissioner to the Financial Commissioner vide order dated 23.07.2009 was a nullity, the subsequent order passed by the Financial Commissioner (Appeals) in Revision Petition No. 112/2009 dated 04.05.2010 on the basis of recommendation made by Divisional Commissioner, Mandi is also *non est* and not sustainable in law.

13. Therefore, in view of the discussion held above, the writ petition is allowed. Order dated 04.05.2010 passed by Financial Commissioner (Appeals), Himachal Pradesh, Camp at Mandi in Revision Petition No. 112/2009 appended with the petition as Annexure P-8 is quashed and set aside and so is the recommendation made by Divisional Commissioner, Mandi dated 23.07.2009. The case is accordingly remanded back to Divisional Commissioner, Mandi Division for adjudication afresh from the stage of appeal which was filed by Pankaj Kumar against the appellate order passed by Deputy Commissioner, Mandi. It is made clear that the appeal shall be heard and adjudicated by Divisional Commissioner, Mandi Division on merit totally uninfluenced

by any observations made by this Court or in the orders/recommendation earlier passed by Financial Commissioner (Appeals) and Divisional Commissioner, Mandi which have been set aside by this Court. It goes without saying that while deciding the appeal, Divisional Commissioner, Mandi Division will take into consideration all the issues raised before it by both the parties including that of *locus standi* as well as delay and latches/limitation and maintainability of the second appeal. Keeping in view the fact that the matter is an old one, this Court hopes and trusts that Divisional Commissioner, Mandi shall made all endeavour to adjudicate upon the appeal as expeditiously as possible.

With the said directions, the present writ petition is disposed of. No order as to costs.

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

Jubeda Bibi and another .....Appellants

Versus

Hassan Ali and others ...Respondents

FAO No.4237 of 2013

Date of decision: 09.09.2016

Motor Vehicles Act, 1988- Section 166- Deceased died in a motor vehicle accident- claim petition was filed by the parents, which was dismissed by the Tribunal- Tribunal held that claimants had failed to prove the rashness and negligence of the driver- held, in appeal that claimants have specifically pleaded that FIR was registered against the driver – charge-sheet was filed before the Court- prima facie case has to be established before MACT- version of the claimants that accident had taken place due to the negligence of the driver was proved- income of the deceased cannot be less than Rs. 4, 000/- per month by guess work- deceased was bachelor and 50% amount has to be deducted towards personal expenses- deceased was 19 years of age- multiplier of '15' is applicable, thus, compensation of Rs. 2,000 x 12x 15= Rs. 3,60,000/- awarded under the head 'loss of dependency, in addition to this Rs. 10,000/- each awarded under the heads 'loss of love and affection', 'loss of estate' and 'funeral expenses'- thus, total compensation of Rs. 3,60,000 + Rs. 30,000= Rs. 3,90,000/- along with interest @ 7.5% per annum awarded. (Para- 8 to 24)

Cases referred:

Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646

Savita vs. Bindar Singh & others, 2014 AIR SCW 2053

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

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

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

Munna Lal Jain and another vs. Vipin Kumar Sharma and others, JT 2015(5) SC 1

For the appellants: Mr.Sunil Chaudhary, Advocate.

For the respondents: Mr.Hemant Sharma, Advocate, vice Mr.Aman Sood, Advocate, for respondent No.1.
Nemo for respondent No.2.
Mr.Praneet Gupta, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 17th October, 2013, passed by the Motor Accident Claims Tribunal, Mandi, District Mandi, H.P., (for short, "the Tribunal") in

Claim Petition No.33 of 2012, titled Jubeda Bibi and another vs. Hassan Ali and others, whereby the claim petition came to be dismissed, (for short the "impugned award").

2. Facts of the case, in brief, are that the claimants, being the parents of deceased Mohamad Usman Haider, who died in a vehicular accident, which took place on 10th July, 2009 at about 8.30 p.m. at Dhanotu, near Punjabi Dhaba and Sheetla Gas Agency, Tehsil Sundernagar, District Mandi, invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, 1988, (for shot, the Act), for compensation to the tune of Rs.20.00 lacs, as per the break-ups given in the claim petition.

3. The claim petition was resisted by the respondents and following issues were framed:

1. Whether Sh.Mohamad Usman Haider died in a road side accident on 10-7-2009, involving vehicle No.HP-31A-4822, being driven by respondent No.2 in a rash and negligent manner? OPP

2. If issue No.1 is proved in affirmative, for what amount of compensation, the claimants are entitled and from whom? OPP

3. Whether the present claim petition is not maintainable in view of the preliminary objection No.1 as taken by the respondents No.1 and 2? OPR-1 & 2

4.Whether the petition is bad for non joinder of necessary party? OPR 1 & 2.

5. Whether the vehicle involved in the accident was being driven by the appellant who was not holding a valid and effective driving licence to drive the vehicle at the time of accident? OPR

6. Whether the vehicle in question was being plied in contravention of terms and conditions of insurance policy, if so its effect? OPR-3

7. Relief.

4. Claimant No.1 Jubeda Bibi, in support of the claim set out in the claim petition, appeared in the witness box as PW-1. The claimants also examined three more witnesses i.e. PW-2 Munish Mohamad, PW-3 HC Sanjeev Kumar and PW-4 Ravinder Kumar. Respondents No.1 and 2, i.e. the owner and the driver of the offending truck, appeared in the witness box as RW-1 and RW-2 respectively. The insurer has not examined any witness.

5. It is apt to record herein that respondent No.4 i.e. National Insurance Company Limited was deleted from the array of respondents vide order dated 13th September, 2012, passed by the Tribunal in the Claim Petition.

6. The Tribunal, after scanning the evidence, held that the claimants had failed to prove that Sanjeev Kumar, (respondent No.2) had driven the offending truck bearing No.HP-31A-4822 rashly and negligently on the fateful day and had caused the accident.

7. After hearing the learned counsel for the parties and after having gone through the record, I am of the considered view that the said findings recorded by the Tribunal are not borne out from the record and are required to be set aside for the reasons given hereinbelow.

8. The claimants have specifically pleaded in the claim petition that FIR bearing No.195/09, dated 10th July, 2009, under Sections 279, 337 and 304 of the IPC was registered at Police Station, Sundernagar, District Mandi, H.P. The said FIR has been proved on record as Ext.PW-3/A, a perusal of which clearly shows that the same was recorded against respondent No.2 Sanjeev Kumar, driver of the offending truck. Final report in terms of Section 173 of the Code of Criminal Procedure, (for short, Cr.P.C.) was presented before the Additional Chief Judicial Magistrate, Sundernagar, against respondent No.2 Sanjeev Kumar, which, as informed during the course of hearing, is still pending.

9. Thus, from the above, it is clear that the findings recorded by the Tribunal are erroneous and against the concept of granting compensation. The Tribunal, while dismissing the

claim petition, seems to have applied the standard of proof required in criminal proceedings, which is against the spirit of awarding compensation in accident cases. While awarding compensation in Claim Petitions arising out of a vehicular accident, the Tribunal has to keep in mind that the victims of a vehicular accident have to establish prima facie that the injury or the death was due to the rash and negligent driving of a motor vehicle.

10. It is beaten law of the land that the Courts, while determining the cases of compensation in vehicular accidents, must not succumb to the niceties and hyper technicalities of law. It is also well established principle of law that negligence in vehicular accident cases has to be decided on the hallmark of preponderance of probabilities and not on the basis of proof beyond reasonable doubt. Furthermore, the claimants claiming compensation in terms of Section 166 of the Motor Vehicles Act, 1988, (for short, the Act), is not to be seen as an adversial litigation, but is to be determined while keeping in view the aim and object of granting compensation.

11. My this view is fortified by the judgment of the Apex Court in ***Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646***.

12. The Apex Court in **Savita vs. Bindar Singh & others, 2014 AIR SCW 2053,** has held that at the time of fixing compensation, courts should not succumb to niceties or technicalities of law. It is apt to reproduce paragraph 6 of the said decision hereunder:

> *"6. After considering the decisions of this Court in Santosh Devi (Supra) as well as Rajesh v. Rajbir Singh (supra), we are of the opinion that it is the duty of the Court to fix a just compensation. At the time of fixing such compensation, the court should not succumb to the niceties or technicalities to grant just compensation in favour of the claimant. It is the duty of the court to equate, as far as possible, the misery on account of the accident with the compensation so that the injured or the dependants should not face the vagaries of life on account of discontinuance of the income earned by the victim. Therefore, it will be the bounden duty of the Tribunal to award just, equitable, fair and reasonable compensation judging the situation prevailing at that point of time with reference to the settled principles on assessment of damages. In doing so, the Tribunal can also ignore the claim made by the claimant in the application for compensation with the prime object to assess the award based on the principle that the award should be just, equitable, fair and reasonable compensation."*

13. A reference may also be made to the decision of the Apex Court in **Sohan Lal Passi v. P.Sesh Reddy and others, AIR 1996 Supreme Court 2627,** in which, in paragraph 12, it was observed that the courts, while deciding claim petitions, must keep in mind that the right of the claimants is not defeated on technical grounds. Relevant portion of paragraph 12 of the said decision is reproduced hereunder:

> *"12. ..... While interpreting the contract of insurance, the Tribunal and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment debtor in respect of the liability in view of sub-section (1) of Section 96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known."*

14. This Court also, in the recent past, in series of judgments, has followed the similar principle and held that aim and object of awarding compensation in vehicular accident cases is just to ameliorate the sufferings of the victims and compensation is to be granted without succumbing to the niceties of law, hyper-technicalities and procedural wrangles and tangles.

15. Having said so, it is held that the claimants have proved that the driver, namely, Sanjeev Kumar, respondent No.2, had driven the offending truck rashly and negligently on the fateful day and had caused the accident in which the son of the claimants lost his life. Accordingly, the findings recorded by the Tribunal on issue No.1 are set aside.

16. Before dealing with issue No.2, I deem it proper to deal with other issues.

Issues No.3

17. This issue pertains to the maintainability of the claim petition and the onus to prove the same was cast on respondents No.1 and 2 i.e. the owner and the driver of the offending vehicle, have not led any evidence to prove the said issues and discharged the onus. On the other hand, as discussed above, FIR was recorded against respondent No.2 Sanjeev Kumar, driver of the offending truck and final report in terms of Section 173 of the Cr.P.C. was also presented before the court of competent jurisdiction against the said Sanjeev Kumar. Therefore, I am of the view that the Tribunal has erroneously held that the claim petition was not maintainable. Accordingly, the findings recorded by the Tribunal on issue No.3 are set aside and it is held that the claim petition was maintainable.

Issues No.4

18. The Tribunal under this issue has held that respondents No.1 and 2 have failed to prove how the claim petition was bad for non joinder of necessary parties, and accordingly decided the said issue against respondents No.1 and 2. The said respondents have not challenged the findings recorded by the Tribunal by filing an appeal or cross objections. Accordingly, the findings returned by the Tribunal on this issue are upheld.

Issues No.5 and 6

19. It was for the insurer to plead and prove that the driver of the offending vehicle was not having a valid and effective driving licence at the time of accident or the offending vehicle was being plied in contravention of the terms and conditions contained in the insurance policy, has not led any evidence. The Tribunal has decided these issues against the insurer and the insurer has not challenged the said findings. Accordingly, the findings returned by the Tribunal on these issues are upheld.

Issue No.2

20. The claimants have pleaded that the deceased was a student of Engineering and was 19 years of age at the time of accident. However, there is nothing on the record suggestive of the fact that the deceased was pursuing Engineering at the time of death. Since the claimants attained the age of majority at the time of death, therefore, by exercising guess work, his income can be treated at par with a labourer and cannot be said to be less than Rs.4,000/- per month. The deceased was bachelor at the time of death. In view of the law laid down by the Apex Court in **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104**, upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR (SCW) 3120,** 50% amount has to be deducted from the income of the deceased towards his personal expenses. Thus, the monthly loss of source of dependency to the claimants can be said to be Rs.2,000/-.

21. It has come on record that the deceased, at the time of accident, was 19 years of age, therefore, as per the dictum of the Apex Court in **Sarla Verma's** case supra and 2nd Schedule attached to the Act, and also the ratio laid down in **Munna Lal Jain and another vs. Vipin Kumar Sharma and others, JT 2015(5) SC 1,** multiplier of 15 is just and appropriate and is applied in the instant case.

22. In view of the above, the claimants are held entitled to Rs.2000x12x15 = Rs.3,60,000/- as compensation under the head loss of source of dependency.

23. Apart from the above, the claimants are also held entitled to Rs.10,000/- each i.e. Rs.30,000/- in all, under the heads 'loss of love and affection', 'loss of estate' and 'funeral expenses'.

24. Thus, in all, the claimants are held entitled to compensation to the tune of Rs.3,60,000/- + Rs.30,000/- = Rs.3,90,000/-, with interest at the rate of 7.5% per annum from the date of filing of the claim petition till deposit.

25. The factum of insurance is admitted. Therefore, the insurer/respondent No.3 is saddled with the liability.

26. The insurer is directed to deposit the amount, alongwith interest, in the Registry of this Court within a period of eight weeks from today, and on deposit, the same be released in favour of the claimants, in equal shares, through their respective bank accounts.

27. In view of the above discussion, the appeal is allowed, the impugned award is set aside and the claim petition is granted. The appeal stands disposed of accordingly.

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

Mohinder Kumar ...Appellant.

Versus

Smt. Shakuntla Devi and others ...Respondents.

FAO No. 373 of 2011

Decided on: 09.09.2016

Motor Vehicles Act, 1988- Section 166- It was admitted that claimant had sustained injuries in the motor accident- he was taken to zonal hospital, Bilaspur, where he remained admitted for 17 days- income of the claimant can be taken as Rs. 5,000/- per month – claimant is entitled to Rs. 2500/- under the head 'loss of income'- Doctor stated that claimant could not have worked for about six months due to the injury sustained by him - he must have spent about Rs.1 lac on his treatment and medicines- he is also entitled to Rs. 50,000/- under the head 'pain and sufferings', Rs. 50,000/- under the head 'future pain and sufferings' and Rs. 50,000/- under the head of 'loss of amenities of life'- thus, total compensation of Rs. 2,62,500/- awarded along with interest @ 7.5% per annum from the date of the claim petition till its realization. (Para-17 to 35)

Cases referred:

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

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

Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 Supreme Court Cases 646

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

Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085

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

Kavita versus Deepak and others, 2012 AIR SCW 4771

Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252

For the appellant: Mr. Dinesh Thakur, Advocate.

For the respondents: Mr. Anil God, Advocate, for respondents No. 1 and 2.
Mr. J.S. Bagga, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is award, dated 19th March, 2011, made by the Motor Accident Claims Tribunal, Ghumarwin, District Bilaspur, Himachal Pradesh (Camp at Bilaspur) (for short "the Tribunal") in M.A.C. No. 85 of 2005, titled as Mohinder Kumar versus Smt. Shakuntla Devi and others, whereby the claim petition filed by the appellant-claimant-injured came to be dismissed (for short "the impugned award").

2. The appellant-claimant-injured has called in question the impugned award on the ground the Tribunal has fallen in an error in dismissing the claim petition on the ground that the claimant-injured has not been able to prove as to how did he suffer any loss on account of the injuries sustained by him.

3. In order to determine this appeal, it is necessary to give a flashback of the case, the womb of which has given birth to the appeal in hand.

4. The claimant-injured, being the victim of the vehicular accident, which was caused by the driver, namely Shri Prakash Chand, while driving bus, bearing registration No. HP-23A-1021, rashly and negligently on 15th June, 2004, at about 7.50 A.M. at village Delag, Tehsil Ghumarwin, in which claimant-injured sustained injuries, was taken to Civil Hospital Ghumarwin, thereafter was referred to Zonal Hospital, Bilaspur.

5. The claim petition was resisted by the respondents on the grounds taken in the respective memo of objections.

6. On the pleadings of the parties, following issues came to be framed by the Tribunal on 30th December, 2005:

> *"1. Whether Mohinder Kumar sustained injuries due to rash and negligent driving of respondent No. 2, driver of bus No. HP-23A-1021, as alleged? OPP*
>
> *2. If issue No. 1 is proved in affirmative, whether the petitioner is entitled for compensation and if so, to what amount and from whom? OPP*
>
> *3. Whether the claim petition is not maintainable? OPR*
>
> *4. Whether bus No. HP-23A-1021 was being plied without valid registration, fitness certificate and route permit as alleged, if so to what effect? OPR-3*
>
> *5. Whether the driver of bus No. HP-23A-1021 was not having a valid and effective driving licence? OPR-3*
>
> *6. Whether the petition is barred by limitation? OPR-1*
>
> *7. Whether the petitioner has no locus standi to file the petition? OPR-1*
>
> *8. Relief."*

7. Parties have led evidence.

Issue No. 1:

8. The Tribunal after scanning the evidence, oral as well as documentary has held that the claimant-injured has proved that he has sustained injuries because of the rash and negligent driving of the offending vehicle by its driver and determined the issue in favour of the claimant-injured and against the respondents. The said findings have not been questioned by the owner-insured, driver and insurer of the offending vehicle. Thus, the findings returned by the Tribunal on issue No. 1 are upheld.

9. Before dealing with issue No. 2, I deem it proper to determine issues No. 3 to 7.

Issues No. 3 and 7:

10. Both these issues came to be decided against the respondents as not pressed, have not questioned the same. Accordingly, the findings returned by the Tribunal on issues No. 3 and 7 are upheld.

Issue No. 4:

11. It was for the insurer to plead and prove that the offending vehicle was being driven without valid documents, has not led any evidence, thus has failed to discharge the onus. Even otherwise, the insurer has not questioned the findings returned by the Tribunal on the said issue, thus, have attained finality. Accordingly, the findings returned by the Tribunal on issue No. 4 are also upheld.

Issue No. 5:

12. The onus to prove this issue was on the insurer, has failed to do so.

13. It is apt to record herein that an appeal, being FAO No. 320 of 2011, titled as Oriental Insurance Company Ltd. Versus Smt. Maya Devi and others, arising out of the same accident, came to be determined by this Court vide judgment, dated 15th July, 2016, wherein it has been held that the driver of the offending vehicle was having a valid and effective driving licence.

14. On the last date of hearing, learned counsel appearing on behalf of the insurer was asked to seek instructions whether the said judgment has been assailed by the insurer. In sequel thereto, Mr. J.S. Bagga, learned counsel appearing on behalf of the insurer, stated at the Bar that he is under instructions to make a statement that the said findings have not been questioned by the insurer. That being so, the said findings have attained finality. Accordingly, the findings returned by the Tribunal on issue No. 5 are upheld.

Issue No. 6:

15. I wonder how this issue came to be framed by the Tribunal. The Motor Vehicles Act, 1988 (for short "MV Act") has gone through a sea change and the rigours of Limitation Act for filing claim petitions under the MV Act have been taken away. Accordingly, the findings returned by the Tribunal on this issue are upheld.

Issue No. 2:

16. The claimant-injured has claimed compensation to the tune of ₹ 3,62,000/-, as per the break-ups given in the claim petition.

17. It has specifically been pleaded in the claim petition that the claimant-injured has sustained injuries in the vehicular accident, was taken to Civil Hospital Ghumarwin, wherefrom he was referred to Zonal Hospital, Bilaspur, where he remained admitted for about seventeen days.

18. The Tribunal has fallen in a grave error in deciding this issue against the claimant-injured for the reasons to be recorded hereinafter.

19. The aim and object of awarding compensation is just to ameliorate the sufferings of the claimants and the claim petitions cannot be dismissed on flimsy grounds.

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

21. The same principle has been laid down by the Apex Court in the cases titled as **N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354; Sohan Lal Passi versus P. Sesh Reddy and others,** reported in **AIR 1996 Supreme Court 2627;** and **Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another**, reported in (**2013) 10 Supreme Court Cases 646,** and by this Court in **FAO No. 339 & 340 of 2008,** titled as NIC versus Parwati & others; **FAO No. 172 of 2006,** titled as Oriental Insurance Company versus Shakuntla Devi & others; **FAO No. 396 of 2012,** titled as Asha & others versus Moti Ram & others; **FAO No. 4248 of 2013,** titled as Magni Devi & others versus Suneel Kumar & others, decided on 13.03.2015; **FAO No. 17 of 2008,** titled as United India Insurance Company Limited versus Smt. Brijbala & others, decided on 20.03.2015; and **FAO No.**

186 of 2008, titled as Oriental Insurance Co. Ltd. Versus Shri Kishan Chand & others, decided on 01.05.2015.

22. Having said so, the findings returned by the Tribunal on issue No. 2 merit to be set aside.

23. The question is – to which amount of compensation, the claimant-injured is entitled to?

24. The perusal of the record does disclose that the claimant-injured suffered fracture in ribs, was taken to Civil Hospital, Ghurmarwin, wherefrom was referred to Zonal Hospital, Bilaspur and remained admitted there with effect from 16th June, 2004 to 2nd July, 2004, as is evident from discharge slip (Ext. PW-2/A).

25. The Apex Court in **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787** and **Kavita versus Deepak and others, 2012 AIR SCW 4771,** has clearly laid down the principles as to how compensation has to be awarded in cases where the claimant has suffered permanent disability and how the assessment is to be made.

26. The Apex Court in its latest decision in the case titled as **Jakir Hussein vs. Sabir and others,** reported in **(2015) 7 SCC 252,** while discussing its earlier pronouncements, observed that in injury cases, the compensation would include not only the actual expenses incurred, but the compensation has to be assessed keeping in view the struggle which the injured has to face throughout his life due to the permanent disability and the amount likely to be incurred for future medical treatment, loss of amenities of life, pain and suffering to undergo for the whole life etc. It is apt to reproduce paragraphs 11 and 18 of the said decision hereunder:

> *"11. With regard to the pain, suffering and trauma which have been caused to the appellant due to his crushed hand, it is contended that the compensation awarded by the Tribunal was meagre and insufficient. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the courts to make a precise assessment of the pain and trauma suffered by a person whose arm got crushed and has suffered permanent disability due to the accident that occurred. The appellant will have to struggle and face different challenges as being handicapped permanently. Therefore, in all such cases, the Tribunals and the courts should make a broad estimate for the purpose of determining the amount of just and reasonable compensation under pecuniary loss. Admittedly, at the time of accident, the appellant was a young man of 33 years. For the rest of his life, the appellant will suffer from the trauma of not being able to do his normal work of his job as a driver. Therefore, it is submitted that to meet the ends of justice it would be just and proper to award him a sum of Rs.1,50,000/- towards pain, suffering and trauma caused to him and a further amount of Rs.1,50,000/- for the loss of amenities and enjoyment of life.*
>
> ....
>
> *18. Further, we refer to the case of Rekha Jain & Anr. v. National Insurance Co. Ltd., 2013 8 SCC 389 wherein this Court examined catena of cases and principles to be borne in mind while granting compensation under the heads of (i) pain, suffering and (ii) loss of amenities and so on. Therefore, as per the principles laid down in the case of Rekha Jain & Anr. and considering the suffering undergone by the appellant herein, and it will persist in future also and therefore, we are of the view to grant Rs.1,50,000/- towards the pain, suffering and trauma which will be undergone by the appellant throughout his life. Further, as he is not in a position to move freely, we additionally award Rs.1,50,000/- towards loss of amenities & enjoyment of life and happiness."*

27. The claim of the claimant-injured has to be tested in view of the principles laid down by the Apex Court in the decisions supra.

28. The perusal of the discharge slip, Ext. PW-2/A, does disclose that the claimant-injured remained admitted in the hospital with effect from 16th June, 2004 to 2nd July, 2004. He was attended upon by the attendant during the period he was in hospital, has undergone and has to undergo pain and sufferings.

29. It has been averred that the claimant-injured was earning ₹ 4,000/- per month by doing the tailoring work. Thus, it can be safely said and held that he would have been earning not less than ₹ 5,000/- per month. He remained admitted in hospital for seventeen days. Thus, by exercising guess work, the claimant-injured is held entitled to ₹ 2,500/- under the head 'loss of income for the period he remained admitted'.

30. Dr. D.R. Sehgal has stepped into the witness box and has stated that the claimant-injured could not have worked for about six months due to the injury sustained by him and must have spent about ₹ one lac on his treatment and medicines. The claimant-injured has also placed on record some of the medical bills. Keeping in view the statement of the doctor and the period for which the claimant-injured remained admitted in hospital, the claimant-injured is held entitled to compensation to the tune of ₹ 1,00,000/- under the head 'medical expenses'.

31. He remained admitted in hospital for seventeen days and must have been attended upon by an attendant during the said period, thus, was entitled to compensation under the head 'attendant charges', which he would have paid not less than ₹ 5,000/- plus other expenses, which can roughly be assessed at ₹ 10,000/-.

32. He has also undergone pain and sufferings during the said period and has to suffer throughout his life. Thus, at least, ₹ 50,000/- was to be awarded under the head 'pain and sufferings' and ₹ 50,000/- under he head 'future pain and sufferings'.

33. The claimant-injured is also deprived of all comforts and amenities because of the injury sustained by him, thus, is entitled to ₹ 50,000/- under the head 'loss of amenities of life'.

34. The factum of insurance is not in dispute. Thus, the insurer is to be saddled with liability.

35. Viewed thus, claimant-injured is held entitled to compensation to the tune of ₹ 2,500/- + ₹ 1,00,000/- + ₹ 10,000/- + ₹ 50,000/- + ₹ 50,000/- + ₹ 50,000/- = ₹ 2,62,500/- with interest @ 7.5 % per annum from the date of the claim petition till its realization.

36. Having glance of the above discussions, the claim petition is granted and the impugned award is modified, as indicated hereinabove, and the appeal is allowed.

37. The insurer is directed to deposit the awarded amount before the Registry within eight weeks. On deposition, the same be released in favour of the claimant-injured through payee's account cheque or by depositing the same in his bank account.

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

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

National Insurance Co. Ltd. .....Appellant.

Versus

Smt. Bhawna Devi and others .....Respondents

FAO (MVA) No. 65 of 2011.

Date of decision: 9th September, 2016.

Motor Vehicles Act, 1988- Section 163-A- Deceased had died in an accident, which was outcome of the use of motor vehicle and claim petition was, therefore, maintainable- deceased was earning Rs. 3300/- per month or say Rs. 39,600/- per annum, which is below the cap fixed and provided under Section 163-A of the Act- appeal dismissed. (Para-9 to 14)

Cases referred:
Surinder Kumar Arora and another vs. Dr. Manoj Bisla & Ors. 2012 AIR SCW 2241
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120,
United India Insurance Co. Ltd. versus Sunil Kumar and another 2013 AIR SCW 6694

For the appellant: Mr. Deepak Bhasin, Advocate.
For the respondents: Mr. Avinash Jaryal, Advocate, for respondents No. 1 to 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

This appeal is directed against the judgment and award dated 22/12/2010, made by the Motor Accident Claims Tribunal, Fast Track Court, Chamba, H.P., in MAC No. 47/2009, titled *Smt. Bhawna Devi and others versus The National Insurance Co. Ltd. and others*, for short "the Tribunal", whereby compensation to the tune of Rs.4,95,500/- alongwith interest @7.5% per annum came to be awarded in favour of the claimants, hereinafter referred to as "the impugned award", for short.

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

3. The claimants had filed claim petition under Section 163-A of the Motor Vehicles Act, 1988, for short "the Act", for the grant of compensation, as per the break-ups, given in the claim petition.

4. The respondents resisted the claim petition and following issues came to be framed.

(i) *whether Jagdish died on 5.8.2009 at Lachori Tehsil Bhalei Distt. Chamba in a vehicular accident involving vehicle NO. HP73-7170 as alleged? OPP.*

(ii) *If issue No. 1 is proved ion affirmative, whether petitioners being dependants of deceased are entitled for compensation, if so, from which of the respondents? OPP.*

(iii) *Whether the petition is not maintainable ?OPR-3 to 6.*

(iv) *Whether the petitioners are stopped by their own act and conduct from filing this petition. OPR 3 to 6.*

(v) *Whether the driver of the offending vehicle was not holding a valid and effective driving licence at the time of accident? OPR-1.*

(vi) *Whether the vehicle involved in the accident was being plied in contravention of conditions of the insurance policy, as alleged?OPR-1.*

(vii) *Relief.*

5. The claimants have examined three witnesses and Smt. Bhawna Devi claimant No. 1, herself stepped into the witness-box as PW1.

6. The insurer has not led any evidence. Thus, the evidence led by the claimants have remained un-rebutted.

7. The Tribunal, after scanning the evidence, held that Jagdish deceased died in the accident which was outcome of the use of a motor vehicle. Thus, the findings returned on issue No. 1 by the Tribunal, are upheld.

8. Before I determine issue No. 2, I deem it proper to determine issues No. 3 to 6.

9. It was for the respondents to discharge the onus, have not led any evidence. However, I have gone through the claim petition. Admittedly, the accident was outcome of the use of a motor vehicle. The Motor Vehicles Act has gone through the sea change by now. In the year 1994, an amendment was made and Section 163-A was introduced in the Act. The compensation payable under Section 163-A of the Act was not as an interim measure, but was final.

10. In case ***titled Surinder Kumar Arora and another vs. Dr. Manoj Bisla & Ors. reported*** in ***2012 AIR SCW 2241***, it has been held that the claimant has option to seek compensation either under Section 166 or under Section 163-A of the Act. It is apt to reproduce paras 9 and 10 of the said judgment herein.

> *"9. Admittedly, the petition filed by the claimants was under Section 166 of the Act and not under Section 163-A of the Act. This is not in dispute. Therefore, it was the entire responsibility of the parents of the deceased to have established that respondent no.1 drew the vehicle in a rash and negligent manner which resulted in the fatal accident. Maybe, in order to help respondent no.1, the claimants had not taken up that plea before the Tribunal. Therefore, High Court was justified in sustaining the judgment and order passed by the Tribunal. We make it clear that if for any reason, the claimants had filed the petition under Section 163-A of the Act, then the dicta of this Court in the case of Kaushnuma Begum (Smt.) & Ors. (supra) would have come to the assistance of the claimants.*
>
> *10. In our view the issue that we have raised for our consideration is squarely covered by the decision of this Court in the case of Oriental Insurance Co. Ltd. (supra). In the said decision the Court stated :*
>
> > *"....Therefore, the victim of an accident or his dependants have an option either to proceed under Section 166 of the Act or under Section 163-A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163-A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle."*

11. In case titled ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120,*** the apex Court, in para 10 of the judgment it has been observed as under.

> *"10.The 1988 Act gives choice to the claimants to seek compensation on structured formula basis as provided in Section 163A or make an application for compensation arising out of an accident of the nature specified in sub-section (1) of Section 165 under Section 166. The claimants have to elect one of the two remedies provided in Section 163A and Section 166. The remedy provided in Section 163A is not a remedy in addition to the remedy provided in Section 166 but it provides for an alternative course to Section 166. By incorporating Section 163A in the 1988 Act, the Parliament has provided the remedy for payment of compensation notwithstanding anything contained in the 1988 Act or in any other law for the time being in force or instrument having the force of law, that the owner of a motor vehicle or authorised insurer shall be liable to pay compensation on structured formula basis as indicated in the Second Schedule in the case of death or permanent disablement due to accident arising out of the use of motor vehicle. The*

peculiar feature of Section 163A is that for a claim made thereunder, the claimants are not required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner or owners of the vehicle concerned. The scheme of Section 163A is a departure from the general principle of law of tort that the liability of the owner of the vehicle to compensate the victim or his heirs in a motor accident arises only on the proof of negligence on the part of the driver. Section 163A has done away with the requirement of the proof of negligence on the part of the driver of the vehicle where the victim of an accident or his dependants elect to apply for compensation under Section 163A. When an application for compensation is made under Section 163A the compensation is paid as indicated in the Second Schedule. The table in the Second Schedule has been found by this Court to be defective to which we shall refer at a little later stage." [Emphasis added]

12. The apex Court in case titled ***United India Insurance Co. Ltd. versus Sunil Kumar and another*** reported in **2013 AIR SCW 6694,** in para 5 has observed as under.

"5. We find difficult to accept the reasoning expressed by the Two-Judge Bench in Sinitha's case . In our view, the principle laid down in Hansrajbhai V. Kodala's case has not been properly appreciated or applied by the Bench. In fact, another Division Bench of this Court vide its order dated 19.4.2002 had doubted the correctness of the judgment in Hansrajbhai V. Kodala's case and referred the matter to a Three- Judge Bench to examine the question whether claimant could pursue the remedies simultaneously under Sections 166 and 163-A of the Act. The Three- Judge Bench of this Court in Deepal Girishbhai Soni & Ors. v. United India Insurance Co. Ltd., Baroda, 2004 5 SCC 385 made a detailed analysis of the scope of Sections 166 and 163-A and held that the remedy for payment of compensation both under Sections 163-A and 166 being final and independent of each other, as statutorily provided, a claimant cannot pursue his remedies thereunder simultaneously. The Court also extensively examined the scope of Section 163-A and held that Section 163-A was introduced in the Act by way of a social security scheme and is a Code by itself. The Court also held that Section 140 of the Act deals with interim compensation but by inserting Section 163-A, the Parliament intended to provide for making of an award consisting of a pre-determined sum without insisting on a long- drawn trial or without proof of negligence in causing the accident. The Court noticed that Section 163-A was inserted making a deviation from the common law liability under the Law of Torts and also in derogation of the provisions of the Fatal Accidents Act. The Three-Judge Bench also held that Section 163-A has an overriding effect and provides for special provisions as to payment of compensation on structured formula basis. Sub- section (1) of Section 163-A contains a non-obstante clause, in terms whereof the owner of the motor vehicle or the authorized insurer is liable to pay, in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be. The Court also held that the scheme of the provisions of Section 163-A and Section 166 are distinct and separate in nature. In Section 163-A, the expression "notwithstanding anything contained in this Act or in any other law for the time being in force" has been used, which goes to show that the Parliament intended to insert a non-obstante clause of wide nature which would mean that the provisions of Section 163-A would apply despite the contrary provisions existing in the said Act or any other law for the time being in force. Section 163-A of the Act covers cases where even negligence is on the part of the victim. It is by way of an exception to Section 166 and the concept of social justice has been duly taken care of.

The above-mentioned Three-Judge Bench judgment was not placed before the learned Judges who decided the Sinitha's case ." [Emphasis added]

13. Accordingly, it is held that the claim petition was maintainable. The respondents have not led any evidence to prove issues No. 4 to 6, thus, the findings returned on these issues are upheld.

Issue No.2.

14. It is stated that the deceased was earning Rs.3300/- per month, i.e., Rs.39,600/- per annum, which comes below the cap fixed and provided under Section 163-A of the Act. Having said so, the Tribunal has rightly made the discussion in paras 12 and 13 of the impugned award, needs no interference. Accordingly, the findings returned on issue No. 2 are upheld.

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

16. The Registry is directed to release the awarded amount in favour of the claimants, through payees' cheque account or by depositing the same in their bank accounts, strictly as per the terms and conditions contained in the impugned award.

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

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

Oriental Insurance Company Limited ...Appellant.

Versus

Gulam Hassan Sheikh and others ...Respondents.

FAO No. 364 of 2011
Decided on: 09.09.2016

Motor Vehicle Act, 1988- Section 149- It was contended that driver of the vehicle was not having valid and effective driving licence at the time of accident- it was for the insurer to prove that driver was not having valid and effective driving licence at the time of accident but he had failed to do so- appeal dismissed. (Para-5)

For the appellants: Mr. Jagdish Thakur, Advocate.

For the respondents: Mr. Jitender P. Ranote, Advocate, for respondent No. 1.
Nemo for respondent No. 2.
Ms. Seema K. Guleria, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Challenge in this appeal is to award, dated 20th May, 2011, made by the Motor Accident Claims Tribunal, Shimla (for short "the Tribunal") in M.A.C. Petition No. 11-S/2 of 2007, titled as Sh. Gulam Hassan Sheikh versus Sh. Ravi Kumar and others, whereby compensation to the tune of ₹ 46,000/- with interest @ 8% per annum from the date of institution of the petition till its realization alongwith costs assessed at ₹ 5,000/- came to be awarded in favour of the claimant-injured and against the insurer (for short "the impugned award").

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

3. Appellant-insurer has questioned the impugned award on the grounds taken in the memo of the appeal.

4. I wonder why the insurer has filed this appeal. A meagre amount of compensation has been awarded in favour of the claimant-injured and he has been deprived of his rights from the year 2007. The appeal merits to be dismissed with costs.

5. At this stage, learned counsel appearing on behalf of the appellant-insurer argued that the insurer has proved that the driver of the offending vehicle was not having a valid and effective driving licence at the relevant point of time, which is not legally correct. The Tribunal has made discussion in paras 20 to 23 of the impugned award and has rightly held that the driver of the offending vehicle was having a valid and effective driving licence. Even otherwise, it was for the insurer to prove that the driver of the offending vehicle was not having a valid and effective driving licence at the time of the accident, has failed to do so.

6. Having said so, the impugned award is well reasoned and legal one, needs no interference.

7. Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in his bank account.

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

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

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

Oriental Insurance Company Ltd. .....Appellant

Versus

Mohinder Singh & others .....Respondents

FAO No. 237 of 2011
Decided on : 09.09.2016.

Motor Vehicles Act, 1988- Section 149- It was for the insurer to plead and prove that driver did not have valid and effective driving licence at the time of accident and the insurer had committed willful breach- insurer had failed to discharge the onus- appeal dismissed. (Para-5)

For the Appellant : Mr. Ashwani K. Sharma, Senior Advocate with Mr. Ishan Thakur, Advocate.
For the Respondents: Mr. Ranvir Chauhan, Advocate, for respondent No.1.
Nemo for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award dated 24th December, 2010, made by the Motor Accident Claims Tribunal (II), Shimla, H.P. (hereinafter referred to as 'the Tribunal') in M.A.C. Petition No. 51-S/2 of 2007, titled as **Shri Mohinder Singh** versus **The Oriental Insurance Company & others,** whereby compensation to the tune of Rs.1,00,000/- (rupees one lac only) with interest at the rate of 7.5% per annum from the date of filing of the claim petition, was granted in favour of the claimant and the insurer came to be saddled with liability (for short, "the impugned award").

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

3. The insurer has questioned the impugned award on the following three grounds:

(i) *that the driver was not having a valid and effective driving licence at the time of accident;*

(ii) that the owner had not obtained Special Route Permit at the relevant time;

(iii) that the insured-owner has committed willful breach.

4. These grounds are relating partly to Issues No. 6 & 7. It is apt to reproduce Issues No. 6 & 7 framed by the Tribunal herein:-

"6. Whether the driver of the vehicle was not having valid and effective driving licence? …OPR-1

7. Whether the respondent No. 2 was not having valid RC and fitness certificate in respect of the vehicle in question? …OPR-1"

5. It was for the insurer to plead and prove that the driver was not having a valid and effective driving licence at the time of accident and the owner-insured has committed willful breach, has failed to do so, thus has failed to discharge the onus. Accordingly, it is held that the Tribunal has rightly decided Issues No. 6 & 7.

6. The adequacy of compensation is not in dispute. However, I have perused the record and the impugned award and am of the considered view that the Tribunal has rightly made the assessment. The amount awarded is adequate. Accordingly, it is held that the just and appropriate compensation has been granted by the Tribunal.

7. Having said so, no interference is required, thus, the impugned award is upheld.

8. Registry is directed to release the awarded amount in favour of the claimant, strictly as per the terms and conditions contained in the impugned award.

9. The appeal is dismissed accordingly.

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

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

FAOs No. 214 & 267 of 2011
Decided on : 09.09.2016.

1. **FAO No. 214 of 2011**
Oriental Insurance Company .....Appellant
Versus
Smt. Satya & others ...Respondents

2. **FAO No. 267 of 2011**
Smt. Satya & others .....Appellants
Versus
Nuziveedu-Seeds Limited & others ...Respondents

Motor Vehicles Act, 1988- Section 166- Deceased was 8 years of old at the time of accident- compensation of Rs. 2 lacs awarded by the Tribunal is just and appropriate- petition dismissed. (Para-13)

FAO No. 214 of 2011
For the Appellant : Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.
For the Respondents: Mr. Raman Sethi, Advocate, for respondents No. 1 to 6.
Mr. B.M. Chauhan, Advocate, for respondent No. 7.

FAO No. 267 of 2011
For the Appellant : Mr. Raman Sethi, Advocate.

For the Respondents: Mr. B.M. Chauhan, Advocate, for respondent No. 1.
Mr. B.M. Chauhan, Advocate, for respondent No. 7.
Nemo for respondent No. 2.
Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Both these appeals are outcome of the common award dated 28th April, 2011, made by the Motor Accident Claims Tribunal, Shimla, H.P. (hereinafter referred to as 'the Tribunal') in M.A.C. Petition No. 35-S/2 of 2009, titled as **Smt. Satya and others** versus **Nuziveedu-Seeds Limited,** whereby compensation to the tune of Rs. 2,00,000/- alongwith costs assessed to the tune of Rs. 5,000/- came to be awarded in favour of the claimants and the insurer was saddled with liability (for short, "the impugned award").

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

3. The insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. The claimants have questioned the impugned award on the ground of adequacy of compensation.

5. The claimants had invoked the jurisdiction of the Tribunal in terms of Section 166 of the Motor Vehicles Act, for grant of compensation to the tune of 10,00,000/- as per the break-ups given in the claim petition.

6. The respondents resisted and contested the claim petition by filing replies.

7. Following issues came to be framed by the Tribunal:

"i) Whether Master Nishant had died on account of the rash and negligent driving of vehicle No. HP-52A-2070 by respondent No. 2? ….OPP

ii) If issue No. 1 is proved, to what amount of compensation and from whom, are the petitioners entitled to? …OPP

iii) Whether the respondent No. 2 had not been in possession of a valid and effective driving licence, if so, with what effect? ….OPR-3

iv) Whether the claim petition is not maintainable? …OPR-3

v) Whether respondent No. 1 had contravened the terms and conditions of the insurance policy, if so, with what effect? …OPR-3

vi) Relief."

8. Claimants examined HHC Bhagwan Singh (PW-1) and Dr. Piyush Kapila (PW-2) and one of the claimants, i.e. Sh. Gian Singh, also appeared in the witness box as PW-3. On the other hand, respondents examined Pradeep Kumar as RW-1.

Issue No. 1

9. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants have proved that the accident was the outcome of the rash and negligent driving of the offending vehicle by driver, namely, Mohinder Singh.

10. I have gone through the entire record. FIR (Ext. PW-1/A) was lodged against the driver. The respondents have not led any evidence in rebuttal. Accordingly, the findings returned by the Tribunal on Issue No. 1 are upheld.

11. Before I deal with Issue No. 2, I deem it proper to deal with Issues No. 3 to 5.

Issues No. 3 to 5.

12. It was for the insurer to plead and prove that the driver was not having a valid and effective driving licence at the time of accident, the claim petition was not maintainable and the owner has committed willful breach, has failed to do so. Thus, the findings returned by the Tribunal on Issues No. 3 to 5 are upheld.

Issue No. 2.

13. The deceased was 8 years old at the time of accident. The compensation to the tune of Rs. 2,00,000/-granted by the Tribunal, is just and appropriate compensation.

14. The factum of insurance is admitted. Accordingly, it is held that the Tribunal has rightly saddled the insurer with liability.

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

16. Accordingly, the impugned award is upheld and the appeals are dismissed.

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

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

Ms. Palvi .....Appellant
Versus
Rajneesh Kumar & others .....Respondents

FAO No. 221 of 2011
Decided on : 09.09.2016.

Motor Vehicles Act, 1988- Section 166- Tribunal held that there was no sufficient material on record to prove that motorcyclist had driven the vehicle rashly and negligently- held, that HHC Om Swaroop, who conducted the investigation specifically stated that FIR was lodged against the motorcyclist who was driving the vehicle rashly and negligently- standard of proof in criminal case is different from the standard of proof in claim petition - proof beyond reasonable doubt is required in a criminal case while a prima facie proof is required in a claim case- there is sufficient prima facie proof that motorcyclist had driven the vehicle rashly and negligently- insurer had examined RW-4 who deposed that driving licence of motorcyclist was not issued by Licensing Authority, Khandur Sahib, District Taran Taaran, Punjab but he admitted that register was not relating to the series of 9000- insurer has not proved breach of the terms and conditions of the insurance policy- claimant remained under treatment for two months and had suffered 5% permanent disability- claimant is entitled to Rs.1 lac under the head 'loss of amenities of life', Rs. 50,000/- under the head 'pain and suffering' and Rs. 50,000/- under the head 'medical expenses'- thus, claimant is entitled to Rs. 2 lacs along with interest @ 7.5% per annum till realization. (Para-5 to 29)

Cases referred:

N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354
Oriental Insurance Co. versus Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81
Sohan Lal Passi versus P. Sesh Reddy and others, AIR 1996 Supreme Court 2627
Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 Supreme Court Cases 646
Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors., 2009 AIR SCW 4298

National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217
Oriental Insurance Company Ltd. versus Smt. Rikta alias Kritka & others, ILR 2014 (VI) HP 1263
R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771

For the Appellant : Mr. Naveen K. Bhardwaj, Advocate.
For the Respondents: Nemo for respondents No. 1 & 2.
Mr. P.S. Chandel, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject matter of this appeal is the award dated 22nd March, 2011, made by the Motor Accident Claims Tribunal-III, District Kangra, H.P. (hereinafter referred to as 'the Tribunal') in MACP RBT No. 70-K/07/10, titled as **Miss Palvi** versus **Rajneesh Kumar & others,** whereby the claim petition came to be dismissed (for short, "the impugned award").

2. The claimant had invoked the jurisdiction of the Tribunal in terms of Section 166 of the Motor Vehicles Act, for grant of compensation to the tune of 3,00,000/- as per the break-ups given in the claim petition.

3. The respondents resisted and contested the claim petition by filing replies.

4. Following issues came to be framed by the Tribunal:

"1. Whether the respondent No. 1 was driving the motor-cycle No. HP-40A-0479 owned by respondent No. 2 in a rash and negligent manner on the road on 2-12-2005 and had struck it against the petitioner at Manal, thereby causing grievous injury to her due to which she had suffered permanent disability as alleged? …OPP

2. If issue No. 1 is proved in affirmative to what amount of compensation the petitioner is entitled and from whom? …OPP

3. Whether the respondent No. 1 was not holding valid and effective driving licence to drive the motor-cycle and he had breached the terms and conditions of the Insurance Policy as alleged? ..OPR

4. Relief."

Issue No. 1

5. The Tribunal, after discussing Issue No. 1, from para-7 to para-13 of the impugned award, held that there was not sufficient material on the record to hold that motor-cyclist, namely, Rajneesh Kumar, has driven the offending vehicle, i.e. motor cycle bearing registration No. HP-40A-0479, rashly and negligently. It is apt to reproduce para-13 of the impugned award herein:-

"*Hence, the entire evidence on record is not sufficient to establish that in fact respondent No. 1 was driving motor cycle No. HP-40-A-0479 and due to his rash and negligent driving he committed the accident in question on 2-12-2005 by hitting petitioner Palvi and in the accident petitioner sustained the injuries in question as well as permanent disability. Consequently, this Issue No. 1 is decided against the petitioner."*

6. It appears that the Tribunal has fallen in an error in holding that the claimant has failed to prove that the driver has driven the offending vehicle, rashly and negligently.

7. FIR (Ext. PW-2/A) was lodged in Police Station Shahpur, District Kangra, H.P.

8. H.H.C. Om Swaroop (PW-2) had conducted the investigation, has specifically stated before the Tribunal that FIR was lodged against motorcyclist, Rajneesh Kumar, who had driven the offending motor cycle, rashly and negligently and caused the accident. Challan, in terms of the mandate of Section 173 of the Code of Criminal Procedure was presented against the driver in the Court of the competent jurisdiction, i.e. before the Judicial Magistrate 1st Class (II), Dharamshala, District Kangra. Thus, there is sufficient material on the record to hold that the motor-cyclist had driven the offending motor-cycle, rashly and negligently.

9. It is a beaten law of the land that standard of proof in criminal and civil cases is altogether different and in claim petition, the *prima facie* proof is required. The technicalities and procedural wrangles and tangles have no role to play.

10. My this view is fortified by the judgment of the Apex Court in the case titled as **N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354.** It is apt to reproduce relevant portion of para 3 of the judgment herein:

> *"3. Road accidents are one of the top killers in our country, specifically when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. Accident Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The court should not succumb to niceties, technicalities and mystic maybes. We are emphasising this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their "neighbour". Indeed, the State must seriously consider no-fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parcimony practised by tribunals. We must remember that judicial tribunals are State organs and Art. 41 of the Constitution lays the jurisprudential foundation for state relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of tribunals and the High Court should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard." (Emphasis Added)*

11. The Jammu and Kashmir High Court in the case titled as **Oriental Insurance Co. versus Mst. Zarifa and others,** reported in **AIR 1995 Jammu and Kashmir 81,** held that the MV Act is Social Welfare Legislation and the procedural technicalities cannot be allowed to defeat the purpose of the Act. It is profitable to reproduce para 20 of the judgment herein:

> *"20. Before concluding, it is also observed that it is a social welfare legislation under which the compensation is provided by way of Award to the people who sustain bodily injuries or get killed in the vehicular accident. These people who sustain injuries or whose kith and kins are killed, are necessarily to be provided such relief in a short span of time and the procedural technicalities cannot be*

allowed to defeat the just purpose of the Act, under which such compensation is to be paid to such claimants."

12. It would also be profitable to reproduce relevant portion of para 12 of the judgment of the Apex Court in the case titled as **Sohan Lal Passi versus P. Sesh Reddy and others,** reported in **AIR 1996 Supreme Court 2627,** herein:

"12. .....While interpreting the contract of insurance, the Tribunals and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment-debtor in respect of the liability in view of sub-section (1) of Section 96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known."

13. The Apex Court in a case titled **Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another**, reported in (**2013) 10 Supreme Court Cases 646** has laid down the same principle and held that strict proof and strict links are not required.

The same principle has been laid down by this Court in a series of cases.

14. A Single Judge of this Court in FAO No. 127 of 1999, titled as Bimla Devi and others versus Himachal Road Transport Corporation and others, decided on 22.08.2005, held that the claimants have to prove the case by leading cogent evidence and applied the mandate of the Code of Civil Procedure, (for short 'the CPC') read with the Evidence Act, was questioned before the Apex Court by the medium of Civil Appeal No. 2538 of 2009, titled as **Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors.,** reported in **2009 AIR SCW 4298,** and the Apex Court set aside the said judgment and held that strict proof is not required. It is apt to reproduce paras 2 and 12 to 15 of the judgment herein:

"2. This appeal is directed against a judgment and order dated 22.8.2005 passed by the High Court of Himachal Pradesh, Shimla in FAO No. 127 of 1999 whereby and whereunder an appeal preferred against a judgment and award dated 28.10.1998 passed by the Motor Accident Claims Tribunal-II [MACT (I), Nahan] in MAC Petition No. 21-NL/2 of 1997, was set aside.

xxx xxx xxx

12. While dealing with a claim petition in terms of Section 166 of the Motor Vehicles Act, 1988, a Tribunal stricto sensu is not bound by the pleadings of the parties; its function being to determine the amount of fair compensation in the event an accident has taken place by reason of negligence of that driver of a motor vehicle. It is true that occurrence of an accident having regard to the provisions contained in Section 166 of the Act is a sine qua non for entertaining a claim petition but that would not mean that despite evidence to the effect that death of the claimants predecessor had taken place by reason of an accident caused by a motor vehicle, the same would be ignored only on the basis of a post mortem report vis-a-vis the averments made in a claim petition.

13. The deceased was a Constable. Death took place near a police station. The post mortem report clearly suggests that the deceased died of a brain injury. The place of accident is not far from the police station. It is, therefore, difficult to believe the story of the driver of the bus that he slept in the bus and in the morning found

a dead body wrapped in a blanket. If the death of a constable has taken place earlier, it is wholly unlikely that his dead body in a small town like Dharampur would remain undetected throughout the night particularly when it was lying at a bus stand and near a police station. In such an event, the court can presume that the police officers themselves should have taken possession of the dead body.

14. The learned Tribunal, in our opinion, has rightly proceeded on the basis that apparently there was absolutely no reason to falsely implicate the respondent Nos. 2 and 3. Claimant was not at the place of occurrence. She, therefore, might not be aware of the details as to how the accident took place but the fact that the First Information Report had been lodged in relation to an accident could not have been ignored. Some discrepancies in the evidences of the claimant s witnesses might have occurred but the core question before the Tribunal and consequently before the High Court was as to whether the bus in question was involved in the accident or not. For the purpose of determining the said issue, the Court was required to apply the principle underlying burden of proof in terms of the provisions of Section 106 of the Indian Evidence Act as to whether a dead body wrapped in a blanket had been found at the spot at such an early hour, which was required to be proved by the respondent Nos. 2 and 3.

15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties."

15. There is sufficient *prima facie* proof on the record to the effect that the motor-cyclist had driven the offending vehicle, rashly and negligently, at the relevant point of time and had caused the accident, in which the claimant sustained injuries. Accordingly, Issue No. 1 is decided in favour of the claimant and against the respondents and the findings returned by the Tribunal on the said issue are set aside.

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

Issue No. 3.

17. It was for the insurer to plead and prove that the driver was not having a valid and effective driving licence at the relevant time.

18. The insurer has examined Kewal Singh as RW-4, who had deposed that as per the register brought by him, the driving licence of the motor-cyclist was not issued by Licensing Authority, Khandur Sahib, District Taran Taaran, Punjab. But in the cross-examination, he has admitted that the said register was not relating to the series of 9000. He further admitted that after serial number 6228, the driving licences have also been issued. The number of the driving licence of the driver is 9648.

19. It was for the insurer to prove that the owner of the offending vehicle has committed willful breach of the terms and conditions of the insurance policy and mere plea here and there cannot be a ground for seeking exoneration, as held by the Apex Court in **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

"105. .....

(i) .....

(ii) .....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in subsection (2) (a) (ii) of Section 149, have to be

proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

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

(v).....

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

20. It is also profitable to reproduce para 10 of the latest judgment of the Apex Court in the case of **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** hereinbelow:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

21. This Court in **FAO No. 322 of 2011**, titled as **IFFCO-TOKIO Gen. Insurance Company Limited versus Smt. Joginder Kaur and others**, decided on 29.08.2014 and **FAO No. 523 of 2007,** titled as **Oriental Insurance Company Ltd.** versus **Smt. Rikta alias Kritka & others,** decided on 19.12.2014, has laid down the same principle.

22. Having said so, the insurer has failed to prove that the owner-insured has committed willful breach. Accordingly, it is held that the insurer has to satisfy the liability.

Issue No. 2.

23. The claimant has suffered 5% permanent disability and remained under treatment for about two months.

24. It is beaten law of land that while assessing compensation in injury cases, guess work is to be made.

25. My this view is fortified by the judgments made by the Apex Court in the cases titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787,** and **Kavita versus Deepak and others,** reported in **2012 AIR SCW 4771**.

26. This Court has also laid down the same principle in a series of cases.

27. Thus, the claimant is entitled to compensation to the tune of Rs.1,00,000/- under the head 'loss of amenities of life', Rs. 50,000/- under the head 'pain and sufferings' and Rs. 50,000/- under the head 'medical expenses'.

28. Viewed thus, the claimant is held entitled to the total amount of compensation to the tune of Rs. 1,00,000/- + Rs. 50,000/- + Rs. 50,000/- = Rs. 2,00,000/- with interest at the rate of 7.5% per annum from the date of the impugned award till its final realization.

29. Accordingly, the impugned award is set aside and the appeal is allowed and compensation to the tune of Rs. 2,00,000/- with interest at the rate of 7.5% per annum from the date of the impugned award till its final realization is awarded in favour of the claimant and against the insurer.

30. The insurer is directed to deposit the compensation amount before the Registry within six weeks from today. The Registry is directed to deposit the compensation amount in the fixed deposit for a period of five years.

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

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

Smt. Radhi Devi and others ...Appellants.

Versus

Savitri and others ...Respondents.

FAO No. 452 of 2011
Decided on: 09.09.2016

Motor Vehicles Act, 1988- Section 149- Insurer was held liable to pay compensation in another claim petition arising out of the same accident- an appeal was preferred, which was dismissed- further appeal was filed before the Supreme Court, which was also dismissed- therefore, insurer is to be held liable to indemnify the insured. (Para-10)

Case referred:

Kala Devi & others versus Bhagwan Dass Chauhan & others, 2014 ACJ 2626

For the appellants: Mr. H.C. Sharma, Advocate.

For the respondents: Mr. Raman Sethi, Advocate, for respondents No. 1 (a) to 1 (c).

Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Ishan Thakur, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is award, dated 6th August, 2011, made by the Motor Accident Claims Tribunal, Fast Track Court, Shimla, H.P. (for short "the Tribunal") in M.A.C. No. 52-S/2 of 2008, titled as Smt. Radhi Devi and others versus Bhagwan Dass Chauhan and others, whereby the claim petition filed by the appellant-claimant-injured came to be dismissed (for short "the impugned award").

2. The claimants invoked the jurisdiction of the Tribunal as per the mandate of Section 166 of the Motor Vehicles, Act, 1988 (for short "MV Act") for grant of compensation to the tune of ₹ 10,00,000/-, as per the break-ups given in the claim petition, on the grounds taken in the memo of the claim petition.

3. The owner-insured and driver of the offending vehicle did not choose to appear before the Tribunal and were set ex-parte.

4. The claim petition was resisted by the insurer on the grounds taken in the memo of the objections.

5. On the pleadings of the parties, following issues came to be framed by the Tribunal on 17th August, 2009;

"1. Whether Shri Ram Lal died due to the rash and negligent driving of vehicle No. HP-09A-0897 by the respondent/driver Shri Keshva Nand? OPP

2. If issue No. 1 is proved in affirmative, whether the petitioners are entitled to the compensation as claimed. If so, its quantum and from whom? OP Parties

3. Whether the vehicle was being plied in violation of the terms and conditions of the insurance policy as alleged. If so, its effect? OPR-3

4. Whether the petition is not maintainable in the present form? OPR-3

5. Whether respondent Shri Keshva Nand was not holding and possessing valid and effective driving licence to drive the vheicle, as alleged. If so, its effect? OPR-3

6. Whether late Shri Ram Lal was travelling as a gratuitous passenger, as alleged? OPR-3

7. Relief."

6. Parties have led evidence

Issue No. 1:

7. The Tribunal has recorded the findings in para 11 of the impugned award that the claimants have proved that deceased-Ram Lal died due to the negligence of the driver of the offending vehicle. The owner-insured, driver and insurer of the offending vehicle have not questioned the said findings. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

8. Before dealing with issue No. 2, I deem it proper to determine issues No. 3 to 6.

Issue No. 3, 5 and 6:

9. It was for the insurer to plead and prove the said issues, have not led any evidence to this extent, thus, has failed to discharge the onus.

10. I deem it proper to record herein that in another claim petition arising out of the same accident, the insurer was saddled with liability by the Claims Tribunal. The insurer questioned the same by the medium of appeal before this Court in the case titled as **Kala Devi & others versus Bhagwan Dass Chauhan & others,** reported in **2014 ACJ 2626,** whereby appeal was dismissed and the findings of the Tribunal that the insurer has to satisfy the award were upheld, was questioned before the Apex Court by the claimants by the medium of C.A. No. 9972

of 2014, reported in **2014 ACJ 2875,** and the said findings came to be upheld. Thus, in this case also, the insurer has to be saddled with liability. Issues No. 3, 5 and 6 are accordingly decided against the insurer.

Issue No. 4:

11. The Tribunal has decided the said issue against the claimants on the premise that the claimants had filed a claim petition, which was dismissed as withdrawn, thus, were caught in terms of Order XXIII Rule 1 (4) of the Code of Civil Procedure (for short "CPC").

12. The Tribunal has fallen in a grave error in dismissing the claim petition as per the mandate of Order XXIII Rule 1 (4) CPC for the reasons to be recorded hereinafter.

13. The perusal of the record does disclose that the claim petition was withdrawn by the claimants with liberty to file fresh claim petition (the copy of the statement is at page 48 of the record). Thus, the claimants were within their rights to file fresh claim petition. Moreover, the claimants have not concealed the said fact and have mentioned the same in the opening portion of the claim petition.

14. The proceedings under the MV act are summary in nature and all the provisions of the CPC are not applicable. However, the State of Himachal Pradesh has framed Himachal Pradesh Motor Vehicles Rules, 1999 (for short "MV Rules"), in terms of which some of the provisions of CPC, including Order XXIII Rules 1 to 3, have been made applicable in terms of Rule 232 of the Rules.

15. The Tribunal has dismissed the claim petition in terms of the mandate of Order XXIII Rule 1 (4) CPC, which is not legally correct. Accordingly, the findings returned by the Tribunal on issue No. 4 are set aside and it is decided in favour of the claimants and against the insurer.

Issue No. 2:

16. I have gone through the assessment made by the Tribunal in paras 12 and 13 of the impugned award, is just, adequate and appropriate, needs no interference.

17. Viewed thus, the claimants are held entitled to compensation to the tune of ₹ 8,23,000/- with interest @ 7.5 % per annum from the date of the claim petition till its realization and the insurer is saddled with liability.

18. Having glance of the above discussions, the claim petition is granted and the impugned award is modified, as indicated hereinabove, and the appeal is allowed.

19. The insurer is directed to deposit the awarded amount before the Registry within eight weeks. On deposition, the same be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their bank accounts.

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

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

RSA No. 373 of 2004 along with
RSA No. 105 of 2004
Reserved on: 22.06.2016
Decided on: 9th September, 2016

1. **RSA No. 373 of 2004**

State of H.P. and another .....Appellants.

Versus

Smt. Sushma Sharma and another .....Respondents.

2. **RSA No. 105 of 2004**

Dr. (Mrs.) Maya Ahuja .....Appellant.

Versus

Smt. Sushma Sharma and others. .....Respondents.

Code of Civil Procedure, 1908- Section 100- Plaintiff underwent tubectomy- the operation was unsuccessful and she gave birth to a male child- she filed a civil suit for the recovery of Rs.2 lacs with costs- the defendants asserted that there was no negligence in the operation- there are chances of failure which were explained to the plaintiff- the suit was dismissed by the trial Court- the appeal was allowed and a decree of Rs. 70,000/- along with interest was passed- held, in second appeal that facts are not disputed- it was not disputed that plaintiff had undergone tubectomy operation and had delivered a male child within two years of the operation – assertion of the plaintiff that defendant No. 3 had assured that operation was successful and plaintiff would not conceive again was not denied specifically- the fact that plaintiff had conceived after the operation was not in accordance with the promise made to her – consent form is in English and plaintiff was unable to understand the same- sum of Rs. 70,000/- is not sufficient to bring up the child and to compensate the plaintiff for the pain and sufferings- appeal dismissed.

(Para-21 to 32)

Cases referred:

State of Punjab V. Shiv Ram and others (2005) 7 Supreme Court Cases 1

Jacob Mathew V. State of Punjab and Another (2005) 6 Supreme Court Cases 1

For the appellants: Mr. D.S. Nainta, Additional Advocate General for the appellant in RSA No. 373 of 2004 and for respondents No. 2 and 3 in RSA No. 105 of 2004.

For the respondents: Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate for respondent No. 1 in both the appeals.

Mr. R.K. Bawa, Senior Advocate with Mr. Ajay Sharma, Advocate for respondent No. 2 in RSA No. 373 of 2004 and for the appellant in RSA No. 105 of 2004.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge

This judgment shall dispose of the present appeal and also the connected one arising out of the judgment and decree dated 16.12.2003 passed by learned District Judge, Solan in Civil Appeal No. 60-S/13 of 2003. It is seen that learned District judge has reversed the judgment and decree passed by learned Senior Sub Judge, Solan in Civil Suit No. 385/1 of 99/97 and decreed the suit in favour of the respondent (hereinafter referred to as the plaintiff) for the recovery of a sum of Rs.70,000/- with interest @ 9% per annum from the date of filing of the suit against the appellants in these appeals (hereinafter referred to as the defendants) jointly and severally.

2. Plaintiff belongs to village Sainj, Post Office Kandaghat in District Solan, a rural area. She has been married to Ved Prakash of that village. She gave birth to two children out of this wedlock. When in the year 1994, the children born to her were 5 and 1½ years of age, on account of their poverty, the couple decided to undergo sterilization operation. She was advised to undergo family planning operation (tubectomy). The operation was conducted by the 3rd respondent, posted at that time in District Hospital, Solan on 8.12.1994 at Kandaghat. The complaint is that the said respondent while conducting the operation had acted negligently and failed to take all precautions. As a result thereof, the operation turned unsuccessful and the plaintiff became again pregnant. She even gave birth to a male child also.

3. Further complaint is that prior to conducting family planning operation of the plaintiff, defendant No. 3 had checked up her womb and other private parts thoroughly and it is after finding everything normal, she was advised to undergo tubectomy. Defendant No. 3 after conducting the operation told the plaintiff that she had taken all care and observed all skill and that the operation was successful. Also that, in future the plaintiff will not bear any child. However, to the utter surprise of the plaintiff, she became again pregnant after one year and four months of undergoing the said surgery. It was beyond her expectation that she will again become pregnant even after conducting the tubectomy. She suffered great risk to her life on account of pregnancy she carried on account of negligence of defendant No. 3, who according to the plaintiff failed to take due care and to observe requisite skill while operating the plaintiff. The plaintiff who was solely dependent upon her husband had to undergo a lot of stress and strain as well as financial burden because huge amount was required to provide best education, schooling, food and clothing etc. to the newly born child. The very purpose of undergoing the sterilization operation was as such frustrated and to the contrary additional burden has come on the plaintiff and her husband to provide all sort of amenities and necessities of life to the newly born child. The plaintiff served the defendants with the legal notice Ext. P-1 under Section 80 of the Code of Civil Procedure vide registered AD post. The postal receipts and acknowledgment are Ext. P-2 to Ext. P-5. However, when defendant failed to reply to the legal notice, she filed the suit for recovery of Rs.2,00,000/- with costs against them.

4. Defendant No. 3 when put to notice has contested and resisted the plaintiff's claim as laid in the plaint. In preliminary, the objections such as the trial Court has no jurisdiction to try and entertain the suit, no notice of the application under Order 33 Rule 1 of the Code of Civil Procedure was ever served upon her, she did not receive any notice under Section 80 of the Code of Civil Procedure and plaintiff is estopped from filing the suit due to her own act, conduct and acquiescence. On merits, while admitting that the plaintiff was operated for tubectomy by her, it is emphatically denied that operation was conducted negligently or rashly. Rather, all precautions were taken while conducting the operation upon the plaintiff. After the operation, the plaintiff never came to the hospital for proper check up so that the successfulness of the operation could have been assured. The contention that the plaintiff became pregnant within one and a half year of operation and gave birth to a child after the operation were denied for want of knowledge as according to defendant No. 3, plaintiff never attended the hospital for subsequent examination. It is, however, pointed out that had in spite of the operation, the plaintiff became pregnant, she would have come to the hospital to get the pregnancy washed off, if not interested to give birth to the child. It is pointed out that plaintiff has given consent in writing for undergoing the operation. She was apprised that the operation for all practical purposes was permanent and that there may be some chances of failure of operation for which the Government Hospital/doctor conducting the operation will not be responsible. The plaintiff was also apprised that she was undergoing the operation which carries element of risk also. The criteria to undergo the operation was explained to her and she consented to undergo the operation as per such criteria. Her consent Ext. D-A was pressed in service in support of such averments in the written statement.

5. Defendants No. 1 and 2 in separate written statement have also raised objections qua territorial jurisdiction, service of notice under Section 80 of the Code of Civil Procedure, service of notice under Order 33 Rule 1 of the Code of Civil Procedure and estoppel etc., in preliminary. On merits, while denying the contentions to the contrary in the plaint, it is submitted that her operation was conducted in a very responsible and careful manner after observance of required precautions. Before that consent of the plaintiff (Ext. D-A) was obtained. It is pointed out that the plaintiff and her husband are well educated and they cannot be said to be illiterate. The averments that the plaintiff and her husband belong to a weaker section of society, hence poor are denied being wrong and it is submitted that they both are employed in private sector and earning handsome amount. In the application for consent, Ext. D-A, it is specifically mentioned that there could be possibility of failure of operation in rarest of rare cases and for that the Government Hospital/surgeon conducting the operation will not be held

responsible. The operation was conducted by defendant No. 3, a well experienced and qualified surgeon after guiding the plaintiff that in case of failure of the operation, she should immediately contact the motivator or the doctor concerned so that M.T.P. etc. could be performed for pregnancy. The plaintiff allegedly did not act upon the advise of the operating surgeon i.e. defendant No. 3 and the staff and to the contrary opted for giving birth to the so called unwanted child. Had she reported the matter of pregnancy well in time to the medical authorities, the birth of the child could have been avoided. The plaintiff who had given birth to two children was expected to have the knowledge of occurrence of pregnancy and as such, she was required to inform the concerned Medical Officer, the pregnancy she carried after the operation. The pregnancy up to three months could have been avoided. The suit has thus been sought to be dismissed.

6. In replication to the written statement filed on behalf of defendant No. 3, the plaintiff has denied the averments to the contrary being wrong and reiterated her case as set out in the plaint. It is denied that she voluntarily consented for undergoing operation. According to her, she was made to sign some documents without taking her into confidence and she was never told that there are chances of failure of operation also. When she sought advise from defendant no. 3, the said defendant had assured her that operation was 100% successful and that no issue would now be born to her nor she will suffer any physical problem after the operation. The said defendant also told her that there was no need to her to come for further check up or there was no apprehension of becoming her pregnant.

7. Similar is her version in the replication to the written statement filed on behalf of defendants No. 1 and 2.

8. On the pleadings of the parties following issues were framed:-

1. Whether the defendants are negligent and thereby the plaintiff is entitled for damages to the extent of the suit amount as alleged? OPP.
2. Whether this Court has no jurisdiction to entertain this suit as alleged? OPD.
3. Whether the suit is not maintainable in the present form? OPD.
4. Whether the plaintiff has not served as notice under Section 80 CPC. If so, its effect? OPD
5. Whether the defendant is estopped from filing the suit? OPD.
6. Whether the suit is not properly valued for the purpose of court fee and jurisdiction as alleged? OPD.
7. Relief.

9. The plaintiff has herself stepped into the witness box as PW-1. Reliance has also been placed on legal notice Ext. P-1 and the postal receipts Ext. P-2 to Ext. P-5. She has also produced in evidence the discharge summary Ext. P-6 and the certificate of undergoing family planning operation on 8.12.1994, Ext. P-7.

10. On the other hand, the defendants have examined Dr. Maya Ahuja, defendant No. 3 and placed reliance on the documentary evidence i.e. consent of the plaintiff Ext. D-A. The letter of appreciation issued in favour of defendant No. 3 Ext. D-B and the case sheet in respect of the plaintiff prepared on the day of her family planning operation, Ext. D-6. This witness has also made reference to the slip of hospital, Ext. D-D, which though is on record, however, not exhibited.

11. Learned trial Court on appreciation of the evidence has arrived at a conclusion that the defendants are not negligent, as such, the plaintiff was not held entitled to the recovery of damages as claimed. Issue No. 1 was answered against the plaintiff. The objections that the Court had no jurisdiction to entertain the suit, the suit was not maintainable, legal notice under Section 80 of the Code of Civil Procedure was not served upon the defendants, estoppel and suit

was not valued for the purpose of court fee and jurisdiction raised by the defendants were answered against them while answering issues No. 2 to 6. The suit, as such, was dismissed.

12. Learned lower appellate Court in appeal preferred by the plaintiff after taking note of the admitted facts and also the evidence available on record has concluded as under:-

> "**16**. The doctor had stated that she never assured plaintiff that there will be hundred percent success by such operation and there were chances for the reasons beyond human control. It was pleaded that the plaintiff could have terminated his pregnancy when she came to know that in spite of operation she had conceived a child. The reason of failure of the operation in the instant case has not been stated. No authentative Book of Medical Science has been brought to my notice by either of the parties. In Dr. Laxman Balkrishana Joshi Vs. Dr. Trimbak Bapu Godbole and another, A.I.R. 1969 Supreme Court, 128, the Hon'ble Apex Court of India has observed that a person who holds himself out ready to give medical advise and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose and that such a person when consulted by a patient owes him certain duties, viz, a duty of care in deciding whether to undertake the case, a duty of care, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. It is not disputed that Dr. Maya Ahuja DW-1 is a qualified Medical Practitioner but the defendants have failed to produce the cogent evidence to pin-point that the consent and application for sterilization operation form Ex. DA was readover and explained to the plaintiff and she was made aware of chances of its failure. Merely by putting the signatures by her on the said form which is not in the language of the plaintiff will not discharge the burden of the defendants but in the instant case even this document was not put during the cross-examination of the plaintiff. Even she has stated that though her signatures were obtained on a form and she did not know English well as she had studied up to the 9th standard. Therefore, it was incumbent upon the defendant to prove the execution of Ex.DA in accordance with law. Even the defendant has also not stated anywhere that this document was readover and explained to the plaintiff by her. There is only self-serving statement of the doctor that the plaintiff was informed about the pregnancy in case of failure but there is nothing on file to show that after the operation any steps were taken by the said defendant to verify that the operation had been a success. Though in the circumstances of the case, the result of the failure of the operation was due to the reasons within the control of human being and the defendant No. 3 was also found negligent to perform her duty because it is not proved that the plaintiff was made aware of the chance of its failure. The plaintiff due to many reasons might not have decided to terminate the pregnancy.
>
> **17**. The delivery of a child is itself a proof of negligence on the part of the doctor performing the operation.
>
> **18**. Under the circumstances of the case, it is duly proved that the plaintiff inspite of the fact that she had undergone family operation and cannot expect to have a child."

13. Learned lower appellate Court, therefore, has reversed the findings recorded by the trial Court and decreed the suit for recovery of Rs. 70,000/- together with interest against the defendants jointly and severally.

14. The grouse of the defendant-State and also the doctor, defendant No. 3 against the judgment and decree is that the learned lower appellate court has not appreciated the oral as well as documentary evidence in its right perspective and as a result thereof, based its findings merely on surmises, conjectures and hypothesis. The evidence that the plaintiff never visited the hospital for her check up even after becoming pregnant also has erroneously been ignored and to

the contrary the sole testimony of plaintiff has been relied upon to decree the suit. The findings recorded by the trial Court that the plaintiff has failed to prove negligence on the part of defendant No. 3 and as such, not entitled to the recovery of suit amount have been brushed aside without assigning any reasons. The plaintiff did not produce any evidence that after becoming pregnant she visited the hospital at Kandaghat and Solan, however, this aspect of the matter has not been properly appreciated. The contents of the consent form in vernacular were read over to the plaintiff before conducting her operation, however, this aspect of the matter has also not been appreciated in its right perspective. The negligence on the part of defendant No. 3 has not been adjudged at all nor it is appreciated that the failure of the operation and the plaintiff having become pregnant could have not been termed as negligence of the surgeon, defendant no. 3. The factum of failure of tubectomy operation from 5 to 7%, an universal phenomenon has not been considered. The medical science is not the exact science and the results of operations sometime are unpredictable and a surgeon cannot be held responsible for failure, if any, has also been ignored. The alleged negligence and failure to take proper care and caution by defendant No. 3 has not been proved by the plaintiff. She has no-where disclosed the nature and extent of negligence attributed to defendant No. 3. Nothing even qua this aspect has been said by the plaintiff in her examination-in-chief. No reason is assigned for decreeing the suit for a sum of Rs. 70,000/-.

15. This appeal has been admitted on the following substantial question of law:

1. Whether as the plaintiff/respondent No. 1 has neither pleaded not proved the factum of the alleged negligence and the manner in which the appellant/defendant No. 3 failed to take reasonable care and caution while performing the Tubectomy operation, the suit of the plaintiff is required to be dismissed?

16. The connected appeal filed by defendant No. 3 has also been admitted on the following substantial question of law:

1. Whether as the plaintiff/respondent No. 1 has neither pleaded not proved the factum of the alleged negligence and the manner in which the appellant/defendant No. 3 failed to take reasonable care and caution while performing the Tubectomy operation, the suit of the plaintiff is required to be dismissed?

17. It is seen that both the appeals have been admitted on similar substantial questions of law.

18. Mr. D.S. Nainta, learned Additional Advocate General representing the appellant-State and Mr. R.K. Bawa, learned Senior Advocate assisted by Mr. Ajay Sharma, Advocate representing proforma respondents in this appeal, whereas, appellant in the connected appeal have strenuously contended that in the absence of pleadings and proof to the effect that defendant No. 3 was negligent while conducting family planning operation of the plaintiff and that she even failed to impart necessary instructions qua taking post operative care by the plaintiff, the suit could have not been decreed. They have placed reliance on the judgment of the apex Court in ***State of Punjab*** V. ***Shiv Ram and others (2005) 7 Supreme Court Cases 1*** and also in ***Jacob Mathew*** V. ***State of Punjab and Another (2005) 6 Supreme Court Cases 1*** and on the strength of the ratio thereof urged that merely the plaintiff after having undergone sterilization operation become pregnant and delivered the child, the defendants cannot be held liable to compensate her on this score, as according to them she could have claimed compensation only if able to prove negligence on the part of defendant No. 3 in performing the surgery.

19. Mr. G.D. Verma, learned Senior Advocate assisted by Mr. B.C. Verma, Advocate while repelling the arguments addressed on behalf defendants has argued that in the present case the plaintiff has successfully pleaded and proved the negligence attributed to defendant No. 3, not only while conducting family planning operation but also proclaiming after conducting the

operation that the plaintiff will not carry pregnancy in future and that the operation was 100% successful. According to Mr. Verma, it is for this reason, the plaintiff could not guess even on menstrual break also that it is on account of she having conceived the pregnancy again. It is further pointed out that in the hospital at Kandaghat also, she was advised that menstrual break may be due to she being weak and not on account of pregnancy. In district hospital at Solan she was advised not to go for termination of pregnancy being 3-4 months old at the pretext that to do so may be dangerous to her life. Therefore, according to Mr. Verma, the law laid down by the apex Court in ***Shiv Ram's*** case supra is distinguishable in the given facts and circumstances of this case.

20. The substantial questions of law as formulated in these appeals being identical in nature can conveniently be determined together by common findings in order to avoid repetition of evidence and also findings.

21. Since the defendants have mainly relied upon the law laid down by the apex Court in *Shiv Ram's* case and *Jacob Mathew's* case supra, therefore, at the first instance, it is deemed appropriate to look into this aspect of the matter to find out that the law so laid down is attracted in the given facts and circumstances of this case or not. Since the law laid down by the apex Court in *Jacob Mathew's* case supra has been discussed and taken into consideration in its subsequent judgment in *Shiv Ram's* case, therefore, it is deemed appropriate to take into consideration the law laid down by the apex Court in *Shiv Ram's* case. That was a case where husband and wife both had filed a suit for recovery of damages to the tune of Rs.3,00,000/- on account of a child born to them irrespective of the plaintiff wife having undergone tubectomy (sterilization) operation performed by a lady surgeon. A certificate like in the case in hand qua undergoing sterilization operation was found to be issued in that case also. The plaintiffs having served the notice under Section 80 of the Code of Civil Procedure filed a suit for damages with the allegations that the child is born to them due to carelessness and negligence of the surgeon. The defendants contested that suit. The plaintiff-wife did not appear in the witness box and it is only her husband who on oath substantiated the averments in the plaint. The defendants have also examined Dr. Sham Lal. The suit was decreed for recovery of Rs.50,000/- with interest and costs by the trial Court. The judgment and decree so passed was even affirmed by the learned lower appellate Court and also the High Court. The matter ultimately landed in the apex Court. The apex Court taking note of the law laid down in Jacob Mathew's case supra has observed as under in para 8 of the judgment:-

> "**8**. The plaintiffs have not alleged that the lady surgeon who performed the sterilization operation was not competent to perform the surgery and yet ventured into doing it. It is neither the case of the plaintiffs, nor has any finding been arrived at by any of the courts below that the lady surgeon was negligent in performing the surgery. The present one is not a case where the surgeon who performed the surgery has committed breach of any duty cast on her as a surgeon. The surgery was performed by a technique known and recognized by medical science. It is a pure and simple case of sterilization operation having failed though duly performed. The learned Additional Advocate General has also very fairly not disputed the vicarious liability of the State, if only its employee doctor is found to have performed the surgery negligently and if the unwanted pregnancy thereafter is attributable to such negligent act or omission on the part of the employee doctor of the State."

22. The facts, not in controversy, are that the family planning operation of the plaintiff was conducted by defendant No. 3 on 8.12.1994 in the hospital at Kandaghat. She was discharged from the hospital on 8.12.1994 itself, as is apparent from the discharge summary, Ext. P-6. The case sheet is Ext. D-C, however, the same is not being given to the patient and rather remained in the record of the hospital itself. Therefore, there cannot be any quarrel even qua the plaintiff had conceived pregnancy, irrespective of she having undergone a family planning operation and gave birth to a male child within two years of the operation. She served the

defendants with a legal notice Ext. P-1. The postal receipts and acknowledgment are Ext. P-2 to Ext. P-5. The defendants have not given any reply to the legal notice Ext. P-1.

23. It is seen that like in Shiv Ram's case supra, in the case in hand also, it is not the case of the plaintiff that defendant No. 3 was not competent to perform the surgery and still she proceeded to conduct the same. However, here the allegations are that defendant No. 3 and other supporting staff before and after conducting her tubectomy made her to understand that after the operation, she will neither become pregnant nor any other issue born to her. It is how according to her, defendant No. 3 was negligent and failed in her duty to tell that the operation may fail and she again conceive pregnancy and thereby failed to take due care and precautions before and after the operation was conducted. In the case before the apex Court, it was not the case of the plaintiffs that the doctor who conducted the operation had committed breach of any duty casts on her as a surgeon. This, however, is not the position in the case in hand for the reason that the plaintiff herein has specifically averred as under in the plaint:-

> "**3**. .....Prior to the operation defendant No. 3 thoroughly checked up the womb as well as other private parts of the plaintiff and she was found normal in all respects and she was advised by the defendant No. 3 to undergo the operation for tubectomy. At the time of above operation the plaintiff had two issues aged about 5 years and 1½ years. The plaintiff was given assurance that after the operation due care and skill is observed and operation is successful one and in future she will not bear any child."

24. Defendant No. 3 in the written statement though has denied the allegations of negligence attributed to her being wrong, however, not responded to the averments in the plaint that after the operation was over, she assured the plaintiff that while conducting operation due care and skill has been observed and that the operation a successful and also that in future she will not bear any child. Therefore, such averments in the plaint remained uncontroverted. On the other hand, plaintiff in replication to the written statement filed on behalf of defendant No. 3 has categorically averred as under:-

> "4.....It would be pertinent to mention here that when she took advise from the defendant No. 3, she assured her that after operation no issue would be born out and it is a 100% successful operation and she will not suffer any physical problem after the operation, since the same is very minor and she has no need to further checking or apprehension of pregnancy and due to this assurance she opted to operate which subsequently failed due to negligence of the defendant No. 3....."

25. Now if coming to the evidence qua this aspect of the matter, the plaintiff while in the witness box as PW-1 in so many words has proved that field staff before she chosen to undergo the operation had assured that after the operation she will not carry any pregnancy. Her version in examination-in-chief is that two issues were already born to her. The field staff from the hospital came to her and they motivated her to undergo family planning operation and also assured that she will not carry any pregnancy thereafter. On this, she came to the hospital at Solan. The doctor assured her that she will be operated upon properly and that after the operation, there will be no scope of any pregnancy and of giving birth to any other child. Further that defendant No. 3 Dr. Maya Ahuja (defendant No. 3) though had conducted her operation in December, 1994, however, not in the manner as was proclaimed, because she after over one and a half year of such operation again carried the pregnancy. No suggestion was given to the plaintiff in her cross-examination that neither the field staff nor defendant No. 3 ever assured her that operation was successful and that she will not carry any pregnancy after the operation. Meaning thereby that when the assurance was given to the plaintiff that her operation was 100% successful and that she will not carry any pregnancy in future, she may have not even imagined that she is carrying pregnancy when there was menstrual break. The stand of the defendants is that the rate of failure of family planning operation is ranging between 5-7%, however, the present is a case where the plaintiff was not made to understand the same. Defendant No. 3 who

performed the surgery has, therefore, committed breach of the duty casts on her to apprise the plaintiff that the chances of failure of family planning operation were also there. Although, an effort has been made to believe that the plaintiff was advised to immediately report in the hospital in the event of becoming pregnant again and to get the pregnancy terminated, however, she never come to the hospital for her follow up subsequent to her operation conducted. It has come in para 3 of the written statement filed on behalf of defendant No. 3. She, however, has not said so while in the witness box that plaintiff was advised to do so when discharged from the hospital. Her statement in examination-in-chief that after the operation, the patients used to be guided properly to visit the hospital for check up in the case of some disturbance in menstruation is noticed or there being menstrual break and that in the event of patient become again pregnant after undergoing the operation, if willing the doctor may terminate the pregnancy also is general in nature. The plaintiff, however, while in the witness box has denied any such advice given to her after the operation. Any how, defendant No. 3 while in the witness box as DW-1 has admitted that the plaintiff had come to hospital for medical check up after becoming pregnant and that she was advised to get her admitted as an 'indoor patient' so that the pregnancy could be terminated but for the reasons best known to her, she failed to get her admitted in the hospital and perhaps was interested in giving birth to the child she had conceived. Such bald assertions without there being any proof, however, cannot be believed to be true for the reason that had it been so, some medical record should have been maintained in the hospital and the same produced in evidence. No doubt, the plaintiff had admitted her visit to the hospital and her check up by defendant No. 3 there, however, as per her version, she was advised not to go for termination of pregnancy being of 2-3 months old at the pretext that to do so may cause danger to her life. Such statement of the plaintiff is nearer to the factual position for the reason that as per her version immediately on noticing menstrual break, she visited the nearby hospital at Kandaghat. She was advised that she may not be pregnant but the menstrual break may be on account of she being weak. She was given some medicines also. No doubt, she failed to produce the prescription slip in evidence at the pretext that it was thrown by her, but it is not understandable as to why a poor lady will tell lie, had she not been went to the hospital at Kandaghat. It was rather for the defendants to produce the record of the hospital to rule-out the visit of the plaintiff there because in the hospital a register which contains the particulars of the patients coming to the hospital and the ailment, from which they are suffering, used to be entered. Therefore, the possibility of the plaintiff having first visited the hospital at Kandaghat and there she having came to know that she was pregnant and it is thereafter she visited defendant No. 3 in district hospital, Solan cannot be ruled-out. The plaintiff's version that it is the doctor who advised that to terminate the pregnancy at that stage would have been dangerous to her life cannot also be ruled-out. The testimony of defendant No. 3 to the contrary that she was advised to seek admission in the hospital for getting the pregnancy terminated without any proof cannot be believed to be true. Therefore, the present is a case where defendant No. 3 has failed to perform the duty casts on her as a surgeon to apprise the plaintiff that irrespective of the family planning operation conducted, in case the same fails and she become pregnant again and also that in such a situation she should rush to the hospital for further management. Such facts, however, were not in *Shiv Ram's* case supra before the apex Court and the observations in para 8 of that judgment "***the present one is not a case where the surgeon who performed the surgery has committed breach of any duty cast on her as a surgeon***" take out this case from the sweep of the above said judgment of the apex Court.

26. The further observations of the apex Court in para 25 of the judgment that "***So also, the surgeon cannot be held liable in contract unless the plaintiff alleges and proves that the surgeon had assured 100% exclusion of pregnancy after the surgery and was only on the basis of such assurance that the plaintiff was persuaded to undergo surgery***" also take out the present case from the sweep of the judgment supra because as noticed hereinabove, the plaintiff has satisfactorily pleaded and proved that the defendants at the time of persuading her to undergo family planning operation and even after conducting the operation also assured her about 100% success of the operation and also that she will not carry any

pregnancy after undergoing the operation in future. Para 25 of the judgment is also reproduced here as under:

> "**25**. We are, therefore, clearly of the opinion that merely because a woman having undergone a sterilization operation became pregnant and delivered a child, the operating surgeon or his employer cannot be held liable for compensation on account of unwanted pregnancy or unwanted child. The claim in tort can be sustained only if there was negligence on the part of the surgeon in performing the surgery. The proof of negligence shall have to satisfy *Bolam's* test. So also, the surgeon cannot be held liable in contract unless the plaintiff alleges and proves that the surgeon had assured 100 % exclusion of pregnancy after the surgery and was only on the basis of such assurance that the plaintiff was persuaded to undergo surgery. As noted in various decisions which we have referred to hereinabove, ordinarily a surgeon does not offer such guarantee."

27. True it is that in terms of the ratio of judgment supra, the failure of the family planning operation provides a valid and legal ground for termination of pregnancy. However, in the case in hand, in view of the assurance given to the plaintiff, she seems to have not thought even in dreams also that she can become pregnant again, inspite of having undergone sterilization operation when menses stopped. Even initially the doctor has also ruled-out the possibility of she having become pregnant. It came to her notice that she is pregnant when she went to district hospital, Solan. The pregnancy at that time was 3-4 months old and as such, defendant No. 3 advised her not to go for termination of pregnancy being dangerous to her life. Therefore, the plaintiff had no occasion to terminate the pregnancy. The plaintiff has, therefore, rightly said in the replication that she could know regarding the pregnancy at a very late stage in view of being under a bonafide belief that there was no question of conception by her after having undergone the operation.

28. It is worth mentioning here that the present is not a case where the surgeon Dr. Maya Ahuja, the 3rd defendant was not competent to conduct the operation but she has otherwise been found to have committed breach of duty cast upon her to advise or guide the plaintiff before conducting her operation or guided her to take post operative precautions such as rushing to hospital at once, if become pregnant and she rather was made to understand that the operation was 100% successful and that she will not bear any pregnancy in future. It is in this way, defendant No. 3 has committed the breach of duty casted on her as a surgeon. The present as such is a case where it is careless and negligent attitude attributed to defendant No. 3 and for that matter the doctor on duty in the hospital at Kandaghat that the plaintiff had given birth to 3rd child. Mr. Verma, learned Senior Advocate representing the plaintiff is, therefore, absolutely justified in claiming that the facts of this case are distinguishable from that in *Shiv Ram's* case before the Hon'ble apex Court.

29. The defendants have heavily relied upon the so called consent form Ext. D-A. It is seen that this document is in English language. The educational qualification of the plaintiff is 9th standard. True it is that as per her own version, she had studied English as a subject in 8th and 9th class, however, in the considered opinion of this Court, a person with qualification as 9th standard, cannot understand the contents of a document like consent form, Ext. D-A. In the replication she filed to the written statement, it is denied that she has voluntarily consented for her family planning operation and rather as per her version, she was made to sign some document without letting her know that there were chances of failure of the operation. Also that, she being illiterate, could not go through the contents of the consent form. As per her version, Ext. D-A is not binding upon her. If coming to the testimony of defendant No. 3, who has stepped in the witness box as DW-1 though in her examination-in-chief it is stated that the consent form Ext. D-A of the plaintiff was obtained and it is thereafter her operation was conducted, however, as per her version in the cross-examination the consent form, Ext. D-A may have filled in by the motivator/health worker in the family planning department. She expressed her inability to disclose the name of such motivator/health worker who filled in this form. In the same breath,

no doubt, she tells us that Ext. D-A was filled in her presence. However, once it is said that form might have been filled in by the motivator/health worker, how she could have turned around and said that the same was filled in her presence, because had it been so, she must have been knowing the name of such motivator/health worker. Being so, version of the plaintiff that she was made only to put her signature on the consent form seems to be nearer to the factual position. What was the qualification of the motivator/Health Worker who filled in the consent form also remained unexplained? It is also not known that he/she had read over and explained the contents of this document in vernacular to the plaintiff. Therefore, it would not be improper to conclude that the consent form Ext. D-A was got signed from the plaintiff in routine without apprising her about the contents thereof in vernacular. Therefore, on this score also, no case in favour of the defendants is made out. Learned lower appellate Court has considered this aspect of the matter in its right perspective.

30. The law laid down by learned Single Judge of this Court in ***State of H.P. and another*** V. ***Smt. Kalpana Chauhan and another in RSA No. 310 of 2002 dated 11.04.2014*** is also distinguishable on facts and as such, is hardly of any help to the case of the defendants.

31. Now if coming to the prayer in the suit, the plaintiff has claimed the decree for recovery of a sum of Rs.2,00,000/-. Learned lower appellate Court in the given facts and circumstances has, however, decreed the suit only for a sum of Rs.70,000/-. The acts of carelessness and negligence as discussed hereinabove are responsible for giving birth to 3rd child by the plaintiff. A sum of Rs.70,000/- is not even a fraction of the amount required for bringing up a child and to provide him good education as well as settling him in his life, because for this purpose, huge amount is required. It can reasonably be believed that carrying pregnancy and giving birth to a child is a painful process for a woman. Therefore, Rs.70,000/- is not sufficient to compensate the plaintiff on account of pain and sufferings she had to undergo during the period she was carrying pregnancy and at the time when she gave birth to child. Therefore, in a case of decree of such a meager amount, the defendant a welfare state otherwise also should have not raised such a hue and cry. It is observed so by this Court in a case titled the ***State of H.P and others*** V. ***Smt. Satya Devi RSA No. 43 of 2006 decided on March 11, 2016***.

32. In view of what has been said hereinabove, both the appeals fail and the same are accordingly dismissed. The judgment and decree under challenge is affirmed. No order so as to costs. Pending application(s), if any, shall also stand disposed of.

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

State of Himachal Pradesh ... Appellant

Versus

Hottam Ram ... Respondent

Cr. Appeal No. 27 of 2012
Reserved on: 29.08.2016
Date of decision: 09.09.2016

N.D.P.S. Act, 1985- Section 20- Accused started running on seeing the police- he was apprehended - his search was conducted during which 1.5 kg. charas was recovered- accused was tried and acquitted by the trial Court- held, in appeal that no independent witness was associated during the search and seizure - all the members of the police party were not examined - testimonies of police officials were contradictory- NCB form was filled in the same ink and in the same hand- there are other discrepancies in the testimonies of official witnesses- prosecution version was not proved beyond reasonable doubt - the trial Court had rightly acquitted the accused- appeal dismissed. (Para-18 to 25)

For the appellant: Mr. V.S. Chauhan, Addl. AdvocateGeneral, Mr. Vikram Thakur and Mr. Puneet Rajta, Deputy Advocate Generals.
For the respondent: Mr. Ajay Chandel, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of this appeal, State has challenged the judgment passed by the Court of learned Special Judge, Fast Track, Kullu, in Sessions Trial No. 63 of 2010 dated 30.09.2011, vide which, learned trial Court has acquitted the accused for commission of offence punishable under Section 20 of Narcotic Drugs & Psychotropic Substances Act.

2. The case of the prosecution was that on 04.07.2010, at about 5.00 p.m., Onkar Singh alongwith other police officials was going from Naggar road towards Saran Gaon on foot for patrolling duty. While on patrolling duty, police party saw one person coming from village Saran towards Naggar side at an isolated place on foot. This person, as soon as he saw the police party, started running. He was carrying one pink colour red bag in his hand. On the basis of suspicion, this person was nabbed by the police who on inquiry disclosed his name as Hottam Ram. SI Onkar Singh tried to associate some local person before conducting search of the accused, however, no local person was available at the site because the accused was nabbed at an isolated place. Accordingly faced with this situation, SI Onkar Singh associated ASI Lal Chand and Constable Hira Lal as witnesses. Thereafter, they gave their personal search to accused and this was followed with the search of the bag which was being carried by the accused. The police party found one polythene envelope inside the bag which was being carried out by the accused. In this polythene envelope Charas in the shape of pancake and rectangles was kept. Said Charas was weighed with the help of traditional scale and it was found to be 1 Kg. 500 grams. Thereafter, Charas was put back in the same envelope, which envelope was placed back in the same bag and wrapped in a apiece of cloth. This parcel was sealed with seal impression 'A' at six places and thereafter, SI Onkar Singh filled up NCB I form in triplicate. The specimen of the seal was taken on the NCB I form as well as on a piece of cloth. Thereafter, the seal was entrusted to ASI Lal Chand. Recovery and seizure memo were also prepared which were signed by the accused and witnesses. A Rukka was sent to Police Station on the basis of which FIR was registered. SI Onkar Singh prepared the site plan and also recorded the statements of the witnesses. Accused was arrested at around 8.00 P.M. near Saran Gaon. Arrest Memo was prepared and information about the arrest of the accused was given to his son. Thereafter, SI Onkar Singh alongwith accused came to the Police Station and produced the case property before SI/SHO, who resealed the same with seal 'K'. SI/SHO took samples of seal on pieces of cloth and also filled up relevant columns of NCB I form. The case property was deposited with MHC alongwith NCB form and sample seals. The case property was thereafter sent to FSL Junga alongwith other relevant documents. Chemical examination of the same revealed that the seized property was Charas.

3. After completion of the investigation, challan was filed in the Court and as a prima facie case was found against the accused, he was charged for commission of offence punishable under Section 20(b)(ii)(C) of Narcotic Drugs & Psychotropic Substances Act, to which, he pleaded not guilty and claimed trial.

4. In order to prove its case, prosecution in all examined 11 witnesses.

5. LC Meena Kumari entered the witness box as PW-1 and she deposed that on 06.07.2010 S.O. Onkar Singh had handed over special report to her with the direction to take the same to Dy. S.P. Manali, which direction was followed by her.

6. PW-2 HHC Sher Singh proved on record the receipt of special report which was handed over by Dy. S.P. Ashish Sharma to him.

7. PW-3 HC Gautam Chand proved on record that on 06.07.2010 MHC Police Station Manali handed over case property alongwith NCB I form and other relevant documents vide RC No. 148 of 2010 and he handed over the said case property and other relevant documents to dealing hand (at FSL Junga) on 07.07.2010. In his cross-examination, he stated that the case property was handed over to him by MHC at about 9.00 P.M. and he boarded HRTC night bus to Shimla at 9.30 P.M. and reached the laboratory on the next day at 10.00 A.M.

8. MHC Sher Singh entered the witness box as PW-4 and he deposed the factum of his having received the case property from SI Om Prakash and thereafter sending the case property to FSL Junga through PW-3.

9. Inspector Om Prakash entered the witness box as PW-5 and deposed that on 04.07.2010 he was performing the duties of SHO Police Station Manali when at 9.00 P.M. SI Onkar Singh handed over one parcel sealed with six impressions of seal 'O' alongwith NCB I form in triplicate and sample seal which were resealed by him with seal 'K' by affixing four impressions thereon. He also stated that thereafter he had handed over the parcel, NCB I form and samples seal to MHC for depositing the same in Malkhana.

10. ASI Shiv Singh entered the witness box as PW-6 and stated that he had carried out the investigation in the matter after the transfer of SI Onkar Singh and also recorded the statements of MHC Sher Singh, SI Om Prakash, HHC Gautam, HHC Sher Singh and LC Meena.

11. HHC Gurdial Singh entered the witness box as PW-7 and stated that on 04.07.2010 he entered rapat No. 21 regarding departure of police party for the purpose of patrol duty towards Naggar. He also stated that on the same day at 11.00 P.M., he entered rapat No. 35 when SI returned back to Police Post.

12. Constable Hira Lal entered the witness box as PW-8 and stated that on 04.07.2010 he alongwith ASI Lal Singh, SI Onkar Singh, Constable Narender Kumar and Constable Nikhil Kaundal were going towards village Saran from Naggar side on foot and they saw a person coming from Saran side towards Naggar side, who was carrying pink colour bag in his right hand. When that person saw the police party he turned back. Police party apprehended the accused and when his antecedents were asked, he disclosed his name as Hottam Ram. This witness further stated that they apprehended the accused at an isolated place. SI Onkar Singh associated him and ASI Lal Singh as witnesses. He further stated that SI Onkar Singh gave his personal search to the accused and Memo Ext. PW8/A was prepared which contained his signatures. This witness further stated that thereafter Onkar Singh conducted the search of the bag which was being carried by the accused and the bag contained one polythene envelope in which Charas in pancake and rectangular shape was found. The same was weighed with the help of traditional balance which was in the kit of the Investigating Officer and the same was found to be weighing 1Kg. and 500 grams. This witness further deposed that thereafter the Charas was put back in the polythene envelope and the bag which were wrapped in a piece of cloth and parcel was sealed with seal impressions of seal 'O' at six places. SI filled the NCB form and parcel was taken into possession vide recovery memo Ext. PW8/B which he signed as a witness. He stated that the same was also signed by ASI Lal Chand and the accused. As per him, SI Onkar Singh prepared Rukka, which was handed over to him with the direction to take the same to Police Station Manali. PW-8 further stated that he handed over the Rukka to MHC Sher Singh and took back the case file to the spot. In his cross-examination, this witness stated that statement Ext. DB which was his statement recorded under Section 161 Cr.P.C. was in his own hand. He admitted that village Saran and Naggar are adjoining to Rorik Art Gallery. He stated that the police party started from P.P. Patlikuhl at 2.30 P.M. and they went upto Art Gallery in a private vehicle. He further stated in his cross-examination that they were three persons when they started from P.P. Patlikuhl and near Art Gallery, ASI Lal Chand and Constable Narender Kumar met them. He further stated that they walked for about 5 minutes, after they got down from the vehicle and ASI Lal Chand and Constable Narender met them near the Art Gallery. He admitted that in his statement Ext. DB it was not recorded that the accused was arrested in his presence and Memo to this effect was prepared. He further stated in his cross-examination that

he scribed Ext. DB after the Rukka was taken by him to the Police Station. He stated that Rukka was handed over to him at 6.15 P.M. He walked some distance on foot and thereafter, took lift upto Chowk and then went in another vehicle to Police Station Manali, where he reached at 7.20 P.M. He stated that Police Station Manali was at a distance of about 24-25 KM from Naggar. He admitted that distance between Rorik Art Gallery was about 2.5 KM from Naggar Chowk. He stated that MHC handed over case file to him at 7.35 P.M. and he reached back at the spot alongwith the case file in between 8.00 to 8.20 P.M. by taking lift in a private vehicle. He admitted it to be correct that he was present at the Police Station at 7.50 P.M.

13. SI Onkar Singh entered the witness box as PW-9 and he also reiterated the factum of apprehending the accused on 04.07.2010 from whom Charas was recovered. This witness stated that the accused was arrested at an isolated place and he tried to search for local witnesses but no one was available there. He stated that he in these circumstances associated ASI Lal Chand and Constable Hira Lal as witnesses and thereafter, conducted the search and seizure. This witness stated that he checked the carry bag which was in the hand of the accused and found one polythene bag containing pancake and stick shape Charas in it. He weighed the Charas which was found to be 1Kg. 500 grams. Charas was again put back in the same polythene bag and thereafter placed in pink colour bag which was wrapped in white coloured cloth. The parcel was sealed with seal impressions of seal 'A' at six places and he also filled up NCB form in triplicate. This witness further stated that he prepared Rukka and handed over the same to Constable Hira Lal, which he took to Police Station. This witness further deposed that he had drawn the sample of seal on pieces of cloth. He also stated that statements of the witnesses were recorded as per their versions. In his cross-examination, he stated that they went upto Naggar Chowk in a private vehicle. He further deposed that he could not tell the registration number of the vehicle, name of the driver or name of the owner of the vehicle. This witness further stated that police party went upto the spot on foot from Naggar Chowk. He also deposed that they stopped at Art Gallery for few minutes as they were on patrolling duty and many tourists were there at the Art Gallery. He further stated that they stopped at the Art Gallery at about 4.30 P.M. and started from there at 4.45 P.M. He further stated that they spotted the accused coming from village Saran side at a distance of about 20 meters. According to this witness, accused turned back and ran a distance of 10 meters before the accused was nabbed by them. This witness further deposed that he tried to locate and associate local panch witnesses from nearby locality but no one was available as the accused was apprehended at an isolated place. According to him, the accused was apprehended at a distance of 500 meters away from Art Gallery. He also stated that he did not go upto Art Gallery for search of panch witnesses. According to him, Charas was recovered at 5.10 P.M. and he handed over Rukka to Constable Hira Lal at 6.15 P.M. Incidentally, this witness says that statement of Hira Lal was dictated by him and scribed by Hira Lal himself. He also deposed that he had added FIR No. in Ext.PW4/D after receiving the case file.

14. On the basis of material produced on record by the prosecution, learned trial Court held that the prosecution had miserably failed to prove that 1Kg. 500 grams Charas were found from the conscious and exclusive possession of the accused. Accordingly, learned trial Court acquitted the accused for commission of offence under Section 20 of Narcotic Drugs & Psychotropic Substances Act.

15. Mr. V.S. Chauhan, learned Additional Advocate General argued that the judgment of acquittal returned by learned trial Court in favour of the accused is perverse and the findings so returned by learned trial Court are not based on the material produced on record by the prosecution. Mr. Chauhan argued that it stood proved from the material that was placed on record by the prosecution, both ocular as well as documentary, that the accused was found in exclusive and conscious possession of 1 Kg. 500 grams of Charas. According to Mr. Chauhan, the factum of the accused having been apprehended with the said narcotic was duly substantiated by the prosecution witnesses and there was no reason for learned trial Court to have disbelieved the cogent and reliable testimony of the prosecution witnesses. It was further argued by Mr. Chauhan that the inference drawn by learned trial Court to acquit the accused

on the ground that no independent witness had been associated by the prosecution was not sustainable because learned trial Court failed to appreciate this aspect of the matter that as the accused was apprehended at an isolated place, it was not possible for the police to have had associated any independent witness. Mr. Chauhan further argued that even otherwise it stood substantiated from the testimony of the Investigating Officer and Hira Lal that the search and seizure had been done strictly as per the provisions of the NDPS Act. Mr. Chauhan further argued that learned trial Court had erred in not appreciating that there were no major contradictions and inconsistencies in the statements of prosecution witnesses. Minor inconsistencies if any in no manner impinged the trustworthiness of the said witnesses. On these basis, it was argued by Mr. Chauhan that the judgment of acquittal passed by learned trial Court was not sustainable in law and the same was liable to be set aside.

16. Mr. Ajay Chandel, learned counsel for the respondent, on the other hand, argued that there was neither any perversity nor any infirmity with the findings of acquittal returned by learned trial Court in favour of the accused. According to Mr. Chandel, the material produced on record by the prosecution did not prove beyond reasonable doubt that the accused was in fact apprehended by the police party with Charas. Mr. Chandel argued that the reason as to why no independent witness was associated by the Investigating Officer was that in fact the accused had not been apprehended by the police at all. According to him, the entire case of the prosecution was concocted and the accused was falsely implicated in the case. Mr. Chandel further argued that the testimony of the prosecution witnesses which comprised only of police witnesses was neither cogent nor the same was trustworthy. He further argued that there were many contradictions and inconsistencies in the same which created great doubt on the truthfullness of the case of the prosecution. Accordingly, he prayed that there was no merit in the present appeal and the same be dismissed.

17. We have heard learned counsel for the parties and also gone through the records of the case as well as the judgment passed by learned trial Court.

18. Admittedly, in the present case, no independent witness has been associated by the Investigating Officer in the search and seizure carried out at the spot by the Investigating Officer. The reason for this given by the Investigating Officer and other prosecution witnesses is that the accused was apprehended at an isolated place and because of this no independent witness could be associated. In our considered view, the said reason which has been putforth by the prosecution does not inspires confidence. It has come in the testimony of the Investigating Officer that the police party in fact had stopped at Rorik Art Gallery at 4.30 P.M. because lot of tourists were there and the police party left the said place at 4.45 P.M. This witness has further deposed that after the accused was apprehended and search was conducted, Charas was recovered at 5.10 P.M. This means that the accused was apprehended by the police party between 4.45 P.M. and 5.10 P.M. If the police party had apprehended the accused within 15 to 25 minutes of leaving Rorik art Gallery, it is not understood as to why no person of the police party was sent by the Investigating Officer to search for an independent witness. This shrouds the case of the prosecution with suspicion. We are not oblivious to the fact that it is not as if in each and every case independent witnesses have to be associated by the prosecution to prove its case but in our considered view, in the peculiar facts and circumstances of the present case, non-association of the independent witness creates serious doubts about the story as has been propounded by the prosecution.

19. As per prosecution, the search and seizure of Charas from the accused has been witnessed by Constable Hira Lal and ASI Lal Chand. Though, constable Hira Lal has entered the witness box as PW-8, however, ASI Lal Chand was not examined by the prosecution as a witness. As per PW-8 Constable Hira Lal, the police party which had apprehended the accused comprised of ASI Lal Singh, SI Onkar Singh, Constable Narender Kumar and Constable Nikhil Kaundal. However, except PW-8 Constable Hira Lal and Investigating Officer Onkar Singh, none of the other persons who were members of the police party were examined by the prosecution. Why no

other member of the police party was examined by the prosecution to substantiate its case, could not be satisfactorily explained by the appellant/State.

20. Now coming to the testimony of Constable Hira Lal, who entered the witness box as PW-8. This witness has stated that his statement recorded under Section 161 Cr.P.C. was written in his own hand. He has admitted in his cross-examination that it was not recorded in statement Ext. DB that the accused was arrested in his presence and Memo to this effect was also prepared. This witness has further deposed that after taking Rukka to the Police Station he reached the spot back alongwith the case file between 8.00 to 8.20 P.M. In the same breath, he has admitted it to be correct that he was present at Police Station Manali at 7.50 P.M. In other words, this witness wants this Court to believe that distance of 24-25 KM between Police Station Manali and Naggar was covered by this witness between 10 to 20 minutes. PW-9 SI Onkar Singh in his cross-examination has admitted that he had not gone upto Art Gallery to search for independent witnesses. He stated in his cross-examination that accused was apprehended at a distance of 500 meters from Art Gallery. Incidentally, in his cross-examination, Investigating Officer has stated that the statement of Hira Lal was dictated by him and the same was scribed by Hira Lal himself. Further, Hira Lal has stated in his cross-examination that he reached back at the spot alongwith case file between 8.00 to 8.20 P.M., whereas PW-9 in his cross-examination has stated that they started from the spot at 8.00 P.M.

21. NCB form is on record as Ext. PW4/D. A perusal of the same demonstrates that case FIR No. was already written on it in the same handwriting and with the same pen with which the other contents of the said form have been filled in. In the said NCB form, the date and time of the seizure has been mentioned as 4.7.2010 at 6.00 P.M. near village Saran. Against column No. 7 of the said form which pertains to date of dispatch by the officer to Police station, the date is mentioned as 04.07.2010 and time of discharge is mentioned as 9.00 P.M. However, a perusal of column No. 10 of the said form demonstrates that date and time and place of deposit of the case property with MHC has been mentioned as 04.07.2010 at 9.00 P.M. at Police station Manali.

22. In our considered view, the factum of the mentioning of FIR No. in the NCB form in the same ink and hand in which columns No. 1 to 8 had been filled up coupled with the fact that the time of dispatch and time of deposit of the case property with MHC is both 9.00 P.M., the case of the prosecution becomes highly suspicious. As we have already taken note of above, village Naggar is at a distance of 24-25 KM from Police Station Manali and as per PW-8, he started from the spot where the accused was allegedly apprehended by the police party for Police Station Manali alongwith Rukka at 6.15 P.M. and he reached there at 7.20 P.M. This witness further deposed that he reached back to the spot alongwithg the case file in between 8.00 to 8.20 P.M. In his cross-examination, PW-8 has stated that the file was handed over to him by the MHC at 7.35 P.M. This testimony of PW-8 is contrary to the daily diary entries for 04.07.2010 where arrival of PW-8 at Police station has been shown against entry No. 29 as 7.20 P.M. and his departure has been shown against entry No. 31 as 7.50 P.M. We have also taken note of the fact that it is highly improbable and impossible to cover a distance of about 24-25 KM within a period of 25 minutes in hilly terrain.

23. Besides this, there are other major discrepancies in the statements of PW-8 and PW-9. According to PW-8 Constable Hira Lal, he reached the spot in a private vehicle and thereafter, he scribed the statement Ext. DB under Section 161 Cr.P.C. and he has also stated that he was a witness to the arrest Memo. The factum of alteration in the time of arrest in the arrest Memo has been admitted by the Investigating Officer PW-9, who stated that Hira Lal in fact had met the police about 1 KM away from the spot. This testimony of his also weakens the case of the prosecution because according to PW-8, he had scribed his statement Ext. DB at the spot and the accused was also arrested at the spot. PW-8 in his statement has also deposed that the Charas which was recovered from the accused was in the shape of pancake and rectangular. On the other hand, PW-9 in his statement has deposed that the Charas which was recovered from the accused was in the shape of pancake and stick shape. A perusal of NCB form

demonstrates that the recovered Charas was in the shape of Chapati. All these discrepancies, inconsistencies and contradictions in the statements of the prosecution witnesses creates a serious doubt as to whether the accused was actually apprehended by the police in the mode and manner, as has been putforth by the prosecution and whether the Charas was actually recovered from the exclusive and conscious possession of the accused as prosecution wants this Court to believe.

24. A perusal of the judgment passed by learned trial Court demonstrates that all these aspects of the matter have been gone into in detail by learned trial Court and thereafter, learned trial Court has come to the conclusion that the prosecution was not able to prove its case against the accused beyond reasonable doubt. It was held by learned trial Court that the contradictions in the case of the prosecution led to two views including a view which is in favour of the accused. On these basis it was held by learned trial Court that when two views are possible then the view which favours the accused has to be taken. On these basis, the accused was acquitted by learned trial Court.

25. In our considered view, the findings so returned by learned trial Court are well founded and are borne out from the appreciation of the material placed on record by the prosecution. The evidence which has been produced on record by the prosecution both ocular as well as documentary does not prove beyond reasonable doubt that the accused in fact was apprehended by the police party on 04.07.2010 at village Saran in the mode and manner in which the prosecution wants this Court to believe, nor the prosecution has been able to establish beyond reasonable doubt that 1Kg. 500 grams Charas was recovered from the exclusive and conscious possession of the accused beyond reasonable doubt. Therefore, while upholding the findings returned by learned trial Court, we dismiss the present appeal being devoid of any merit. Bail bonds, if any, furnished by the accused are discharged.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh .....Appellant.

Versus

Satnam Singh & another. .....Respondents.

Cr. Appeal No. 80 of 2013

Date of decision: September 9, 2016.

N.D.P.S. Act, 1985- Section 20- Accused was travelling in a bus- he was occupying seat No.23 and 24 and had kept one carry bag in between them- police party signaled the bus to stop- search of the bag was conducted during which 2.5 kgs. Charas was recovered from the bag- accused was tried and acquitted by the trial Court on the basis of Division Bench judgment of High Court **Sunil** Vs. **State of Himachal Pradesh**, **Latest HLJ 2010 (HP) 207** but the same has been overruled in **State of Himachal Pradesh** versus **Mehboob Khan 2013(3) Him.L.R. (FB) 1834** – therefore, judgment of trial Court is not sustainable- appeal allowed and case remanded to trial Court for a fresh disposal in accordance with the law. (Para-8 to 10)

Cases referred:

Sunil Vs. State of Himachal Pradesh, Latest HLJ 2010 (HP) 207

State of Himachal Pradesh versus Mehboob Khan 2013(3) Him.L.R. (FB) 1834

For the appellant Mr. D.S. Nainta and Mr. Virender Verma, Addl. AGs.

For the respondents Ms. Kanta Thakur, Advocate, for respondent No. 1.

Mr. N. K. Thakur, Sr. Advocate with Mr. Ramesh Sharma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

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

State of Himachal Pradesh is in appeal before this Court. The complaint is that learned Special Judge, Chamba, Division at Chamba has erroneously acquitted the respondents, hereinafter referred to as 'the accused' from the charge under Sections 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, hereinafter referred to as 'the NDPS Act' in short vide judgment dated 24.11.2012 passed in Sessions trial No. 27 of 2012. The impugned judgment has thus been sought to be quashed and set aside with further prayer that both accused be convicted and sentenced for the commission of the offence they committed as per law.

2. The facts in a nut shell are that on 25.2.2012 a police patrol headed by ASI Harish Kumar PW11 and comprising HC Rajinder Kumar, HC Hem Raj (PW2) and HHC Raj Kumar left for patrolling towards Sahoo and Sillagharat area in wee hours (early morning). Rapat Ext.PW6/A to this effect was entered in the rapat rojnamcha. Around 7:45A.M. the police party had laid a Nakka at Ludera Forest Check Post. Suresh Kumar PW1 the forest guard and forest worker Baldev Singh on duty in the check post were also present at the spot. Around 8:00 A.M. Shiva Coach, a private bus, bearing registration No. HP-68-0676 arrived at the place of *Nakka*. PW11 got the bus stopped for its checking by the police party. During the course of checking the bus the accused who were found to be occupying seat Nos. 23 and 24 had kept one carry bag in between them. On inquiry they both claimed the bag to be their. On suspicion having arisen they both were made to alight from the bus. On inquiry they disclosed their names and other particulars. PW11 on suspicion that the accused may be carrying some drug or psychotropic substance in the bag deemed it appropriate to conduct the search of the bag. Before that he apprised them about their legal right of being searched either before a nearby Magistrate or gazetted officer vide memos Ext.PW1/D and Ext.PW1/E in the presence of Suresh Kumar PW1 and Baldev Singh. They however, opted for the search of the bag by the police present there. On this PW11 had first offered his search to the accused and memo Ext.PW1/A was prepared in this regard. Nothing incriminating was recovered from his possession. On conducting the search of the bag being carried by the accused *charas* in the shape of *Batties* was recovered therefrom. The same was kept beneath a red and white coloured shawl. The recovered *charas* was weighed and found to be 2Kg and 500 grams. The *charas* was packed again in that very bag. The same was sealed in a parcel of cloth with five impressions of seal 'R' and taken in possession vide seizure memo Ext.PW1/C. The sample of seal 'R' was taken on a piece of cloth which is Ext.PW1/B. The I.O. had prepared Rukka Ext.PW10/A and it was sent to Police Station, Sadar Chamba through HC Hem Raj (PW2) for registration of FIR. On the basis of Rukka the FIR Ext.PW10/C came to be registered in the police station.

3. The I.O PW11 had completed all codel formalities including filling up NCB form in triplicate and preparation of spot map on the spot. The accused were apprised about the offence they committed and the sentence prescribed therefor vide memos Ext.PW1/F and Ext.PW1/G. They both were thereafter arrested and taken in custody. The information qua their arrest was also given to the persons of their choice. The personal search of both accused were also conducted vide memos Ext.PW1/H and Ext.PW1/J.

4. On the same day, PW11 produced the case property before SI/SHO Prem Dass PW10 in the police station. The witness has resealed the parcel containing the case property with impression of seal 'T' and thereafter deposited the same with Pawan Kumar MHC Police Station, Sadar Chamba.

5. PW5 in turn had sent the case property to Forensic Science Laboratory, Junga through C. Amit Kumar. The report Ext.PA was received from the Forensic Science Laboratory and as per the same the contraband recovered from the accused was found to be the extract of cannabis and as such *Charas.*

6. On the completion of the investigation, report under Section 173 of the Code of Criminal Procedure came to be filed in the trial Court against both accused.

7. Learned Special Judge on going through the police report and the documents annexed therewith has prima-facie found a case under Section 20 of the NDPS Act made out against the accused. Charge against both of them was framed accordingly. They however pleaded not guilty.

8. The prosecution in order to sustain charge against them has examined oral as well as documentary evidence. The material prosecution witnesses are Suresh Kumar Forest Guard PW1, and HC Hem Raj PW2. PW3 Raj Kumar is the driver of the bus in which the accused were traveling whereas Ravinder Kumar PW4 is its conductor. The I.O. is PW11. The remaining prosecution witnesses HC Pawan Kumar, HHC Gian Chand, C. Amit Kumar, C. Rajesh Kumar, HC Subhash Sharma and ASI Prem Dass PWs 5 to 10 are formal as they remained associated during the investigation of this case in one way or the other. The statement of the accused under Section 313 Cr.P.C. were also recorded. They however, have not opted for leading any evidence in their defence.

9. On the completion of record and hearing learned Public Prosecutor as well as defence counsel learned Special Judge while placing reliance on a Division bench judgment of this Court in ***Sunil*** Vs. ***State of Himachal Pradesh***, ***Latest HLJ 2010 (HP) 207*** has arrived at a conclusion with the following observations:

> "....18. After having discussed the reports in detail, the Hon'ble High Court went on to hold that the reports did not prove that the stuff recovered from the accused was Charas as they were not in consonance with the provisions of Section 2(iii)(a) of the Act.
>
> 19. In para 31 of the Sunil Kumar's judgment, referred hereinabove supra, the Hon'ble High Court further observed as under:
>
> 'in view of the above stated position, we hold that Experts report in non of these six cases prove that the stuff recovered from the appellants/accused was Charas. The possibility of the stuff recovered from them being only bhang i.e. the dried leaves of cannabis plant, possession of which is no offence, cannot be ruled out.'
>
> 20. The learned counsel for the accused(s) has further urged that the a foresaid proposition has further been reiterated by the Hon'ble High court in '**Bajinder Singh vs. State of hp, Latest HLJ 2010(2) 1263 (HP), Om Parkash vs. State of H.P., Latest HLJ 2012 (HP) 474, Lekh Raj Vs. State of H.P., Latest HLJ 2012 (HP) 41** and also in **State of H.P. Vs. Ranjeet Ram 2011 Latest HLJ (HP) 1466** and very recently in **2012(3) RCR 370 (Criminal) Hukam Singh Vs. State of Himachal Pradesh.**
>
> 21. It is thus clear that the judgment rendered in Sunil Kumar's case has consistently been followed by the Hon'ble High Court till date.
>
> 22. It would not be out of place to now reproduce the result of the examination rendered by the State Forensic Science Laboratory, Junga in the present case, vide Ex. PA. It reads thus:
>
> 'Various scientific tests such as physical identification, chemical and chromatographic analyses were carried out in the laboratory with the exhibit under reference, The above tests performed indicated the presence of cannabinoids including the presence of tetrahydrocannabinol in the exhbt. The miscroscopic examination indicated the presence of Cystolithic hairs in the exhibit. Charas is a resinous mass, which on testing was found present in the exhibit. The quantity of resin as found in the exhibit is 23.79% w/w. The result thus obtained is given below:
>
> **The exhibit is extract of cannabis and sample of CHARAS.**

23. The perusal of the result of the examinations of the contraband found in possession of the two accused in the present case is verbatim, the same as have been considered by the Hon'ble High Court in Sunil Kumar's judgment, referred hereinabove supra and the other judgments discussed hereinabove. That being so, it can well be said that the contraband recovered from the possession of the accused(s) has not been proved to be Charas or the same being resin of charas and is not in consonance with the definition so provided under section 2(iii)(a) of the Act, as has been held by our Hon'ble High Court in catena of decision discussed hereinabove supra.

24. Keeping in view the mandate laid down by the Hon'ble High Court, the other aspects of the case are hardly required to be gone into, as the prosecution has failed to prove that the accused(s) were found in possession of Charas. The prosecution having failed to prove that the stuff recovered from the accused was the resin of Charas."

10. It is worth mentioning that a Larger Bench of this Court in ***State of Himachal Pradesh*** versus ***Mehboob Khan 2013(3) Him.L.R. (FB) 1834*** has reconsidered the law laid down by the Division in ***Sunil's*** case supra and concluded as under:-

a. After taking into consideration Section 293 of the Code of Criminal Procedure, Sections 45 and 46 of the Indian Evidence Act and the Law laid down by the apex Court as well as various High Courts discussed in detail hereinabove, we conclude that on account of non-consideration of the same by the Division Bench, which has rendered the judgment in ***Sunil's*** case, correct law on the expert opinion and the reports assigned by the scientific expert after analyzing the exhibit has not been laid down.

b. We further conclude that on account of non-consideration of various reports of the United Nations Office on Drugs and Crime including Single Convention on Narcotic Drugs, 1961 and to the contrary placing reliance on the text books, which basically are on medical jurisprudence, the Division Bench in ***Sunil's*** case failed to assign correct meaning to 'charas' and 'cannabis resin', the necessary constituents of an offence punishable under Section 20 of the NDPS Act.

c. In view of the detailed discussion hereinabove, the Division Bench while deciding ***Sunil's*** case supra has definitely erred in taking note of the percentage of tetrahydrocannabinol in three forms of cannabis i.e. Bhang, Ganja and Charas and hence, concluded erroneously that without there being no reference of the resin contents in the reports assigned by the Chemical Examiners in those cases, the contraband recovered is not proved to be Charas, as in our opinion, the Charas is a resinous mass and the presence of resin in the stuff analyzed without there being any evidence qua the nature of the neutral substance, the entire mass has to be taken as Charas.

d. There is no legal requirement of the presence of particular percentage of resin to be there in the sample and the presence of the resin in purified or crude form is sufficient to hold that the sample is that of Charas. The law laid down by the Division Bench in Sunil's case that 'for want of percentage of tetrahydrocannabinol or resin contents in the samples analyzed, the possibility of the stuff recovered from the accused persons being only Bhang i.e. the dried leaves of cannabis plant, possession of which is not an offence, cannot be ruled out', is not a good law nor any such interpretation is legally possible. The percentage of resin contents in the stuff analyzed is not a determinative factor of small quantity, above smaller quantity and lesser than commercial quantity and the commercial quantity. Rather if in the

entire stuff recovered from the accused, resin of cannabis is found present on analysis, whole of the stuff is to be taken to determine the quantity i.e. smaller, above smaller but lesser than commercial and commercial, in terms of the notification below Section 2 (vii-a) and (xxiii-a) of the Act.

e. We have discussed the Single Convention on Narcotic Drugs, 1961 in detail hereinabove and noted that resin becomes cannabis resin only when it is separated from the plant. The separated resin is cannabis resin not only when it is in 'purified' form, but also when in 'crude' form or still mixed with other parts of the plant. Therefore, the resin mixed with other parts of the plant i.e. in 'crude' form is also charas within the meaning of the Convention and the Legislature in its wisdom has never intended to exclude the weight of the mixture i.e. other parts of the plant in the resin unless or until such mixture proves to be some other neutral substance and not that of other parts of the cannabis plant. Once the expert expressed the opinion that after conducting the required tests, he found the resin present in the stuff and as charas is a resinous mass and after conducting tests if in the opinion of the expert, the entire mass is a sample of charas, no fault can be found with the opinion so expressed by the expert nor would it be appropriate to embark upon the admissibility of the report on any ground, including non-mentioning of the percentage of tetrahydrocannabinol or resin contents in the sample.

f. We are also not in agreement with the findings recorded by the Division Bench in ***Sunil's*** case that "mere presence of tetrahydrocannabinol and cystolithic hair without there being any mention of the percentage of tetrahydrocannabinol in a sample of charas is not an indicator of the entire stuff analyzed to be charas" for the reason that the statute does not insist for the presence of percentage in the stuff of charas and mere presence of tetrahydrocannabinol along with cystolithic hair in a sample stuff is an indicator of the same being the resin of cannabis plant because the cystolithic hair are present only in the cannabis plant. When after observing the presence of tetrahydrocannabinol and cystolithic hair, the expert arrives at a conclusion that the sample contains the resin contents, it is more than sufficient to hold that the sample is of charas and the view so expressed by the expert normally should be honoured and not called into question. Of course, neutral material which is not obtained from cannabis plant cannot be treated as resin of the cannabis plants. The resin rather must have been obtained from the cannabis plants may be in 'crude' form or 'purified' form. In common parlance charas is a hand made drug made from extract of cannabis plant. Therefore, any mixture with or without any neutral material of any of the forms of cannabis is to be considered as a contraband article. No concentration and percentage of resin is prescribed for 'charas' under the Act."

10. A Larger Bench, therefore, has held that the judgment in ***Sunil's*** case supra does not lay down the correct legal position as to what is Charas and what shall be its constituents in legal parlance and as such not to be followed. Therefore, in view of the Larger Bench judgment in ***Mehboob Khan***'s case supra, the impugned judgment can not be said to be legally and factually sustainable and the same as such is quashed and set aside. The case, however, is remanded to learned trial Court for fresh disposal in accordance with law. The parties through learned counsel representing them are directed to appear before the trial Court on ***5th October, 2016***. Record be sent back so as to reach in the trial Court well before the date fixed.

11. The appeal is accordingly allowed and stands disposed of.

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

The New India Assurance Co. Ltd. .....Appellant.
Versus
Smt.Neelam Kumari Mongra and others .....Respondents

FAO (MVA) No. 103 of 2011.
Date of decision: 9th September, 2016.

Motor Vehicles Act, 1988- Section 173- Insurer was saddled with liability with the right of recovery from the owner- appeal was filed by him on the ground that he is not liable- held, that law had gone through sea change and the insurer had to satisfy the award with right of recovery- appeal dismissed. (Para-2 and 3)

For the appellant: Mr. B.M. Chauhan, Advocate.
For the respondents: Mr. Ramakant Sharma, Sr. Advocate with Mr. Soma Thakur, Advocate, for respondents No. 1 to 3.
Ms. Archana Dutt, Advocate, for respondent No.7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, Oral).

This appeal is directed against the judgment and award dated 5.10.2010, made by the Motor Accident Claims Tribunal, Fast Track Court, Kangra at Dharamshala, H.P., in MACP No. 37-K/2006, titled *Smt. Neelam Kumari Mongra and others versus Chuni Singh and others*, for short "the Tribunal", whereby compensation to the tune of Rs.28,17,000/- alongwith interest @7.5% per annum came to be awarded in favour of the claimants, and insurer was saddled with the liability with right of recovery from the owner/insured, hereinafter referred to as "the impugned award", for short.

2. It appears that the insurer has filed appeal in view of the law which was applicable at the time of passing the impugned award for the reason that the insured was to be saddled with the liability. Now the law has gone through sea change and the insurer has to satisfy the award with right of recovery.

3. The insured has not questioned the impugned award.

4. Having said so, the appeal is not maintainable and is dismissed as such.

5. The Registry is directed to release the awarded amount in favour of the claimants, through payees' cheque account or by depositing the same in their bank accounts, strictly as per the terms and conditions contained in the impugned award. The insurer is at liberty to lay motion for recovery before the Tribunal.

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

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

United India Insurance Company Ltd. .....Appellant
Versus
Smt. Mansa Devi & others .....Respondents

FAO No. 248 of 2011
Decided on : 09.09.2016.

Motor Vehicles Act, 1988- Section 166- **Insurance Act, 1938-** Section 64-VB- It is for the insurer to prove that insurer was intimated- if no intimation is given and the accident takes place in the meantime, Insurer is liable – appeal dismissed. (Para-9 to 15)

Cases referred:

New India Assurance Co. Ltd. versus Rula and others, AIR 2000 Supreme Court 1082,
Deddappa & Ors. versus The Branch Manager, National Insurance Co. Ltd., 2007 AIR SCW 7948
United India Insurance Co. Ltd. versus Laxmamma & Ors., 2012 AIR SCW 2657
M/s New Prem Bus Service versus Laxman Singh & another, Latest HLJ 2014 (HP) 579
United India Insurance Company Ltd. Versus Smt. Sanjana Kumari & others, Latest HLJ 2014 (HP) 1140

For the Appellant :	Mr. Ashwani K. Sharma, Senior Advocate with Mr. Ishan Thakur, Advocate.
For the Respondents:	Mr. Ajay Sharma, Advocate, for respondent No.1. Respondents No. 2 & 4 already ex-parte. Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject matter of this appeal is the award dated 23rd April, 2011, made by the Motor Accident Claims Tribunal, Kangra at Dharmshala, (H.P.) (hereinafter referred to as 'the Tribunal') in M.A.C.P No. 52-G/2003, titled as **Smt. Mansa Devi & another** versus **Paramjeet Singh & others,** whereby compensation to the tune of Rs. 1,00,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition, was granted in favour of the claimants and the insurer came to be saddled with liability (for short, "the impugned award").

2. The other respondents, except the appellant-insurer of Truck No. AP-03/W-11, have not questioned the impugned award, on any count. Thus, it has attained finality, so far it relates to them.

3. The appellant-insurer of Truck No. AP-03/W-11 has questioned the impugned award on the following two grounds:

> "*(i) The accident was outcome of the contributory negligence of the drivers of the offending vehicles, i.e. trucks bearing registration Nos. HR-55-A-5651 and AP-03/W-11.*
>
> *(ii) The premium amount was made by cheque, which was dishonoured and intimation was sent to the owner of truck No. AP-03/W-11, thus the owner of Truck No. AP-03/W-11, i.e. respondent No. 4 in the appeal and respondent No. 3 in the claim petition, was to be saddled with liability."*

4. Both the grounds are not tenable for the following reasons.

5. The Tribunal has discussed the pleadings and the evidence led by the parties from paras 9 to 15 of the impugned award and held that the accident was not outcome of the contributory negligence of the drivers of both the trucks, but was caused by the driver of Truck No. AP-03/W-11, while driving the same rashly and negligently.

6. I have perused the entire record and am of the considered view that the Tribunal has rightly held that the accident was outcome of the rash and negligent driving of the driver of Truck No. AP-03/W-11.

7. The owner of Truck No. AP-03/W-11 had not filed reply to the claim petition, thus, the averments made in the claim petition remained unrebutted, are deemed to have been admitted in terms of the mandate of the Code of Civil Procedure.

8. Having said so, the Tribunal has rightly decided issue No. 1.

9. It was for the appellant-insurer of Truck No. AP-03/W-11 to prove that they have followed the mandate of Section 64-VB of the Insurance Act, 1938 (hereinafter referred to as "the Insurance Act") .

10. In terms of Section 64-VB of the Insurance Act read with the provisions of Sections 147 to 149 of the Motor Vehicles Act, 1988 (for short "MV Act"), the insurer has to intimate the insured, which has not been done in the present case, and if intimation is not given and during that period, the accident happens, it is the insurer, who is liable.

11. The Apex Court in the case titled as **New India Assurance Co. Ltd. versus Rula and others,** reported in **AIR 2000 Supreme Court 1082,** has held that the insurer has to mandatorily intimate the owner by way of notice about the cancellation of insurance policy and if the accident occurs between the period till the cancellation is conveyed, it is the insurer, who is liable. It is apt to reproduce para 11 of the judgment herein:

> *"11. This decision, which is a 3-Judge Bench decision, squarely covers the present case also. The subsequent cancellation of the Insurance Policy in the instant case on the ground that the cheque through which premium was paid was dishonoured, would not affect the rights of the third party which had accrued on the issuance of the Policy on the date on which the accident took place. If, on the date of accident, there was a Policy of Insurance in respect of the vehicle in question, the third party would have a claim against the Insurance Company and the owner of the vehicle would have to be indemnified in respect of the claim of that party. Subsequent cancellation of Insurance Policy on the ground of non-payment of premium would not affect the rights already accrued in favour of the third party."*

12. The matter again came up for consideration before the Apex Court in **Deddappa & Ors. versus The Branch Manager, National Insurance Co. Ltd.,** reported in **2007 AIR SCW 7948,** and the same principle has been laid down. It is apt to reproduce paras 26 to 28 of the judgment herein:

> *"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 cancelled and all concerned have been intimated thereabout, we are of the opinion, the insurance company would not be liable to satisfy the claim.*
>
> *27. A beneficial legislation as is well known should not be construed in such a manner so as to bring within its ambit a benefit which was not contemplated by the legislature to be given to the party. In Regional Director, Employees' State Insurance Corporation, Trichur v. Ramanuja Match Industries [AIR 1985 SC 278], this Court held :*
>
> > *"We do not doubt that beneficial legislations should have liberal construction with a view to implementing the legislative intent but where such beneficial .legislation has a scheme of its own there is no warrant for the Court to travel beyond the scheme and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered by the scheme."*
>
> *We, therefore, agree with the opinion of the High Court.*
>
> *28. However, as the appellant hails from the lowest strata of society, we are of the opinion that in a case of this nature, we should, in exercise of our extra-ordinary*

jurisdiction under Article 142 of the Constitution of India, direct the Respondent No.1 to pay the amount of claim to the appellants herein and recover the same from the owner of the vehicle viz., Respondent No.2, particularly in view of the fact that no appeal was preferred by him. We direct accordingly.

13. In the case titled as **United India Insurance Co. Ltd. versus Laxmamma & Ors.,** reported in **2012 AIR SCW 2657,** the Apex Court has discussed the law developed on the issue and ultimately held that if cancellation order is not conveyed and if the accident occurs till the cancellation is made, the insurer is liable. It is profitable to reproduce para 19 of the judgment herein:

"19. In our view, the legal position is this : where the policy of insurance is issued by an authorized insurer on receipt of cheque towards payment of premium and such cheque is returned dishonoured, the liability of authorized insurer to indemnify third parties in respect of the liability which that policy covered subsists and it has to satisfy award of compensation by reason of the provisions of Sections 147(5) and 149(1) of the M.V. Act unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident. In other words, where the policy of insurance is issued by an authorized insurer to cover a vehicle on receipt of the cheque paid towards premium and the cheque gets dishonored and before the accident of the vehicle occurs, such insurance company cancels the policy of insurance and sends intimation thereof to the owner, the insurance company's liability to indemnify the third parties which that policy covered ceases and the insurance company is not liable to satisfy awards of compensation in respect thereof."

14. The same view has been taken by this Court in the cases titled as **M/s New Prem Bus Service versus Laxman Singh & another,** reported in **Latest HLJ 2014 (HP) 579,** and **United India Insurance Company Ltd. Versus Smt. Sanjana Kumari & others,** reported in **Latest HLJ 2014 (HP) 1140.**

15. Having said so, no interference is required. Accordingly, the impugned award is upheld.

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

17. The appeal is dismissed accordingly.

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

****

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

Vidya Devi alias Lachhi & anr. .....Petitioners.

Versus

Om Prakash . .....Respondent.

CMPMO No. 531 of 2015.
Reserved on: 6.9.2016.
Decided on: 9.9.2016.

Code of Civil Procedure, 1908- Order 23 Rule 1- Plaintiff filed a civil suit for possession – application to withdraw the suit with liberty to file a fresh suit on the same cause of action was filed- application was allowed by the trial Court- application was filed on the ground that J had executed a valid Will- he was missing for last three years and his whereabouts were not known - a decree seeking declaration regarding civil death of J was not obtained, which is a technical defect- held, that Will would come into operation after the death of J and when proof of the death

of J was not filed, suit was liable to be dismissed- no prejudice would be caused to the defendants by permitting the plaintiff to withdraw the suit- petition dismissed. (Para-5 and 6)

Case referred:
K.S. Bhoopathy and others vs. Kokila and others, AIR 2000 SC 2132

For the petitioners: Mr. Kulwant Singh Katoch, Advocate.
For the respondent: Mr. P.S.Goverdhan, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition is instituted against the order dated 2.7.2015, rendered in Civil Suit No. 241/2013 by the learned Civil Judge (Jr. Divn.), Kandaghat, Distt. Solan, H.P.

2. "Key facts" necessary for the adjudication of this petition are that the respondent-plaintiff (hereinafter referred to as the plaintiff) has filed a suit for possession under Section 6 read with Section 38 of the Specific Reliefs Act, 1963. The plaintiff filed an application under Order 23 Rule 1 CPC seeking permission to withdraw the suit and to file a fresh suit on the same cause of action. According to the averments made in the application, the plaintiff was residing along with his family members at village Biran-Silhari, PO and Tehsil Kandaghat in the house of Shri Jai Ram, defendant No. 8 for the last more than 7-8 years. Shri Jai Ram had been treating the plaintiff as his own son and out of love and affection he executed a legal and valid Will in favour of plaintiff on 7.11.2005. It was duly registered with Sub Registrar, Kandaghat as document No. 66 dated 8.11.2005 thereby bequeathing all his property, including the suit land in favour of the plaintiff. Shri Jai Ram was missing for the last three years and his whereabouts were not known to anyone. The report to this effect was also lodged in the Police Station Kandaghat on 5.5.2007. The defendants have started interfering in his possession and have dispossessed him. A formal defect has crept in as the declaration with respect to Will dated 7.11.2005, executed by defendant No. 8, is required to be taken and due to this formal defect and without seeking declaration with respect to the civil death of defendant No. 8 Jai Ram, the point in controversy between the parties could not be decided properly and effectively. It is further stated that without seeking declaration with respect to civil death, suit of plaintiff was bound to fail on this formal defect.

3. The application was contested by the defendants. The learned Civil Judge (Jr. Divn.), Kandaghat, Distt. Solan, H.P., allowed the application on 2.7.2015. Hence, this petition.

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

5. According to the averments made in the application, it is a formal defect and not a defect of substance. Neither the plaintiff has stated in the suit that Jai Ram has died nor any declaration was sought regarding his civil death. The Will would come into force only after the death of Jai Ram. The defect was technical in nature and no prejudice has been caused to the petitioners-defendants by permitting the withdrawal of the suit and filing a fresh suit as per order dated 2.7.2015. Moreover, the suit is at the initial stage. The suit was bound to fail due to this formal defect.

6. Their lordships of the Hon'ble Supreme Court in the case of ***K.S. Bhoopathy and others vs. Kokila and others,*** reported in ***AIR 2000 SC 2132,*** have laid down the following principles while granting permission to withdraw the suit with leave to file a fresh suit:

> "12. The provision in Order XXIII Rule 1 CPC is an exception to the common law principle of *non suit.* Therefore on principle an application by a plaintiff under sub-rule 3 cannot be treated on par with an application by him in exercise

of the absolute liberty given to him under sub-rule 1, In (he former it is actually a prayer for concession from the Court after satisfying the Court regarding existences of the circumstances justifying the grant of the such concession. No doubt, the grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the Court but such discretion is to be exercised by the Court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided; (1) where the Court is satisfied that a suit roust fail by reason of some formal defect, and the other where the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim. Clause (b) of sub-rule (3) contains the mandate to the Court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The Court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under Order XXIII Rule (1) is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the Court or courts below. Grant of permission for withdrawal of a suit with leave to file afresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/second appellate court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII Rule 1(3) CPC for exercise of the discretionary power in permitting the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of Courts which is of considerable importance in the present time in view of large accumulation of cases in lower courts and inordinate delay in disposal of the cases."

7. There is neither any perversity nor any illegality in the order dated 2.7.2015. Consequently, there is no merit in this petition, the same is dismissed so also the pending application(s), if any.

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

Vijay Kumar son of Sh. Babu Ram ....Petitioner.

Vs.

State of H.P. .....Non-petitioner.

Cr.MMO No.303 of 2015.
Order reserved on: 17.6.2016.
Date of Order: September 9, 2016.

Code of Criminal Procedure, 1973- Section 456- Five vehicles loaded with Oxen were checked- it was found that oxen were loaded in a cruel manner- drivers of vehicles did not give satisfactory answer- petitioner filed an application for releasing the oxen on the ground that these were purchased by him- application was dismissed by the trial Court- a revision was preferred, which was also dismissed- held, that certificate has been given by Chief Agriculture Officer Haridwar (Uttrakhand) that petitioner is an agriculturist by profession and had purchased the oxen from Ropar for agricultural purposes- no other person had filed application for releasing the oxen - the

plea that oxen were being carried for slaughtering or for the purpose of agricultural is to be determined by taking evidence - petition allowed- oxen released on supardari of Rs. 1 lac with one surety subject to the conditions. (Para-6 to 8)

Cases referred:

Rajmata Vijaya Raje Scindia Vs. State of M.P. and others, 2003 (12) SCC 429

Ram Parkash Sharma Vs. State of Haryana, AIR 1978 SC 1282

Khuraijam Jugeswar Singh and another Vs. Smt. Chanabam Ongbi Tomu Devi and another, AIR 1968 Manipur 29

For petitioner: Ms.Shashi Kiran Advocate.

For non-petitioner. Mr.R.K.Sharma Deputy Advocate General.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present petition is filed under Section 482 of the Code of Criminal Procedure 1973 against order dated 29.7.2015 passed by learned Additional Sessions Judge Sirmour District at Nahan whereby learned Additional Sessions Judge dismissed revision petition of petitioner and affirmed order of learned Trial Court dated 8.4.2015.

BRIEF FACTS OF THE CASE:

2. On 1.4.2015 Sh Govind Attri got recorded his statement under section 154 code of criminal procedure 1973 before ASI Rajpal that on 1.4.2015 he was coming from Chandigarh at about 4.15 AM (Night) and when he reached at Naina Tikkar then he noticed five vehicles were loaded with oxen. Vehicles were checked by police officials. Oxen were loaded in cruel manner and drivers of vehicles did not give satisfactory answer and criminal case under section 429 IPC read with section 34 IPC and under section 11 of Prevention of Cruelty to Animal Act 1960 registered. Oxen handed over to local residents by investigating agency as of today. Sh Vijay Kumar petitioner filed petition under section 457 Cr.PC with prayer that cattle two in number be ordered to be released to petitioner on any conditions imposed by Court. It is alleged that Vijay Kumar is the owner of two cattle and cattle were purchased in cattle fair from Ropar (Punjab) for agricultural work. It is alleged that Vijay Kumar is agriculturist and he has no past criminal background. It is alleged that no criminal case is pending against Vijay Kumar. Learned Trial Court dismissed the application on 8.4.2015.

3. Feeling aggrieved against the order of learned Trial Court Vijay Kumar filed revision petition under section 397 Cr.PC. Learned Additional Sessions Judge Sirmour District at Nahan on dated 29.7.2015 dismissed revision petition and affirmed the order of learned Trial Court. Learned Additional Sessions Judge further directed that Vijay Kumar is at liberty to file fresh application before learned Trial Court. Thereafter Vijay Kumar filed fresh application before learned Trial Court under section 457 Cr.PC on the ground that investigation is completed and charge-sheet stood filed in Court and oxen be released to him on the ground that Vijay Kumar is owner of oxen. Learned Trial Court again dismissed the application of petitioner on dated 14.9.2015 relating to releasing of oxen.

4. Court heard learned Advocate appearing on behalf of petitioner and learned Deputy Advocate General appearing on behalf of non-petitioner and also perused entire records carefully.

5. Following points arise for determination in present petition:

(1) Whether petition filed under Section 482 code of criminal procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of petition?.

(2) Final Order.

Findings upon Point No.1 with reasons.

6. Submission of learned Advocate appearing on behalf of petitioner that investigation is complete, charge-sheet has been filed in competent Court of law and trial of the case will be concluded in due course of time and custody of two oxen be granted to him on sapurdari is accepted for reasons hereinafter mentioned. As per section 457 of the Code of Criminal Procedure 1973 whenever the seizure of property by any police officer is reported to a Judicial Magistrate under the Code of Criminal Procedure 1973 the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to possession thereof. It is well settled law that discretionary power should be exercised by Judicial Magistrate judicially. It is well settled law that Judicial Magistrate has to decide as to who is entitle to possession. It is well settled law that Judicial Magistrate has no power to go into question of title of property because Judicial Magistrate is not a Civil Court. See 2003 (12) SCC 429 title Rajmata Vijaya Raje Scindia Vs. State of M.P. and others**.** See AIR 1978 SC 1282 title Ram Parkash Sharma Vs. State of Haryana**.** See AIR 1968 Manipur 29 title Khuraijam Jugeswar Singh and another Vs. Smt. Chanabam Ongbi Tomu Devi and another. Chief Agriculture Officer Haridwar (Uttrakhand) has given certificate Annexure P3 placed on record that petitioner is agriculturist by profession and Chief Agriculture Officer has also given certificate to the effect that petitioner has purchased two oxen from Ropar (Punjab) for agriculture purpose. Chief Agriculture Officer has also given certificate that character of Vijay Kumar is satisfactory. No other person has filed any application claiming title of two oxen over suit property.

7. Submission of learned Deputy Advocate General appearing on behalf of non-petitioner that two oxen were carried by petitioner for the purpose of slaughtering and not for the purpose of agriculture and the custody of two oxen has been granted to local residents as of today and on this ground present petition be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. Issue whether two oxen were carried in vehicle for the purpose of agriculture work or for the purpose of slaughtering is complicated issues of facts. Judicial finding relating to complicated issues of facts cannot be given at this stage. Judicial finding relating to complicated issues of facts whether two oxen were carried in vehicle for agriculture purpose or for slaughtering purpose would be given by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case. In view of certificate Annexure P3 given by Chief Agriculture Officer Haridawar (Uttrakhand) placed on record it is expedient in the ends of justice to allow petition. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final Order).

8. In view of findings upon point No.1 petition is allowed and it is ordered that spurdari of two oxen owned by petitioner will be given to petitioner till conclusion of trial on furnishing personal bonds to the tune of Rs.100000/- (One lac) with one surety in the like amount to the satisfaction of learned Trial Court on following terms and conditions. (1) That two oxen will be produced before learned Trial Court whenever and wherever directed by learned Trial Court in accordance with law. (2) That petitioner will not sale or exchange two oxen during trial of case in any manner. (3) That petitioner will not change the nature of two oxen in any manner till disposal of trial. (4) That learned Trial Court will be at liberty to inspect two oxen in order to ensure that no cruelty is committed upon oxen in any manner till conclusion of trial. Certificate annexure P3 given by Chief Agriculture Officer Haridawar (Uttrakhand) will form part and parcel of order. Order of learned Additional Sessions Judge and learned Trial Court are modified accordingly. Observations will not effect merits of the case in any manner. Petition filed under Section 482 Cr PC is disposed of. All pending application(s) if any are also disposed of.

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

Anil Kumar .....Petitioner.

Vs.

State of Himachal Pradesh and another .....Respondents.

CWP No: 2767 of 2010
Reserved on: 09.09.2016
Date of Decision: 14.09.2016

Constitution of India, 1950- Article 226- Petitioner filed a revision petition under Section 17 of the Himachal Pradesh Land Revenue Act against the order passed by the Court of learned Commissioner, Mandi- revision petition was dismissed in default- miscellaneous application was filed after 13 years for restoration of the revision petition along with an application for condonation of the delay- it was pleaded that petitioner was ill and could not appear before the Court- Counsel had also not appeared nor had he informed the petitioner about the dismissal of the revision petition - when petitioner came to the Shimla and made inquiry, he came to know about the dismissal – application was dismissed by the Financial Commissioner (Appeal)- aggrieved from the order, present writ petition has been filed- held, that order has been passed in exercise of statutory power- order is reasoned and speaking- no cogent explanation was given for delay in filing the application- allegations have been made against the Counsel without mentioning his name- petitioner had appeared on the earlier occasion, therefore, he was aware of the date of hearing- explanation given by the petitioner was not satisfactory and was rightly discarded- petition dismissed. (Para-9 to 13)

For the petitioner: Mr. R.R. Rahi, Advocate.
For the respondents: Ms. Parul Negi, Dy. A.G.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of the present writ petition, the petitioner has prayed for the following reliefs:

"(i) That the impugned order dated 27.04.2010 (Annexure P-6) may kindly be quashed by issuing the writ of certiorari.

(ii) That the respondent No. 2 may be directed to restore the Revision Petition to its original number and may be heard on merit.

(iii) That the record pertaining to the case may kindly be summoned from the respondents for the kind perusal of this Hon'ble Court.

(iv) That the present Civil Writ Petition may kindly be allowed with costs.

(v) That any other order which this Hon'ble Court may deem fit just and proper in the facts and circumstances of the case may also be passed in favour of the petitioner and against the respondents."

2. Annexure P/6 quashing of which has been sought by way of the present writ petition is an order passed by learned Financial Commissioner (Appeals), H.P. in Miscellaneous Application No. 07/10 dated 27.04.2010 vide which, learned Financial Commissioner (Appeals) dismissed the application filed by the present petitioner for restoration of revision petition which was dismissed in default on 11.04.1996.

3. Brief facts necessary for the adjudication of the present case are that the present petitioner had filed a revision petition under Section 17 of the Himachal Pradesh Land Revenue Act against the order dated 12.04.1994 passed by the Court of learned Commissioner, Mandi

Division in Revision Petition No. 110/93. The Revision Petition so filed before learned Financial Commissioner (Appeals) was dismissed in default by the Financial Commissioner (Appeals) vide order dated 11.04.1996, which reads as under:

> *"Case called. Neither the petitioner nor his counsel is present today. On the last date of hearing the petitioner/applicant Anil Kumar was present and informed him about the date of hearing. Thus, he was fully aware about the date of hearing. There is no written request or any explanation on behalf of the petitioner or his counsel for the adjournment of the case. It appears that the petitioner is not interested in pursuing his case. Therefore, the revision petition is dismissed in default."*

4. A Miscellaneous application for restoration of the said revision petition was filed by the present petitioner before the Court of learned Financial Commissioner (Appeals) on 15.12.2009, i.e. after 13 years alongwith an application under Section 5 of the Limitation Act for condonation of delay in filing the application for restoration of revision petition.

5. The grounds which are mentioned in the application so filed for restoring the revision petition which was dismissed in default on 11.04.1996 were that the petitioner could not put in appearance before the Court of learned Financial Commissioner (Appeals) on 11.04.1996 as he was not feeling well and on the said date personal presence of the petitioner was not necessary/required. As per the petitioner, the counsel engaged by him did not appear on 11.04.1996 nor did he inform the petitioner about the fact that the case stood dismissed in default. It was further the case of the petitioner that each time, when he asked his counsel about the fate of the case, he was told that the case was pending. Further, as per the petitioner, when he came to Shimla in the month of November, 2009 and enquired from the Registry of the Court of learned Financial Commissioner (Appeals), then he came to know that the case had been dismissed in default as far back in the year 1996. Thereafter, without any further delay, he contacted another counsel, who inspected the file and after preparation of the application, the same was filed for restoration of revision petition. Same reasons were given in the application so filed under Section 5 of the Limitation Act for condonation of delay.

6. Learned Financial Commissioner (Appeals) vide impugned order dated 27.04.2010 dismissed the application so filed by the petitioner by holding that before the case was dismissed in default on 11.04.1996, on the previous date of hearing, petitioner Anil Kumar was present and he had been informed about the next date of hearing. Learned Financial Commissioner (Appeals) held that despite this, no one appeared on behalf of the petitioner on 11.04.1996 and the application for restoration of the case which was dismissed in default was filed after more than 13 years and 8 months and there was no cogent explanation for the inordinate delay in filing of the application except blaming the counsel which could not be verified. Learned Financial Commissioner (Appeals) further held that the case put forth by the petitioner that he could not personally appear on 11.04.1996 on account of ill health and he had informed his counsel to put in appearance on the said date, who did not appear and also did not inform him about the factum of the case having been dismissed in default also seemed to be not cogent. It was further held by learned Financial Commissioner (Appeals) that a litigant is always anxious to know about the fate of his case especially one who has engaged a counsel. Learned Financial Commissioner (Appeals) further held that it was the duty of the petitioner to have had enquired about the fate of his case and there was no cogent explanation as to why he did not do so for such a long period. By assigning the said reasons, learned Financial Commissioner (Appeals) dismissed the application for restoration of revision petition.

7. Feeling aggrieved by the said rejection, the petitioner has filed the present writ petition.

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

9. The order passed by learned Financial Commissioner (Appeals) has been assailed on the grounds that the same is *inter alia* arbitrary, illegal, discriminatory, unconstitutional and violative of Articles 14, 16 and 21 of the Constitution of India. It has been further mentioned in the petition that the learned Financial Commissioner (Appeals) failed to appreciate that a client cannot be made to suffer on account of the fault of his counsel. It is on these grounds that the impugned order was assailed by the learned counsel for the petitioner before me.

10. In my considered view, the arguments raised by learned counsel for the petitioner to the effect that the impugned order was arbitrary, illegal, discriminatory, unconstitutional and violative of Articles 14, 16 and 21 of the Constitution of India call for outright rejection. The order under challenge is a quasi judicial order which has been passed by Financial Commissioner (Appeals) in the exercise of statutory powers conferred upon him under the provisions of the Himachal Pradesh Land Revenue Act. It is not understood as to how an order dismissing an application for restoration of revision petition which revision petition was dismissed almost 13 years back can be said to be violative of Articles 14, 16 and 21 of the Constitution of India. The contention of the learned counsel for the petitioner that the impugned order is violative of the principles of natural justice also merits outright rejection for the simple reason that the order has been passed by the authority after hearing the petitioner and it is not even the ground of challenge in this Court that the impugned order was passed without hearing the petitioner.

11. Similarly, a challenge to the impugned order on the ground that the same is violative of Articles 16 and 21 of the Constitution of India *per se* demonstrates that the petition in fact has been filed without due application of mind. This is evident from the fact that Article 16 of the Constitution of India which deals with equality in the matters of employment has nothing to do in a matter wherein a quasi judicial authority dismisses an application filed for restoration of a revision petition, that too filed under the provisions of the Himachal Pradesh Land Revenue Act. Similarly, it is not understood as to how an order passed by quasi judicial authority in exercise of its statutory powers can be said to be violative of Article 21 of the Constitution of India which Article deals with the life and liberty of an individual.

12. Even otherwise, a perusal of the order passed by Financial Commissioner (Appeals) demonstrates that the same is a reasoned and a speaking order. In my considered view, the findings returned by learned Financial Commissioner (Appeals) while rejecting the application filed for restoration of revision petition are cogent and justified. It is apparent from the averments made in the application filed by the petitioner for restoration of the revision petition as well as the averments which are made in the application for condonation of delay that there is no cogent explanation given in the same as to why the application for restoration of the revision petition was being filed after more than 13 years. The reason given in the said application wherein the blame has been fairly and squarely levelled on the counsel concerned is neither corroborated nor substantiated by any material produced on record to this effect by the petitioner. It is not mentioned in the application as to who was the counsel engaged by him during the pendency of the revision petition before learned Financial Commissioner (Appeals) and what efforts, if any, were made by him to enquire about the fate of his case after 11.04.1996. In fact, even the name of the counsel who was allegedly instructed by the petitioner to put in appearance on 11.04.1996 has not been mentioned in the application. It is not the case of the petitioner that he was not aware of the fact that the case was to come up before the Court of learned Financial Commissioner (Appeals) on 11.04.1996 because it is apparent from the order passed by learned Financial Commissioner (Appeals) that on the date previous to 11.04.1996, the petitioner was present and he was made aware about the next date of hearing.

13. In view of this, in my considered view, there is no infirmity or illegality with the order passed by learned Financial Commissioner (Appeals) dated 27.04.2010 vide which the application filed by the present petitioner for restoration of revision petition after more than 13 years was dismissed. Order passed by learned Financial Commissioner (Appeals) besides being a speaking and reasoned order, otherwise also does not calls for any interference on merits because in my considered view, learned Financial Commissioner (Appeals) rightly rejected the application

filed by the petitioner for restoration of revision petition which was dismissed as far back as on 11.04.1996 in view of the fact that the petitioner was not able to substantiate with any cogent explanation as to why the said application was filed for restoration of the revision petition after more than 13 years and 8 months from the date the revision petition was so dismissed in default.

14. Accordingly, as there is no merit in the present petition, the same is dismissed. No order as to costs. Miscellaneous application(s), if any, also stands disposed of.

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

Hans Raj ...Appellant/Defendant

Versus

Ramesh Chand and others ...Respondents/Plaintiffs

R.S.A. No. 227 of 2006
Judgment reserved on: 07.09.2016.
Date of decision:14th September, 2016.

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit pleading that he is owner in possession of the suit land being legal heir of deceased R – mutation attested on the basis of the Will stated to have been executed by R is wrong and illegal- deceased had left the village when he was aged 12 years- his whereabouts are not known to any person for 60 years, therefore, he was presumed to be dead- a false Will was propounded by the defendant- suit was opposed by filing a reply pleading that Will was executed by R- land was partitioned by the Settlement Authority- defendant is in possession of the suit land- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, that presumption regarding documents, which are thirty years old, does not apply to a Will and the Will has to be proved in terms of Succession Act and Evidence Act- Will was shrouded in suspicious circumstances- defendant was not able to dispel those circumstances- Will was rightly held to be not proved- appeal dismissed. (Para-9 to 29)

Cases referred:

Bharpur Singh and others vs. Shamsher Singh, (2009) 3 SCC 687
M.B. Ramesh (dead) by LRs vs. K.M. Veeraje Urs (dead) by LRS and others (2013) 7 SCC 490
Jaswant Kaur vs. Amrit Kaur (1977) 1 SCC 369

For the Appellant :Mr. Bhupender Gupta, Senior Advocate with Mr. Neeraj Gupta, Advocate.
For the Respondents :Mr. G.D. Verma, Senior Advocate, with Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The defendant is the appellant and has come up in appeal against concurrent findings recorded against him by the learned Courts below.

2. The facts as necessary for the adjudication of the case are that the predecessor-in-interest of the respondents/plaintiffs i.e. Chingu Ram (hereinafter referred to as the 'plaintiff') filed a suit for declaration and injunction to the effect that he is owner in possession of the suit land as detailed in the plaint being legal heir of deceased Rania son of Dheru and that the mutation No. 515 in favour of the appellant/defendant (hereinafter referred to as the 'defendant') is null and void and that the Will dated 15.3.1946 in favour of the defendant executed by deceased Rania is also wrong and illegal. A decree of permanent injunction was also sought by

the plaintiff against the defendant to the effect that he be restrained from cutting or removing trees or taking forcible possession of the suit land.

3. It was averred that the suit land was owned and possessed by deceased Rania S/o Dheru as co-sharer. The said Rania left the village and his whereabouts are not known for the last sixty years nor he has been heard of being alive. He was 12 years of age when he left the village. He never visited the village again and as such, is presumed to be dead. The mutation was attested on 12.8.1988 in respect of his estate and as such, his date of death is to be presumed to be 12.8.1988. The said Rania was minor when he left the village and therefore, there was no occasion for him to execute Will nor he ever executed Will nor he was competent to do so. The defendant in connivance with the settlement field staff and witnesses propounded a false forged Will and on its basis managed to mutate the estate of deceased Rania in his favour. The Will in question is forged and fabricated document and therefore is not binding on the rights of the plaintiff in the suit land. The plaintiff is the only legal heir of deceased Rania and is entitled to succeed his estate. The revenue official did not adopt proper procedure at the time of attestation of mutation and forged Will was relied upon for attestation of mutation. The defendant threatened to cut and remove the trees and to take forcible possession of the suit land in an illegal manner.

4. The suit was contested and resisted by defendant by raising preliminary objections regarding maintainability, estoppel on account of his act and conduct, jurisdiction and limitation. On merits, it was admitted that the suit land was owned and possessed by Rania son of Dheru. It was denied that said Rania left the village when he was child. It was also denied that he had not been heard of for the last more than 60 years. The said Rania was having disposing state of mind and being issueless on 15.3.1946, had executed the Will of his entire property in favour of the parties to the extent of half share. It was denied that Rania left the village when he was of 12 years old, rather he left about thirty years back. It was averred that the dispute inter se the parties in respect of the estate of deceased Rania arose during settlement in the year 1986. It was denied that mutation had been wrongly attested. It was averred that the Will was a genuine one and had been executed by deceased Rania voluntarily. It was also averred that during consolidation operation, the revenue staff had partitioned the joint land and the same cannot be assailed before the Civil Court. It was denied that Rania left the village before 15.3.1946 or that he was insane or incompetent to execute the Will. The correctness of the pedigree-table was also challenged. It was averred that the defendant is already in possession of his share in the suit land. It was lastly denied that the defendant threatened to cut or remove the trees. The defendant accordingly prayed for dismissal of the suit.

5. The plaintiff filed replication wherein the contents of the written statement were controverted and those of the plaint were reiterated.

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

1. Whether plaintiff is owner in possession of the suit land being legal heir of deceased Rania as alleged? OPP
2. Whether mutation No. 515 dated 12.2.88 is wrong, illegal and void? If so, its effect? OPP.
3. Whether plaintiff is entitled to the relief of injunction as prayed? OPP
4. Whether plaintiff is entitled to the relief of possession of suit land in alternative? OPP
5. Whether suit is not maintainable as alleged? OPD
6. Whether act and conduct of plaintiff is a bar to the suit? OPD
7. Whether this Court has no jurisdiction to entertain the suit? OPD
8. Whether deceased Rania had executed a valid Will in favour of the parties qua the suit land as alleged? If so, its effect? OPD
9. Relief.

7. The learned trial Court vide judgment and decree dated 31.3.2003 decreed the suit of the plaintiff. The appeal filed by the defendant against the judgment and decree of the learned trial Court resulted in dismissal and this is how the defendant is before this Court by way of the present regular second appeal.

8. On 21.11.2006, this Court admitted the appeal on the following substantial question of law:

> *"Whether the two courts below ought to have drawn presumption under Section 90 of the Evidence Act in favour of the Will, it having been executed in the year 1946 and having been produced from the proper custody?*

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

9. In order to appreciate the controversy in issue, it would be appropriate to refer to Section 90 of The Indian Evidence Act, 1872, which reads thus:

> *"**90. Presumption as to documents thirty years old.**—Where any document, purporting or proved to be thirty years old, is produced from any custody, which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.*
>
> ***Explanation.**—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.*
>
> *This Explanation applies also to section 81."*

10. This section does away with the strict rules, as regards requirement of proof, which are enforced in the case of private documents, by giving rise to a presumption of genuineness, in respect of certain documents that have reached a certain age. The period is to be reckoned backward from the date of the offering of the document, and not any subsequent date i.e. the date of decision of suit or appeal. Thus, the said section deals with the admissibility of ancient documents, dispensing with proof as would be required, in the usual course of events in usual manner. However, the moot question is wither the presumption extends to wills which are more than thirty years old.

11. In ***Bharpur Singh and others vs. Shamsher Singh, (2009) 3 SCC 687,*** it was categorically held that a presumption regarding documents thirty years old, does not apply to a Will and the same has to be proved in terms of Section 63 (c) of the Succession Act read with Section 68 of the Evidence Act. It was observed as under:

> *"19. The provisions of Section 90 of the Indian Evidence Act keeping in view the nature of proof required for proving a Will have no application. A Will must be proved in terms of the provisions of Section 63(c) of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. In the event the provisions thereof cannot be complied with, the other provisions contained therein, namely, Sections 69 and 70 of the Indian Evidence Act providing for exceptions in relation thereto would be attracted. Compliance with statutory requirements for proving an ordinary document is not sufficient, as Section 68 of the Indian Evidence Act postulates that execution must be proved by at least one of the attesting witness, if an attesting witness is alive and subject to the process of the Court and capable of giving evidence. {See B. Venkatamuni vs. C.J. Ayodhya Ram Singh & ors. [(2006) 13 SCC 449, SCC p. 458, para 19)."*

12. Similar reiteration of law can be found in the subsequent judgment of the Hon'ble Supreme Court rendered in ***M.B. Ramesh (dead) by LRs vs. K.M. Veeraje Urs (dead) by LRS and others (2013) 7 SCC 490***, wherein it was observed as under:

> *" 15. The first submission on behalf of the appellant has been that the learned judge of the high Court has erred by framing the question of law, in the manner in which he has. It was submitted that when the trial court and the first appellate court have given a concurrent finding about the invalidity of the will, it was a finding of fact, and the High Court could not have disturbed the finding of fact by framing a question of law as to whether the finding was bad in law, and perverse or contrary to the evidence on record. Reliance was placed, in this behalf, on the observations of this Court in Narayanan Rajendran Vs. Lekshmy Sarojini reported in 2009 (5) SCC 264. That apart, it was submitted that in any case, the findings of the Courts below could not in any way be categorized as perverse, since they were not contrary to the evidence on record."*

13. Though, the question of law could have been conveniently answered by holding that the presumption as envisaged under Section 90 of the Evidence Act does not apply to a Will and the same is required to be proved in accordance with law. However, to be fair to the appellant, this Court would go into question as to whether the Will in question has been proved and the appellant has been able to dispel all suspicious circumstances.

14. It is more than settled that when the Will is allegedly shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. An adversarial proceeding in such cases becomes a matter of court's conscience and propounder of the will has to remove all suspicious circumstances to satisfy that the Will was duly executed by the testator wherefor cogent and convincing explanation of suspicious circumstances shrouding the making of Will must be offered. This was so held by the Hon'ble Supreme Court in ***Jaswant Kaur*** vs. ***Amrit Kaur (1977) 1 SCC 369,*** wherein some of the suspicious circumstances were enumerated as follows:

> "*23. Suspicious circumstances like the following may be found to be surrounded in the execution of the Will:*
>
> *i. The signature of the testator may be very shaky and doubtful or not appear to be his usual signature.*
>
> *ii. The condition of the testator's mind may be very feeble and debilitated at the relevant time.*
>
> *iii. The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason.*
>
> *iv. The dispositions may not appear to be the result of the testator's free will and mind.*
>
> *v. The propounder takes a prominent part in the execution of the Will.*
>
> *vi. The testator used to sign blank papers.*
>
> *vii. The Will did not see the light of the day for long.*
>
> *viii. Incorrect recitals of essential facts."*

15. Adverting to the facts, the Court is first required to examine the oral evidence. The plaintiffs examined five witnesses. PW-1 Ramesh Rana stated that his grand father and the grand father of Rania were real brothers. Rania had not died in the village and had gone missing. He had not executed any Will and his property was inherited by his legal heir Chingo which property in turn had thereafter been inherited by him and his three brothers and one sister and the defendant had no concern with this property. In cross-examination, the witness stated that he had not seen Rania. He denied that Rania had executed a Will on 15.3.46.

16. PW-2 Nathu Ram stated that he had not seen Rania ever since his childhood. In cross-examination, he stated that he had been working at Amritsar for the last 15 years and had left for Amritsar about 10 years ago. He had no knowledge whether Rania was married or not as he had never seen Rania.

17. PW-3 Davinder Kumar was the Secretary, Co-operative Society, Gindpur Malaun and had simply brought the record. PW-4 Satya Dev Sharma was a retired Kanungo, who had translated the document Ex.PW-4/A from Urdu to Hindi.

18. As against this, the defendant examined four witnesses. DW-1 Hardev Singh has stated that the original Will of Rania had been written by his father and he was conversant with his handwriting as he remained with him. In cross-examination, the witness stated that Will was not written in his presence and he had no personal knowledge of the villagers and the parties. He further stated that his house was situated at a distance of about 2 KM from the village of the parties.

19. DW-2 Rattan Chand has stated that his father had told him that Rania had executed a Will in favour of Hans Raj and Chingo and he claimed to have been a witness to that Will and had put thumb impression on the same. In cross-examination, the witness denied that Rania was missing from his childhood as according to him Rania was missing after 50 years of age. He further stated that about 38-40 years have elapsed since Rania was found to have gone missing. He admitted that the Will had not been written in his presence, but claimed that he had seen the Will about 20-22 years ago.

20. DW-3 Inderjit Singh has stated that he had seen the original Will which had been signed by his father as he was conversant with his father's signature. In cross-examination, the witness stated that he had passed matriculation in 1972, but had not read Urdu language. According to him, he knew little bit of Urdu, but could not read the 7th line of the Will. He could not even read Urdu. He denied that Will Ext. D-1 had not been signed by his father.

21. DW-4 Hans Raj stated that Rania had executed a Will of his entire property on 15.3.46 in his favour and in favour of Chingo Ram in equal shares as he had no off-spring. According to him, Rania had left the village about 30 years ago and never came back. He denied that Rania had left the village about 60 years ago and was minor at that time. He stated that the mental condition of Rania was sound at the time he left the house. In cross-examination, he stated that his father had expired about 25 years ago, whereas Rania had gone missing for the last 15-20 years. He further stated that Rania was missing since 1965. He also stated that the age of Rania was 50 years when he executed the Wil. The age of Rania in 1965 was 70-75 years as he was 40-45 years elder to his father. He further stated that Will had been handed over to him by the plaintiff about 18 years ago and claimed to have knowledge regarding the same even earlier to the same being handed over to him. He claimed to be 20 years of age at the time of preparation of Will.

This in entirety is the oral evidence led by the parties.

22. As regards documentary evidence, the plaintiff has filed the copy of jamabandi Missal Hakiat for the year 1987-88 Ext.P-1, P-2, P-3 and copy of Missal Hakiat for the year 1989-90 Ext.P-4, copy of Missal Hakiat for the year 1989-90 Ext.P-5, Ext.P-6, Ext.P-7, copy of Missal Hakiat for the year 1987-88 Ext.P-8, Ext.P-9, jamabandi for the year 1981-82 Ext.P-10, jamabandi for the year 1982-83 Ext.P-11, copy of jamabandi for the year 1982-83, Ext.P-12, P-13 to P-16 and copy of members of co-operative society Kharoh Ext.PW-4/A.

23. The defendant on the other hand has only produced on record the Will Ext.D-1.

24. It is evidently clear from the oral and documentary evidence that both the parties were related to deceased Rania but the plaintiff is in closer proximity and the legal heir, who in absence of the Will is alone entitled to inherit his property and this fact is not even disputed by the defendant.

25. Therefore, the only question that arises for consideration is whether late Rania had executed a valid Will Ext.D-1 and the same has been proved in accordance with law.

26. The learned Courts below have categorically found the evidence led by the defendant to be totally shaky and have further held the Will not to be a genuine document, but a fabricated one.

27. Learned Courts below have culled out the following suspicious circumstances:

(i) That alleged scribe of the Will Partap Singh has been shown to be village Gindpur in Tehsil Una, whereas his son DW-1 Hardev Singh has clearly stated on oath that he is resident of Village Gulerdhar situated in Tehsil Jaswan in District Kangra. This witness had further deposed that not only his father but even his ancestors were residing at Village Gulerdhar. Therefore, there was no reason for alleged scribe to give his address as a resident of village Gindpur. Not only this, it was not even the case of any of the parties that the scribe Partap Singh was resident of Village Gindpur.

(ii) Second suspicious circumstance noted by the learned courts below was that at the time of execution of the Will the father of the defendant Hans Raj was very much alive. DW-4 Hans Raj had categorically stated in his statement on oath that his father had died about 45 years and such statement was recorded on 25.10.2002 and that would mean that Sher Singh father of Hans Raj was alive at the relevant time. It assumes importance because deceased plaintiff Chingu Ram and Sher Singh were cousins of deceased Rania. Chingu and Sher Singh were having one sister Nihatu. The defendant Hans Raj is the son of aforesaid Sher Singh. The will contains a clear cut recital to the effect that Rania was bequeathing his property in favour of Hans Raj son of Sher Singh and Chingu because they happened to be his heirs. Once Sher Singh is proved to be alive at the time of execution of the Will then in that event, Hans Raj could not and cannot be considered to be the heir of Rania.

(iii) The third suspicious circumstance relates to the identification of the signature of the attesting witness Kehar Singh whose signatures were sought to be proved with the aid of statement of DW-3 Inderjit. This witness on oath has stated that he had been living with his father and had seen him writing and could identify his signatures which were admittedly in Urdu language. However, when the witness was subjected to cross-examination, it is clearly revealed that he had very little knowledge of Urdu language and admitted that he did not know how to write Urdu, but could only identify Urdu writing. Surprisingly, the witness during the course of examination failed to read the 7th line of the Will. It was on the basis of such testimony and conduct of the witness that the Courts below have come to a categorical conclusion that the witness had no knowledge of the Urdu language and whatever he was deposing was on the basis of guess work and was not sufficient to prove the signature of his father on the Will in question.

(iv) The last suspicious circumstance observed by the learned Courts below related to the production of the Will after considerable lapse of time from the date of disappearance of deceased Rania. DW-4 Hans Raj had in his examination-in-chief stated that whereabouts of Rania were not known since 1965 and, therefore, he would be presumed to be dead in the year 1972. The Will in question was stated to have been executed in the presence of Hans Raj, who was supposed to be in its custody for the last more than 18 years and before that Will was allegedly in the custody of the plaintiff deceased Chingu. In such circumstances, why the defendant took

no steps to get the mutation attested despite the fact that Rania as per him had already gone missing since 1965. Why the defendant Hans Raj waited for more than a decade to cause production of the Will from the year 1972 for the purpose of attestation of the mutation.

28. Even before this Court, learned senior counsel for the appellant has not been able to dispel the suspicious circumstances noted by the learned Courts below.

29. In addition to the aforesaid, learned senior counsel for the respondents has taken me through the trend of cross-examination adopted by the defendant whereby while examining PW-1 it is suggested to the witness that Rania had not gone missing and had been visiting the village and this suggestion completely demolish the case set up by the defendant.

The substantial question of law is answered accordingly.

30. There is no impropriety, illegality or irregularity much less perversity in the findings recorded by the learned Courts below and the same are based on proper appreciation of the pleadings as also the evidence and the law on the subject.

Having said so, I find no merit in this appeal and the same is accordingly dismissed, leaving the parties to bear their own costs. The pending application(s) if any, stands disposed of.

****

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

Kuldeep Chand and another ....Appellants.
Versus
Bhagi Rath ... Respondent.

RSA No. 246 of 2006.
Reserved on: 05.08.2016.
Decided on: 14.09.2016.

Specific Relief Act, 1963- Section 5- Plaintiff filed a civil suit seeking possession of the suit land pleading that he is successor of P- defendant had taken illegal possession of the suit land on the basis of Will, stated to have been executed by P- no Will was executed by the deceased- suit was decreed by the trial Court- an appeal was filed, which was dismissed- it was held by the Courts that original Will was not proved at the time of examination of the witnesses- held, in second appeal that original Will was submitted to Sub Judge 1st Class but was not exhibited- application to lead additional evidence was filed, in which it was prayed that witnesses be recalled for proving the original Will, which was not exhibited and whose photocopy was exhibited – another application for leading additional evidence was filed, in which it was stated that Will could not be exhibited due to mistake of Lower Court, which is not correct- original Will was not exhibited at the time of examination of the witness and the findings recorded by the Court that original Will was not proved on record cannot be said to be perverse- appeal dismissed. (Para-13 to 27)

For the appellants. : Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K. Vashisht, Advocate.
For the respondent : Mr. Dilip Sharma, Sr. Advocate with Mr. Umesh Kanwar, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge.

This appeal has been filed by the appellants/defendants (hereinafter referred to as 'defendants') against the judgment passed by the Court of learned Additional District Judge, Ghumarwin, District Bilaspur, in Civil Appeal No. 46/13 of 2004/2000, dated 12.04.2006, vide

which, learned Appellate Court while rejecting the appeal so filed by the defendant-appellant has upheld the judgment and decree passed by the Court of learned Sub Judge 1st Class, Ghumarwin, in Civil Suit No. 125/1 of 1991, dated 29.12.1999.

2. This appeal was admitted on 18.12.1006 on the following substantial question of law:

> *"Whether the two Courts below have committed serious illegality in dismissing the plea of the appellants/defendants that late Punu Ram had executed a Will in their favour on the grounds that the original Will has been with-held, when the original Will is on record and one witness, namely DW-3 Bali Ram has specifically stated that the Will was Ext. DW-4/A, though it is a different matter that the Will is not so marked?"*

3. Brief facts necessary for the adjudication of this case are that respondent/plaintiff (hereinafter referred to as 'plaintiff') filed a suit for possession of the suit land on the pleadings that one Shri Punnu Ram son of Shri Mali was owner of land comprised in Khata Khatauni No. 30/38, Khasra Nos. 34, 42, 47, 142, 153, 155, 160 and 169, measuring 16.18 bighas, situated in village Kharota, Pargana Sunhani, Tehsil Ghumarwin, District Bilaspur, H.P which property was succeeded by plaintiff after the death of Punnu Ram, who died on 15.08.1989. As per the plaintiff, Punnu Ram was his real maternal uncle and plaintiff was the sole successor to the property of deceased Punnu. According to the plaintiff, last rites of Punnu after his death were also performed by him as he had started living in the house of deceased and also was looking after the management of the land of Shri Punnu. According to the plaintiff, defendants were interfering in the property of deceased Punnu on the pretext that Punnu had made a 'Will' in their name and they had also forcibly taken possession of the suit land as well as house from the plaintiff on 20.01.1991 with the help of police. Further as per the plaintiff, defendants had no right, title or interest over the suit land and Shri Punnu had executed no 'Will' in favour of defendants and the order which had been passed by Sub Registrar, Ghumarwin, District Bilaspur, vide which it has ordered that the 'Will' be registered, was illegal, wrong, null and void. On these bases, the plaintiff filed the suit praying for decree of possession of the suit land.

4. Defendants in the written statement filed by them denied the claim of the plaintiff. According to them, the plaintiff had not succeeded to the property of deceased Punnu Ram and in fact, it were the defendants who had succeeded the deceased Punnu Ram by virtue of 'Will' dated 30.07.1989 which was duly executed by Punnu Ram in their favour. According to the defendants, they were looking after deceased Punnu during his lifetime and also used to cultivate his land.

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

> *"1. Whether the plaintiff is entitled to the possession of the suit land? OPP.*
>
> *2. Whether Sh. Punnu, executed a valid Will dated 15-8-1990 in favour of defendants? OPD.*
>
> *3. Whether the plaintiff is estopped to file the suit by his acts, conducts, omissions and commissions? OPD.*
>
> *4. Whether the suit has not been properly valued for the purpose of court fee and jurisdiction? OPD.*
>
> *5. Whether this court has no jurisdiction to hear and decide the suit? OPD*
>
> *1-A. Whether the suit is not maintainable? OPD*
>
> *2-A. Whether plaintiff has no locus standi to file the present suit? OPD*
>
> *3-A. Whether plaintiff has no cause of action? OPD*
>
> *6. Relief."*

6. On the basis of evidence led by the parties both ocular as well as documentary in support of their respective cases, the issues so framed were answered by the learned trial Court in the following manner:-

"Issue No.1	*: Yes.*
Issue No. 2	*: No.*
Issue No. 3	*: No.*
Issue No.4	*: No.*
Issue No.5	*: No.*
Issue No. 1-A	*:No.*
Issue No. 2-A.	*:No.*
Issue No. 3-A.	*:No.*
Relief	*:The suit of the plaintiff is decreed as per operative part of the judgment."*

7. Accordingly, learned trial Court decreed the suit of the plaintiff for possession against the defendants in respect of land measuring 16.18 bighas i.e. the suit property and it directed the defendants to hand over vacant possession of the suit land within three months to the plaintiff.

8. Issue No. 2 framed by the learned trial Court was to the effect that *"whether Shri Punuu, executed a valid Will dated 15.8.1990 in favour of defendants?"*, which issue was decided alongwith Issue No. 1 by the learned trial Court, which issue was to the effect that "*whether the plaintiff is entitled to the possession of the suit land?"*.

9. Learned trial Court while holding that plaintiff was entitled to the possession of the suit land also held that Shri Punnu Ram had not executed any valid 'Will' dated 15.8.1990 in favour of defendants. While disbelieving the 'Will' propounded by the defendants, learned trial Court held that Sohan Singh Thakur who had entered the witness box as DW-2 and who was stated to be scribe of the 'Will, had deposed that he was practicing as an Advocate at Ghumarwin for the year 1981 to 1993 and Ext. DW-2/A was the copy of the original 'Will' scribed by him. Learned trial Court took note of the fact that the exhibition of the said document was objected by learned counsel for the plaintiff and from this it was deciphered by the learned trial Court that the original 'Will' was not produced by the defendants in the Court at the time when statement of DW-2 Sohan Singh Thakur was recorded in the Court and the copy of same was sought to be exhibited. Learned trial Court further held that said document could not have been exhibited without placing on record the original 'Will'. It was further held by learned trial Court that no application for leading secondary evidence was moved by the defendants and as per the provisions of Section 64 of the Indian Evidence Act, documents must be proved by primary evidence except in the cases mentioned therein and for leading secondary evidence as was envisaged in Section 65 of the Indian Evidence Act conditions mentioned therein are required to be fulfilled. Learned trial Court went on to hold that although the original 'Will' was later on produced by the defendants, but the same had not been exhibited in the Court and was exhibited as Ext. PW-2/A by the Sub Registrar and therefore, fact remained that the 'Will' in issue had not been exhibited before the learned trial Court during the course of trial. It was further held by learned trial Court that defendants had moved an application under Order 18, Rule 17-A praying that defendants be allowed to recall all the D.Ws already examined in the Court to prove the 'Will' and after due consideration, the application was dismissed by learned trial Court on 23.12.1997. It further went on to hold that similar application was also rejected by the learned trial Court earlier vide order dated 09.02.1995. As per learned trial Court, these applications were moved by the defendants at belated stage when the case was fixed for final arguments. Learned trial Court further concluded that in the case in hand, none of the conditions for leading secondary evidence were fulfilled by the defendants. It further held that in the written statement submitted by the defendants it was submitted that "original will" was produced during the course of proceedings

before the learned trial Court, however, said contention of the learned counsel for defendants was found to be totally wrong as there was no record to this effect on the case file, which could show and prove that the original 'Will' was produced in the Court, when statements of witnesses of the defendants were recorded. It was held by learned trial Court that original 'Will' was not put to DW3 Bali Ram and DW5 Nand Lal. On these bases learned trial Court returned the finding that "original Will" was not proved on record by the defendants as per the provisions of Section 64 and 65 of the Indian Evidence Act and the contentions regarding the valid execution of the 'Will' were rejected by learned trial Court.

10. It is pertinent to mention here that in para 19 of the judgment passed by learned trial Court, it is mentioned that original 'Will' was later on produced by the defendants but the same was not exhibited in the Court. The findings returned in this regard are quoted herein below:

> *"19. Although the original will was later on produced by the defendants, but the same has not been exhibited in the Court and is exhibited as Ex.PW-2/A by the Sub-Registrar. Therefore, fact remains that the will has not been exhibited in this Court during the course of trial of this case."*

11. Learned Appellate Court in its judgment held that the onus to prove that Punnu had executed a valid 'Will' dated 30.07.1989 in their favour was heavily upon the defendants but defendants had not produced the original 'Will' at the time when evidence was adduced. Accordingly, learned Appellate Court held that the original 'Will' was not proved in accordance with law. It further held that Ext. 2/A was the photocopy of original 'Will', therefore, same cannot be read in evidence as the same was secondary evidence. On these bases, learned Appellate Court held that it was correctly held by learned trial Court that defendants had failed to prove execution of 'Will' by Punnu Ram. Learned Appellate Court further held that perusal of the record demonstrated that statements of witnesses Kuldeep Singh and scribe Sohan Singh were recorded on 17.1.1995 and on the said date Sh. D.K. Sharma, was appointed as Local Commissioner to record the statements of attesting witness Nand Lal and trial Court specifically directed vide order dated 17.1.1995 that the original file of the case be handed over to Local Commissioner i.e. D.K. Sharma but in the meantime, defendants on 19.1.1995 moved application under Order 13 Rule 2 CPC for allowing them to produce the original 'Will' dated 30.7.1989 alongwith other documents before examining the witnesses and the application so filed was allowed vide order dated 24.1.1995 subject to costs of Rs. 100/-. Learned Appellate Court further held that despite the fact that application under Order 13, Rule 2 CPC was allowed, defendants failed to produce the original 'Will' before the learned trial Court as well as before the Local Commissioner who while recording the statement of attesting witness Nand Lal on 29.1.1995 observed before recording statement of Nand Lal that the original 'Will' was not on record. Learned Appellate Court further held that the evidence of defendants was closed on 01.02.1995 and thereafter defendants moved application for leading additional evidence which was dismissed on 9.2.1995 and revision petitioned filed against order of dismissal dated 9.2.1995 was allowed by High Court vide order dated 21.7.1995 and defendants were allowed to examine five witnesses subject to cost of Rs. 150/-. Thereafter, statements of DW3 Bali Ram and DW4 Rameshwar were recorded on 18.3.1996 and evidence of defendants was closed. Thereafter again defendant moved an application under Order 18, Rule 17-A CPC for adducing additional evidence which was opposed by the plaintiff and said application was dismissed on 18.3.1996. Learned Appellate Court further held that pursuant to order passed by the High Court dated 21.7.1995, defendants were allowed to adduce five witnesses and defendants examined only DW3 Bali Ram and DW-4 Rameshwar but failed to produce original 'Will' the 'Will' at the time of examination of these witnesses. Learned Appellate Court held that it appeared that the original 'Will' was produced by the defendants alongwith their application under Order 18, Rule 17 CPC which was moved after evidence of defendants was closed. On these bases, it was held by learned Appellate Court that it was apparent that original 'Will' was in possession of the defendants but they failed to produce it before the learned trial Court. Accordingly, it was held by learned Appellate Court that the defendants were not vigilant when they adduced their evidence. Learned Appellate Court further

held that the 'Will' in issued was not refused by the learned trial Court from being admitted in evidence and it were the defendants in whose possession the 'Will' in issue was, but they did not exercise due diligence at the time of adducing their evidence. It is further held by learned Appellate Court that provisions of Order 41, Rule 27 CPC was not meant to help a sleeping litigant. On these bases, learned Appellate Court also rejected the plea of the appellants therein to lead additional evidence. On the said findings, learned Appellate Court went on to uphold the judgment and decree passed by learned trial Court and the appeal filed against the said judgment and decree was accordingly dismissed.

12. Mr. Ajay Kumar, learned Senior Counsel appearing for the appellants argued that the judgments and decrees passed by both the learned Courts below were not sustainable as both the learned Courts below had committed serious illegality in dismissing the plea of the appellants that late Punnu Ram in fact had executed a 'Will' in favour of defendants and said 'Will' was never withheld by the defendants as one of the defendant's witness namely DW3 Bali Ram had specifically stated that the original 'Will' was available on the record of the learned trial Court and the same was referred to him as Ext. DW4/A, though according to Mr. Ajay Kumar, it was a different matter that the original 'Will' on record was not so marked. According to Mr. Ajay Kumar, the conclusion arrived at by both the learned Courts below to the effect that the original 'Will' was not produced on record by the defendants at the time of examination of their witnesses was totally perverse. As per the learned senior counsel, the original 'Will' was already placed on record by the defendants before the statements of defence witnesses were recorded and this was apparent from the statement of DW3 Bali Ram. According to Mr. Ajay Kumar, said perversity in the findings returned by both the learned Courts below rendered the said judgments as *non est* and according to Mr. Ajay Kumar, the judgments and decrees passed by the learned Courts below are liable to be set aside on this count only.

13. On the other hand, Mr. Dilip Sharma, learned Senior Counsel appearing for the respondent argued that there was neither any perversity nor any infirmity with the findings which have been returned by both the learned Courts below to the effect that the defendants had not produced the original 'Will' at the time when the statements of defence witnesses were recorded. Mr. Sharma vehemently argued that in fact it was explicitly explained both in judgment passed by learned trial Court as well as judgment passed by learned Appellate Court that despite ample opportunities having been granted to the defendants, they failed to place on record of the learned trial Court the original 'Will' purportedly executed in their favour by Punnu Ram. According to Mr. Sharma, the findings so returned by both the learned Courts below were based on records of the case. Mr. Sharma further submitted that a perusal of the judgment passed by the learned Appellate Court demonstrated that during the pendency of the appeal, defendants had also filed an application to lead additional application under Order 41, Rule 27 CPC which was also and rightly so dismissed by the learned Appellate Court. According to Mr. Sharma had the original 'Will' been on the records of the learned trial Court before the testimony of defence witnesses was recorded then there was no occasion for the defendants to have had filed the application either before learned trial Court under Order 18, Rule 17 CPC or before the learned Appellate Court under Order 41, Rule 27 CPC. On these bases, it was submitted by Mr. Sharma that there was no merit in the appeal and same is liable to be dismissed.

14. I have heard the learned counsel for the parties and also gone through the records of the case as well as the judgments passed by both the learned Courts below.

15. The issue for adjudication before this Court is in a very narrow compass. It is to be adjudicated by this Court as to whether the findings returned by the learned Courts below to the effect that defendants had failed to place on record of the learned trial Court the original 'Will' at the time when defendant's witnesses were examined are correct or whether the contention of the appellants before this Court that the original 'Will' was on record at the time of deposition of defendant's witnesses and this was apparent from the testimony of DW3 is correct.

16. Before proceeding further, it is necessary to take note of the fact that learned trial Court in its judgment retuned the finding that though original 'Will' was later on produced by the

defendants but the same was not exhibited in the Court. It is evident from the records of the case that statement of DW2 Sohan Singh was recorded on 17.1.1995. This witness deposed in the Court that 'Will' was scribed on 30.07.1989. At page 87 of the paper book, there is one 'Will' dated 30th July, 1989. This 'Will' is a two page document which bears the signatures of Punnu Ram, the alleged testator of the said 'Will' and two witnesses namely Bali Ram and Nand Lal. As per said 'Will', it was scribed by Shri S.S. Thakur, Advocate. This 'Will' also stands duly registered before the Sub Registrar on 15.7.1992.

17. At page 78 of the learned trial Court's case file there is a photocopy of the said 'Will'. Photocopy of 'Will' dated 30.07.1989 as well as the original 'Will' bears the stamp of Sub Judge 1st Class, Ghumarwin, District Bilaspur, H.P. On the photocopy of the said 'Will' which is at page 78 of the paper book, on the first page Ext. 2/A is written in red ink. Signature of Shri S.S. Thakur are encircled and marked as mark Y, whereas signatures of testator Punnu Ram were encircled in red ink and marked as mark X. Similarly 'Will' which is at page 87, also bears one stamp of Sub Judge 1st Class, Ghumarwin, District Bilaspur on its first page and two such stamps on its second page. In the original 'Will', signatures of Bali Ram, attesting witness are encircled in red ink and marked as mark X, whereas signatures of other witnesses Nand Lal are encircled in red ink and are marked as mark Y. However, below mark X and mark Y, "Sub Registrar" is written in the same ink i.e. red and in the same hand. As per learned senior counsel appearing for the appellants, the factum of original 'Will' being on record has been proved by the testimony of DW3. Shri Bali Ram, one of the attesting witness of the 'Will' in issue, has entered the witnesses box as DW3. A perusal of his testimony demonstrates that in his examination in chief he has deposed "*Punnu ke Dastkhat vasiyat Ext. DW4/A par hai. Phir maine bhee vasiyat par daskhat bataur gawah keye*". One thing which is apparent from a perusal of the testimony of DW3 is that neither he identified the signatures of Punnu on any particular document on the court file nor there is any document on the court file which has been marked as Ext. DW4/A. According to Mr. Ajay Kumar in fact the "original Will" which is at page 87 of the trial Court's record which was put to DW-3 when the said witness was examined, however, by mistake, the same could not be exhibited as a document.

18. Statement of DW3 Bali Ram was recorded on 18.3.1996. It is a matter of record that there were two applications filed by the defendants before the learned trial Court under Order 18, Rule 17 to lead additional evidence. The application later on filed under Order 18, Rule 17 dated 24.9.1997 is at page 107 of the trial Court's case file which was rejected by the learned trial Court. A perusal of the averments made in the said application demonstrate that it was mentioned therein that the case in issue was listed on 24.9.1997 (the date on which said application was filed) and at the time of recording statement of the said witness, the original 'Will' was lying on the record but by mistake the original 'Will' was not exhibited by the Court and resultantly photocopy of the 'Will' was exhibited by the Court. On these bases, it was contended in that application that it was necessary in the interest of justice that D.Ws. be recalled and re-examined to prove the 'Will'. In my considered view, if the contention of the learned senior counsel appearing for the appellants is to be believed that the original 'Will' which was on the record of the trial Court was duly proved by DW3 but erroneously the same was wrongly marked then the averments which have been made in the application which was filed by the defendants under Order 18, Rule 17 dated 24.9.1997 were wrong and incorrect vide which application, prayer for recalling and re-examining the defendant's witnesses was made to prove the 'Will' in issue on the ground that the original 'Will' which was lying in the Court, by mistake was not exhibited and resultantly photostate copy of same 'Will' got exhibited.

19. It is evident from the averments which were made in the application filed under Order 18 Rule 17 CPC dated 24.9.1997 that by way of recalling D.Ws, defendants intended to prove original 'Will' dated 30.07.1989, whereas the 'Will' which was exhibited earlier was the photocopy i.e. Ext. 2/A, which is at pages 78 and 79 of the paper book.

20. Besides the factum of a photocopy having been exhibited on record being substantiated by the averments made in the application filed under Order 18, Rule17, this is also

substantiated from the fact that in the photocopy of the said 'Will' stamp of Sub Judge 1st Class, Ghumarwin, District Bilaspur is affixed below where the said document has been exhibited as Ext. 2/A as well as below where signatures of Shri S.S. Thakur, Advocate, were encircled in red ink and marked as mark Y and signatures of testator of the 'Will' Punnu Ram were encircled in red ink and marked as mark Y.

21. In my considered view, whereas on one hand, the testimony of DW3 nowhere leads us to the conclusion that original 'Will' was ever put to him, on the other hand, the averments made in the application filed by the defendants under Order 18, Rule 17 CPC dated 24.9.1997 categorically proves and demonstrates that till the date of filing of the said application, the original 'Will' had not been exhibited. Therefore, in this background, in my considered view, there is no merit in the contention of learned counsel for the appellant that despite the fact that the original 'Will' was lying on the records of the learned trial Court and it was put to DW-3, both the learned Courts below had erroneously concluded that the said 'Will' had not been proved on record.

22. Further, a perusal of the averments made in the application which was filed during the pendency of first appeal by the present appellants before the first Appellate Court under Order 41, Rule 27 CPC demonstrates that the reasons which were given therein by the present appellants to allow them to produce additional evidence was that defendants had produced Bali Ram and Sohan Singh as their witnesses in support of 'Will' but due to negligence of the counsel and the mistake of learned lower Court the "original Will" could not be properly marked as Exhibit on the records of the learned lower Court.

23. In my considered view, averments made in the application which was filed under Order 41, Rule 27 CPC to the effect that the "original Will" could not interalia be properly marked as an exhibit due to the mistake of learned lower Court was a very serious allegation leveled by the appellants. It is a matter of record that the application filed under Order 18, Rule 17 CPC dated 24.9.1997 before the learned trial Court was dismissed by the learned trial Court vide order dated 23.12.1997. This order attained finality. During the pendency of suit before the learned trial Court, present appellants had also moved an application under Order 13, Rule 2 CPC for production of 'Will' dated 30.07.1989 which was registered in the office of Sub Registrar, Ghumarwin on 8.6.1992. By way of said application, the prayer which was made by the appellants therein was that the defendants may be allowed to produce original 'Will' dated 30.07.1989 along with other documents before examining the witnesses. However, there is nothing on record to substantiate as to how and when the original 'Will' was in fact placed on record by the defendants. There is no list of documents filed alongwith the "original Will" and incidentally, though there is stamp of Sub Judge 1st Class on the "original Will" but there is no signature of Presiding Officer on the same. These facts create serious suspicion on the mode and manner in which the "original Will" in fact was placed on record by the defendants. During the course of arguments also, learned counsel for the appellants could not point out from either any document on record or any order passed by the learned trial Court as to on which date and in what manner, the original 'Will' in fact was placed on record.

24. The testimony of Nand Lal (DW5) was recorded on 29.1.1995 and this witness has deposed in his examination in chief that if "original Will" is shown to him then he can identify his signatures as well as the signatures of Punnu Ram and the marginal witnesses. This demonstrates that at the time when this witness was examined, the "original Will" was not shown to him. If on that date, the "original Will" was on record then it is not understood as to what prevented the defendants from showing the said "original Will" to DW5.

25. Another important aspect of the matter is that defendants earlier also filed an application under Order 18, Rule 17 CPC to recall witnesses for the purpose of re-examination which application is at page 95 of the learned trial Court's case file. This application is dated 1.2.1995 and it was averred in the said application that the case was fixed for 01.02.1995 itself and witnesses had already been examined on photostate copy of 'Will' dated 30.07.1989 which was pending for the purpose of registration in the office of Sub Registrar, Ghumarwin and

therefore, this necessitated the recall of witnesses as additional evidence to prove the original 'Will' which was later on submitted in the aforesaid case. Though, this application was dismissed by the learned trial Court, however, defendants were permitted to examine D.Ws by this Court and accordingly, on 18.3.1996, DW3 Bali Ram and DW4 Rameshwar were examined by the defendants. A perusal of the testimony of these witnesses also does not demonstrate that the original 'Will' in fact was put to them on 18.03.1996.

26. As I have already mentioned above that thereafter another application was filed under Order 18, Rule 17 CPC by the defendants to recall defendants witnesses to prove the 'Will' which was rejected. It is pertinent to mention that reply which was filed by the plaintiffs to the subsequent application filed by the defendants under Order 18, Rule 17 CPC demonstrates that it was the categorical stand of the plaintiffs in the said reply that the original 'Will' was not on record and thus there was no question to recall defendant's witnesses again.

27. All the above facts, in my considered view, point towards one fact only that the original 'Will' was not on record when the defendants witnesses were examined on various dates and the original 'Will' was subsequently introduced in the records of the learned trial Court by the defendants. The contention of the learned counsel for the appellants that the factum of the original 'Will' being on record was substantiated by the testimony of DW3 Bali Ram, is neither convincing nor the same is borne out from the records of the case. On the other hand, the findings returned by both the learned Courts below to the effect that the original 'Will' in fact was not placed on record by the defendants at the time when defendants witnesses were examined are neither perverse nor it can be said that the findings so returned by both the learned Courts below are contrary to the records. The substantial question of law is answered accordingly.

In view of the findings returned above, as there is no merit in the appeal, the same is dismissed with costs, so also pending miscellaneous application(s), if any.

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

Prita ...Appellant/Defendant

Vs.

Baldev Singh & ors ...Respondents /Plaintiffs

RSA No.486 of 2004
Reserved on: 7.9.2016
Decided on: 14.9.2016

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for seeking declaration that they were in possession of the suit property as non-occupancy tenants and had become owners after the commencement of H.P. Tenancy and Land Reforms Act- defendant denied the tenancy of the plaintiff and claimed that he was the tenant- proprietary rights were rightly conferred upon the defendant- suit was dismissed by the trial Court- an appeal was filed, which was also dismissed- held, in appeal that dispute was between two tenants and the jurisdiction of the Civil Court was not barred- name of the father of the plaintiff was recorded as tenant in the year 1964-65 which continued till 23.4.1971- earlier suit land was shown in the ownership and possession of A- owners had not challenged the entry nor had they appeared before the trial Court to challenge the same- no order for recording defendant No. 1 as gair maurusi was placed on record- application to bring on record the proceedings of Revenue Court was rightly dismissed, as proceedings were initiated after filing the suit- appeal dismissed. (Para-9 to 19)

Cases referred:

Tulsa Singh Vs. Agya Ram & ors,1994 (2) Sim.L.C. 434

Babu Ram (deceased) through L.Rs Smt. Sita Devi & ors Vs. Pohlo Ram (deceased) through L.Rs Smt. Vidya Devi & ors, 1991(2) Sim.L.C 211

Gurnam Singh & ors Vs. Jagjit Singh Rosha, 1975 PLJ 505
Niranjan Singh and others vs. The Financial Commissioner, Punjab (Revenue) and others 1979 PLJ 352

For the Appellant	Mr.R.K.Gautam, Senior Advocate with Ms. Megha Kapur Gautam, Advocate.
For the respondents No.1 to 3:	Mr. N.K.Thakur, Senior Advocate with Ms. Jamna, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J

The defendant is the appellant, who aggrieved by the concurrent decrees passed by the learned courts below, has filed the instant appeal.

2. Relevant facts are that the plaintiffs/respondents (hereinafter referred to as 'respondents') filed suit for declaration to the effect they have been coming in physical cultivation and possession of the suit land as non occupancy tenants and now have become owners by virtue of coming into force the H.P. Tenancy and Land Reforms Act (the 'Tenancy Act' for short) and the Rules, 1972. Suit land is stated to be measuring 13 kanal 4 marlas comprised in Khewat No.176 min, Khatauni No.2806 min, bearing new Khasra Nos.4387, 4389, 4388 and old Khasra Nos. 4060 to 4063 as entered in Misal Hakiat Ishtemal for the year 1989-90, situate in Village Kungrat Majra Chhetran, Tehsil and District Una (the 'suit land' for short). It was averred that entries in the column of cultivation showing the name of defendant No.1 Prita as 'Gar Mourusi' are wrong, null and void and further the mutation No.8713 dated 22.12.1990, conferring proprietary rights under the Act in favour of defendant No.1 are also illegal, null and void and not binding on the plaintiffs. It is averred that in June, 1984, predecessors of defendants 2 to 21, who were Khatri by caste were not ploughing the suit land and had inducted Mohna son of Hako, father of the plaintiffs as tenant-at-will on payment of rent over 13 kanal 12 marlas of land which area was decreased in re-partition proceedings during the consolidation operation to 13 kanal 4 marlas. Predecessors of the plaintiffs reclaimed that land and brought it under cultivation. After the death of Mohna, plaintiffs succeeded to the tenancy rights being the sons of Mohna.

It was further averred that the revenue officials wrongly mentioned the name of Prita son of Hako instead of mentioning the name of plaintiffs being sons of Mohna son of Hako inadvertently without confirming the name of Mohna after his death, as a result of which wrong and incorrect entry came to be incorporated in the Jamabandi for the year 1968-69 in favour of defendant No.1. It was averred that there was no person in the village in the name of Prita son of Hako and, it is only the plaintiffs who are successors in interest to the tenancy rights under the law and, therefore, entries to the contrary in the revenue record were not only wrong, but null and void and inoperative qua the legal rights of the plaintiffs. It was also averred that defendant No.1 was a clever person and with connivance of the revenue officials, got sanctioned proprietary rights under the Tenancy Act in his favour vide order dated 28.9.2000 passed by A.C. Grade-II and, therefore, said mutation was also wrong, illegal and null and void.

3. Suit was resisted and contested by the defendant No.1 only and other defendants did not contest the suit and were proceeded against *ex parte.* As regard defendant No.1, he, in his written statement, took preliminary objection, inter alia of jurisdiction, locus standi, maintainability, plaintiff being out of possession and approaching the court with unclean hands, limitation, estoppel and non joinder of necessary parties. On merits, it was specifically denied that the plaintiffs or their predecessor were in possession of the suit land as tenants at any point of time and even the entry of tenancy in favour of Mohna, father of plaintiffs, was claimed to be wrong and false and a stray entry which had resulted out of manipulation. It was also alleged that the mutation of proprietary rights had been rightly sanctioned in favour of answering defendant. It is further claimed that the order dated 28.9.2000 passed by Settlement Tehsildar-

cum- AC Grade-I, Una pertaining to mutation No.8713 was legal as defendant No.1 was in possession of the suit land as owner thereof. Defendant also took the plea of adverse possession as his possession was stated to be actual, continuous, uninterrupted, open and hostile for a period exceeding 12 years.

4. Plaintiffs filed replication to the written statement filed by defendant and reiterated the allegation made in the plaint and denied those of the written statement.

5. Learned trial court framed the following issues:

"1.Whether the plaintiff has been coming in actual cultivatory possession of the suit land as gair marusi and now has become owners of the suit land, as alleged? OPP.

2.Whether the plaintiff has no cause of action? OPD.

3.Whether this court has no jurisdiction to try the present suit? OPD.

4. Whether the plaintiffs have no locus standi to file the suit? OPD.

5.Whether the suit is not maintainable in the eyes of law? OPD.

6.Whether the plaintiffs have not approached the court with clean hands? OPD.

7.Whether the suit is not within time? OPD.

8.Whether the plaintiffs are estopped from filing the suit by their acts and conduct? OPD.

9.Whether the suit is bad for non joinder of necessary parties, as alleged? OPD.

9-A.Whether the order dated 28.9.2000 of the AC 1st Grade in Misal No.15/2000 is wrong as alleged? OPD.

10.Relief."

6. After recording evidence and evaluating the same, learned trial court dismissed the suit and even the appeal filed against the same was dismissed by the learned lower appellate court constraining the defendant to file the instant appeal.

7. On 2.11.2004, appeal was admitted on the following substantial questions of law:

"1. Whether civil court had no jurisdiction to try the suit?

2. Whether the trial Court and first Appellant court erred in ignoring long standing entries in the revenue record and based decisions on sole stray entry in the revenue record?."

8. During the course of hearing, parties were put to notice and the appeal was also heard on the following additional question of law. (3) *Whether the proceedings initiated by the plaintiffs/respondents before the civil court were barred by principle of res judicata?.*

Substantial Question No.1

9. As regards question No.1, there is no difficulty in concluding that since the dispute was not one between landlord and tenant and was rather *inter se* two persons claiming themselves to be the tenant, therefore, it was the civil court alone which had the jurisdiction to determine the said issue. This court in ***Tulsa Singh Vs. Agya Ram & ors,1994 (2) Sim.L.C. 434,*** was confronted with a similar issue and the same was repelled with the following observations:

"8. Learned counsel for the appellant has contended vehemently that as the appellant had already been granted proprietary rights under Section 104 or the Act and therefore the civil court will have no jurisdiction whatsoever to entertain and decide the case of present nature, where the rights of tenancy in favour of appellant stood legally decided under the provisions of the Act by the competent authority and civil court will have no jurisdiction to again go into that controversy. The learned counsel in support of the aforesaid contention has tried to rely upon (1991) 1 Sim LC 223 Chuhniya Devi v. Jindu Ram.

9. In the reported case the appellants came up before the Full Bench for answer to the question whether civil court had jurisdiction in respect of an order:

> *(a) made by the competent authority under the H.P. Land Revenue Act, 1954, and*
>
> *(b) of conferment of. proprietary rights under Section 104 of the H.P. Tenancy and Land Reforms Act, 1972.*

10. In so far as present case was concerned point (b) above was more relevant.

11. In this Chuhniya Devi case (supra) their Lordships answered to the question as under :

> *(a) that an order made by the competent authority under the H. P. Land Revenue Act, 1954, is open to challenge before a civil court to the extent that it related to matters falling within the ambit of Section 37(3) and Section 46 of that Act; and*
>
> *(b) the civil court has no jurisdiction to go into any question connected with the conferment of proprietary rights under Section 104 of the Act, except in a case where it was found that the statutory authorities envisaged by that Act had not acted in conformity with the fundamental principles of judicial procedure or where the provisions of the Act had not been complied with.*

12. I think the applicability of the principle disposed of in the aforesaid case on the basis of the facts involved and proved on record in the present case was not at all called for.

13. Firstly, in Chuhniya Devi's case, (1991 (1) Sim LC 223) referred to above the dispute was between the landlord and tenant but in the present case the dispute is between the two persons alleging themselves to be the tenant,

14. Secondly, in the aforesaid reported case the proprietary rights had been granted in favour of the tenant by the competent officer under the Act and that too in the presence of the landlord. In the case under reference the suit Was filed on February 4, 1977 and the proprietary rights were granted initially through mutation No. 2649 Ex. D-5 on record sanctioned on December (sic).

15. Thirdly, it may be pointed out that the suit was filed on February 4, 1977 and the written statement was filed by the defendant-appellant on March 25, 1977 while replication was filed on April 12, 1977, meaning thereby the present appellant was in full knowledge of the present suit where his tenancy rights were being assailed in so far as on the date when the proprietary rights were conferred in his favour. The appellant did not bring .to the notice of the Revenue Officer under the Act sanctioning of mutation of proprietary, rights in his favour, pertaining to the alleged civil suit. Thus, the order of proprietary rights in favour of the appellant was granted in the absence of the present plaintiffs.

16. Fourthly, it may again be referred that the landlord preferred an appeal before the Collector, Una, assailing the order of grant of proprietary rights in favour of the present appellant which appeal was accepted and the case was remanded back to the Assistant Collector, for decision, afresh as is evident from Ex. P-5, certified copy of the order of the Collector. Order of the Collector is dated April 5, 1978 and thereafter finally the proprietary rights in favour of the appellant were granted behind the back of the present plaintiff-respondent, though later mutation granting proprietary rights has not been brought on record.

17. The aforesaid facts which have been proved on record clearly make the present case of an altogether different nature than the facts involved in Chuhniya Devi's case (1991 (1) Sim LC 223) referred to above. The applicability of the ratio of that judgment as such on the basis of dissimilarity of the facts in the two cases is not at all called for.

10. In ***Babu Ram (deceased) through L.Rs Smt. Sita Devi & ors Vs. Pohlo Ram (deceased) through L.Rs Smt. Vidya Devi & ors, 1991(2) Sim.L.C 211,*** this court has categorically held that the Legislature barred only those suits from cognizance of Civil Courts where there is no dispute between parties about relationship of landlord and tenant and where such relationship was disputed, it was the civil court alone which had the jurisdiction to entertain and decide the case. Relevant observations read as under:

> *"5. I have heard the learned counsel for the parties. Learned counsel for the appellants urged before me that in view of the averments made in the plaint, in which the plaintiff had claimed a decree for declaration that he was a tenant on the suit land, civil court had no jurisdiction to entertain and decide the suit. It was further urged that there was cogent and convincing evidence adduced by the defendant on record to show that plaintiff was not in possession of the suit property and before the Panchayat the plaintiff had, on April 3, 1974, admitted by giving a document in writing that he was not in possession of the property and on the basis of this document, an order Ex D-1 was passed on April 25, 1976, by the Assistant Collector Second Grade, ordering the correction of entries in revenue records by showing the defendant to be in possession. It was on the basis of this order that change was effected in Khasra Girdwari in Rabi 1976 and for which report in Roznamcha Waquati was also made by the Patwari on May 11, 1976 vide copy Ex D-3. The learned counsel for the appellant further urged that the courts below were not right in discarding the order passed by the Assistant Collector Second Grade on the ground that it was based upon the report of Girdawar Kanungo, who had not been produced in the witness box. It was for this reason that application under order 41 Rule 27 of CPC had been made seeking to produce by way of additional evidence the report of Field Kanungo dated December 11, 1975 along with a copy of summon dated November 18, 1976, by which Assistant Collector Second Grade had asked the plaintiff to appear before him to show cause as to why the correction in revenue records be not made in favour of the defendant.*
>
> *6. Learned counsel for the respondents, on the other hand, urged that the status of the plaintiff was not admitted by defendant and, therefore, there was no bar for civil court to entertain and decide the suit and moreover incorrect entry had appeared in the revenue record against the plaintiff, therefore, suit for declaration in a civil court was competent and maintainable in view of section 46 of the HP Land Revenue Act. It was further contended that defendant could not be permitted to lead additional evidence merely to fill in the lacunae in the case especially when such evidence was within the knowledge of the defendant and could have been easily produced in the trial court.*
>
> *7. I see much force in the arguments advanced by the learned counsel for the respondent-plaintiff. The argument of the learned counsel for the appellants that the suit is barred under Section 58 of the H.P. Tenancy and Land Reforms Act (hereinafter to be called as the Tenancy Act) is not tenable. There is no clause in section 58 of the Tenancy Act which provides for a suit by or against a person claiming himself to be a tenant and whose status as a tenant is not admitted by the land owner. The legislature barred only those suits from the cognizance of civil court where there is no dispute between the parties about the relationship of landlord and tenant. It was a suit filed by the plaintiff claiming himself to be in possession of the property as a tenant under the defendant and defendant had not admitted the status of the plaintiff, as such, rather, it was pleaded that the plaintiff was not at all in possession. The provisions contained in the Punjab Tenancy Act, as applicable to Himachal Pradesh, which are parimateria with the provisions of section 58 of the Tenancy Act came up for consideration before the Supreme Court in Raja Durga Singh V. Tholu and others, AIR 1963 SC 361. The Supreme Court observed init report as under:*

"……There is no entry or item relating to a suit by or against a person claiming to be a tenant and whose status as a tenant is not admitted by the landlord. It would, therefore, be reasonable to infer that the legislature barred only those suits form the cognizance of a civil court where there was no dispute between the parties that a person cultivating land or who was in possession of land was a tenant……"

8. In view of the specific pleadings and as observed by the Supreme Court in Durga Singh's case (supra), Civil Court undoubtedly had jurisdiction to entertain and decide the suit. Moreover, plaintiff had felt aggrieved by an entry made in the revenue records on the basis of an order passed by Revenue Officer. Section 46 of the Himachal Pradesh Land Revenue Act provides that if a person considers himself aggrieved as to any right of which he is in possession by an entry in a record of right or any periodical record, he can institute a suit for declaration of the rights under Chapter VI of the Specific Relief Act, 1963. The courts below, as such, were right in their view that Civil Court had jurisdiction to entertain and decide the suit."

This question is answered against the appellant.

Substantial Question No.2

11. It is not in dispute that it was defendants 2 to 21 who were the owners of the suit land. It is also not in dispute that Mohna, father of the plaintiffs, died in the year 1966 and the name of Mohna was recorded as tenant for the first time in Khasra Girdwari Ext P-6 for the year 1964-65. This entry of tenancy continued upto 23.4.1971. In the Jamabandi for the year 1963-64, Ext P-2, there were no entries of tenancy in favour of said Mohna or defendant No.1 and suit land is shown to be owned and possessed by Smt. Achhri. It is also not in dispute that under para 9.9, Patwari has power to make entry in khasra Girdwari as per spot possession. As observed earlier, Mohna was recorded as a tenant during the course of harvest inspection i.e. Kharif 1965 and this entry continued upto April, 1971, yet the owners did not challenge the said entry, nor did they appear either before the trial court or any revenue officer to challenge the same. Entry in favour of Prita was made for the first time in the Jamabandi for the year 1968-69, Ext P-3, wherein he has been shown as Gair Mourusi

12. Learned courts below, on the basis of evidence, have come to a conclusion that entry in favour of Prita son of Hako as Gair Mourusi was only due to accidental slip or error of judgment on the part of revenue officer wherein instead of writing the name of Mohna son of Hako, name of Prita son of Hako was recorded,. This is clearly evident from the fact that Prita was the son of Nandu and not the son of Hako and the onus was rightly placed on defendant No.1 to explain that he is the son of Hako. That apart, there is admittedly no order of revenue officer whereby the defendant No.1 was ordered to be entered as Gair Mourusi under the land owners and it is more than settled that change in the revenue entries effecting proprietary title or tenancy cannot be made by a revenue officer without following procedure under he law. (*Harbans Singh Vs. Karam Chand, 1991(2) SLC 222, Kanshi Ram Vs. Harbhajan, AIR 2002 HP 154..*

Accordingly, this substantial question of law is answered against the appellant.

Substantial Question No.3

13. Learned Senior counsel for the appellant would vehemently argue that the application for leading additional evdiednce filed by his client before learned lower appellate court has been wrongly rejected whereby he had only sought production of copy of the order passed by Settlement Collector dated 14.9.2008, through which the filed by respondents was dismissed and the order passed by LRO dated 28.9.2000 in Misal No.15/2000 was upheld. Order dated 14.9.2001 was stated to have attained finality as no appeal against the same had been preferred and thus the instant proceedings were barred by the principle of *res judicata*.

14. In support of such submission, heavy reliance is placed by the learned Senior counsel for the appellant on the judgment rendered by me in ***RSA No.332 of 2007, titled as Gurdev Singh Vs. Narain Singh & ors***, more particularly the following observations:

> *"Substantial Question No.1*
>
> *8.It is not in dispute that during settlement, the karukans prepared were ordered to be rectified by the Collector vide order Ext P-8 and the order so passed was affirmed by the Divisional Commissioner vide order Ext P-9. It is further not in dispute that this order has attained finality, having not been assailed before any authority or even a court of competent jurisdiction. Now, what would be the effect of the order?.*
>
> *9.Section 11 Explanation VIII of the Code of Civil Procedure reads as under:*
>
> > *"An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."*
>
> *10.It cannot be disputed that the Settlement Collector had the jurisdiction to entertain the application for correction. Therefore, in such circumstances, whether the order was right or wrong or in accordance with law or not in accordance with law, would not make the order coram non judice or void and the respondents/defendants, if at all aggrieved, were required to assail the same before the competent authority.*
>
> *11.To be fair to the learned counsel for the respondents/defendants, he has vehemently argued that once it is proved on record that no proper procedure was followed by the Settlement Collector while ordering the correction of entries and also bearing in mind that these corrections were carried out at the back of the respondents without affording proper and reasonable opportunity of being heard to them, these findings cannot be held to be binding much less operate as res judicata against the respondents/defendants.*
>
> *12.It is more than settled that where a court or Tribunal is having authority or jurisdiction to decide a particular dispute, but in exercise of such jurisdiction, comes to a wrong conclusion then it is difficult to hold that such an order is void. The correctness of the order has nothing to do with the jurisdiction of the court. It is equally settled that where a quasi judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion whether it is wrong in law or facts and if decides wrongly, the party wronged can only take the recourse prescribed by law for setting the matters right and if that course is not taken, the decision, however, wrong, cannot be disturbed.*
>
> *13.Similar issue came up before a Constitution Bench of Hon'ble Supreme Court in* ***Ujjam Bai Vs. State of Uttar Pradesh& anr, AIR 1962 SC 1621*** *and it was held as under:*
>
> > *"15.Now, I come to the controversial area. What is the position with regard to an order made by a quasi-judicial authority in the undoubted exercise of its jurisdiction in pursuance of a provision of law which is admittedly intra vires? It is necessary first to clarify the concept of jurisdiction. Jurisdiction means authority to decide. Whenever a judicial or quasi-judicial tribunal is empowered or required to enquire into a question of law or fact for the purpose of giving a decision on it, its findings thereon cannot be impeached collaterally or on an application for certiorari but are binding until (1) (1962) 1 S.C.R. 540 reversed on appeal. Where a quasi-judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion whether it is wrong in law or in fact. The question, whether a tribunal hat; jurisdiction depends not on the truth or*

falsehood of the facts into which it has to enquire, or upon the correctness of its findings on these facts, but upon their nature, and it is determinable "at the commencement, not at the conclusion, of the enquiry". (Rex v. Bolten, (1841) 1 QB 66 at p.74).. Thus, a tribunal empowered to determine claims for compensation for loss of office has jurisdiction to determine all questions of law and fact relating to the measure of compensation and the tenure of the office, and it does not exceed its jurisdiction by determining any of those questions incorrectly but it has no jurisdiction to entertain a claim for reinstatement or damages for wrongful dismissal, and it will exceed its jurisdiction if it makes an order in such terms, for it has no legal power to give any decision whatsoever on those matters. A tribunal may lack jurisdiction if it is improperly constituted, or if it fails to observe certain essential preliminaries to the inquiry. But it does not exceed its jurisdiction by basing its decision upon an incorrect determination of any question that it is empowered or required, (i. e.) has jurisdiction to determine. The strength of this theory of jurisdiction lies in its logical consistency. But there are other oases where Parliament when it empowers an inferior tribunal to enquire into certain facts intend to demarcate two areas of enquiry, the tribunal's findings within one area being conclusive and with in the other area impeachable. "The jurisdiction of an inferior tribunal may depend upon the fulfilment of some condition precedent or upon the existence of some particular fact. Such a, fact is collateral to the actual matter which the tribunal has to try and the determination whether it exists (1) [1841] 1 Q.B. 66,74.

or not is logically prior to the determination of the actual question which the tribunal has to try. The tribunal must itself decide as to the collateral fact when, at the inception of an inquiry by a tribunal of limited jurisdiction, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether it will act or not, and for that purpose to arrive at some decision on whether it has jurisdiction or not. There may be tribunals which, by virtue of legislation constituting them, have the power to determine finally the preliminary facts on which the further exercise of their jurisdiction depends; but, subject to that an inferior tribunal cannot, by a wrong decision with regard to a collateral fact, give itself a jurisdiction which it would not otherwise possess."

(Halsbury's Laws of England, 3rd Edn. Vol. II page 59). The characteristic attribute of a judicial act or decision is that it binds, whether it be right or wrong. An error of law or fact committed by a judicial or quasi judicial body cannot, in general, be' impeached otherwise than on appeal unless the erroneous determination relates to a matter on which the jurisdiction of that body depends. These principles govern not only the findings of inferior courts strito sensu but also the findings of administrative bodies which are held to be acting in a judicial capacity. Such bodies are deemed to have been invested with power to err within the limits of their jurisdiction; and provided that they keep within those limits, their decisions must be accepted as valid unless set aside on appeal. Even the doctrine of res judicata has been applied to such decisions. (See Living stone v. Westminister Corporation (1) Re Birkenhead Corporation (2) Re 56 Denton Road Twickenham(3) Society of Medical Officers of Health v. Hope(4). In Burn & Co. Calcutta v. Their Employees(5) (1) [1904] 2 K.B. 109. (2) (1952) Ch. 359, (3) [1953] Ch. 51. (4) [1959] 2 W.L.R. 377, 391, 396, 397, 402. (5) [1956] S.C.R. 781: (S) AIR 1957 SC 38) this Court said that although the rule of res judicata as enacted by s. 11 of the Code of Civil Procedure did

not in terms apply to an award made by an industrial tribunal its underlying principle which is founded on sound public policy and is of universal application must apply. In Daryao v. The State of U. P. (1) this Court applied the doctrine of res judicata in respect of application under Art. 32 of the Constitution. It is perhaps pertinent to observe here that when the Allahabad High Court was moved by the petitioner under Art. 226 of the Constitution against the order of assessment, passed on an alleged misconstruction of the notification of December 14, 1957, the High Court rejected the petition on two grounds. The first ground given Was that the petitioner had the alternative remedy of getting the error corrected by appeal the second ground given was expressed by the High Court in the following words:

"We have, however, heard the learned counsel for the petitioner on merits also, but we are not satisfied that the interpretation put upon this notification by the Sales Tax Officer contains any obvious error in it. The circumstances make the interpretation advanced by the learned counsel for the petitioner unlikely. It is admitted that even handmade biris, have been subject to Sales Tax since long before the dated of the issue of the above notification. The object of passing the Additional Duties of Excise (Goods of Special Importance) Central Act No. 58 of 1957, was to levy an additional excise duty on certain important articles and with the concurrence of the State Legislature to abolish Sales Tax on those articles. According to the argument of the learned counsel for the petitioner during the period 14th December, 1957, to (1) [1961] 2 S.C.A. 591.

30th June, 1958, the petitioner was liable neither to payment of excise duty nor to pay- ment of Sales Tax. We do not know why there should have been such an exemption. The language of the notification might well be read as meaning that the notification is to 'apply only to those goods on which an addi- tional Central excise duty had been levied and paid".

If the observations 'quoted above mean that the High Court rejected the petition also on merits, apart from the other ground given, then the principle laid down in Daryao v. The State of U. P. (1) will apply and the petition under Art. 32 will not be maintainable on the ground of res judicata. It is,' however, not necessary to pursue the question of res judicata any further, because I am resting my decision on the more fundamental ground that an error of law or fact committed by a judicial body cannot, in general, be impeached otherwise than on appeal unless the erroneous determination relates to a matter on which the jurisdiction of that body depends.

16. In Malkarjun Narhari (2) the Privy Council dealt with a case in which a sale took place after notice had been wrongly served upon a person who was not the legal representative of the judgment. debtor's estate, and the executing court had erroneously decided that he was to be treated as such representative. The Privy Council said:

"In so doing the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right;

(1) (1961) 2 S.C.A. 591.

(2) [1950] L.R. 279, A, 216. 225.

and if that course is not taken the decision, however wrong, cannot be disturbed".

17. The above view finds support from a number of decisions-of this Court.

1. Aniyoth Kunhamina Umma v. Ministry of Rehabilitation , Petn No.32 of 1959, D/- 22.3.1961 (AIR 1962 SC 1616). In this case it had been held under the Administration of Evacuee Property Act, 1950, that a certain person was an evacuee and that certain plots of land which belonged to him were, therefore, evacuee property and vested. in the Cus- todian of Evacuee Property.' A transferee of the land from the evacuee then presented a petition under Art. 32 for restoration of the lands to her and complained of an infringement of her fundamental right, under Art. 19 (1) (f) and Art. 31 of the Constitution by the aforesaid order under the Administration of Evacuee Property Act. The petitioner had been a party to the proceedings resulting in the declaration under that Act earlier-mentioned. This Court held that as long as the decision under the Administration of Evacuee Property Act which had become final stood, the petitioner could not complain of any infringement of any fundamental right. This Court dismissed the petition observing :

" We are basing our decision on the ground that the competent authorities under the Act had come to a certain decision, which decision has now become final the petitioner not having moved against that decision in an. appropriate court by an appropriate proceeding. As long as that decision stands, the petitioner cannot complain of the. infringement of a fundamental right, for she has no such right".

2. Gulabdas & CO. v. Assistant Collector, of Customs (S) AIR 1957 SC 733. In this case certain imported goods had been assessed to customs tariff. The assessee continued in a petition under Art. 32 that the duty (1) [1962] 1 S.C.R. 505. (2) A.LR. [1957] S.C. 733, 736. should have been charged under a different item of that tariff and that its fundamental right was violated by reason of the assessment order charging it to duty under a wrong item in the tariff. This Court held that there was no violation of fundamental right and observed :

"If the provisions of law under which impugned orders have been passed are with jurisdiction, whether they be right or wrong on fact,' there is really no question of the infraction of a fundamental right. If a particular decision is erroneous on facts or merits, the proper remedy is by way of an appeal".

3. Bhatnagar & Co. Ltd. v. The Union of India, 1957 SCR 701: (S) AIR 1957 SC 478). In this case the Government had held that the petitioner had been trafficking in licences and in that view confiscated the goods imported under a licence. A petition had been filed under Art. 32 challenging this action. It was held :

> *"If the petitioner's grievance is that the view taken by the appropriate authority in this matter is erroneous, that is not a matter which can be legitimately agitated before us in a petition under Art. 32".*

4. The Parbhani Transport Co-operative Society. Ltd. v. Regional Transport Authority, Aurangabad, 1960-3 SCR 177: (AIR 1960 SC 801). In this case it was contended that the decision of the Transport Authority in granting a permit for a motor carriage service had offended Art. 14 of the Constitution. This Court held that the decision of a quasi-judicial body, right or wrong, could not offend Art. 14."

14. Once the Settlement Collector had the jurisdiction to make the necessary corrections and such order was affirmed by the Divisional Commissioner who too had the jurisdiction, then even if it is assumed that the order passed was wrong,

the same would not make such order a nullity or having been passed without jurisdiction and would therefore, be binding on the parties.

15.Accordingly, question No.1 is answered in favour of appellant by holding that the order passed by Collector Settlement was required to be assailed by the respondents before a competent authority or court and in absence of any challenge to the same, the learned lower appellate court could not have gone into the validity of the order passed either by the Settlement Collector or the Divisional Commissioner and thereafter reverse the judgment and decree passed by the learned Trial Court.

16.Since question No.1 has been answered in favour of appellant, the appeal succeeds on this sole count alone. Therefore, in such circumstances, there is no requirement or even necessity to answer the remaining two other substantial questions of law framed by this Court on 1.8.2007 which have now only become academic.

17.In view of the aforesaid discussion, appeal succeeds and is accordingly allowed and the judgment and decree passed by the learned lower appellate court is set aside and that of the learned trial court is affirmed."

15. I am afraid that the reliance placed on the judgment in Gurdev Singh's case (supra) is totally misplaced as in that case the findings rendered by the Settlement Collector had attained finality as the same were not even questioned before the Civil court while filing suit and having not been assailed before any authority or even before the court of competent jurisdiction, the findings were held to operate as *res judicata* in the subsequent lis between the parties. Whereas, this is not the fact situation obtaining in the instant case as admittedly in the suit itself, proceedings pending before the revenue authority and the order passed therein were already assailed and were subject matter of the suit as the order passed by ST-cum-AC Grade-I, Una in Misal No.15/2000 pertaining to Mutation No.8713 had specifically been assailed.

16. It may be relevant to observe here that the suit was filed in the year 1994 and was subsequently amended so as to assail the order passed by revenue authorities. Once that be so, any subsequent order passed by the revenue authorities would be hit by the doctrine of *lis pendens* and would otherwise have no effect on the proceedings initiated before the civil court, as it is more than settled that the findings recorded by the civil court are binding on the revenue court and not vice versa.

17. That apart, the record clearly establishes that proceedings before the Settlement officer were initiated only after the proceedings were pending before the civil court and, therefore, the defendant No.1 cannot take any advantage of the order passed by Settlement Officer.

18. In ***Gurnam Singh & ors Vs. Jagjit Singh Rosha, 1975 PLJ 505***, it was held by Hon'ble Punjab & Haryana High Court that though the entries in Khasra girdwaris are to be corrected by the revenue authorities, but once dispute has arisen between the parties, the controversy cannot be allowed to be transferred for decision to the revenue authorities. If any orders for correction of entries in khasra girdwaris have been made by these authorities, they would hardly be relevant in the civil proceedings and the evidence adduced by the parties in connection with the prayer for correction of the entries in khasra girdwaris shall have to be assessed independently by the civil courts. It is apt to reproduce the relevant observation which reads thus:

"*2. The point in controversy between the parties is whether possession of the land had been transferred to the proposed vendee under the agreement of sale. There were entries in Khasra Girdawaris which showed that the vendee had succeeded in obtaining possession. These entries have been ordered to be corrected on an application filed by the appellants before the revenue authorities but once the disputes have arisen between the parties, the controversy cannot be allowed to be transferred for decision to the revenue authorities. If any orders for the correction of*

the entries in the Khasra Girdawaris have been made by these authorities, they would hardly be relevant in the civil proceedings and the evidence adduced by the parties in connection with the prayer for the correction of the entries in the Khasra Girdawaris shall have to be assessed independently by the civil Courts. A Local Commissioner appointed by the trial court had also reported that the respondent was in possession of the land in dispute. Under the circumstances, there was prima facie evidence about the plaintiff- respondent having succeeded in obtaining possession of the land under the agreement of sale. No final verdict can, however, be given as to which party is in possession unless the parties have had a full opportunity of examining their entire evidence. The order under appeal is apparently intended to maintain the status quo with regard to possession over the land as it existed on the date of the passing of the temporary injunction on 9.6.1970 in the absence of the appellants. This order had been made absolute by the trial Court on 26.6.1971 after hearing them. It is, however, made clear that this temporary injunction is not supposed to authorize any party to disturb the actual physical possession of the opposite party. The temporary injunction may, however, appear to be fully justified as the plaintiff- respondent had made out a prima facie case."

19. To the similar effect, are the observations made by the same court in case of ***Shri Niranjan Singh and others vs. The Financial Commissioner, Punjab (Revenue) and others 1979 PLJ 352***, wherein court has held that though the correction of khasra girdawari entries was within the exclusive jurisdiction of revenue officer, however, the civil court was seized of the matter. It is the civil court, which can interpret entry either singly or in context of other relevant evidence proved on record by the parties. It has further been held that the findings of civil court regarding the status of contesting party over-rides the findings of revenue authorities:-

"6. The learned counsel for the petitioners confining his arguments to respondent No. 3 only has argued that the issue whether the latter is a trespasser or a tenant of the land measuring 52 Kanals 7 Marlas is sub judice before the civil Court. The trial Court vide judgment dated December 19, 1966 (A. 5) has found that respondent No. 3 was a trespasser. The civil court shall continue to be seized of this matter because respondent No. 3 has filed an appeal against that judgment which is still pending. In this situation, the orders of the revenue authorities ordering the change of the entries in the Girdawaris from 1962 to 1965 showing respondent No. 3 as a tenant of the land is ultra vires and the same are liable to be quashed. I see no force in this contention. The Commissioner in his impugned order dated July 25, 1967, said that it was within the exclusive jurisdiction of a revenue officer to correct the Khasra Girdawari and it is up to the civil court to interpret it in any particular civil proceeding pending before it either singly or in the context of other relevant evidence brought on record by the parties. The learned counsel for the parties do not (and rightly) dispute the correctness of the observation made by the Commissioner. The revenue authorities shall continue to be competent to effect change in the entries in the Girdawaris irrespective of the fact that the civil court is seized of the same matter, though the finding of the civil court regarding the status of the contesting respondents including respondent No. 3 being a tenant or otherwise will over-ride the finding of the revenue authorities resulting in the change of entries in the Girdawaris."

In view of above, this substantial question of law is answered accordingly against the appellant.

In view of the aforesaid discussion and cumulative effect of the answers to the aforesaid three substantial questions of law, there is no merit in this appeal and the same is dismissed leaving the parties to bear their own costs.

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

S.K. Shant. .....Petitioner.

Versus

I.C.I.C.I. Bank Ltd. .....Respondent.

Cr. Revision No. 102 of 2010
Reserved on: 06.09.2016
Decided on: 14 .09.2016

Negotiable Instruments Act, 1881- Section 138- Complaint was filed pleading that petitioner had taken loan from the bank and had issued a cheque, which was dishonored due to insufficient funds- trial Court convicted the accused and sentenced him to undergo simple imprisonment for 6 months and to pay compensation of Rs. 60,000/-- an appeal was preferred, which was dismissed in view of the statement made by the accused- held, that Appellate Court had dismissed the appeal for the simple reason that undertaking was given before the Court to deposit the money which amounted to confession of guilt- accused had disputed delivery of cheque and the receipt of notice- Appellate Court was supposed to adjudicate all these facts- it was not permissible to dispose of the appeal on the basis of undertaking- revision allowed and case remanded to Appellate Court for deciding the same afresh on merits. (Para-6 to 8)

For the petitioner: Mr. M.S. Thakur, Advocate.
For the respondent: Mr. Vijay K. Verma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present criminal revision petition is maintained by the petitioner/accused (hereinafter referred to as 'the petitioner') assailing the order, dated 16.02.2010, of learned Additional Sessions Judge (Fast Track Court), Shimla, H.P. passed in criminal Appeal No. 83-S/10 of 2009, which had arisen out of the judgment, dated 14.09.2009, passed by the learned Judicial Magistrate Fist Class, Court No. 4, Shimla, in Criminal Complaint No. 143/2 of 2006.

2. Briefly stating the facts giving rise to the present petition are that the complainant/respondent-Bank (hereinafter referred to as 'the respondent-Bank') maintained a complaint under Section 138 read with Section 142 of the Negotiable Instrument Act (hereinafter referred to as 'the Act') and Sections 406/420 of Indian Penal Code against the petitioner with the allegations that the petitioner took a loan from the respondent-Bank vide agreement No. LPSHM00001912900 and pursuant to the agreement the petitioner, in order to clear a part of the balance loan amount, issued the cheque, dated 14.02.2006, bearing No. 111620, drawn at Punjab National Bank, The Mall , Shimla. However, on being presented, the cheque was dishonored with remarks "funds insufficient". Subsequently, a demand notice was issued to the petitioner by the respondent-Bank, but the same was not answered, therefore, the respondent-Bank instituted a complaint under Section 138 of the Act. The learned Trial Court convicted the petitioner and sentenced him to undergo simple imprisonment for six months and to pay compensation of Rs.60,000/- to the respondent-Bank. The petitioner preferred an appeal against the order of learned Trial Court to the Court of learned Additional Sessions Judge (Fast Track Court), Shimla, which came to be dismissed, hence the present petition.

3. The learned Trial Court allowed the complaint and sentenced the petitioner to undergo simple imprisonment for six months and to pay compensation of Rs.60,000/- to the respondent-Bank for the loss suffered by it and inconvenience and harassment caused. The petitioner (accused), feeling aggrieved, from the judgment of the learned Trial Court preferred an appeal and the learned Lower Appellate Court dismissed the appeal holding that from the statement dated 14.12.2009 made by the petitioner (accused) it becomes clear that he has

confessed his guilt. In view of the above noted facts, the learned Lower Appellate Court found no merits in the appeal and the same was accordingly dismissed.

4. The learned Lower Appellate Court dismissed the appeal for the simple reason that when appeal was pending before the learned Trial Court the petitioner (accused) has given an undertaking before the Court that he will deposit the amount of compensation and he confessed his guilt. The learned Lower Appellate Court without going into the merits of the appeal has simply held that since the appellant (petitioner herein) has confessed his guilt, so the appeal was dismissed and the petitioner was ordered to surrender before the Court below. Against the said order, the present revision petition is maintained by the petitioner (accused). As per the petitioner, the Court below, however, has neither touched the merits of the appeal nor gone through the facts of the case and simply passed the order on 16.02.2010 after recording the statement of the accused on 14.12.2009. It is further averred that the order of the learned Lower Appellate Court is not sustainable for the simple reason that the Court below has not touched the merits of the appeal at all. Whether the amount was legally payable or not has not been considered by the learned Lower Appellate Court and no findings are given on the appeal.

5. I have heard the learned counsel for the petitioner, learned counsel for the respondent and gone through the record in detail.

6. The learned counsel for the petitioner has argued that the findings of the learned Lower Appellate Court are no findings and the appeal is required to be remanded back to the learned Lower Appellate Court to give findings on merits of the case. The learned counsel for the respondent has argued that no findings are required to be given by the learned Lower Appellate Court when the accused has himself admitted his mistake and confessed his guilt and also promised to pay Rs.60,000/- to the respondent-Bank. In rebuttal, the learned counsel for the petitioner has argued that his statement is not sufficient to conclude his guilt, as the appeal was pending adjudication before the learned Lower Appellate Court and the Court below was required to give its findings on merits.

7. This Court finds that the petitioner (accused), in the learned Trial Court, has disputed the delivery of the cheque as well as the receipt of the statutory notice and these facts were again agitated before the learned Lower Appellate Court in appeal. In the fitness of the things, the learned Lower Appellate Court was required to at least go through the merits of the case after hearing the learned counsel for the parties and give its findings on the merits of the appeal. The order passed by the learned Lower Appellate Court is without touching the merits of the case and the same is not sustainable in the eyes of law and is liable to be set aside. Accordingly, the order under challenge, passed by the learned Lower Appellate Court, dated 16.02.2010, is set aside and it is directed that the learned Lower Appellate Court will pass a detailed order touching the merits of the case as well as considering the submissions made by the learned counsel for the parties afresh.

8. In view of what has been discussed hereinabove, the case is remanded back to the Court of learned Lower Appellate Court for deciding the same afresh on mertis. Records, if any, be send back forthwith to the concerned Court. The petition, as also pending application(s), if any, stand(s) disposed of.

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

State of Himachal Pradesh ..... Appellant

Versus

Chaman Lal ..... Respondent

Cr. Appeal No. 36/2014
Reserved on: September 9, 2016
Decided on: September 14, 2016

Indian Penal Code, 1860- Section 376 and 506- Prosecutrix used to go to the jungle to graze goats and cattle- accused also used to go to jungle to graze cattle and goats- accused had sexual intercourse with the prosecutrix without her consent - he also threatened the prosecutrix - she was found to be pregnant – she was mentally retarded and she delivered a female child- accused was found to be biological father of the child- accused was tried and acquitted by the trial Court- held, in appeal that prosecutrix had supported the prosecution version- her sister and mother corroborated her version- her IQ was found to be 62- she had mental retardation- accused had taken advantage of the mental retardation of the prosecutrix- it is duly proved that accused is biological father of the baby of the prosecutrix- delay was properly explained- trial Court had wrongly acquitted the accused- appeal allowed- accused convicted of the commission of offences punishable under Sections 376 and 506 (Part-II) of I.P.C. (Para-27 to 30)

For the appellant : Mr. M.A. Khan, Additional Advocate General.
For the Respondent : Mr. Devender K. Sharma, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The present appeal has been filed by the State against Judgment dated 2.5.2013 rendered by the learned Additional Sessions Judge, Mandi, District Mandi, Himachal Pradesh in Sessions Trial No. 2 of 2009, whereby respondent-accused (hereinafter referred to as 'accused' for convenience sake) who was charged with and tried for offence under Sections 376 and 506 IPC, has been acquitted.

2. Case of the prosecution, in a nutshell, is that on 22.4.2008, Jai Ram, father of the prosecutrix got registered FIR No. 68 of 2008 against the accused in Police Station Karsog with the allegations that on 1.4.2008, his wife Dhaneshwari Devi telephonically informed him at Shimla that their daughter (Prosecutrix) is pregnant. It was alleged that the prosecutrix told her mother that when she used to go to jungle to graze goats and cattle, then accused also used to go to jungle to graze cattle and goats. Prosecutrix told her mother that three-four months ago, accused had sexual intercourse with her forcibly and without her consent. Accused threatened the prosecutrix not to disclose the incident to anyone. Due to fear and due to forgetting the same, and further due to mental weakness, she did not disclose about the incident to anyone including her mother. Complainant was working at Shimla and was busy in treatment of another daughter at IGMC Shimla. Due to this reason, matter was not reported to the police earlier. During investigation, prosecutrix was got medically examined and as per Medical Officer, she was found habitual to sexual intercourse and was carrying a pregnancy of 31 weeks. Her age was stated to be 19 years. Prosecutrix was alleged to be mentally retarded. She was medically examined at IGMC Shimla as well as PGI Chandigarh. Birth certificate of the prosecutrix was obtained from the concerned Panchayat. Prosecutrix gave birth to a female child on 19.6.2008 at KNH Shimla. Blood samples of the prosecutrix, the bay and the accused were taken for DNA test. As per report, accused was the biological father of the female child. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as twenty three witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He pleaded innocence. Trial Court acquitted the accused as noticed above. Hence, this appeal.

4. Mr. M.A. Khan, Additional Advocate General has vehemently argued that the prosecution has proved its case against the accused person.

5. Mr. Devender K. Sharma, Advocate, has supported the judgment dated 2.5.2013.

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

7. PW-1 Jai Ram is the father of the prosecutrix. He testified that he had three sons and three daughters. Prosecutrix was his daughter. She was aged 20 years in the year 2008. She stammered while talking. She was medically retarded. She could understand her welfare. His elder daughter was under treatment in IGMC Shimla. His wife called him on 1.4.2008 that the prosecutrix was pregnant by eight months from the accused. Prosecutrix did not reveal the incident due to shame. He came on 7th. He could not come earlier due to operation of his daughter. Accused came to their house. He admitted that child belonged to him. He was ready to maintain the child but was not ready to marry the prosecutrix. He made complaint Ext. PW-1/A to the police. PW-1 resiled from his earlier statement. He was cross-examined by the Public Prosecutor. He admitted that he had told the police that the girl was mentally weak. He also admitted that he had told the police that his daughter was mentally ill and unable to communicate properly. Volunteered that he was confused and did not know what was written by the police. In his cross-examination by the learned defence Counsel, he has deposed that his daughter performs all household chores. She has difficulty in speaking. She could understand everything. She was illiterate and understood local language. She was residing happily with her family and a daughter was born to her. She was maintaining her daughter.

8. PW-2 Dhaneshwari Devi is the mother of the prosecutrix. She deposed that PW-4 Lajwanti told her that the prosecutrix was saying that she was pregnant. She made inquiry from her. She told her that the child belonged to the accused. she also told that the accused had threatened her not to disclose the incident at home. Her husband was attending to her elder daughter at Shimla. Her brother-in-law came. Prosecutrix used to stammer. She performed the work after reminding her twice or thrice and it was difficult to make her understand. She had told her that the accused had done wrong act in the month of *Bhado*. Accused came to their house. Her agreed to take the child but refused to marry the prosecutrix. When her husband, matter was reported to the police. Police came. Photographs were taken. Girl showed the places where she was raped. In her cross-examination, she deposed that her daughter was doing all household chores.

9. Prosecutrix PW-3 testified that she used to take cattle to jungle for grazing. She used to do work of grazing the cattle and goats. Accused used to come to graze cattle. About three years ago, in the month of *Bhado*, she had gone to the jungle for grazing the cattle. She was caught by arm and was taken to a cave. Accused gagged her mouth and raped her. Accused threatened to kill her in case the incident was revealed to any person. She told this fact to her younger sister Lajwanti. She did not tell the incident to anyone else since she was afraid. Her mother inquired about the paternity of the child. She told that the child was of the accused. Her father came after the operation of her sister. She was medically examined. Her blood sample was taken. Police came to the village. Member, Kameshwar and her maternal aunt also came. She showed the places to the police, where she had been raped. In her cross-examination by the learned defence Counsel, she deposed that she was 20 years of age. She performed all household work. She was married about 1 ½ year back. One daughter was born to her. She was named Neha. She was residing at Tehsil Nihri earlier and now was residing at Tehsil Thunag. She had studied upto 5th Class at Primary School Fegal. She failed and her mother declined to send her to the school. Accused had raped her thrice. She was raped 2-3 days of the first incident and then 6-7 days after the incident. She was taking care of her daughter.

10. PW-4 Lajwanti is the sister of the prosecutrix. She deposed that that she was studying in 7th class in 2008. She had gone to Chanjeer (Marla Nala) for grazing cattle with her sister. Her sister used to graze cattle. Her mental condition was not proper. She was wearing a shawl. She inquired from her as to why she was wearing the shawl in such a hot weather. It was difficult for her to wear the cardigan and how she could wear shawl. She told that she was carrying a child in her womb. She was shocked. She inquired about the father of the child. She replied that the child was of accused. she told this fact to her maternal aunt Banti Devi and to her maternal uncle Bodh Raj. Later this fact was told to her mother. In her cross-examination, she told that she used to make inquire from prosecutrix as to why she kept shawl and she used

to reply that it was cold. Prosecutrix had studied upto 5th class. Her sister was married in village Janjehli.

11. PW-5 Kameshwar testified that on 25.4.2008, police called him, Begu Devi, Shanti Devi , Dhaneshwari Devi, Banti Devi etc. Prosecutrix showed three places where she was raped. Photographs were taken. Accused had shown one place in a cave. Photographs of the places were taken. Site plan was prepared.

12. PW-6 Dhani Ram deposed that he came to know at Shimla that the prosecutrix was pregnant by accused. He and Narain were called by his sister-in-law, Dhaneshwari. Accused had also come to the house. He confessed his guilt and promised to take care of the child but refused to marry the prosecutrix.

13. PW-7 Surender Kumar deposed that police filed an application Ext. PW-7/A, on which he issued birth certificate of the prosecutrix, Ext. PW-7/B.

14. PW-8 Jitender Kumar has done the blood grouping of the prosecutrix and the accused.

15. PW-9 Dr. Sarla Chand testified that she was posted as Medical Officer, Zonal Hospital Mandi 6 years back. Application was received for conducting medical examination. She has conducted medical examination on 23.4.2008 at 12.30 PM. Prosecutrix was brought with alleged history of sexual assault by the accused, 3-4 times, eight months prior to the examination. Patient was conscious, cooperative and well oriented to time, place and person. According to her, patient was sexually exposed. However, last date of coitus could not be given. She was pregnant at the time of examination. She advised ultrasound of the abdomen to determine the size of foetus and time of pregnancy. As per final opinion, patient was habitual of sexual intercourse and she was pregnant for 31 weeks. Her age was 19 years. Her blood group was A+. She issued MLC Ext. PW-9/B.

16. PW-10 Dr. Rakesh Kumar is the radiologist. Prosecutrix was referred to him by Dr. Sarla Chand for age verification. He issued report Ext. PW-10/B. He has also undertaken ultrasound examination of the prosecutrix. He issued Ext. PW-10/D.

17. Dr. Ramesh Kumar (PW-11) testified that he was posted as Assistant Professor, Department of Psychiatry in 2007. He examined the prosecutrix on 2.5.2008. History was obtained from her father. Based on the history and mental state examination, she appeared to be mentally retarded. She was referred to PGI Chandigarh for determination of her IQ as per the report received from PGI MER, her IQ was 62. Based on the history and mental state examination and IQ assessment report, she had mild mental retardation. She was not in a position to understand the good and bad aspects of the alleged sexual assault. He sent his report alongwith the report of PGI to the Senior medical Superintendent vide letter Ext. PW-11/A. In his cross-examination, he deposed that he had given in his opinion that she was unable to understand good and bad aspects of the sexual assault on the basis of questions, activities and IQ record. He recorded history of the patient on the basis of information. He had talked to the prosecutrix.

18. PW-12 Dr. Jeeva Nand Chauhan has examined the accused on 29.4.2008 at 11.10 AM. He issued MLC Ext. PW-12/B.

19. PW-13 Sh. Nand Singh has deposed that the blood samples of the baby of the prosecutrix were taken by Dr. Joyti Sharma, for analysis of blood group.

20. Dr. Monika Sharma (PW-14) has taken blood samples of accused.

21. PW-15 MHC Sarwan Kumar has handed over parcels with box and all the articles deposited with him to Constable Rameshwar on 25.6.2008 with the direction to carry these to CFSL Chandigarh vide RC No. 36/08.

22. PW-19 SI Sunder Singh went to the spot on 25.4.2008 and associated the prosecutrix, Ward Panch Begu Devi, Dhaneshwari Devi and Kameshwar Dutt. He went with the

victim and Shyam Lal to the spot in Dachihar Jungle. Prosecutrix pointed out a cave where one storied house was being constructed. Banti Devi was present. Site plan was prepared. Photographs of the spot were taken. Blood samples of accused and prosecutrix were taken. Application Ext. PW-19/F was moved for conducting the mental examination of the victim. She was referred to the PGI Chandigarh.

23. PW-20 Dr. Rajiv Sood deposed that the prosecutrix has delivered a full term female child on 18.6.2008.

24. PW-21 Dr. Joyti Sharma testified that she collected blood of prosecutrix on 20.6.2008 at 11.15 AM.

25. PW-22 Dr. Rama Malhotra is a material witness. She has examined the prosecutrix. According to her mean IQ 62 falls in the category of mild mental retardation. She issued Ext. PW-22/A. Report was warded to the Senior Medical Superintendent. In her cross-examination, she deposed that a person having mental retardation can enter marriage if the other person is made aware of this fact and volunteers to marry her. Such a person can not take care of a child. A person having mild mental retardation can tell about the sexual assault committed upon her after three years. She does not have the ability to manipulate the facts.

26. PW-23 Dr. Sanjeev, Assistant Director, CFI Bhopal has proved report Ext. PW-23/A. As per Ext. PW-23/A, the accused was the father of the baby of the prosecutrix.

27. What emerges from the appraisal of evidence is that the prosecutrix PW-3 has testified that three years back, in the month of Bhado, she had gone to the jungle to graze the cattle. She was caught by the accused, from the arms. She was taken to a cave by the accused. accused gagged her mouth and raped her. He threatened to kill her in case the incident was disclosed to any one. She told the incident to her younger sister Lajwanti. She did not tell the incident to any other person because she was scared. In the cross-examination, she has deposed that the accused has raped her thrice. She was raped 2-3 days after the first assault and then 6-7 days thereafter. PW-4 Lajwanti corroborated the statement of the prosecutrix. She deposed that her sister used to wear a Shawl in the summers also, in hot weather. Her sister told that she was pregnant. Incident was also narrated by the prosecution to her mother i.e. PW-2 Dhaneshwari Devi. PW-2 Dhaneshwari Devi has told the incident to PW-1 Jai Ram. Jai Ram was away to Shimla to look after his elder daughter. PW-7 Surinder Kumar has proved the birth certificate of the prosecutrix Ext. PW-7/B. PW-9 Dr. Sarla Chand has proved has examined the prosecutrix. According to her opinion, patient was habitual of sexual intercourse. She was carrying a pregnancy of 31 week and her age was 19 years. As per the report of the Radiologist the age of the prosecutrix was 19 years. She issued MLC Ext. PW-9/B. Statements of PW-11 Dr. Ramesh Kumar and PW-22 Dr. Rama Malhotra are material. According to PW-11 Dr. Ramesh Kumar, he had referred the patient to PGI Chandigarh to determine the IQ. As per the report, her IQ was 62 based on history, mental state examination. She had mild mental retardation. She was not in a position to understand the good and bad aspects of the sexual assault. In his cross-examination, he has admitted that he had given the opinion that the prosecutrix was unable to understand the good and bad of the sexual assault on the basis of questions put to her by him. PW-22 Dr. Rama Malhotra has also examined the prosecutrix to assess the mental IQ. According to her report, Ext. PW-22/A, mean IQ of 62. She has categorically deposed in her cross-examination that a person having mental retardation can enter into marriage if the other person is made aware of this fact and volunteers to marry her. Such a person can not take care of a child. A person having mild mental retardation can tell about the sexual assault committed upon her after three years. Such a person does not have the ability to manipulate the facts.

28. What emerges from the statements of PW-11 Dr. Ramesh Kumar and PW-22 Dr. Rama Malhotra is that the prosecutrix was suffering from mental retardation. She was not in a position to understand the consequences of the sexual assault. Merely that she was married and looking after a baby does not prove that she was of a sound mind. Learned trial Court has erred while making observation that according to him, girl was intelligent. Statement of the prosecution

P-3 has been duly corroborated by her sister Lajwanti and mother Dhaneshwari Devi, regarding the manner in which the incident has taken place. Statement of the prosecutrix PW-3 is also corroborated by medical evidence, as per the statement of PW-9 Dr. Sarla Chand, who has issued MLC Ext. PW-9/B. Accused has taken advantage of the mental retardation of the prosecutrix.

29. There is delay in lodging the FIR but the same is due to the fact that the prosecutrix did not know the consequences of the sexual assault by the accused. The ocular evidence of the prosecutrix has been duly corroborated by the statements of PW-11 Dr. Ramesh Kumar and PW-22 Dr. Rama Malhotra. Blood samples of the accused, the baby and the prosecutrix were taken and the report has been submitted by PW-23 Dr. Sanjeev, Assistant Professor, CFI, Bhopal. He has proved the report Ext. PW-23/A. It is clear from the Ext. PW-23/A that the accused (Chaman Lal) is the biological father of the baby of the prosecutrix. Learned trial Court has also brushed aside Ext. PW-23/A, which conclusively proves that the accused is father of the baby of the prosecutrix as per Ext. PW-23/A. It has come in the statement of PW-3 (Prosecutrix) that the accused used to threaten to kill her in case the incident was divulged to anyone. Thus, the prosecution has duly proved its case against the accused under charged sections.

30. Accordingly, in view of the discussion and analysis made hereinabove, the present appeal is allowed. Judgment dated 2.5.2013 rendered by the learned Additional Sessions Judge, Mandi, District Mandi, Himachal Pradesh in Sessions Trial No. 2 of 2009, is set aside. Accused is convicted for the commission of offence under Sections 376 and 506-II IPC. He be produced to be heard on quantum of sentence on 19.9.2016.

31. Registry is directed to prepare and send the production warrants forthwith.

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

State of Himachal Pradesh .....Appellant.

Versus

Ranjan Lama & another .....Respondents.

Cr. Appeal No. 58 of 2014
Reserved on: September 09, 2016.
Decided on: September 14, 2016.

Indian Penal Code, 1860- Section 304 and 506 read with Section 34- Informant, her husband and one D were residing in a house- husband of the informant was taking liquor- accused R came and started taking liquor with the husband of the informant- husband of the informant slapped accused R and sent him to his house - subsequently, both accused came to the house of the informant and started quarreling with her husband- accused R picked him and threw him down from the upper floor- he suffered injuries- he was taken to hospital and died on the way- accused were tried and acquitted by the trial Court- held, in appeal that informant was a sole eye witness- she had raised hue and cry on which PW-4 and PW-17 arrived at the spot- no liquor was detected in the blood of the deceased- thus, possibility of accidental fall has to be ruled out- it was duly proved that accused had threatened to kill the husband of the informant and had subsequently thrown him from the first floor resulting in his death- prosecution version was proved beyond reasonable doubt- appeal partly allowed- accused R convicted of the commission of offence punishable under Section 304 (Part-II) of IPC, whereas, accused P acquitted. (Para-20 to 22)

For the appellant: Mr. Vivek Singh Attri, Dy. AG.
For the respondents: Mr. Rajesh Mandhotra, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted at the instance of the State against the judgment dated 13.5.2013, rendered by the learned Addl. Sessions Judge-III, Kangra at Dharamshala, H.P. in Sessions Case No. 63-P/VII-2010, whereby the respondents-accused (hereinafter referred to as the accused), who were charged with and tried for offences punishable under Sections 304 and 506 IPC read with Section 34 IPC have been acquitted.

2. The case of the prosecution, in a nut shell, is that in the month of September, 2009, complainant Prabha Devi Lama along with her husband Sanjeev Kumar was residing in the house of one Jagat Ram at place Ghuggar near SSB Chowk, Palampur. One Dhan Bahadur, Uncle of Sanjeev Kumar was also residing with them. On 15.9.2009, Sanjeev Kumar was taking liquor in his rented house and the complainant was packing the luggage as she was supposed to go to her village in West Bengal. In the meantime, accused Ranjan Lama came there from his house at Bindraban and started taking liquor with Sanjeev Kumar. After some time, a quarrel took place between the accused Ranjan Lama and Sanjeev Kumar. Accused Ranjan Lama threatened Sanjeev Kumar to do away with his life. Sanjeev Kumar slapped accused Ranjan Lama at the spot and sent him back to his house. At about 10:00 PM, both the accused persons came to the house of the complainant. Sanjeev Kumar opened the door and accused Punam Lama started quarrelling with him. The accused Ranjan Lama came there all of a sudden and picked up Sanjeev Kumar and threw him down from the upper floor. Sanjeev Kumar fell on the road due to which he suffered injuries on his person. On making noise, Kalpana, her husband Kumar Nishant, Raju, Devan etc. came to the spot, who took Sanjeev Kumar to CHC Palampur from where he was referred to Dr. R.P.G.M.C., Tanda. He was further referred to PGI Chandigarh from Dr. R.P.G.M.C., Tanda and on the way Sanjeev Kumar succumbed to injuries. The matter was reported to the police and FIR was registered. The matter was investigated and on completion of the investigation, challan was put up before the Court.

3. The prosecution, in order to prove its case has examined as many as 16 witnesses. The statements of the accused were also recorded under Section 313 Cr.P.C. According to them, they were falsely implicated. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Vivek Singh Attri, Dy. Advocate General, appearing on behalf of the State, has vehemently argued that the prosecution has proved the case against the accused under Sections 304 and 506 IPC read with Section 34 IPC. On the other hand, Mr. Rajesh Mandhotra, Advocate has supported the judgment of the learned trial Court dated 13.5.2013.

5. We have heard learned counsel appearing for the State and gone through the judgment and records of the case carefully.

6. PW-1 Kumar Rahi testified that he did not remember the date and year of occurrence. However, in the evening time, Punam his sister-in-law came to his room. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that when he reached just outside the quarter of Sanjeev then Ranjan threw Sanjeev Kumar who first struck on the roof and then fell on the road.

7. PW-2 Dr. Jai Des Rana testified that on 15.9.2009 he was on night duty when injured, namely, Sanjeev was brought to the hospital with head injury. He inquired from the attendants about the cause of injury and they disclosed that the injury was sustained by fall. He gave first aid treatment and referred the patient to Dr. R.P.G.M.C., Tanda for further management and treatment. He proved copy of OPD register vide Ext. PW-10/A. In his cross-examination, he admitted that amongst the attendants, wife of the patient was with them. The patient appeared to be under the influence of liquor as he was smelling of alcohol. The injury was possible by way of fall. He has also conducted the post mortem examination. According to him, the death was

due to injuries sustained in brain leading to cardio-respiratory arrest and death. He issued PMR Ext. PW-2/B. According to him, the probable duration between injuries and death was within 24 hours and between death and post mortem was 12 to 36 hours.

8. PW-3 Dr. Harshvardhan Singh testified that on 16.9.2009 Sanjeev Kumar injured was referred from CHC Palampur to Dr.R.P. G.M.C., Tanda for further treatment and management. He treated Sanjeev Kumar and advised C.T. Scan of head and also referred the injured to Surgery Department. He proved prescription slip Ext. PW-3/A and C.T. Scan form Ext. PW-3/B.

9. PW-4 Jagat Ram testified that he had two houses, one at Neugal road and another at SSB Chowk. Sanjeev Kumar along with his wife and Uncle used to reside as tenants in his house situated at SSB Chowk. In the ground floor of the house, he had rented one shop to Prabha Devi, wife of Sanjeev Kumar. On 15.9.2009 at about 10:15 PM, Prabha came to him and told that Puman and her son present in the Court have thrown her husband from first floor to ground floor and there were minimum chances of his survival. He reached the spot and saw blood stains near the drain. However, Sanjeev was already shifted from the spot to room. Then he went to the room where Sanjeev Kumar was lying. He saw blood oozing out from his mouth and ear but he was unable to talk. Thereafter, Sanjeev Kumar was shifted to hospital. On the next day at about 11:00-11:30 AM, he came to know through telephone that Sanjeev Kumar died near Una while he was on way to PGI. He remained associated in the investigation of the case. The police took OPD slip Ext. PW-3/A, CT Scan report form Ext. PW-3/B, C.T. Scan film Ext. PW-4/A vide memo Ext. Pw-4/B. In his cross-examination, he testified that on that very night, he had not made any report about the alleged incident to anyone, including Panchayat and Police. He denied the suggestion that he was not informed by Prabha Devi that Punam and her son threw Sanjeev Kumar down from upper floor of the house.

10. PW-5 Amar Tamang testified that he belongs to Darjelling. Accused and deceased were known to him. He came to know on 16.9.2009 at 4:00 PM that Sanjeev Kumar fell down and was being taken to Dr. R.P.G.M.C., Tanda for treatment. From Tanda, he was referred to PGI Chandigarh and he was accompanying him along with others to PGI. When they reached near Una, Sanjeev Kumar died. They brought him back to Palampur and Prabha Devi lodged report with the police. He did not know that how Sanjeev Kumar fell down nor he was told by anyone in this regard. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination by the learned Public Prosecutor, he admitted that he had conversation with Prabha wife of Sanjeev at the spot and on way to hospital i.e. Palampur and PGI Chandigarh. He denied the suggestion that Prabha told him that both accused picked up quarrel with Sanjeev and that accused Ranjan Lama threw him down from upper floor. He admitted that he had relations with the accused.

11. PW-6 Vishal Rai testified that he belongs to Darjelling. On 15.9.2009 at 10:00 PM, his brother Naveen was in their room when sister of Punam Lama came to their room and told that Sanjeev had fallen and he is to be taken to hospital. He along with Naveen went to the room of Sanjeev Kumar and took him to hospital, Palampur from where he was referred to Tanda and from Tanda to PGI Chandigarh. He did not know how Sanjeev Kumar received injuries. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination by the learned Public Prosecutor, he denied the suggestion that on 15.9.2009 at 10:00 PM Punam Lama told him that her son Ranjan Lama had quarreled with Sanjeev and Sanjeev had fallen down. He denied the suggestion that Sanjeev died due to injuries sustained by him as he was thrown by accused Ranjan Lama. He admitted that accused were known to him.

12. PW-7 Sukhdev testified that he was residing in the house of Jagat Ram. Deceased Sanjeev also used to reside along with wife and Uncle in the same house adjacent to his room. On 16.9.2009, Sanjeev Kumar was to go to Darjelling and for that purpose he had purchased railway ticket on 15.9.2009. He was also with him at that time. On 15.9.2009, Sanjeev Kumar was packing his luggage. When he was sleeping at 10:30 PM, he heard noise and

in the meantime, Jagat Ram came to him and he saw Sanjeev Kumar fallen down. He was taken to hospital. He was told by wife of Sanjeev Kumar that he was thrown down by accused. Sanjeev Kumar died on way to PGI near Una on 16.9.2009. He admitted in his cross-examination that neither on 15.9.2009 nor on 16.9.2009, he reported the matter to the police.

13. PW-14 Dr. Sumeet Sood, testified that on 15.9.2009 when injured Sanjeev Kumar was brought to the hospital, at that time, he was on duty and Dr. Jaidesh Rana was on duty.

14. PW-15 Prabha Tamang is the eye witness to the incident. According to her, she along with her husband late Sanjeev Kumar was residing at Bindravan, Palampur. On 15.9.2009 at 9:30 PM accused Ranjan Lama, cousin brother of her husband came to their house and demanded Rs. 2000/- from her husband. Her husband and accused Ranjan Lama took liquor together in their room. An altercation ensued between her husband and accused Ranjan Lama regarding the money. Her husband told him that he would give the amount on the next day but accused Ranjan Lama insisted that the amount be given on that day only. She was packing her luggage on that day as on the next day they were to leave for their home town. Her husband slapped Ranjan Lama. She called Dhan Bahadur who was in another room who took accused Ranjan Lama away and while going away accused Ranjan Lama threatened her husband to do away with his life. After some time accused Ranjan Lama brought his mother Punam Lama with him and knocked their door. Her husband opened the door. Arguments started between her husband and accused Punam Lama. Accused Ranjan Lama all of a sudden appeared and lifted her husband from his legs and threw him down first on roof and from there her husband fell on the road. Her husband sustained injuries on head, ear, shoulder and other parts of the body. Blood was oozing out from the wounds. The accused fled away from the spot. On making noise, Naveen, Vishal, Nishant and Jagat Ram etc. came at the spot and her husband was taken to CHC Palampur, from where he was referred to Tanda and from Tanda to PGI Chandigarh. He died on the way at Una. She lodged FIR Ext. PW-13/A with the police on 16.9.2009. In her cross-examination, she deposed that on asking of doctor in Civil Hospital, she told the doctor that her husband received injuries due to fall from the roof. She denied the suggestion that after the death of Sanjeev Kumar, she in connivance with Dhan Bahadur made a false story in order to implicate the accused persons in this case.

15. PW-16 Jagdish Chand stated that on 16.9.2009 after the registration of FIR Ext. PW-13/A, the case file was handed over to him for investigation. Inquest papers Ext. PW-16/A and PW-16/B were prepared. The post mortem was got conducted. The spot map Ext. PW-16/C was prepared. He also took the photographs of the spot. The blood stained soil was taken from the spot from three different places and the same were put in three different boxes. A blood stained Baniyan (inner) over which “Amul Gold” was written was also taken into possession. In his cross-examination, he admitted that it was written in the OPD slip Ext. PW-3/A that the smell of alcohol was present in the mouth of the deceased.

16. PW-15 Prabha Tamang is the only eye witness to the incident. According to her, on 15.9.2009 at 9:30 PM accused Ranjan Lama, cousin brother of her husband, came to their house and demanded Rs. 2000/- from her husband. Her husband and accused Ranjan Lama took liquor together in their room. An altercation ensued between her husband and accused Ranjan Lama regarding the money. Her husband slapped Ranjan Lama. After some time accused Ranjan Lama brought his mother Punam Lama with him and knocked their door. Her husband opened the door. Arguments started between her husband and accused Punam Lama. Accused Ranjan Lama all of a sudden appeared and lifted her husband from his legs and threw him down first on the roof and from there her husband fell on the road. Her husband sustained injuries on head, ear, shoulder and other parts of the body. Her husband was taken to CHC Palampur, from where he was referred to Tanda and from Tanda to PGI Chandigarh. He died on the way to PGI Chandigarh at Una. She lodged FIR Ext. PW-13/A with the police on 16.9.2009.

17. PW-2 Dr. Jai Des Rana has stated that on 15.9.2009 he was on night duty when injured, namely, Sanjeev was brought to the hospital with head injury. He inquired from the attendants about the cause of injury and they disclosed that the injury was sustained by fall. He has also conducted the post mortem examination. According to him, the death was due to injuries sustained in brain leading to cardio-respiratory arrest and death. He issued PMR Ext. PW-2/B. According to him, the probable duration between injuries and death was within 24 hours and between death and post mortem was 12 to 36 hours. PW-4 Jagat Ram was the landlord of the deceased. According to him, the wife of deceased came to him and told that Puman and her son present in the Court has thrown her husband from first floor to ground floor and there were minimum chances of his survival. He reached the spot and saw blood stains near the drain. He went to the room where Sanjeev Kumar was lying. He saw blood oozing out from his mouth and ear but he was unable to talk. Thereafter, Sanjeev Kumar was shifted to hospital.

18. PW-5 Amar Tamang and PW-6 Vishal Rai have not supported the case of the prosecution. They were declared hostile and cross-examined by the learned Public Prosecutor. In their cross-examination, they have admitted that they were related to the accused. PW-7 Sukhdev has deposed that he was the neighbourer of deceased Sanjeev Kumar. In the evening on 15.9.2009, Sanjeev Kumar was packing his luggage. He heard noise at 10:30 PM. Jagat Ram came to him and he saw Sanjeev Kumar fallen down. He was taken to hospital. He was told by wife of Sanjeev Kumar that he was thrown down by accused.

19. PW-4 Jagat Ram and PW-7 Sukhdev have admitted that they did not lodge report with the police. Admittedly, FIR was lodged on 16.9.2009. There is no undue delay in lodging the FIR. The first instinct of the wife was to save her husband. Her husband was thrown from the first floor. He received multiple injuries. Sanjeev Kumar (deceased) was taken to hospital, Palampur from where he was referred to Tanda and from Tanda to PGI Chandigarh. He died near Una on way to PGI, Chandigarh. The incident has taken place on 15.9.2009 and FIR has been registered on 16.9.2009. Although FIR should be registered with promptitude, however, in the instant case, the delay in lodging the FIR has been duly explained.

20. The learned trial Court has not correctly appreciated the statement of eye witness to the incident PW-15 Prabha Tamang. She is the wife of deceased and she was the sole eye witness, as discussed hereinabove. She had raised alarm and thereafter, PW-4 Jagat Ram and PW-7 Sukhdev reached the spot. Sanjeev Kumar was shifted to the hospital. Dhan Bahadur was though cited as a witness but his whereabouts were not known and it is in these circumstances, his statement could not be recorded. The learned trial Court has given undue importance that Dhan Bahadur was not examined by the prosecution. PW-15 Prabha Tamang seems to be simpleton lady and she has told the doctor that her husband has fallen.

21. Mr. Vivek Singh Attri, learned Dy. Advocate General for the State has drawn the attention of the Court to Ext. PA, report of the FSL. It is evident from the contents whereof that no ethyl alcohol was detected in the blood of deceased Sanjeev Kumar. Thus, possibility of his falling accidently from roof is ruled out.

22. It has also come in the statement of PW-15 Prabha Tamang that accused Ranjan Lama has threatened her husband with dire consequences to do away with his life, while leaving the house. The prosecution has duly proved that accused Ranjan Lama has thrown the deceased from the first floor resulting in his death. He knew the consequences that if Sanjeev Kumar was thrown from the first floor, he was bound to receive life threatening injuries resulting in his death. Thus, the prosecution has proved the case against accused Ranjan Lama under Sections 304-II and 506-II IPC and has failed to prove the case against accused Punam Lama.

23. Accordingly, the appeal is partly allowed. Accused Ranjan Lama is convicted under Section 304-II IPC and Section 506-II IPC whereas accused Punam Lama is acquitted of the offences under Section 304-II IPC and Section 506-II IPC. Accused Ranjan Lama be heard on the quantum of sentence on 22.9.2016.

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

Sh. Sunder Lal s/o Sh. Mishroo Ram .....Petitioner

Versus

Master Vikas (Minor) s/o Sh. Sunder Lal through next friend Smt.Pushpa Devi .....Non-petitioner

Cr.MMO No. 356 of 2015
Order Reserved on 22.06.2016
Date of Order 14.09.2016

Code of Criminal Procedure, 1973- Section 482- Application for maintenance was filed by V and U, which was partly allowed and maintenance of Rs. 500/- per month was awarded in favour of V- he filed an application for enhancement of maintenance allowance from Rs. 500/- per month to Rs. 10,000/- per month- Court appointed P, maternal aunt of V as next friend of minor- aggrieved from the order, present petition was filed- held, that notice was issued to V, natural mother of minor- she appeared and filed an affidavit regarding no objection for appointment of P, next friend of minor- proceedings under Section 127 are quasi civil and next friend can be appointed in these proceedings - there is no evidence that P had adverse interest to the minor, thus, Court had rightly appointed her as next friend- petition dismissed. (Para-5 to 8)

Cases referred:

Dwarka Prasad Satpathy vs. Bidyut Prava Dixit, AIR 1999 SC 3348
Ramesh Chander Kaushal vs. Mrs Veena Kaushal and others, AIR 1978 SC 1807
Vimala (K) vs. Veeraswamy (K), 1991 (2) SCC 375
S. Sethu rathinam vs. Barbara, 1971 (3) SCC 923

For petitioner : Mr. R. L. Chaudhary, Advocate
For non-petitioner : Mr. B. S. Thakur, Advocate

The following order of the Court was delivered:

P.S. Rana, Judge.

Present petition is filed under Section 482 Code of Criminal Procedure 1973 read with Article 227 of Constitution of India against order dated 03.11.2015 whereby learned Judicial Magistrate appointed Smt. Pushpa Devi wife of Sh. Yash Pal as next friend of minor Vikas in case No.53-4 of 2013 filed under Section 127 Code of Criminal Procedure 1973 for enhancement of monthly maintenance allowance awarded vide order dated 10.09.2001 in case No.35-4 of 2000.

Brief facts of the case:

2. Smt. Urmila Devi and master Vikas filed application under Section 125 Code of Criminal Procedure 1973 and same was decided on 10.09.2001 by learned Judicial Magistrate Anni Distt. Kullu (H.P.). Smt. Urmila Devi and master Vikas filed maintenance petition under Section 125 Code of Criminal Procedure 1973 on the ground that Smt. Urmila Devi was student of 7th class in Govt. Middle School Tandi. It is alleged that Sh. Sunder Lal was also posted in Govt. Middle School Tandi as teacher. It is alleged that Sh. Sunder Lal in the month of March 1998 caught Smt. Urmila Devi in her house and committed sexual intercourse against the will of Smt. Urmila Devi. It is alleged that Smt. Urmila Devi became pregnant and thereafter minor Vikas born. During pendency of petition filed application under Section 125 Code of Criminal Procedure 1973 Smt. Urmila Devi married and she did not press her maintenance allowance petition before learned Judicial Magistrate. Learned Judicial Magistrate granted monthly maintenance allowance to minor Vikas @Rs.500/- per month from the date of filing of application. Thereafter minor Vikas filed application under Section 127 Code of Criminal Procedure 1973 for enhancement of monthly maintenance allowance from Rs.500/- per month to Rs.10,000/- per month. It is alleged that

minor Vikas is student of 10th class in Govt. Senior Secondary School Tandi. It is alleged that minor Vikas could not meet the necessity of life within meager amount of maintenance allowance granted by learned Judicial Magistrate. During pendency of petition minor Vikas filed application under Order XXXII Code of Civil Procedure 1908 for appointment of next friend of minor in proceedings under Section 127 Cr.PC. Learned Trial Court vide order dated 03.11.2015 appointed Smt. Pushpa Devi wife of Sh. Yash Pal Rana who is maternal aunt of minor as next friend of minor. Aggrieved against the order Sh. Sunder Lal filed present petition.

3. Court heard learned Advocate appearing on behalf of petitioner and learned Advocate appearing on behalf of non-petitioner and Court also perused the entire record carefully.

4. Following points arise for determination:

1) Whether petition filed under Section 482 Code of Criminal Procedure 1973 read with Article 227 of Constitution of India is liable to be accepted as mentioned in memorandum of grounds of petition?

2) Final order.

Findings upon Point No.1 with reasons.

5. Submission of learned Advocate appearing on behalf of petitioner that learned Trial Court appointed Smt. Pushpa Devi maternal aunt of minor as next friend without consent of natural guardian and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. It is proved on record that on dated 09.10.2015 learned Judicial Magistrate issued notice to natural mother of minor Smt. Urmila Devi. It is proved on record that Smt. Urmila Devi natural mother of minor appeared before learned Trial Court and filed affidavit that she has no objection if Smt. Pushpa Devi is appointed as next friend of minor. Smt. Urmila Devi had also given affidavit to the effect that minor Vikas is under the care of Smt. Pushpa Devi. There is recital in the affidavit that Smt. Pushpa Devi is providing all necessities of life to minor and is also bearing expenses of education of minor. Affidavit filed by Smt. Urmila Devi before learned Trial Court remain unrebutted on record.

6. Submission of learned Advocate appearing on behalf of petitioner that proceedings under Section 127 Code of Criminal Procedure 1973 are criminal proceedings and no order under Order XXXII Code of Civil Procedure 1908 can be passed by criminal Court and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. It is held that proceedings under Section 127 Code of Criminal Procedure 1973 are quasi criminal and quasi civil proceedings. It is held that in quasi criminal and quasi civil proceedings provisions of order XXXII Code of Civil Procedure can be invoked. It is well settled law that Chapter IX and Section 125 to 128 of Code of Criminal Procedure 1973 are measure of social justice to protect women and children from vagrancy and destitution. ***See AIR 1999 SC 3348 Dwarka Prasad Satpathy vs. Bidyut Prava Dixit. See AIR 1978 SC 1807 Ramesh Chander Kaushal vs. Mrs Veena Kaushal and others. See 1991 (2) SCC 375 Vimala (K) vs. Veeraswamy (K). See 1971 (3) SCC 923 S. Sethu rathinam vs. Barbara.***

7. Submission of learned Advocate appearing on behalf of petitioner that Smt. Pushpa Devi is not appointed under Hindu Minority and Guardianship Act 1956 and under Guardians and Wards Act 1890 and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. It is well settled law that it is the duty of the Court to appoint next friend of minor in judicial proceedings. It is also well settled law that any person can be appointed next friend of minor if he fulfilled following conditions: (1) Next friend should not be of unsound mind. (2) Next friend himself should not be minor. (3) Next friend should not have any adverse interest against minor.

8. Submission of learned Advocate appearing on behalf of petitioner that Smt. Pushpa Devi has adverse interest qua minor and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. There is no evidence on record that Smt. Pushpa Devi has adverse interest qua minor. Plea of petitioner that Smt. Pushpa Devi has adverse interest qua minor is defeated on the concept of *ipse dixit.* (An assertion made without

proof). In view of the fact that petition under Section 127 Code of Criminal Procedure filed by minor and in view of the fact that Courts are under legal obligation to protect the interest of minor it is held that learned Trial Court did not commit any illegality by way of appointing Smt. Pushpa Devi as next friend of minor in proceedings under Section 127 Code of Criminal Procedure 1973. In view of above stated facts point No.1 is answered in negative.

Point No.2 (Final order).

9. In view of findings upon point No.1 above petition is dismissed. File of learned Trial Court alongwith certified copy of this order be sent back forthwith. Observations will not effect merits of case in any manner and will be strictly confined for disposal of present petition. Learned Trial Court will dispose of petition of minor within two months. Parties are directed to appear before learned Trial Court on **30.09.2016.** Cr.MMO No.365/2015 is disposed of. Pending applications if any also disposed of.

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

Swaran Singh (Deceased), through LRS. ...Appellants

Versus

Darshan Singh (Deceased), through LRS. ...Respondents

RSA No. 62 of 1997
Date of decision: 14.9.2016

H.P. Tenancy and Land Reforms Act, 1972- Section 104- Plaintiff filed a suit for possession pleading that revenue entries showing the deceased as non-occupancy tenant were wrong- defendant No. 1 taking benefit of wrong revenue entries dispossessed the plaintiff from the suit land - suit was decreed by the trial Court- an appeal was preferred - Appellate Court returned the plaint for presentation in the Competent Court of law- held in second appeal, jurisdiction of the Civil Court is barred, when both the parties admit the status of landlord and tenant, but when there is a dispute about such status, then Civil Court alone will have jurisdiction- judgment of the Appellate Court set aside- case remanded to Appellate Court for decision afresh.

(Para-7 to 15)

Cases referred:

Chuhniya Devi Vs. Jindu Ram 1991 (1) Shimla Law Cases 223

Babu Ram (deceased) through L.Rs. Smt. Sita Devi and others Vs. Pohlo Ram (deceased) through L.Rs. Smt. Vidya Devi and others 1991 (2) Sim. L.C. 211

Birbal Vs. Udhami and others 1992 (1) Sim.L.C. 153,

Udham Singh Vs. Ram Singh and Another (2007) 15 SCC 529

For the Appellants: Mr. Karan Singh Kanwar, Advocate.

For the Respondents: Mr. K.D. Sood, Senior Advocate with Mr.Rajneesh K. Lal, Advocate, for respondents No. 1(a) to 1 (e).

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J. (Oral).

The plaintiffs are the appellants, who aggrieved by the judgment and decree passed by the learned lower Appellate Court, whereby he held the suit of the plaintiff to be not maintainable before the Civil Court and thereby reversed the findings recorded by the learned Trial Court, have filed this Regular Second Appeal questioning the said judgment and decree.

2. The bare minimal facts as necessary for adjudication of this case are that the plaintiffs/appellants (herein after referred to as the 'plaintiffs') filed a suit for possession of land comprised in Khata Khatauni No. 62min/160, Khasra No. 1 min measuring 3 Bighas, Khasra No. 55 min measuring 7 Bighas and Khasra No. 56 min measuring 14 Biswas, Kitas 3 total measuring 10 Bighas 14 Biswas. It was further pleaded that the revenue entries showing Darshan Singh, (now deceased) as non-occupancy tenant were wrong, illegal, void and not binding on plaintiffs and proforma defendants, as he was never inducted as non-occupancy tenant. The owners were not aware of the wrong revenue entries and only in the month of May, 1990, plaintiff No. 1 came to know about such entries, where after, he moved an application opposing the attestation of conferment of proprietary rights upon defendant No. 1. However, defendant No. 1, taking undue advantage of the wrong revenue entries dispossessed the plaintiff from the suit land in July, 1990.

3. Only defendant No. 1 contested the suit and denied that he had dispossessed the plaintiffs from the suit land in July, 1990 and asserted that he was a non-occupancy tenant over the suit land and was inducted as such by predecessor of the plaintiffs in the year 1960. He raised the objection regarding jurisdiction of the Civil Court to try the suit and further submitted that the conferment and vestment of proprietary rights is automatic under the H.P. Tenancy and Land Reforms Act, 1972.

4. The learned trial Court framed the following issues:-

"1. Whether the possession of defendant No. 1 in the suit land is of tres-passer? OPP

2. If issue No. 1 is proved in affirmative, whether the entries of tenancy are illegal and fraudulent? OPP

3. Whether the plaintiffs are entitled to claim possession, as claimed? OPP

4. Whether the proper court fee has been affixed? OPP

5. Whether this court has jurisdiction? OPP

6. Whether this suit is within limitation? OPP

7. Relief."

5. After recording evidence and evaluating the same, the learned trial Court decreed the suit of the plaintiffs. However, on appeal being filed before the learned lower Appellate Court, the decree passed by learned trial Court was set aside and the case was remanded back to it for returning the plaint to the plaintiffs for presentation in a competent Court of law.

6. Aggrieved by the said findings, plaintiffs/appellants have filed the instant appeal and the same came to be admitted on 23.11.2001 on the following substantial question of law:-

"Whether the Civil Court has the jurisdiction to go into the question involved in the present case between the parties?"

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

7. At the outset, it may be observed that the jurisdiction of Civil Court cannot be readily inferred or easily excluded. While determining such jurisdiction, it is the pith and substance of the plaint's allegations that have to be kept in mind, so also the pith and substance of the relief sought and the jurisdiction does not depend upon the defence taken by the defendant in the written statement.

8. Adverting to the facts of the case, it would be noticed that the only reason which weighed with the learned lower Appellate Court to conclude that the jurisdiction of the Civil Court was excluded is the judgment rendered by Hon'ble Full Bench of this Court in ***Chuhniya Devi Vs.***

Jindu Ram 1991 (1) Shimla Law Cases 223, as would be evident from para 9 of the judgment, which reads thus:

> *"9. The facts of the case are not disputed that the plaintiffs and proforma-defendants No. 2 to 19 having been recorded as occupancy tenants of the suit land shall be deemed to have become its owners. However, the suit land is alleged to be admittedly in possession of the defendant No. 1. Though it is alleged in the plaint that the defendant No. 1 has dispossessed the plaintiffs and came in illegal possession of the suit land in May, 1990, but the long standing entries in the revenue records commencing from the Jambandies 1960-1961 (Ext.DW1/A) todate show the possession of the defendant No. 1 over the suit land as non-occupancy tenant on payment or rent of Rs.150/- per annum. The presumption of correctness having been attached to the entries of the revenue records he shall prima facie be deemed to be in possession of the suit land as non-occupancy tenant. However at the worst it can be taken that there is a dispute between the parties if the possession of the defendant No. 1 over the suit land has been as a non-occupancy tenant or not. But such dispute is triable by the revenue Courts under the H.P. Tenancy and Land Reforms Act. The order of the Land Reform Officer to that effect is appealable to the higher revenue courts. Even the revision and review lies to the higher Authorities. Therefore, it is not disputed that the H.P. Tenancy and Land Reforms Act is a complete Code in itself with regard to the dispute in question. Therefore, I do agree with the learned counsel for the appellant that in view of the Chuhniya Devi's case referred to above the jurisdiction of the Civil Court in this matter is barred. This point as such is decided in favour of the appellants."*

9. To say the least, the learned lower Appellate Court has not at all applied its judicial mind and has further not even cared to have a glance, much less, read the judgment passed in Chuhniya Devi's case (supra) or else the learned lower Appellate Court would not have passed such an order.

10. In *Chuhniya Devi's* case (supra), the Hon'ble Full Bench of this Court had categorically held that the jurisdiction of the Civil Court was barred only when both the parties admit about the status of landlord and tenant, but when there is dispute about such status, then the Civil Court alone would have the jurisdiction. This position of law has been consistently maintained by this Court and reference in this regard can conveniently be made to ***Babu Ram (deceased) through L.Rs. Smt. Sita Devi and others Vs. Pohlo Ram (deceased) through L.Rs. Smt. Vidya Devi and others 1991 (2) Sim. L.C. 211***, wherein it has been held as under:-

> *"6. Learned counsel for the respondents, on the other hand, urged that the status of the plaintiff was not admitted by defendant and, therefore, there was no bar for civil court to entertain and decide the suit and moreover incorrect entry had appeared in the revenue record against the plaintiff, therefore, suit for declaration in a civil court was competent and maintainable in view of section 46 of the HP Land Revenue Act. It was further contended that defendant could not be permitted to lead additional evidence merely to fill in the lacunae in the case especially when such evidence was within the knowledge of the defendant and could have been easily produced in the trial court.*
>
> *7. I see much force in the arguments advanced by the learned counsel for the respondent-plaintiff. The argument of the learned counsel for the appellants that the suit is barred under Section 58 of the H.P. Tenancy and Land Reforms Act (hereinafter to be called as the Tenancy Act) is not tenable. There is no clause in section 58 of the Tenancy Act which provides for a suit by or against a person claiming himself to be a tenant and whose status as a tenant is not admitted by the land owner. The legislature barred only those suits from the cognizance of civil court where there is no dispute between the parties about the relationship of*

landlord and tenant. It was a suit filed by the plaintiff claiming himself to be in possession of the property as a tenant under the defendant and defendant had not admitted the status of the plaintiff, as such, rather, it was pleaded that the plaintiff was not at all in possession. The provisions contained in the Punjab Tenancy Act, as applicable to Himachal Pradesh, which are parimateria with the provisions of section 58 of the Tenancy Act came up for consideration before the Supreme Court in Raja Durga Singh V. Tholu and others, AIR 1963 SC 361. The Supreme Court observed init report as under:

> *"……There is no entry or item relating to a suit by or against a person claiming to be a tenant and whose status as a tenant is not admitted by the landlord. It would, therefore, be reasonable to infer that the legislature barred only those suits form the cognizance of a civil court where there was no dispute between the parties that a person cultivating land or who was in possession of land was a tenant……"*

8. In view of the specific pleadings and as observed by the Supreme Court in Durga Singh's case (supra), Civil Court undoubtedly had jurisdiction to entertain and decide the suit. Moreover, plaintiff had felt aggrieved by an entry made in the revenue records on the basis of an order passed by Revenue Officer. Section 46 of the Himachal Pradesh Land Revenue Act provides that if a person considers himself aggrieved as to any right of which he is in possession by an entry in a record of right or any periodical record, he can institute a suit for declaration of the rights under Chapter VI of the Specific Relief Act, 1963. The courts below, as such, were right in their view that Civil Court had jurisdiction to entertain and decide the suit."

11. On the same preposition, reliance can be placed on the judgment rendered in ***Birbal Vs. Udhami and others 1992 (1) Sim.L.C. 153***, wherein this Court held as under:-

"8. The close perusal of section 58 (3) of the Act shows that there is no clause therein providing for a suit by or against a person claiming himself to be a tenant and whose status as a tenant is not admitted by the land owner. The legislature barred only those suits from the cognizance of civil courts where there is no dispute between the parties about the relationship of landlord and tenant. It was a suit filed by the plaintiff claiming himself to be in possession of the property as a tenant under the defendant and defendant had not admitted the status of the plaintiff as such, rather, it was pleaded that the plaintiff was not at all in possession. The provisions contained in the Punjab Tenancy Act, as applicable to Himachal Pradesh, which are pari material with the provisions of section 58 of the Tenancy Act came up for consideration before the Supreme Court in Raja Durga Singh V. Tholu and others, AIR 1963 SC 361. The Supreme Court observed as under:

> *"….There is no entry or item relating to a suit by or against a person claiming to be a tenant and whose status as a tenant is not admitted by the landlord. It would, therefore, be reasonable to infer that the legislature barred only those suits from the cognizance of a civil court where there was no dispute between the parties that a person cultivating land or who was in possession of land was a tenant….."*

In view of the specific pleadings and as observed by the Supreme Court in Durga Singh's case (supra), civil court undoubtedly had jurisdiction to entertain and decide the suit. In the instant case, admittedly, both the parties are at loggerheads with respect to the status of the plaintiff. The plaintiff claims to be the owner in possession of the suit land. The point involved in the instant case is covered by the facts and circumstances of the case of Raja Durga Singh (supra). Accordingly, the point being devoid of any merit is rejected. Even otherwise, no

interference is called for in the second appeal keeping in view the peculiar facts and circumstances of the case which are covered by the observations made in V. Ramachandra Ayyar and another Vs. Ramalingam Chettiar and another, AIR 1963 SC 302. The observations, in fact, pertain to the Regular Second appeal under section 100, C.P.C. prior to its amendment by C.P.C. (Amendment) Act, 1976. Defendant Birbal has no legs to stand up irrespective of the plea of relinquishment of tenancy land by the plaintiff in view of section 31 of the Act."

12. Above all, the question posed for consideration is no longer resintegra in view of the judgment rendered by the Hon'ble Supreme Court in ***Udham Singh Vs. Ram Singh and Another (2007) 15 SCC 529***, wherein it was observed as under:-

"11. The observations of the High Court on the point of jurisdiction may be quoted, which read as under:

> *"It may be very specifically pointed out here that so far as the present case is concerned, as per the allegations made in the plaint, the plaintiff filed a suit for possession against a trespasser on the basis of title. Such a suit primarily is triable by the civil court and in the present case the plaintiff has failed to prove his plea that he was the owner and the defendants were the trespassers. Suit, as discussed above, has to be disallowed. In the present case, relationship of landlord and tenant between the parties existed and stood established during the trial of the present suit. On the basis of the ratio of Chuhniya case (supra) the plaintiff otherwise has not been successful to make out a case for civil court's interference. ON that account also, the plaintiff has not been successful."*

12. According to the own observations of the High Court on the basis of the averment made in the plaint the suit was cognizable by the civil court. The averments and prayers made in the plaint, are relevant for purpose of deciding the forum where the cause will lie. Looking to the plaint case, the High Court was itself of the opinion that the civil court was competent to take cognizance of the suit. But we feel that the High court went wrong while holding otherwise on the basis of the findings ultimately arrived at by the High Court on facts that the defendants were not the trespassers. The jurisdiction is not to be decided on the basis of the ultimate findings arrived at by the Court. We have already held earlier that the High Court erred in upsetting the concurrent findings of fact arrived at by the two courts of fact, namely, the trial court and first appellate court after detailed and elaborate discussion of the oral as well as documentary evidence on the record. The High court misread the documents and thereby upset the findings of courts below."

13. In view of the aforesaid exposition of law, the findings rendered by the learned lower Appellate Court on the point of jurisdiction cannot be sustained and are liable to be set aside. The learned Lower Appellate Court has not gone into the merits of the case and therefore, it would not be advisable for this Court to go into the factual matrix of the case, lest it defeats one's valuable right of appeal to the aggrieved party. The substantial question of law is answered accordingly and it is held that it is only the Civil Court which has the jurisdiction to entertain the instant lis.

14. Having said so, the appeal is allowed and the judgment and decree passed by the learned lower Appellate Court being not sustainable in the eyes of law is accordingly set aside, leaving the parties to bear their costs. The appeal is remanded back to the learned lower Appellate Court for decision afresh.

15. The parties through their learned counsel are directed to appeal before the learned lower Appellate Court on 3.10.2016. As the suit in this case was filed nearly 26 years

back on 24.10.1990, the learned lower Appellate Court is requested to dispose of the appeal as expeditiously as possible and in no event later than **31st December, 2016**.

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BEFORE HON'BLE MR.JUSTICE SANJAY KAROL, J. AND HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Yogesh Kumar Chandel ....Petitioner

Versus

Union of India & Others ....Respondents

CWP No.3985 of 2015
Date of decision: 14.09.2016

Constitution of India, 1950- Article 226- State Government had leased 31 acre of land to respondent No. 5 at a token price of Rs. 1/- for 99 years for construction of ESIC Hospital & Medical College at Ner Chowk- amount of Rs. 750/- crore was spent but no efforts were being made to make Hospital & Medical College functional- it was contended on behalf of the respondent that certain conditions were to be followed by ESIC before handing over the College to the State Government as per the decision of Government of India- formalities have been completed and steps are being taken by State Government to make College functional- hence, no further direction needs to be passed. (Para- 2 to 8)

For the Petitioner:	In person.
For Respondents No.1 & 2:	Mr.Ashok Sharma, Assistant Solicitor General of India with Mr.Adarsh Sharma, Advocate.
For Respondent No.3:	Mr.Shrawan Dogra, Advocate General with Mr.Anup Rattan & Mr.Romesh Verma, Additional Advocate General and Mr.J.K. Verma, Deputy Advocate General.
For Respondents No.5 & 6:	Mr.Sumit Raj Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

By way of present writ petition, which is in the nature of Public Interest Litigation, petitioner, while invoking extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India, prayed for the following relief(s):-

"(i) That the respondents are directed to make ESIC Hospital & Medical College functional from the academic session 2016-17.

(ii) That the respondents No.1 to 3 and 5 to 6 may kindly be directed to remove all the deficiencies in ESIC-Nerchowk that are pointed out by the MCI in its latest re-inspection in the month of Fab.-2015.

(iii) That the respondents may kindly be directed to decide the issue with regard to the recognition of ESIC-Ner Chowk with immediate effect.

(iv) That respondent Union of India, State of HP and ESIC may kindly be directed to decide the issue with respect to the running of ESIC-Nerchowk, Hospital & Medical College with immediate effect so that it could be made functional from the academics session 2016-17.

(v) That any other order which this Hon'ble Court deems fit may kindly be passed in this matter in the interest of justice."

2. Briefly stated the facts, as emerged from the record, are that the petitioner, who is a practicing advocate in the High Court of Himachal Pradesh, raised important issue of public importance in the present litigation specifically stating therein that State of Himachal Pradesh solely with a view to make available better medical facilities to public at large provided around 31 acre of land to respondent No.5 i.e. Employees State Insurance Corporation at a token price of Rs.1/- for 99 years for construction of ESIC Hospital & Medical College at Ner Chowk in District Mandi. Perusal of documents made available on record further reveals that College was joint endevour of Centre and the State Government. It also emerged from the record that for the completion of aforesaid Project, an amount of Rs.750/- crore was spent, but despite that no efforts were being made by the Authorities concerned to make Hospital & Medical College functional. Accordingly, present petitioner approached this Court seeking reliefs as have been reproduced hereinabove.

3. During pendency of the present petition, Shri Ashok Sharma, learned Assistant Solicitor General of India made available communication dated 17th May, 2016, whereby decision was taken by the Government of India to transfer the ESIC Hospital & Medical College, Ner Chowk, Mandi to the State Government subject to certain conditions, which were to be followed by ESIC before handing over the College to the State Government. Accordingly, this Court vide order dated 19th May, 2016, directed the concerned Authorities to take steps for handing over the aforesaid Medical College to the State Government.

4. Learned Advocate General appearing on behalf of respondent-State specifically informed this Court that they have already taken steps, as required vide communication dated 17th May, 2016.

5. On 4th August, 2016, Shri Sumit Raj Sharma, learned counsel representing respondents No.5 and 6, further informed the Court that they have taken steps to handover the Medical College alongwith ancillary infrastructure to the State.

6. Today, we have been informed at Bar by the learned counsel representing the parties that ESIC Hospital & Medical College, Ner Chowk, Mandi, stands duly transferred to the State of Himachal Pradesh and all necessary steps are being taken by the State of Himachal Pradesh to make it functional.

7. In view of the aforesaid discussion, it clearly emerges that issue raised in the present petition stands duly addressed by the respondents-Authorities and as such present petition can be disposed of having become infructuous.

8. Accordingly, present petition is disposed of as having rendered infructuous. However, before parting, this Court hope and trust that respondent-State shall make all out efforts/endevour to make ESIC Hospital & Medical College, Ner Chowk, fully functional by the next academic sessions so that public at large is benefited. At this stage, we also intend to place on record words of appreciation for the efforts put in by the petitioner; namely; Shri Yogesh Chandel, who filed this petition in public interest.

9. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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

Amar Chand .....Appellant

Versus

State of Himachal Pradesh .....Respondent

Cr. Appeal No. 283/2006
Reserved on: September 14, 2016
Decided on: September 15, 2016

N.D.P.S. Act, 1985- Section 17 and 20- Accused got perplexed on seeing the police and tried to run away- he was apprehended- his search was conducted during which 20 grams brown sugar and 60 grams charas were recovered from the accused- accused was tried and convicted by the trial Court- held, in appeal that efforts were made to associate independent witnesses- police approached a lady but she refused to become the witness- official witnesses supported the prosecution version- their statements inspire confidence- there are no major contradictions in the their statements - contradiction regarding the number of belongings recovered is minor contradiction which can come with the passage of time- prosecution version was proved beyond reasonable doubt and the accused was rightly convicted by the trial Court- appeal dismissed.

(Para-7 to 19)

Case referred:
Karamjit Singh vs. State (Delhi Administration), AIR 2003 SC 1311

For the appellant	:	Mr. Sunil Mohan Goel, Advocate.
For the respondent	:	Mr. Parmod Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

The instant appeal has been filed against Judgment dated 23.8.2006 rendered by the learned Special Judge, Fast Track Court, Kullu, Himachal Pradesh in Sessions Trial No. 12 of 2005,whereby the appellant-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for the commission of offence under Sections 17 and 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), has been convicted and sentenced to undergo rigorous imprisonment for a period of six months and to pay a fine of Rs. 1,000/- for the commission of offence under Section 20(A) of the Act, and in default of payment of fine, to further undergo imprisonment for one month. He has further been convicted and sentenced to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.10,000/-, for the commission of offence under Section 17(b) of the Act, and, in default of payment of fine, to further undergo imprisonment for six months. Both the sentences were ordered to run concurrently.

2. Prosecution case, in a nutshell, is that on 19.7.2004, SHO Jagdish Chand was present half a kilometre from Manali from 15 Mile bridge alongwith HC Hari Singh and HHC Uttam Singh. At about 10.15 AM, a person crossed 15 Mile bridge and was on his way towards Manali. On seeing the police, he got perplexed and tried to run away. He was nabbed. Accused was apprised of his right to be searched before a Magistrate or a Gazetted Officer since the police was suspecting that he was carrying contraband on his person. Accused consented to be searched by the police present on the spot. Written consent memo was prepared in this behalf. SHO Jagdish Chand gave his personal search to the accused and no incriminating article was found in his person. Personal search of the accused was conducted in the presence of witnesses Hari Singh and Uttam Singh. Two polythene envelopes were recovered from the right pocket of the jacket of accused. On checking, it was found containing brown sugar and *Charas*. Recovered brown sugar was weighed. It weighed 20 grams. Two samples of brown sugar, 2 grams each were separated from the recovered brown sugar and both the samples were sealed in the parcels on the spot. remaining brown sugar was sealed separately in the parcel. Thereafter, recovered *Charas* was weighed. It weighed 60 grams. Two samples of *Charas*, 10 grams each were separated from the recovered *Charas* and both the samples were sealed in separate parcels. Remaining *Charas* was also sealed in a cloth parcel. Four seal impressions of 'H' were affixed on each parcel. Sample seal impressions were obtained separately. NCB form in triplicate was filled in. Seal, after use, was handed over to Hari Singh. All the six sealed parcels were taken into possession by the police and recovery memo was prepared in this behalf which was signed by the accused and the witnesses. No independent witnesses could be associated since it was a secluded place. *Rukka*

was prepared on the spot and sent to Police Station, Manali, on the basis of which FIR was registered. Jagdish Chand thereafter went to Shamshi alongwith accused. House of the accused was searched in the presence of two independent witnesses namely Sanjeev Verma and Leeladhar Thakur. Currency notes of Rs.95,280/-, one camera, head-torch, CD Player and one scale were recovered from the house of the accused. Recovery memo to this effect was prepared. Incriminating articles were deposited in the Malkhana at Police Station, Manali. MHC Mohar Singh handed over sealed sample parcels of brown sugar and *Charas* alongwith NCB form in triplicate, copy of FIR and seizure memo and sample seal impressions to Constable Ishwar Dass for being carried for chemical examination to chemical Laboratory Chandigarh and Kandaghat. Ishwar Dass deposited the sealed samples of brown sugar alongwith relevant documents at CFSL Chandigarh and also deposited sealed samples of *Charas* alongwith the relevant documents at CTL Kandaghat. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as seven witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He pleaded innocence. Accused was convicted as noticed above. Hence, this appeal.

4. Mr. Sunil Mohan Goel, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. Parmod Thakur, Additional Advocate General has supported the judgment dated 23.8.2006.

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

7. Constable Ishwari Ram (PW-2) testified that on 20.7.2004, MHC Police Station, Manali handed over to him one sample of brown sugar pertaining to the case duly sealed with four seal impressions of 'H', NCB form in triplicate, sample of seal and other documents vide RC No. 76/04 with the direction to carry the same to CFSL Chandigarh. Vide RC No. 75/04, MHC Police Station Manali also handed over to him a sample of *Charas* pertaining to the case sealed with four seal impressions of 'H', NCB form in triplicate and sample seals and other documents with the direction to carry the same to CTL Kandaghat. On 21.7.2004, he deposited the sample of brown sugar and other related documents at CFSL Chandigarh and obtained receipt. On 22.7.2004, he deposited the case property at CTL Kandaghat against receipt.

8. Leeladhar (PW-3) deposed that he was running a ply board and other construction material shop in the name and style of M/s Shobia Ply-board Company at Shamshi. He knew the accused. On 19.7.2004, police conducted search of the house of the accused at Shamshi and recovered Rs.95,280/- but other articles were not recovered. Sanjeev Verma was also present at that time. Police prepared seizure memo Ext. PW-3/A. He identified his signatures on Ext. PW-3/A in red circle portion 'A'. Amar Chand and Sanjeev also signed the memo.

9. PW-4 MHC Uttam Singh testified that he alongwith SHO Jagdish Chand and HC Hari Singh was present about half kilometre from 15 Miles towards Manali in connection with traffic checking. At about 10.15 AM, a person was spotted coming after crossing the 15 Miles bridge towards Manali side. On seeing the police party, he became perplexed and tried to run away. He was nabbed. Accused was apprised by the IO whether he wanted to be searched before a Magistrate or a Gazetted Officer. He opted to be searched by the police on the spot, vide Ext. PW-4/A. He was sent for calling witnesses near Tibetan colony. He met a Tibetan lady but she refused to become a witness. He and Hari Singh were associated as witnesses in the case. IO gave his personal search to the accused and thereafter search of accused was conducted. One polythene packet was recovered from the external pocket of his jacket, which he was wearing. On checking said polythene packet, brown sugar and *Charas* were recovered. Brown sugar and *Charas* were separately packed in polythene packet. Firstly, brown sugar was weighed. It weighed 20 grams. Two samples of 2 grams each were taken out of recovered brown sugar for chemical test and remaining bulk brown sugar was separately packed and sealed by affixing four seal

impressions of 'H'. Thereafter, *Charas* was weighed. It weighed 60 grams. Two samples of 10 grams each were drawn out of recovered *Charas*. Remaining *Charas* was put in the same polythene packet and samples and remaining *Charas* were separately packed and sealed by putting four seal impressions of 'H' on each parcel. Recovered *Charas* was in the shape of *Chapati* and sticks. NCB form of brown sugar and *Charas* were separately prepared. Sample seals were taken. Seal, after use, was handed over to Hari Singh. Case property was taken into possession vide Ext. PW-4/C. IO prepared *Rukka* and handed over it to him, which he took to Police Station Manali for registration of the case. Case property was produced before the Court during the examination of this witness. In his cross-examination, he deposed that the Tibetan colony was 3-4 kms towards Kullu side. He has not stated to the police that he was sent by IO for calling the witness. He denied the suggestion that every minute vehicles ply on the road. He admitted that the vehicles plied on this road but at that time, no vehicle crossed the spot.

10. HC Mohar Singh (PW-5) testified that on 19.7.2004, a *Rukka* was brought by HHC Uttam Singh, on the basis of which he registered FIR Ext. PW-5/A. On the same day, six sealed parcels were deposited by SHO Jagdish Chand having seal impressions of 'H', four in number, on each parcel, NCB form in triplicate and sample seals. He also deposited one lady purse containing Rs.95,280/-, another bag having camera, CD Player, head-light torch and scale. He deposited the same vide entry No. 291 of the Malkhana Register. He has proved Ext. PW-5/C. On 20.7.2004, he remitted sample parcel of brown sugar, NCB form in triplicate, copy of FIR, seizure memo and sample seal vide RC No. 76/04 Ext. PW-5/D to CFSL Chandigarh through Constable Ishwar Dass. On the same date, one sample parcel of *Charas* alongwith NCB form in triplicate, seizure memo, copy of FIR and sample seal of 'H' were sent to CTL Kandaghat through Constable Ishwar Dass vide RC No. 75/04.

11. PW-6 SI/SHO Jagdish Chand also testified the manner in which accused was apprehended, search, seizure and sampling proceedings were completed at the spot. He prepared *Rukka*. *Rukka* was sent to the Police Station through PW-4 Uttam Singh. Search of the house of the accused was also conducted. Rs.95,280/-, a camera, head torch, CD Player and a scale were recovered from his house which were taken into possession vide memo Ext. PW-3/A. In his cross-examination, he deposed that accused was spotted on National Highway after he had crossed the bridge. Accused was spotted moving on the bridge. Proceedings were completed on the spot. These were completed on the parapet on the road. He proceeded to Bhuntar for taking search of house of the accused alongwith HC Hari Singh and HHC Uttam Singh. He also made inquiry from the Patwari regarding the house and he informed that accused was having no land in his name. He admitted that land over which the house was situate and the house belonged to the father of the accused.

12. A.K. Dalela, Junior Scientific Officer (PW-7) has testified that on 21.7.2004, their laboratory received one sealed parcel, sealed with four seals of 'H' alongwith specimen seals and other case related documents through Constable Ishwari Ram. Case was marked to him. He proved report, Ext. PY.

13. Accused was apprehended at 10.15 AM when he was crossing 15 Mile bridge towards Manali side. He was apprised of his right to be searched before a Magistrate or a Gazetted Officer. Vide Ext. PW-4/A, he gave consent to be searched by the police. According to PW-4 HHC Uttam Singh, he went in search of independent witnesses. He met one Tibetan lady but she refused to become a witness. He has admitted that though it was a National Highway but at that time, the vehicles did not cross the spot. Statement of PW-4 HHC Uttam Singh regarding the manner in which accused was apprehended, search was conducted etc. is duly corroborated by PW-6 Jagdish Chand. PW-4 Uttam Singh and PW-6 Jagdish Chand are official witnesses. Their statements inspire confidence. PW-4 Uttam Singh has tried to associate independent witness but she refused to become a witness.

14. Statements of the official witnesses are trustworthy and inspire confidence. Their lordships of the Hon'ble Supreme Court in the case of **Karamjit Singh vs. State (Delhi Administration)**, reported in AIR 2003 SC 1311, have held that there is no principle of law that

without corroboration by independent witnesses statements of official witnesses cannot be relied upon. Presumption that person acts honestly applies as much in favour of police personnel as of other persons. It has been held as follows:

> " 8. Shri Sinha, learned senior counsel for the appellant, has vehemently urged that all the witnesses of recovery examined by the prosecution are police personnel and in absence of any public witness, their testimony alone should not be held sufficient for sustaining the conviction of the appellant. In our opinion the contention raised is too broadly stated and cannot be accepted. The testimony of police personnel should be treated in the same manner as testimony of any other witness and there is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon. The presumption that a person acts honestly applies as much in favour of police personnel as of other persons and it is not a proper judicial approach to distrust and suspect them without good grounds. It will all depend upon the facts and circumstances of each case and no principle of general application can be laid down. PW11 Pratap Singh has clearly stated in the opening part of his examination-in-chief that ACP Shakti Singh asked some public witnesses to accompany them but they showed their unwillingness. PW10 Rajinder Prasad, SI has given similar statement and has deposed that despite their best efforts no one from public was willing to join the raiding party due to the fear of the terrorists. Exactly similar statement has been given by PW9 R.D. Pandey. We should not forget that the incident took place in November 1990, when terrorism was at its peak in Punjab and neighbouring areas. The ground realities cannot be lost sight of that even in normal circumstances members of public are very reluctant to accompany a police party which is going to arrest a criminal or is embarking upon search of some premises. At the time when the terrorism was at its peak, it is quite natural for members of public to have avoided getting involved in a police operation for search or arrest of a person having links with terrorists. It is noteworthy that during the course of the cross- examination of the witness the defence did not even give any suggestion as to why they were falsely deposing against the appellant. There is absolutely no material or evidence on record to show that the prosecution witnesses had any reason to falsely implicate the appellant who was none else but a colleague of theirs being a member of the same police force. Therefore, the contention raised by Shri Sinha that on account of non-examination of a public witness, the testimony of the prosecution witnesses who are police personnel, should not be relied upon has hardly any substance and cannot be accepted."

15. All the codal formalities have been completed on the spot strictly in accordance with law. There are no major contradictions in the statements of PW-4 Uttam Singh and PW-6 Jagdish Chand. PW-4 Uttam Singh has deposed that only one polythene packet was recovered from the external pocket of the jacket worn by the accused. PW-6 has deposed that personal search was conducted and two polythene packets were recovered. This is a minor contradiction. Accused was apprehended on 19.7.2004 and statements of PW-4 Uttam Singh and PW-6 Jagdish Chand were recorded on 2.8.2005. Thus, there is bound to be memory loss with the passage of time.

16. Mr. Sunil Mohan Goel, Advocate, has also argued that the NCB form is not in accordance with the law. Court has gone through the NCB form Ext. PW-6/D. There is no illegality in the same. Case property was handed over to the MHC. He has entered the same in Malkhana Register. Thereafter, case property was sent to CFSL Chandigarh and CTL Kandaghat. Reports of the laboratories are Ext. PX and PY.

17. Mr. Sunil Mohan Goel has also argued that since the IO has told the accused that he suspected that he was carrying *Charas* and other contraband, thus, he had prior knowledge. In other words, his submission that Section 42 of the Act was required to be complied. However, Court has also gone through the Ext. PW-4/A. Same is in conformity with the law. Accused was required to be told that the police suspected that he was carrying some

contraband and he was required to be given an option to be searched either before a Magistrate or a Gazetted Officer. Thus, there is no illegality in Ext. PW-4/A.

18. Prosecution has proved beyond reasonable doubt that the contraband was recovered from the conscious and exclusive possession of the accused.

19. There is no occasion for this Court to interfere with the well reasoned judgment of the learned trial Court.

20. Accordingly, there is no merit in the present appeal and the same is dismissed, so also the pending applications, if any. Bail bonds of accused are cancelled.

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

Sh. Bhupinder Singh and another .....Appellants.

Vs.

Sh. Devinder Singh and others .....Respondents.

RSA No.: 152 of 2005
Reserved on: 01.09.2016
Date of Decision: 15.09.2016

Code of Civil Procedure, 1908- Order 41 Rule 33 - Plaintiff filed a civil suit for seeking permanent prohibitory injunction – suit was dismissed by the trial Court- an appeal was preferred- a Local Commissioner was appointed by the Appellate Court- Appellate Court held that the area under the house is to be presumed to be that of the person who owns the house- it was further held that it can be further presumed that stairs might have been constructed jointly by the parties- user of the stairs has been denied to the plaintiff by the construction of latrine and bath room by the defendants - held, in second appeal that finding of fact by the Court cannot be based on presumptions- Appellate Court should have taken into consideration the reasoning behind the findings reached by the trial Court and should have returned its independent findings- whole case is open in appeal for rehearing on question of fact and law - judgment of the Appellate Court must reflect its conscious application of mind – Appellate Court should record findings supported by reasons along with the contentions put forth and pressed by the parties – appeal allowed and case remanded to the Appellate Court for decision in accordance with law.

(Para-15 to 19)

For the appellants: Mr. G.R. Palsra, Advocate.

For the respondents: Mr. Sanjeev Kuthiala, Advocate, for respondent No. 1.
Respondents No. 2 and 3 *ex parte*.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge :

This appeal has been filed by the appellants/defendants against the judgment and decree passed by the Court of learned District Judge, Mandi in Civil Appeal No. 36 of 2003 dated 13.01.2005 vide which, learned appellate Court while allowing the appeal filed therein by the present respondent No. 1, has set aside the judgment and decree passed by the Court of learned Senior Sub Judge, Mandi in Civil Suit No. 108/1999 dated 18.01.2003 and decreed the suit so filed by the plaintiff for mandatory injunction by directing the appellants/defendants to remove the construction raised by them on the portion of suit land shown by pink colour in map Ex. PW3/A within 3 months from the date of said judgment.

2. This appeal was admitted on 13.09.2005 on the following substantial questions of law:

"1. Whether the first appellate Court erred in ignoring the material evidence on record which if considered the first appellate Court would have reached the opposite conclusion?"

3. Brief facts necessary for the adjudication of the present case are that respondent No. 1/plaintiff (hereinafter referred to as 'the plaintiff') filed a suit for permanent prohibitory and mandatory injunction against the present appellants/defendants (hereinafter referred to as 'the defendants) on the grounds that land comprised in Khata Khatauni No. 117/715, bearing Khasra Nos. 2201, 2202, 2203 and 2525/2205, Kita 4 measuring 544-27 Sq. mtrs. situated at Mauja Magwain/366/8, Tehsil Sadar, District Mandi was jointly owned by plaintiff, defendant No. 1 as well as proforma defendants, as per Jamabandi for the year 1994-95. As per the plaintiff, the aforesaid Khasra numbers were adjacent to each other and they consisted one plot and all the owners of these Khasra numbers by mutual consent had divided this plot in four parts in the year 1990 as the plaintiff had shown his "willingness" to raise construction over the joint land. Further, as per the plaintiff, the plot allocated to him was in two parts on the spot and one portion was at higher level/elevation as compared to the other. Similar was the location of the plot of the defendants. According to the plaintiff, he started raising construction over a part of the portion of his plot which was at lower level in the year 1991 and completed one story in the same year. He left two feet vacant land from the boundary line in between plot of the plaintiff and defendants and the wall of his house. Further, as per the plaintiff, he extended eves of his slab on the ground floor on that vacant space to the extent of 1 ½ feet. Defendants also started raising construction in the year 1992 at the lower level over his plot and he suggested to the plaintiff that he would also attach the eves of his slab with the eves of their house on the boundary of two plots and both of them also agreed to keep some vacant space on the boundary of their plot and also agreed to keep said space as common path to go to both the houses and as such, on the vacant space on the boundary of both the houses, stairs were made and since then, both the parties were enjoying those stairs as common for the purpose of going to their houses. Further, as per the plaintiff, defendants with the malafide intention to use these stairs for their exclusive purpose, started raising construction of latrine on the front from where there was a bifurcation of path to both the houses since 13.08.1999 and defendants completed it within two days when the plaintiff and his family members were away from the suit premises and in this manner, defendants completely blocked the common path and he also covered the area beneath the eves of the plaintiff's house. As per the plaintiff, defendants were also using the wall of the plaintiff as common wall to that latrine. On these basis, a suit was filed by the plaintiff praying for decree of mandatory injunction as well as permanent prohibitory injunction against the defendants.

4. Defendants No. 1 and 2 in the written statement filed by them, denied the claim of the plaintiff by stating therein that the plaintiff had no enforceable cause of action to institute the suit which otherwise was time barred. According to the defendants, the factum of plaintiff having completed his construction in the year 1991 was admitted, but rest of the contentions of the plaintiff were denied. According to the said defendants, plaintiff had carried out construction in excess of his share. Defendants denied any agreement regarding the vacant space to be kept as path to go to the respective houses and stairs of plaintiff and defendants. According to defendants No. 1 and 2, they had not given any such right of common use to the plaintiff. It was denied by the defendants that there was any common wall in between constructions carried by plaintiff and defendants No. 1 and 2. Existence of a common path, stair case etc. was denied.

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

"1. Whether the plaintiff is entitled for mandatory injunction as prayed? OPP
2. Whether the plaintiff is entitled for Permanent Prohibitory Injunction as prayed? OPP
3. Whether the suit of the plaintiff is not maintainable in the present form? OPD.
4. Whether the plaintiff has no cause of action to file the present suit? OPD
5. Whether the suit of the plaintiff is barred by period of limitation? OPD

6. Relief.

6. On the basis of evidence adduced by the respective parties in support of their respective claims, the following findings were returned by learned trial Court on the issues so framed:

"Issue No. 1:	*No.*
Issue No. 2:	*No.*
Issue No. 3:	*No.*
Issue No. 4:	*No.*
Issue No. 5:	*No.*
Relief:	*Suit dismissed as per operative part of judgment."*

7. Accordingly, vide judgment and decree dated 18.01.2003, learned trial Court dismissed the suit of the plaintiff.

8. Feeling aggrieved by dismissal of his suit, plaintiff filed an appeal. Learned appellate Court vide judgment and decree dated 13.01.2005 accepted the said appeal and decreed the suit of the plaintiff for mandatory injunction by directing the defendants to remove the construction raised by them on the portion of the suit land shown by pink colour in map Ex. PW3/A. Judgment so passed by learned first appellate Court has been challenged by way of present appeal.

9. I have heard the learned counsel for the parties and have also gone through the records of the case as well as the judgments passed by both the learned Courts below.

10. A perusal of the judgment passed by learned trial Court demonstrates that it was held by learned trial Court that plaintiff did not produce any site plan to demonstrate that both plaintiff and defendants had kept vacant space towards each others plots as agreed between them and had also connected their respective slabs and had agreed to use three feet space between two houses as common path and had also constructed stairs, though it was admitted by the plaintiff that he had got plan of his house sanctioned which was lying with him. Learned trial Court further held that there was no written agreement/partition placed on record regarding the factum of leaving 1 ½ feet space by both the parties. It was further held by learned trial Court that no demarcation or measurement of the area of the house of the plaintiff and defendants was placed on record and on these basis, it was difficult to believe the version of the parties with regard to leaving of vacant space and construction of common stairs by both the parties. It was further held by learned trial Court that the plaintiff could have had produced the plan of the house of the defendants in case he had made any deviation or had encroached upon more area than that was sanctioned by the Municipal Committee. It was further held by learned trial Court that it was admitted case of both the parties that the suit land was still joint and some portion of the same was vacant which was also joint and was liable to adjusted at the time of final partition. On these basis, it was held by learned trial Court that it could not be said that the plaintiff was in exclusive possession of any portion of the suit land and he was entitled to any relief of mandatory or prohibitory injunction until the suit land was partitioned in accordance with law.

11. Learned appellate Court while reversing the said findings held that it was admitted case of the parties that the entire suit land was joint and a part of it was allotted to the plaintiff in the year 1990 for raising construction of his house. It was further held by learned appellate Court that it had come in the statement of the plaintiff that he constructed his house in the year 1990 and the defendants constructed their house in the year 1992 and both kept one and half feet vacant land in between their houses to be used as common path. It was further held by learned appellate Court that according to plaintiff while he was away, defendants No. 1 and 2 constructed a latrine on the common path and blocked the same in the year 1999 and for this purpose, defendants also used one of the walls of the house of the plaintiff. It was further held by learned appellate Court that the path in dispute and the stairs in dispute were on the portion

which was under the joint possession of the plaintiff and the defendants and on these basis, learned appellate Court held that it can further be presumed that the stairs might have been constructed jointly by the parties and by construction of latrine and bath room by the defendants, the user of the stairs has been denied by the plaintiff. While arriving at these conclusions, learned appellate Court relied upon the report of the Local Commissioner, in which as per learned appellate Court it was mentioned that both latrine on the ground floor and bath room on the first floor had been constructed by the defendants under the projections and slab of the house of the plaintiff also. It was further held by the learned appellate Court that the contention of the learned counsel for the respondents therein (i.e. the present appellants) to the effect that the suit land had not been partitioned between the parties by metes and bounds and hence plaintiff cannot claim exclusive possession of the stairs was true, but for both the parties, i.e. plaintiff and the defendants. On these basis, it was held by learned appellate Court that even the defendants cannot claim exclusive ownership and possession of the stairs. It was further held by learned appellate Court that the factum of obstruction being caused by the defendants despite objection of the plaintiff was evident from the statement of the plaintiff and that of PW-2 Netar Singh, who was related both to the plaintiff and the defendants. On these basis, it was held by learned appellate Court that defendants had raised construction of their latrine and bath room despite objection of the plaintiff and by their this act, the right of the plaintiff to use the property had been adversely affected. Accordingly, while allowing the appeal, learned appellate Court decreed the suit of the plaintiff for mandatory injunction directing the defendants to remove the construction raised by them in the portion of the suit land shown by pink colour in map Ex. PW3/A.

12. In the present case, it is a matter of record that during the pendency of the appeal before the first appellate Court, a Local Commissioner was appointed who submitted his report dated 11.01.2005, which has been taken into consideration by learned appellate Court while deciding the appeal. As per records, no objection was filed to the said report of Local Commissioner by either of the parties. The relevant part of the report of the Local Commissioner is quoted hereinbelow:

> *"i) Whether by construction of the latrine in the ground floor and bath room, in the first floor, defendant Bhupinder has covered the projection of the house of the appellant Devinder?*
>
> *On this respect, it is submitted that on the spot Bhupinder Singh respondent has constructed a Latrine on the ground floor and bath room in the 1st floor and has constructed half of the abovesaid latrine under the projected slab (Chhaja) of Devinder appellant which is about 16 Inch in Breadth and 3 feet in length and has also constructed a bath room in the first floor in the like manner.*
>
> *ii) Whether the wall of the house of Devinder has also been included by the defendant in his latrine and bath room?*
>
> *With respect to this point, it is submitted that no wall relating to the house of Devinder has been included by the defendant Bhupinder.*
>
> *iii) Whether both the parties are having projection over the stairs in dispute?*
>
> *With respect point No. 3, it is submitted that Devinder appellant has 19 Inch and defendant Bhupinder has 21 Inch projection over the stairs in dispute."*

13. Relying upon the report of the said Local Commissioner, it was held by the learned appellate Court that both the plaintiff and defendants were having projections of their houses towards the alleged common path and projection of the house of the plaintiff measures 19 inches and that of the defendants measures 21 inches over the stairs in dispute. It was further held by the learned appellate Court that it was also mentioned in the report that both latrine on the ground floor and bath room on the first floor had been constructed by the defendants upon the projections and slab of the house of the plaintiff also. On these basis, it was concluded by learned appellate Court that the projection was constructed to cover the area of the house and

the area of the house can be taken to the extent to which the projection goes. Thereafter, learned appellate Court went on to hold that the contention of learned counsel for the respondents therein, i.e. the present appellants to the effect that house of the plaintiff cannot be considered up to the level to which the projection of his house goes and the area in between the house of the plaintiff and the house of the defendants was in possession of the defendants cannot be accepted because **"the area under the house is to be presumed of the person who owns the house."** On these basis, it was held by learned appellate Court that it can safely be said that path in dispute and the stairs in dispute were on the portion which was under the joint possession of the plaintiff and the defendants and appellate Court further went on to hold that **"if it is so, it can further be presumed that the stairs might have been constructed jointly by the parties and by construction of latrine and bath room by the defendants the user of the stairs has been denied to the plaintiff."**

14. Before the learned trial Court, there were specific issues framed; (i) whether the plaintiff is entitled for mandatory injunction as prayed?; and further (ii) whether the plaintiff was entitled for permanent prohibitory injunction?. After appreciating the evidence which was placed on record both by the plaintiff and the defendants, it was held by learned trial Court that there was neither any written family partition nor any agreement adduced on record by the plaintiff regarding the parties having agreed to keep vacant space of 1 ½ feet towards the plots of each other. It was further held by learned trial Court that there was no demarcation or measurement of the area of the house of the plaintiff and the defendants and, therefore, it was difficult to believe the version of the parties with regard to leaving of vacant space and construction of common stairs by both the parties. Learned trial Court further held that plaintiff did not produce any site plan, though it was the case of the plaintiff that he had got the plan of his house sanctioned and this was available with him. It was further held by learned trial Court that there was no evidence regarding the total area and the area which in fact had come in the respective share of the parties and it was an admitted fact of both the parties that the suit land was still joint and some portion of the land which was vacant was also joint and was liable to be adjusted at the time of final partition. On these basis, it was held by learned trial Court that it cannot be said that the plaintiff was in exclusive possession of any portion of the suit land and he was not entitled for the relief of mandatory and prohibitory injunction till the suit was partitioned. These findings given by learned trial Court were assailed in the appeal. Learned appellate Court rather than adjudicating the appeal by discussing the findings arrived at by learned trial Court and thereafter adjudicating on the basis of the contentions urged by both the parties as to whether the findings so arrived at by learned trial Court were sustainable or not went on to set aside the judgment and decree passed by learned trial Court by arriving at conclusions based on assumptions and presumptions. This is evident from the findings returned in the judgment passed by learned appellate Court wherein after coming to the conclusion that path in dispute and the stairs in dispute were on the portion which was under the joint possession of the plaintiff and the defendants, it was further held by learned appellate Court that it can be presumed that the stairs might have been constructed jointly by the parties and by construction of latrine and bath room by the defendants, the user of the stairs has been denied to the plaintiff.

15. I am afraid that the findings so arrived at by learned appellate Court are not sustainable. The findings of fact by a Court of law cannot be based on presumptions. On the basis of material adduced on record by both the parties, the Court has to give a definite finding.

16. Learned trial Court after appreciating material on record held that the plaintiff failed to prove that he was in exclusive possession of any portion of the suit land and on these basis, learned trial Court declined the relief of mandatory and prohibitory injunction in favour of the plaintiff. This Court is not making any observation as to whether the finding so returned by learned trial Court was correct or not. However, in my considered view, in case the finding arrived at by learned trial Court was to be set aside or distinguished by learned appellate Court, then it was obvious that after taking into consideration the reasonings behind the findings so arrived at by learned trial Court, learned appellate Court should have had returned its independent findings which were to be arrived at on the basis of material on record and not on the basis of conjectures,

surmises or presumptions. However, this has not been done by the learned appellate Court in the judgment under challenge.

17. It is well settled law that the first appellate Court is the final Court of fact ordinarily and therefore a litigant is entitled to a full, fair and independent consideration of the evidence at the appellate stage and anything less than this is unjust to him. The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court and first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on question of fact and law. It is settled law that while reversing a finding of fact, the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate court had discharged the duty expected of it. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons on all the issues involved in the case alongwith the contentions put forth and pressed by the parties for decision by the appellate Court.

18. In view of the above salutary principles, I am of the considered view that the learned appellate Court has failed to discharge the obligation placed on it as first appellate Court by deciding the appeal on presumptions rather than returning its findings by coming close quarters with the reasoning assigned by the learned trial Court and thereafter assigning its own reasons for arriving at a different finding. Substantial question of law is answered accordingly.

19. In view of the discussion held above, the appeal is allowed and judgment and decree dated 13.01.2005 passed by the Court of learned District Judge, Mandi in Civil Appeal No. 36 of 2003 are set aside. The case is remanded back to learned appellate Court with a direction to decide the appeal afresh on merits. Parties through their counsel are directed to put in appearance before the learned appellate Court on 17.10.2016. Keeping in view the fact that case pertains to the year 1999, this Court hopes and trusts that learned appellate Court shall adjudicate upon the appeal as expeditiously as possible. No order as to costs. Miscellaneous application(s), if any, also stands disposed of. Registry is directed to return back the records of the case to learned appellate Court forthwith.

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

Dile Ram (since deceased through LRs Tikam Devi & ors.) .....Appellants.

Versus

Sidhu Ram & ors. .....Respondents.

RSA No. 33 of 2004.
Reserved on: 14.09.2016.
Decided on: 15.09.2016.

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for permanent prohibitory injunction pleading that their predecessor-in-interest, D was in possession of the suit land as tenant at will- his tenancy right was inherited by the plaintiffs- they became owners on the commencement of H.P. Tenancy and Land Reforms Act- defendants had filed a wrong application for correction of wrong entry pleading that predecessor-in-interest of the plaintiffs, D had surrendered/relinquished his tenancy rights- suit was opposed by filing a reply denying the contents of the plaint and pleading that D had surrendered the tenancy in the year 1959- he was not the tenant thereafter- suit was dismissed by the trial Court- an appeal was filed, which was allowed- held, in second appeal that defendants had not given the date when they came into possession- application for bringing on record certain documents were filed but it was not shown that these documents could not be traced earlier despite exercise of due diligence- application was filed to fill up the lacuna and was rightly dismissed- it was for the Revenue Authorities to carry out necessary correction after the death of D- no evidence was led to prove that D had

relinquished/surrendered his rights over the suit land- tenancy has devolved upon the plaintiffs - landlord-tenant relation never came to an end in the year 1959- plaintiffs became owners on the commencement of H.P. Tenancy and Land Reforms Act automatically- appeal dismissed.

(Para-16 to 19)

Cases referred:

Sohawa Singh vs. Kesar Singh and others, AIR 1932 Lahore 586
Bogha Singh alias Kishan Singh and anr. vs. Harnarain Singh and ors., 1959 PLJ 136
Jit Singh and others vs. Chanan Singh and anr., 1966 PLJ 246

For the appellant(s): Mr. Sanjeev Kuthiala, Advocate.
For the respondents: Mr. Bhupinder Gupta, Sr. Advocate with Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Kullu, H.P., dated 19.12.2003, passed in Civil Appeal No. 53/2002.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the respondents-plaintiffs (hereinafter referred to as the plaintiffs), have instituted a suit for permanent prohibitory injunction against the appellants-defendants (hereinafter referred to as the defendants). According to the averments made in the plaint, the land comprised in Khata Khatauni No. 505 min/808, Kh. No. 1671, measuring 1-2-0 bighas situated in Phati Vashishat, Kothi Jagatsukh was recorded in the ownership of defendants No. 7 to 9, 13 and one deceased Bir Singh whose legal representatives are defendants No. 10 to 12 but in the possession of deceased Dodu, the father of plaintiffs who was inducted as tenant at will on paying rent and now vide mutation No. 3466, the tenancy rights of deceased Dodu were inherited by plaintiffs in equal shares. The land comprised in khata/khatauni No. 505 min/807 min, Kh. No. 1599 and 1660, measuring 2-9-0 bighas situated in Phati Vashishat, Kothi Jagatsukh was recorded in the name of deceased Ram Chand whose legal representatives are defendants No. 2 to 6 and in this land also deceased Dodu was inducted as tenant at will and now vide mutation No. 3466, tenancy rights were inherited by the plaintiffs. Dodu expired in the year 1971 and after his death the tenancy rights were inherited by plaintiffs and they started payment of rent to the owners and subsequently by operation of Section 104 of the H.P. Tenancy and Land Reforms Act, 1972, the plaintiffs became owner of the suit land on appointed day. The defendants have filed applications before the Tehsildar (Settlement) Kullu for the correction of revenue entries in which they have claimed that suit land was purchased by them and Dodu during his life time had surrendered/relinquished his tenancy rights. It was alleged that in the applications it was mentioned that plaintiffs are not in possession of suit land which fact was incorrect. The plaintiffs and their father have raised orchard over the suit land, out of which the plants on the land 0-9-0 bighas in Kh. No. 1668 are small plants and remaining portion of the land comprises fruit bearing plants. On the portion of land containing Kh. No. 5599, two houses have been constructed by deceased Dodu, one of which is 2 ½ storyed and other is 1 ½ storyed.

3. The suit was contested by the defendants. According to the defendants, Dodu was never inducted as tenant. The mutation No. 3466 was wrongly attested and sanctioned as Dodu himself was not a tenant in possession of the suit land. The mutation does not confer any title, right or interest to the plaintiffs. It was also denied that plaintiffs have become owners of the suit land by operation of Section 104 of the H.P. Tenancy and Land Reforms Act. The filing of three applications before the Assistant Collector is admitted. It is further averred that earlier Dodu was tenant in possession of the suit land under the previous owner but he had failed to pay rent to the owners and had fallen in huge arrears of rent. He was not in a position to cultivate the suit land and to pay the arrears of rent and as such he offered to surrender the possession of the suit land and relinquish the tenancy in favour of previous owner. The offer was accepted by

the owners and the suit land was handed over to them in the year 1959. There was no relationship of landlord or tenant. Dina Ram, Govind and Chetu who were owners-in-possession of land measuring 0-19-0 bighas contained in Kh. Nos. 1668 and 1970 through a registered sale deed dated 3.4.1967 sold the land in favour of defendant No.1 and possession of the land was also delivered to defendant No. 1. Sh. Primu and Tikam Ram being owners-in-possession of land measuring 3-14-0 bighas contained in Kh. Nos. 1671, 1599 and 1600 through a registered sale deed dated 21.5.1962 sold the land in favour of Budh Ram and Ram Chand the predecessor in interest of defendants No. 2 to 13 and the actual and physical possession of the same was also delivered to Budh Ram and Ram Chand. Sh. Ram Chand, predecessor-in-interest of defendants No. 2 to 6 has constructed two houses i.e. single storyed house measuring 37' x 16' and two storyed house measuring 18' x 16 ½' on Kh. Nos. 1599 and 1600.

4. Replication was filed and the learned Sub Judge Ist Class, Manali framed the issues on 21.11.2001 and the suit was dismissed on 13.8.2002. The plaintiffs, feeling aggrieved, preferred an appeal before the learned District Judge, Kullu. He allowed the same on 19.12.2003. Hence, this regular second appeal.

5. The regular second appeal was admitted on 15.10.2004 on the following substantial questions of law:

> "1. Whether the learned first appellate Court has misread and misconstrued the oral and documentary evidence on record, especially the statements of PW-1, DW-1 and DW-2, DWs 5 to 7, Ext. DW-1/A, Ex. DW-1/C, Ex. DW-2/A, Ex. DW-3/A and Ex. DW-5/A and the judgment and decree, as such by the learned first appellate court is based upon mis-appreciation of facts and law?
>
> 2. Whether without effecting any enquiry as envisaged under the H.P. Tenancy and Land Reforms Act and rules, the officer concerned can grant and sanction proprietary rights beyond the provisions of the Act and Rules framed there under and without making any enquiry and whether such grant creates any title in favour of the tenant, especially when mutation, in itself does not create any title?"

6. Mr. Sanjeev Kuthiala, Advocate, appearing on behalf of the appellants, on the basis of the substantial questions of law framed, has vehemently argued that the first appellate Court has misread and misconstrued the oral and documentary evidence on record, especially the statements of PW-1, DW-1 and DW-2, DWs 5 to 7, Ext. DW-1/A, Ex. DW-1/C, Ex. DW-2/A, Ex. DW-3/A and Ex. DW-5/A. He also contended that the conferment of proprietary rights upon the plaintiffs was without making any enquiry. On the other hand, Mr. Bhupinder Gupta, Sr. Advocate has supported the judgment and decree dated 19.12.2003 passed by the learned first appellate Court.

7. Since both the substantial questions of law are inter-connected, hence are taken up together for determination to avoid repetition of discussion of evidence.

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

9. One of the plaintiffs, namely, Sidhu Ram has appeared as PW-1. He deposed that his father Dodu Ram was tenant since 1953. His father has planted apple orchard. He has constructed two houses, one is 1 ½ storyed and other is 2 ½ storyed. His father expired in the year 1971. The land was inherited by all the brothers. They used to pay rent to the landlords till 1975 and they became owners after the enforcement of Section 104 of the H.P. Tenancy and Land Reforms Act and thereafter they have stopped paying the rent. The defendants have started interfering in their possession.

10. DW-1 Kanshi Ram testified that he was working as Niab Tehsildar in Settlement at Manali in the year 1992. He has visited the spot and recorded the statements of the parties. In his cross-examination, he deposed that he has visited the spot at the instance of Tehsildar. He

has admitted categorically that he has given the report on the basis of oral statements. He has also admitted that he has not called any member of the Panchayat on the spot, including Lambardar or Chowkidar. He did not remember the details of the adjoining fields. He has also admitted that he has not summoned any other witness and that defendants have not handed over any revenue papers to him. He also admitted that in the jamabandi for the year 1992-93, Dodu Ram was shown as tenant and Dila Ram and Om Parkash Shashni were landlords. He also admitted that tenancy was inherited by the plaintiffs from Dodu Ram and mutation was also attested in their favour. He admitted that during settlement, the Patwari also prepares khasra girdawri. He also admitted that at the time of girdawri, general public, Chowkidar etc. are present. The general public, Lambardar and Chowkidar give the details of the sown crops in the fields. He also admitted that at that time if there is any mistake in the revenue entry, the same is noted by the Patwari with pencil. The report is confirmed by the Kanungo. Thereafter, it is confirmed by the Tehsildar. He also reiterated that in the year 1975, in revenue papers, the plaintiffs have been shown as tenants.

11. DW-3 Om Parkash Shashni deposed that Dodu Ram may be cultivating the land of the landlords but since he was not in a position to pay the rent he told the landlords that he could not pay the rent and thereafter he relinquished the tenancy in their favour and possession was handed over to the landlords in the year 1959. Thereafter, his father Ram Chand and Budh Ram have purchased 3-0-11 bighas of land in the year 1962. He proved Ext. DW-3/A. The original sale deed was not produced. In his cross-examination, he admitted that he did not know properly about the sale of the land. He also admitted that in 1959, he did not know Dodu Ram. He also admitted that he was born in the year 1954. He also admitted that no conversation has taken place about giving of the possession of the land. Volunteered that it was told to him by his father. It was in the year 1975 that he was told about the surrendering of the possession of the land. His father has never told him about any writing to this effect. No ejectment proceedings were ever initiated against Dodu Ram.

12. DW-5 Dile Ram testified that he has planted trees after purchasing the land. He has submitted an application for correction of revenue entries which was pending before the Tehsildar.

13. DW-6 Dole Ram testified that Dile Ram has planted Cherry trees, Japani fruit plants on the land, including apples. Om Parkash has constructed house on the suit land.

14. DW-7 Tashi Ram testified that on the suit land the possession is with Om Parkash and Lala Budh Ram.

15. Mr. Sanjeev Kuthiala, Advocate has vehemently argued that there was no landlord-tenant relationship between Dodu predecessor-in-interest of plaintiffs and the defendants. However, the case set up by the defendants themselves is that Dodu Ram predecessor-in-interest of plaintiffs has relinquished the tenancy since he was in arrears of rent. The defendants have not led any tangible evidence to prove that in what manner Dodu Ram has relinquished the tenancy. According to the plaintiffs, Dodu Ram was inducted as tenant in the year 1959. According to Section 8 of the Punjab Security of Land Tenures Act, 1953, there would be continuity of tenancy and would not terminate with the death of tenant. The mutation was also attested in favour of the plaintiffs. The case of the defendants is that they have purchased the land in the year 1962. The tenancy of Dodu Ram was not effected even if the sale has taken place. Dodu Ram has died in the year 1971. The revenue entries are in favour of Dodu as tenant. The plaintiffs have thus acquired proprietary rights after coming into force of the H.P. Tenancy and Land Reforms Act, 1972.

16. PW-1 Sidhu Ram in his statement has deposed that they were paying rent to the landlords but after the conferment of proprietary rights upon them, they stopped paying the rent to the landlords. The revenue entries vide Ext. P-1 to P-14 from the year 1952-53 to 1991-92 have remained in favour of Dodu Ram. Dodu Ram was shown in possession of the suit land on

payment of rent. The entries were changed in favour of defendants abruptly without there being any order of the competent authority.

17. The defendants have also filed an application under Order 41 Rule 27 CPC being CMP No. 19831/2014. The defendants have not given the date when they came into possession of the documents placed along with the application. Moreover, defendants have not shown that despite due diligence these documents could not be traced earlier. The purpose of filing application is not to fill up the lacunae. The application has been filed under Order 41 Rule 27 CPC at a very belated stage. It cannot be believed that documents remained in the brief of local counsel and could not be produced before the lower appellate Court. Thus, the application merits dismissal.

18. Mr. Sanjeev Kuthiala, Advocate has relied upon the decisions in the cases of ***Sohawa Singh vs. Kesar Singh and others,*** reported in ***AIR 1932 Lahore 586, Bogha Singh alias Kishan Singh and anr. vs. Harnarain Singh and ors.,*** reported in ***1959 PLJ 136*** and ***Jit Singh and others vs. Chanan Singh and anr.,*** reported in ***1966 PLJ 246.*** These judgments are not applicable in the present case since they pertain to Punjab Tenancy Act, 1887 and the present lis is covered under the Punjab Security of Land Tenures Act, 1953.

19. It was for the revenue authorities to carry out necessary corrections after the death of Dodu Ram in the year 1971. It is reiterated that defendants have failed to lead any evidence that Dodu Ram had relinquished or surrendered his tenancy rights over the suit land in the year 1959. The tenancy has devolved upon the plaintiffs, being male lineal descendants. The landlord-tenant relationship has never come to an end in the year 1959. The learned first appellate Court has correctly appreciated the oral as well as documentary evidence. The proprietary rights have been conferred upon the plaintiffs after the death of their father under Section 104 of the H.P. Tenancy and Land Reforms Act, 1972, automatically. The substantial questions of law are answered accordingly.

20. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

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

Sh. Manish Ghai son of Sh Surinder Ghai ...Petitioner.

Vs.

Smt Nancy Ghai wife of Sh Manish Ghai. ...Non-petitioner.

Cr.MMO No. 88 of 2016.
Order reserved on: 4.7.2016.
Date of Order: September 15 ,2016.

Protection of Woman from Domestic Diolence Act, 2005- Section 12- Application was filed by N pleading that she was being harassed by her husband and his relatives- a consent order directing the husband to pay Rs. 3,000/- per month to wife and Rs. 1500/- per month each to the children was passed- it was ordered that husband would meet the children but would not take them out of Kasauli- application for alteration of consent order was filed on the ground that wife had shifted to Delhi and permission was sought to bring the children from Delhi to Kasauli- Magistrate ordered that husband will not take the children to Kasauli- however, he could meet them at Delhi from 9 A.M. to 5 P.M. and the wife can bring the children to Kasauli at her desire - appeal was preferred, in which consent order was passed that husband would pay maintenance of Rs. 9,000/- per month to each of minor daughters and husband would be at liberty to take them from Delhi to Kasauli- held, that maintenance was granted as per statement of the Advocate- husband cannot be permitted to resile from the statement - otherwise also, husband is under an obligation to maintain the children- petition dismissed. (Para-5 to 8)

For the petitioner: Mr.Vishal Bindra Advocate.
For non-petitioner: Mr. J.L.Bhardwaj Advocate.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present petition is filed under Section 482 code of criminal procedure 1973 read with Article 227 of Constitution of India for quashing order dated 7.3.2015 passed by learned Additional Sessions Judge II Solan HP in appeal No. 5-ASJ-II/10 of 2014 title Sh Manish Ghai Vs. Smt. Nancy Ghai.

BRIEF FACTS OF THE CASE:

2. Smt. Nancy Ghai wife of Sh Manish Ghai filed application before protection officer under Protection of woman from domestic violence act 2005 alleging therein that she was married with Sh Manish Ghai on dated 8.7.2006 in Delhi. Applicant Smt. Nancy Ghai alleged that after marriage she had gone to Nahan in her matrimonial house. It is alleged by Smt.Nancy Ghai that her father-in-law Sh Surinder Mohan Ghai and her mother-in-law Smt. Vidya Ghai demanded dowry from her in her matrimonial house in the shape of fixed deposit, car, gold and TV. Smt. Nancy Ghai further alleged that her father-in-law is characterless person and he harassed her physically and threatened her that he would kill her and spoil her life. Smt. Nancy Ghai further alleged that her husband also harassed her mentally and physically and also tried to kill her in the month of February 2012. Smt. Nancy Ghai further alleged that she was also beaten several times. Smt. Nancy Ghai further alleged that she has two daughters. She has further alleged that Rhythm Ghai is five years old and younger daughter Rijul Ghai is 1 ½ years old. Smt. Nancy Ghai further alleged that her father-in-law used to tell that he would marriage Manish Ghai again because Smt. Nancy Ghai did not give birth to a male child. Protection officer forwarded the application of Smt. Nancy Ghai to Judicial Magistrate Kasauli. On dated 26.4.2012 learned Judicial Magistrate Kasauli recorded the statement of Smt. Nancy Ghai and Sh Manish Ghai and passed consent order to the effect that Sh Manish Ghai would pay sum of Rs.3000/- (Three thousand) per month i.e. Rs.1500/- (One thousand five hundred) per month to each of children as monthly allowance and would deposit the same in the account of Smt. Nancy Ghai. Learned Judicial Magistrate also passed consent order on dated 26.4.2012 that Sh Manish Ghai would meet the children but would not take children out of Kasauli and would not take children to their grand father. Learned Judicial Magistrate disposed of application filed under Protection of women from domestic violence act 2005 accordingly with the consent of Sh Manish Ghai and Smt. Nancy Ghai. Thereafter Sh Manish Ghai filed application under Section 25 of Protection of women from domestic violence act 2005 for alteration of consent order dated 26.4.2012 on the ground that Smt. Nancy Ghai has shifted to Delhi along with her two minor daughters and Sh Manish Ghai is teacher in Lawrence school Kasauli. Sh Manish Ghai sought permission to bring minor children from Delhi to Kasauli. Learned Judicial Magistrate keeping in view the entire facts and circumstances of case, keeping in view the tender age of minor children and keeping in view pending litigation between Sh Manish Ghai and Smt. Nancy Ghai ordered that Sh Manish Ghai would not take minor children from Delhi to Kasauli in the absence of their mother. Learned Judicial Magistrate further directed that Sh Manish Ghai could meet minor children at Delhi and could also take them for outing during their holidays from 9 AM to 5 PM and thereafter he would hand over the safe custody of minor children to their mother at 5 PM. Learned Judicial Magistrate further ordered that Smt. Nancy Ghai can take children to Kasauli if she so desires during their holidays and could accompany them till they resides with Sh Mansih Ghai at Kasauli. Thereafter Sh Manish Ghai filed appeal under section 29 of Protection of women from domestic violence act 2005 against order dated 13.5.2014 passed by learned Judicial Magistrate. Again before learned Additional Sessions Judge Solan compromise order was passed by learned Additional Sessions Judge Solan in appeal No. 5-ASJ-II/10 of 2014 title Sh Mansih Ghai Vs. Smt. Nancy Ghai as per statement of Sh Manish Ghai and Smt. Nancy Ghai placed on record. Learned Additional Sessions Judge Solan passed consent order on dated 7.3.2015 in appeal to the effect that Sh

Manish Ghai would pay maintenance allowance to the tune of Rs.9000/- (Nine thousand) per month to each of two minor daughters (Total maintenance allowance Rs.18000/-). Learned Additional Sessions Judge also passed consent order to the effect that during school vacation Sh Manish Ghai would be at liberty to take minor daughters from Delhi to Lawrence school Sanawar Kasauli HP where Sh Manish Ghai is presently posted. Learned Additional Sessions Judge further directed by way of consent order that it would be the duty of Sh Manish Ghai to hand over the children in safe custody to Smt. Nancy Ghai at her residence at Delhi after the expiry of vacation period.

3. Court heard learned Advocate appearing on behalf of petitioner and learned Advocate appearing on behalf of non-petitioner and also perused entire record carefully.

4. Following points arise for determination in present petition:

1. Whether petition filed under Section 482 Cr.PC read with Article 227 of Constitution of India is liable to be accepted as mentioned in memorandum of grounds of petition?

2. Final order.

Findings upon point No.1 with reasons.

5. Submission of learned Advocate appearing on behalf of petitioner that maintenance allowance granted to minor daughters to the tune of Rs.18000/- (Eighteen thousand) by way of consent order be reduced to Rs.9000/- (Nine thousand) per month i.e. Rs.4500/- per month per minor daughter is rejected being devoid of any force for reasons hereinafter mentioned. It is proved on record that learned Additional Sessions Judge granted maintenance allowance to minor daughters as per voluntary consent of Sh Manish Ghai. Sh Manish Ghai has given voluntary written statement signed by him and his Advocate to the effect that he would pay Rs.18000/- (Eighteen thousand) to minor daughters. Sh Manish Ghai has signed his statement in the presence of his Advocate on dated 7.3.2015 voluntarily without any coercion and without any undue influence. The contents of statement given by Mansih Ghai were read over and explained to him and after admitting the contents of statement as correct Sh Manish Ghai has signed statement dated 7.3.2015. It is held that at this stage of case Sh Manish Ghai cannot be allowed to resile from compromise dated 7.3.2015. It is held that compromise dated 7.3.2015 is binding upon parties and parties cannot be allowed to escape from consequences of compromise in order to maintain majesty of law. Even Sh Manish Ghai did not pay any maintenance allowance to Smt. Nancy Ghai but only pay maintenance allowance to his minor daughters who are school going children. It is the duty of Court to protect the interest of minors. Court is guardian of minor. Monetary relief was granted by learned Additional Sessions Judge Solan to minors only as per voluntary consent of Sh Manish Ghai. Sh Manish Ghai is the father of minor daughters and he is under legal obligation to maintain his minor daughters. Keeping in view the interest of minor daughters it is not expedient in the ends of justice to reduce maintenance allowance granted to minor daughters with the consent of Sh Manish Ghai when Sh Manish Ghai signed statement dated 7.3.2015 voluntarily he was of sound state of mind. The statement of Sh Manish Ghai was recorded by learned Additional Sessions Judge dated 7.3.2015 in the presence of his Advocate namely Sh Vishal Bindra and Sh Vishal Bindra Advocate has also signed along with Sh Manish Ghai when statement of Sh Manish Ghai was recorded on dated 7.3.2015 by learned Additional Sessions Judge II Solan H.P.

6. Submission of learned Advocate appearing on behalf of petitioner that consent order of learned Additional Sessions Judge dated 7.3.2015 be set aside and case be remitted back to learned Additional Sessions Judge Solan for disposal afresh in accordance with law upon merits is also rejected being devoid of any force for reasons hereinafter mentioned. Learned Additional Sessions Judge has passed consent order dated 7.3.2015 as per statement of Sh Manish Ghai and Smt. Nancy Ghai recorded on 7.3.2015 voluntarily. As per section 28 of Protection of women from domestic violence act 2005 proceedings relating to sections 12,18,19, 20, 21,22, 23 and 31 would be governed by the provision of code of criminal procedure 1973. It is

held that Protection of women from domestic violence act 2005 is a special act and it empowers the Magistrate to pass protection order in favour of aggrieved person. In view of above stated facts it is not expedient in the ends of justice to interfere in the consent order passed by learned Additional Sessions Solan dated 7.3.2015 in favour of minor daughters and keeping in view price index and welfare of minor daughters.

7. Submission of learned Advocate appearing on behalf of petitioner that non-petitioner has flouted terms and conditions of consent order intentionally and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. It is held that petitioner can file execution petition in accordance with law to implement terms and conditions of consent order passed by Court. Point No.1 is answered in negative.

Point No.2 (Final order).

8. In view of findings on point No.1 petition is dismissed. File of learned Trial Court and learned Appellate Court along with certify copy of order be sent back forthwith. Certify copy of order be sent to both parties free of cost as mentioned under section 24 of Protection of women from domestic violence act 2005. Certify copy of order will also be sent to police officer incharge of police station in the jurisdiction of which the Magistrate has been approached. Certify copy of order will also be sent to protection officer as required under Section 24 of Protection of women from domestic violence act 2005 forthwith for compliance. Petition is disposed of. All pending application(s) if any also disposed of.

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

State of H.P. ...Appellant.
Versus
Rahul Kumar Sharma ...Respondent.

Cr. Appeal No. 191 of 2012
Judgment reserved on: 26.07.2016
Date of Decision: September 15, 2016

Indian Penal Code, 1860- Section 341, 353, 332, 333 and 302- Deceased was employed as Assistant Lineman with H.P. State Electricity Board- he was asked to attend a complaint pertaining to a transformer - thereafter deceased did not report to the office- R and deceased had consumed liquor and a quarrel had taken place between them- this fact was reported to police- police help was sought- accused walked into the police Station and informed the police about the quarrel- deceased was bleeding from the cheek- deceased was admitted in the hospital on the next day- he had informed earlier that he was beaten by the accused- deceased expired subsequently- accused was tried and acquitted by the trial Court- held, in appeal that deceased was not certified to be competent to make statement- he was admitted in semiconscious state and was unable to speak- it was not proved that deceased was fit to make statement- deceased was not taken to hospital after altercation but was taken to home- when deceased walked into police station, no FIR was registered- he was allowed to go away with the accused- statement made by the deceased to his relatives is not believable - disclosure statement and the consequent recovery were also doubtful as witnesses have not supported the same- it was also not established that blood on the recovered articles matched the blood group of the accused or the deceased- police has suppressed the genesis of the crime- accused was rightly acquitted in these circumstances- appeal dismissed. (Para-12 to 27)

Cases referred:

Prandas v. The State, AIR 1954 SC 36
Sham Shankar Kankaria Versus State of Maharashtra, (2006) 13 SCC 165

Sanjaysingh Ramrao Chavan Versus Dattatray Gulabrao Phalke and others, (2015) 3 SCC 123
State of Gujarat Versus Kishanbhai and others, (2014) 5 SCC 108
Shakila Abdul Gafar Khan (Smt) vs Vasant Raghunath Dhoble and another, (2003) 7 SCC 749
Mano Versus State of Tamil Nadu, (2007) 13 SCC 795
Suresh Versus State of Haryana, (2009) 13 SCC 538
Gulzar Ahmed Azmi and another Versus Union of India and others, (2012) 10 SCC 731
Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94

For the Appellant:	Mr. V.S. Chauhan, Additional Advocate General with Mr.Vikram Thakur, Deputy Advocate General, for the appellant-State.
For the Respondent:	Mr. Ashwani K. Sharma, Sr. Advocate with Mr.Nishant Thakur, Advocate, for the respondent. Mr. Arjun K. Lall, Amicus Curiae.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Assailing the judgment dated 03.01.2012, passed by the Additional Sessions Judge (II), Kangra at Dharamshala, H.P., in RBT S.C. No.69-K/VII/10/2009 / S.T. No.34/11, titled as *State Versus Rahul Kumar*, whereby accused stands acquitted, State has filed the present appeal under the provisions of Section 378 of the Code of Criminal Procedure, 1973.

2. In connection with FIR No.59/08, dated 23.12.2008 (Ex.PW.25/A) registered at Police Station, Nagrota Bagwan, District Kangra, H.P., accused was charged to face trial for having committed offences punishable under the provisions of Sections 341, 353, 332, 333 and 302 of the Indian Penal Code. Finding the prosecution case not to have established its case, through the testimonies of 26 prosecution witnesses, trial Court has acquitted the accused on all counts.

3. We have heard learned counsel for the parties, as also perused the record. Having done so, we are of the considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

4. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. Having considered the material on record, we are of the considered view that prosecution has failed to establish the essential ingredients so as to constitute the charged offence.

5. In *Prandas v. The State*, AIR 1954 SC 36, Constitution Bench of the apex Court, has held as under:

> "(6) It must be observed at the very outset that we cannot support the view which has been expressed in several cases that the High Court has no power under S. 417, Criminal P.c., to reverse a judgment of acquittal, unless the judgment is perverse or the subordinate Court has in some way or other misdirected itself so as to produce a miscarriage of justice. In our opinion, the true position in regard to the jurisdiction of the High Court under S. 417, Criminal P.c. in an appeal from an order of acquittal has been stated in – 'Sheo Swarup v. Emperor', AIR 1934 PC 227 (2) at pp.229, 230 (A), in these words:
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> > "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be

reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice." "

6. In the instant case, identity of the deceased is not in dispute. His name is Ram Krishan and was employed as an Assistant Line Man with H.P. State Electricity Board, Nagrota Bagwan, having duty hours from 2.00 PM to 10.00 PM. Through the testimonies of Satinder Pal (PW.9), Prakash Chand (PW.10), Desh Raj (PW.11) and Jyoti Prakash (PW.13), it stands proven on record that on 22.12.2008, at about 9.30 PM deceased was asked to attend a complaint pertaining to a transformer at a place known as Gohrav. From the testimonies of these witnesses, it is evidently clear that thereafter deceased did not report to the office.

7. Further, it is the case of prosecution that on the said date accused Rahul Kumar and the deceased consumed liquor in the shop of Kishan Kumar (PW.12), where quarrel took place between the two. Accused telephonically called up Police Station, Nagrota Bagwan, informing Constable Sudershan Kumar (PW.21) about such fact. Accused had requested the police for help, which fact was so disclosed by Constable Sudershan to ASI Manohar Lal (PW.23). After some time, accused again called up Sudershan, but the phone came to be disconnected. Immediately Sudershan brought the matter to the notice of SHO SI Balbir (PW.25). Soon thereafter, accused walked into the Police Station and in person, informed the police about the quarrel. At that time, deceased Ram Krishan, who was bleeding from the cheek was also with him. Police wanted to get the deceased medically examined, but since he was drunk, on his request, no action was taken and the accused left with the deceased, assuring that he would be dropped home. On 23.12.2008, at 3.30 AM, deceased came to be admitted at hospital, Nagrota Bagwan, which fact was brought to the notice of Balbir (PW.25), who immediately deputed Manohar Lal (PW.23) and Ram Swaroop (not examined) to visit the hospital. In the hospital, deceased got recorded his statement (Ex.PW.17/A), which led to the registration of the case against the accused. Investigation further revealed that on 22.12.2008, at about 8.30 PM, deceased informed Pawan Kumar (PW.5) that he had been beaten up by the accused, which fact latter brought to the notice of Hari Krishan (PW.6), brother of the deceased. Thereafter both Pawan Kumar and Hari Krishan went to search the deceased. In the meanwhile, Banwari Lal (PW.18), son of the deceased and an acquaintance Ashwani Kumar (PW.19) also reached the spot. Hari Krishan and Banwari Lal brought the deceased home and Hari Krishan went to drop Pawan Kumar. After some time, Banwari Lal telephonically informed Hari Krishan that deceased wanted to disclose some information. Hari Krishan immediately met the deceased, who informed that he had been beaten up by the accused. Also finding his condition to be precarious, Hari Krishan took the deceased to the CHC Nagrota. Since deceased was not improving he was referred to the State Hospital, Tanda, wherefrom, he was taken to PGI Hospital, Chandigarh, where he expired on 26.12.2008.

8. It is a matter of record that deceased came to be admitted in the Community Health Centre, Nagrota Bagwan in the morning of 23.12.2008. Testimonies of Dr. Reshmi Shekhar (PW.1), Dr.A.R. Raghu (PW.2) and Dr.Maneesh Verma (PW.3), reveal that the deceased was having the following injuries on his body:-

"1) Swelling on head left side 2 cm x 1 cm.

2) Lacerated wound on lower lip ½ long and ¼ cm in breadth reddish in colour.

3) Injury teeth.

4) Abrasion on right leg 1 cm x 1 cm. Reddish coloured.

5) Abrasion of dorsum of right hand 3 cm x 1/8 cm. Reddish in colour."

9. From the testimony of Dr.Ravinder Jeet Singh (PW.4), who conducted the postmortem of the deceased and also issued postmortem report (Ex.PW.4/B), it is evidently clear that deceased died as a result of shock on account of head injury.

10. It is a matter of record that at the time when deceased was brought to the hospital, he was in a state of semi-consciousness. Such fact is evident from the testimony of Dr.A.R. Raghu (PW.2). It is also the case of prosecution that condition of the deceased continued to deteriorate thereafter.

11. In the instant case, prosecution heavily relies upon the dying declaration so made by the deceased (Ex.PW.17/A), recorded by ASI Sawaran Roop Singh (PW.17) in the presence of Hari Krishan (PW.6), Vijay Kumar (PW.7) and Banwari Lal (PW.18). Now when we peruse the said statement, we find the deceased to have disclosed that *"on 22.12.2008, at about 10.15 PM, I alongwith one Pappu, who owns a tea shop near Gandhi ground, was going to home. When I alongwith Pappu reached at Nagrota Bazar, outside the Dulhoo Restaurant, Rahul, who owns a Readymade garments shop near new bus-stand, restrained my path and by giving fist and kick blows took me upto the Subzi Mandi. On seeing such assaults, Pappu ran away. As a result of beatings given by Rahul, I sustained injuries on my face, head, leg and on other parts of body I sustained hidden injuries. Also he gave kick blows on my face, as a result of which my tooth was broken."*

12. We express serious doubt about the genuineness of the said statement and/or truthfulness of its contents. And this we say so for the reason that according to Hari Krishan (PW.6), altercation between the deceased and the accused had already taken place somewhere at about 8.30 PM. There may be discrepancy with regard to timing, for it has come on record that at about 9.30 PM, deceased was asked by his superior to attend to a complaint, but the fact of the matter is that the deceased who was found in a wounded condition was brought home from the spot and not taken to the hospital. Considering his injuries he should have been straightaway taken to the hospital. As is so admitted by his son and the wife condition of the deceased had deteriorated and he was unconscious and semi-conscious state at home. He was taken to the hospital at about 3.30 AM when he was examined by Dr.A.R. Raghu (PW.2), who himself states that accused was in a state of semi-consciousness. Now significantly this doctor did not certify the deceased to be fit enough to make any statement. Sawaran Roop Singh (PW.17) wants the Court to believe that the said statement, so recorded by him, contains exact version narrated by the deceased, but then he himself admits that *"At that time Ram Krishan was in semiconscious and he was not able to speak".* The witness does state that he had obtained the medical opinion about the fitness of the deceased, but no such document is on record.

13. On this count, what further renders the statement of the close relatives to be doubtful is the fact that Police Station is just at a close distance of 10 minutes from the house of the deceased. None directly reported the matter to the police. Also after knowing about the altercation they did not take the deceased to the hospital, but instead took him home and allowed his condition to deteriorate. Why is it that deceased did not straightaway disclose the incident to all or any one of the witnesses who had reached the spot. After all he was conscious at that time.

14. Dying declaration is also rendered doubtful, in view of the testimony of police officer/officials Uma Pati Jamwal (PW.20), Sudershan (PW.21), Manohar Lal (PW.23) and Balbir (PW.25), according to whom accused had himself walked into the Police Station and made a grievance of having been beaten up by the deceased. Significantly police officials, admit that prior thereto, accused himself had called the police twice on the telephone, yet they did not respond. Even when he walked into the Police Station, they found the deceased to be present in an injured condition. Blood was oozing out from his cheek, yet they did not take any action, much less register a report. It is not the case of prosecution that matter between the parties got patched up. In fact, they allowed him to leave in the company of the accused. Why so? remains unexplained, for it is not the case of these police officials that either of the party were friends or known to each

other from before. In fact, Sudershan (PW.21) refers to the presence of third person, who also was injured. Strangely, Investigating Agencies are conspicuously silent about him. In the Police Station, no grievance, as is made out in the dying declaration (Ex.PW.17/A), was ever made by the deceased to the police officials. To the contrary, he requested the police not to get him medically examined as he was drunk.

15. Prosecution relies upon yet another dying declaration through the testimonies of close relatives of the deceased, according to whom, deceased had also disclosed to them about the accused having beaten him up. Though this dying declaration is ocular in nature, but close scrutiny of testimonies of Pawan Kumar (PW.5) Hari Krishan (PW.6), Vijay Kumar (PW.7), Satya Devi (PW.8), Banwari Lal (PW.18) and Ashwani Kumar (PW.19), would only reveal such fact not to be inspiring in confidence and the reason is not far to seek. These witnesses admit that Ashwani, Banwari and Hari Krishan had gone to search for the deceased. They had learnt about the alleged quarrel. These witnesses admit that Police Station was closeby, yet none of them reported the matter to the police either in person or on telephone. Why so? remains undisclosed by them. The incident took place sometime at 10.00 PM and yet they did not inform the police the reason of assault. Also deceased allegedly disclosed such fact only when he was brought home. Why the delay? remains unexplained.

16. Hence, there is serious doubt with regard to genuineness of the document and correctness of the contents of statement (Ex.PW.17/A) as also the ocular dying declaration. We take this view in view of the law laid down by the Apex Court in *Sham Shankar Kankaria Versus State of Maharashtra,* (2006) 13 SCC 165.

17. The genesis of the prosecution story of the deceased and the accused having consumed liquor in the shop of Kishan Kumar (PW.12), cannot be said to have been established on record, in view of categorical denial of such fact by this witness and the Investigating Agency not having recovered any incriminating substance connecting the accused or the deceased in the establishment of such fact.

18. Also Pawan Kumar (PW.5), who allegedly witnessed the incident and initially informed Ram Krishan about such fact, has categorically denied the same. He has not supported the prosecution and nothing fruitful could be elicited from his testimony. He is not even friendly to the accused.

19. Prosecution further wants the Court to believe that in the presence of Sanjiv Kumar (PW.14) and Bhagwan Dass (PW.15), accused made a disclosure statement (Ex.PW.14/A), which led to recovery of blood stained apparels vide memo (Ex.PW.14/B). Disclosure statement and recovery is also rendered doubtful for the reason that independent witnesses PW.14 and PW.15 have not supported the prosecution. Even otherwise, and significantly, scientific evidence (Ex.PX-1 & Ex.PX-2), does not link the accused to the offence. Though human blood was found on some of these articles, but there is nothing on record to establish as to whether it matched the group of the accused or the deceased.

20. There is one disturbing feature, which has come on record and that being involvement of the police in the crime cannot be ruled out, for it is admitted by Banwari Lal (PW.18) *"that it is correct that after this occurrence all the villagers had blocked the road. Then the villagers also sat on Dharna out side the Police Station for 3/4 days".* Uma Pati Jamwal (PW.20) states that *"I cannot say that the investigation was handed over to me due to political pressure. It is correct that local MLA has carried out the agitation out side the police station".* Constable Sudershan (PW.21) states that *"It is correct that after the registration of case the brother of aforesaid injured person and local MLA alongwith other persons had sat on hunger strike out side the Police Station. It is correct that said persons were disclosing the reason for hunger strike that above said person was beaten in the police custody and no action was taken. This hunger strike had continued for 6/7 days".* ASI Manohar Lal (PW.23) states that *"It is correct that no Rapat was lodged in the police station regarding the coming of Rahul and Ram Krishan. It is incorrect that Rapat was not lodged because Ram Krishan and Rahul had not come to the police station. It is correct that during this period the MLA of Nagrota had staged agitation against police".* SI Ranjit

Singh (PW.24) states that *"It is correct that there was a agitation regarding this case in Nagrota Bagwan".*

21. In the aforesaid background, we find the Investigating Agency to have prepared the document (Ex.PW.6/A) perhaps only to create evidence. Significantly, statements of the family members of the deceased also came to be recorded not promptly, but with certain amount of delay.

22. Unmerited and undeserved prosecution is an infringement of a legal right under Article 21 of the Constitution of India. [See: *Sanjaysingh Ramrao Chavan Versus Dattatray Gulabrao Phalke and others,* (2015) 3 SCC 123].

23. Police appears to have suppressed the genesis of the crime, for the version of police officials does not in any manner concur with the contents of the alleged dying declaration.

24. Under these circumstances, we direct the Principal Secretary (Home) to the Government of Himachal Pradesh and Director General of Police, Himachal Pradesh, to have the matter examined and take appropriate action in compliance of the direction issued by the Apex Court in *State of Gujarat Versus Kishanbhai and others,* (2014) 5 SCC 108. Affidavit of compliance be positively filed within eight weeks for which purpose matter be listed before Court.

25. Suggestion of the learned Amicus Curiae in awarding compensation to the accused is left open to be adjudged in an appropriate proceedings. This would be in the light of the ratio laid down by the Apex Court in *Shakila Abdul Gafar Khan (Smt) versus Vasant Raghunath Dhoble and another,* (2003) 7 SCC 749; *State of W.B. and others Versus Babu Chakraborthy ,* (2004) 12 SCC 201; *Mano Versus State of Tamil Nadu,* (2007) 13 SCC 795; *Suresh Versus State of Haryana,* (2009) 13 SCC 538; *and Gulzar Ahmed Azmi and another Versus Union of India and others,* (2012) 10 SCC 731.

26. Thus, to our mind, prosecution has not been able to establish by leading clear, cogent, convincing and reliable piece of evidence so as to prove that accused restrained the deceased Ram Krishan to proceed further; gave beatings to him and prevented him from discharging his duties as such public servant; caused grievous hurt as a result of which he died and thereby committed his murder.

27. The accused has had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in *Mohammed Ankoos and others* versus *Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94*, since it cannot be said that trial Court has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice, no interference is warranted in the instant case.

28. For all the aforesaid reasons, present appeal, being devoid of merit, is dismissed, so also the pending application(s), if any. Bail bonds furnished by the accused are discharged. Record of the trial Court be immediately sent back.

29. Efforts put in by Mr. Arjun Lall, learned Amicus Curiae in rendering valuable assistance to the Court is highly appreciable.

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

Balwant Rai ..Appellant

Versus

Ramesh Chand and another ..Respondents

Cr. Appeal No. 70 of 2011.
Reserved on : 7.07.2016.
Date of Decision 16.09.2016

Indian Penal Code, 1860- Section 323 and 307 read with Section 34- Informant along with his daughter-in-law was irrigating his field when his cousin (accused No. 1) came to the spot armed with the spade along with his wife (accused No.2) who was armed with the sickle – they inflicted injuries on the person of the informant- he was taken to hospital – the accused No.1 was convicted for the commission of offences punishable under Section 324 of I.P.C, whereas, accused No. 2 was acquitted by the trial Court – aggrieved from the judgment, present appeal has been filed- held, that the accused had given one blow of spade in a spur of moment- there was no person to stop the accused and he could have inflicted a graver injury, if he so wanted – there is nothing on record to show that accused had an intention of causing death – a compromise was effected between the parties, which shows that injury was not considered serious enough or dangerous to life- the trial Court had rightly acquitted the accused of the commission of offence punishable under Section 307 of I.P.C.- the conduct of the accused is not such as to deny the benefit of Probation of Offenders Act to him- appeal dismissed. (Para- 6 to 29)

Cases referred:

Mohindar Singh versus State AIR 1960, Punjab 135 and Kanbi Nagji Kala versus State AIR 1956, Saurashtra 107

Kumar Majhi versus State 1981 Cr.LJ 1787

Hari Singh versus Sukhbir Singh and others (1988) 4 SCC 551 and Tukaram Gundu Naik versus State (1994) 1 SCC 465

State of Punjab versus Bawa Singh, reported in 2015(2) Criminal Court Cases 765 (SC)

For the Appellant : Mr. Vivek Chandel, Advocate.
For the Respondents No. 1 & 2. Mr. Gaurav Gautam, Advocate.
For the Respondent No. 3.: Mr. P.M. Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Appellant (PW-1 Balwant Rai) lodged a complaint against respondents No. 1 and 2 stating therein that on 18.11.2009 he, alongwith his daughters in-law namely Manjit and Neena Devi, was irrigating his fields at about 2.30 PM and at that time his cousin Ramesh Chand (son of his Chacha) having spade in his hand alongwith his wife Rachana Devi having sickle in her hand reached there. They asked reason for damaging boundary of their fields. PW-1 Balwant Rai replied that he was raising blockade (Aad) for irrigating his field but respondents extending threaten to see him alleged that he was removing boundary of their fields and Respondent No. 1, Ramesh Chand gave a blow of spade on his head and respondent Rachna Devi inflicted injury on his right hand thumb with sickle causing bleeding from his hand and head. His daughters-in-law rescued him and took to Civil Dispensary Dehlan for treatment. After taking treatment he returned home. Thereafter matter was compromised between him and his cousin Ramesh Chand but thereafter also his cousin continued to threaten.

2. On registration of FIR matter was investigated and PW-1 Balwant Rai was medically examined and after completion of investigation challan was presented in the Court.

3. Respondents No. 1 and 2 were charge sheeted under Sections 323 and 307 readwith Section 34 IPC. On conclusion of trial, respondent No. 1 was convicted under Section 324 IPC and was given benefit of Section 4 of Probation of Offenders Act, 1958 whereas respondent No. 2 Rachana Devi was acquitted of charge framed against her under Sections 323 and 307 IPC readwith Section 34 IPC vide impugned judgment.

4. Respondent No. 1 did not file any appeal against his conviction. Therefore, his conviction under Section 324 stands accepted.

5. In instant appeal appellant/complainant has assailed impugned judgment with prayer to quash and setaside the same and to convict respondents No. 1 and 2 under Section 307 IPC.

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

Section 307 reads as under:-

"307. Attempt to murder- Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to {imprisonment for life}, or to such punishment as is hereinbefore mentioned.

Attempt by life convicts {When any person offending under this section is under sentence of (imprisonment of life), he may, if hurt is caused, be punished with death}"

7. The offence of attempt to commit murder punishable under Section 307 IPC is constituted by occurrence of mens rea followed by an actus rues. An intent per-se is not an attempt. It implies purpose and attempt is an actual effort made in execution of the purpose. From overt act directed towards the objective sought, the criminal intent must be logically inferable. The attempt for purpose of Section 307 IPC should stem from a specific intention to commit murder and this blameworthy condition of mind may be gathered from direct or circumstantial evidence including the conduct of accused. When mens rea, which is essential part of offence of murder, is absent and where the weapons used by accused is ordinarily agricultural implement and does not necessarily indicate a deliberate intention to cause death or fatal injury, the accused is not be convicted under Section 307 IPC. (**Mohindar Singh versus State AIR 1960, Punjab 135** and **Kanbi Nagji Kala versus State AIR 1956, Saurashtra 107).**

8. Conviction is not legally punishable under Section 307 IPC unless prosecution proves ingredients of Section 300 IPC., of which intention or knowledge play a vital role. (**Kumar Majhi versus State 1981 Cr.LJ 1787).**

9. Under Section 307 IPC, Court has to see whether the act irrespective of its result was done with the intention or knowledge and under circumstances mentioned in that Section. The intention or knowledge of the accused must be such as his necessary to constitute murder. Without this ingredient being established there can be no offence of attempt to murder under Section 307, the intention precedes the act attributed to accused. The intention is to be gathered from all circumstances and not merely from the consequences that ensue. The nature of weapons used, manner in which it is used, motive for the crime, severity of the blow, the part of the body where injury was inflicted are some of the factors that may be taken into consideration to determine intention. (**Hari Singh versus Sukhbir Singh and others (1988) 4 SCC 551** and **Tukaram Gundu Naik versus State (1994) 1 SCC 465)**

10. In present case PW-1 Balwant Rai and PW-2 Manjit Kaur are spot witnesses. No other witness examined by prosecution has witnessed incident. By accepting conviction by respondent No. 1 under Section 324 IPC, causing injury to PW-1 Balwant Rai by him with spade is conceded. Therefore, only gravity of offence committed by respondent No. 1 is to be assessed. So far as respondent No. 2 is concerned, she was acquitted and her acquittal is also challenged in present appeal, therefore her culpability is to be determined.

11. PW-2 Manjit Kaur stated that other persons were also working in their own fields before they started irrigating their land. PW-1 Balwant Rai stated that he alongwith her daughter-in-law was irrigating their fields. PW-1 Balwant Rai was having spade in his hand. Similarly, respondent No. 1 was also having spade in his hand. Daughters-in-law of PW-1 Balwant Rai i.e. PW-2 Manjit Kaur and Neena and also respondent No. 2 were also having tools

required for agricultural operation in their fields. Therefore, holding a spade in hand by respondent No. 1 and sickle by respondent No. 2 cannot be basis to infer criminal intent on their part.

12. It came in evidence that except two daughters-in-law of PW-1 Balwant Rai no one came forward to rescue PW-1 Balwant Rai. One daughter-in-law Manjeet Kaur was examined as PW-2 whereas another daughter-in-law Neena was given up to avoid repetition. Intention or knowledge of respondents to cause injuries to PW-1 Balwant Rai is to be assessed on the basis of statements of PW-1 Balwant Rai and PW-2 Manjeet Kaur and other surroundings facts and circumstances on record. PW-2 Manjeet Kaur stated that she was working in her fields at a distance of about 10-12 feet from her father-in-law and respondent No. 1 inflicted injury to her father-in-law with spade only once and she did not try to snatch spade from him. In his statement Ex. PW-1/B under Section 154 Cr.P.C., PW-1 Balwant Rai stated that on questioning by respondents for reasons to damage boundary of their fields, he had replied that he was raising blockade to irrigate his fields. Thereupon respondent No. 1 gave one blow to PW-1 Balwant Rai with spade, being carried by him.

13. Besides causing injury to PW-1 Balwant Rai, intention or knowledge to cause death was also necessary for convicting respondents under Section 307 IPC. There was no one near PW-1 Balwant Rai so as to stop respondents from inflicting injuries to him as nearest person to him, his daughters in-law were at a distance of 10 to 12 feet from him who did not try to snatch spade from respondent No. 1 and after inflicting one blow to PW-1, Balwant Rai, respondent No. 1 had left the place on his own.

14. Conjoint reading of statements of PW-1 and PW-2 indicated that except one stroke of spade in spur of moment after reply of PW-1 Balwant Rai to question of respondent Ramesh Chand asking for reasons for uprooting boundary, there was no further assault by respondent Ramesh Chand. It happened within few seconds PW-2 Manjeet Kaur stated that she and Neena were at some distance about 10-12 feet. No one was there to stop respondent Ramesh Chand from inflicting more than one injury or striking PW-1 Balwant Rai with spade more than once. But as stated by PW-1 and PW-2 respondent Ramesh Chand hit PW-1 Balwant Rai only once and weapon used by respondent was agricultural implement. There is nothing on record to infer that intention of respondent was to cause death of PW-1. In these facts and circumstances, it can be inferred that there was no intention on the part of respondent Ramesh Chand to cause death of PW-1 Balwant Rai.

15. After incident PW-1 Balwant Rai went home, visited Civil Dispensary at Dehlan and after getting first-aid returned back to home on foot and no complaint was lodged by him with police meaning thereby that on that day injury caused to him was not considered to be of such nature so as to attract Section 307 IPC. Later on, some complications developed in the wound of PW-1 Balwant Rai and he had to have medical treatment for his head injury from PGI Chandigarh and DMC Ludhiana.

16. PW-12 Dr. Rajesh stated that PW-1 was brought to PGI Chandigarh on 23.11.2009 with alleged history of assault on 18.11.2009 and patient was conscious, moving all four limbs with stable vitals. On local examination, there was sutured wound over scalp and C.T. Scan showed fracture left parietal bone with preumecphas-lus. PW-1 was treated conservatory and was referred to District Hospital on 24.11.2009.

17. PW-6 Dr. Indu Bhardwaj treated PW-1 Balwant Rai in Regional Hospital Una. She stated that patient remained for basic nursing care with them for three days and on 27.11.2009 he was developing hemiparasis paralysis of half of the body but attendants were reluctant to take the patient to PGI.

18. PW-13 Dr. R.K. Kaushal admitted PW-1 Balwant Rai in DMC Hospital Ludhiana with history of weakness of right side of the body and difficulty in speaking and memory loss. At the time of admission patient was conscious but having difficulty in expressing himself with weakness of right side. On C.T. Scan of his head, fracture left parietal area with the

pneumocephalus (air in the brain) was noticed. He was operated on 28.11.2009. At the time of surgery injured areas was found to be infected. In cross examination he stated that incidence of wound infection was much more in diabetic untreated patient and PW-1 had history of diabetes for the last five years. From medical evidence on record it transpired that initially injury was not apprehended be so serious and later on due to delay in medical aid the injured area was infected and injury was aggravated. There is nothing on record to show that respondents were having knowledge that PW-1 Balwant Rai was diabetic since last 5 years and even injury caused by single blow may be fatal for his life. Therefore, knowledge of causing death with such injury is negated by evidence on record.

19. Knowledge of causing death by injury inflicted to PW-1 Balwant Rai by respondent Ramesh Chand was also absent. Not only PW-1 Balwant Rai but PW-7 Doctor Suresh Kumar did also not apprehend impact of injury received by PW-1 Balwant Rai. For that reason only, gravity of offence was not considered to be of such high degree so as to report the matter to police despite the fact that constable Banwari Lal son-in-law of PW-1 Balwant Rai was serving in Police Department.

20. PW-1/A compromised deed also indicated that PW-1 respondent Ramesh Chand apologized and Balwant Rai admonished him in Khangi Panchayat. It was possible only when there was a feeling amongst parties that alleged incident had taken place between cousins without any intention or knowledge to murder. PW-1 Balwant Rai went and came back from Dehlan on foot. PW-7 Doctor Suresh had stitched the wound and given firstaid to PW-1 Balwant Rai. Despite being a Medical Officer he did not find injury so serious at first instance so as to causing danger to life of PW-1 Balwant Rai and for that reason no such apprehension was mentioned in prescription slip Ex. PW-7/A issued on 18.11.2009. However, in MLC PW-7/B issued on 23.11.2009 he stated that injury was grievous and dangerous to life. But this opinion of doctor that injury caused to PW-1 Balwant Rai was dangerous to life is not sufficient to hold respondent guilty for committing an offence under Section 307 IPC.

21. In absence of intention or knowledge of respondents as required under Section 307 IPC, respondent are not liable to be convicted under Section 307 IPC and trial Court has rightly acquitted respondents under Section 307 IPC.

22. PW-1 alleged that respondent No. 2 inflicted injury on his right hand thumb with sickle. During medical examination of PW-1 Balwant Rai, no injury was found on his right hand thumb. PW-1 had approached PW-7 Doctor Suresh Kumar for his treatment immediately after the incident on 18.11.2009. PW-7 Doctor Suresh Kumar had found following injuries:-

1. Wound was 7x2x2 cm. bleeding profusely, stitched applied.

2. Wound on left wrist joint 3x1 cm. antiseptic dressing done. Abrasion and contusion right side of arm.

23. In his deposition in the Court also, PW-1 Balwant Rai stated that he sustained injury on his right hand thumb due to sickle stroke by respondent No. 2. PW-2 Manjit Kaur also stated that Rachna Devi inflicted injury to right hand thumb of her father-in-law. On this count, version of these witnesses was negated by injuries noticed by PW-7 Doctor Suresh Kumar on body of PW-1. There was no injury not only on right hand thumb of PW-1 but even on left hand thumb. It is not a case where there is a reconcilable discrepancy in ocular and medical evidence, rather medical opinion is completely wiping ocular version with regard to injury caused by respondent Rachna Devi.

24. Prosecution also relied upon compromise dated 20.11.2009 arrived at between parties after the incident. In this compromise, it was mentioned in clear words that respondent Ramesh Chand abused and beat PW-1 Balwant Rai and respondent Ramesh Chand confessed his fault and PW-1 Balwant Rai admonished him. There was no reference about even slightest involvement of respondent Rachna Devi in incident.

25 The matter was reported to Police on 23.11.2009 after five days of incident. There was possibility to improvement at the time of lodging FIR after five days to involve respondent No.2 Rachna Devi being wife of respondent Ramesh Chand because of afterthought for revenge. There was no other evidence regarding involvement of respondent No. 2 Rachana Devi in the incident so as to held her liable for act of respondent Ramesh Chand punishable under Section 34 IPC. Therefore, there was no sufficient material to invoke Section 34 IPC, to hold respondent Rachna Devi liable for committing an offence in furtherance of common intention for common object with respondent Ramesh Chand. Trial Court has rightly acquitted respondent Rachna Devi and therefore, no interference is warranted to disturb her acquittal.

26. So far as conviction of respondent Ramesh Chand under Section 324 IPC, the same was not challenged by respondent Ramesh Chand. However, he was released by trial Court on probation by giving benefit of Section 4 of Probation of Offender Act 1958. The said release of respondent has also been challenged by appellant.

27. Learned counsel for appellant relying upon pronouncement of Hon'ble Supreme Court in case titled as **State of Punjab versus Bawa Singh,** reported in **2015(2) Criminal Court Cases 765 (SC)** submitted that release of respondent Ramesh Chand on probation was a result of misplaced sympathy and in view of ratio laid down in this judgment respondents deserved to be sentenced to undergo imprisonment as provided in Indian Penal Code.

28. After giving our anxious consideration to the contention urged by counsel for appellant we are of the view that the trial Court has not committed any error in releasing respondent Ramesh Chand on probation of good conduct. Respondent No. 1 is not dangerous criminal but a person who surrendered to temptation. The occurrence in question was a out come of a sudden flare-up. The respondent was 55 years of age at the time of occurrence. He was released on probation of good conduct in the year 2010. The incident had taken place on account of sudden boundary dispute. Respondent Ramesh Chand cannot be compared with hard core criminal or person having a criminal intent to commit crime to murder PW-1 with pre-mediation. Also from compromise dated 20.11.2009, it can be inferred that respondent had realized his mistake and after his repentance matter was compromised. It is also relevant that at the time of compromise there was no police complaint pending against respondent Ramesh Chand and therefore compromise was not under pressure but only of repentance. There is nothing on record to reflect conduct of respondent Ramesh Chand warranting interference of this Court after releasing him on probation of good conduct. For these reasons, we do not consider it appropriate to interfere in release of respondent under Probation of Offenders Act, 1958.

29. In view of above discussion, appeal being devoid of merit is dismissed alongwith pending application if any. Bail bonds if any, are discharged. Record of the Court below be sent back immediately.

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

Krishan Kumar ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Cr. Appeal No. 297/2016
Reserved on: September 15, 2016
Decided on: September 16, 2016

Indian Penal Code, 1860- Section 452 and 302- PW-1 heard the cries from the house of S, he went to the spot and saw the accused, who tried to run away - efforts were made to apprehend him but he ran away from the spot- PW-1 went inside the house and saw that 'K' was set on fire –

she revealed that accused had poured kerosene on her and had set her on fire- she was taken to Hospital- she made a statement to the police in the presence of Medical Officer- subsequently, K succumbed to the injuries- accused was tried and convicted by the trial Court- held, in appeal that accused had forced K to marry him and on her refusal, accused poured kerosene oil on her and set her on fire- prosecution witnesses proved that K had told them about being set on fire by the accused- K had also made statement to the police- she was found fit to make the statement- she had also made statement before Tehsildar- dying declarations were consistent - minor contradictions cannot be ground to acquit the accused- prosecution version was duly proved beyond reasonable doubt and the accused was rightly convicted by the trial Court- further, directions issued not to mention the caste of accused, victim and witnesses in the police papers.

(Para-20 to 38)

Cases referred:

Gulzari Lal v. State of Haryana, AIR 2016 SC 795

Jeeja Ghosh and another v. Union of India and others, (2016) 7 SCC 761

For the appellant: Mr. R.L. Chaudhary, Advocate.

For the respondent: Mr. M.A. Khan, Additional Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

This appeal has been instituted against Judgment dated 30.5.2016 rendered by the learned Additional Sessions Judge (III), Kangra at Dharamshala, District Kangra, Himachal Pradesh in S.T. No. 2-P/2014, whereby the appellant-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for the commission of offences under Sections 452 and 302 IPC, has been convicted and sentenced to undergo life imprisonment and to pay a fine of Rs.10,000/- for the commission of offence under Section 302 IPC and in default of payment of fine, to further undergo simple imprisonment for two months. He has been further convicted and sentenced to undergo imprisonment for two years and to pay a fine of Rs.2,000/-, for the commission of offence under Section 452 IPC, and, in default of payment of fine, to further undergo simple imprisonment for a period of one month.

2. The case of the prosecution, in a nutshell, is that the house of Sunil Kumar (PW-1) was adjacent to the house of Swaroop Chand. He was at home on 10.8.2013 at about 2-2.30 PM, he heard cries from the house of Swaroop Chand. He went to the house of Swaroop Chand. He saw the accused on the spot. Kamlesh and Jasbir had also reached there. Accused tried to run away from the house of Swaroop Chand. Sunil Kumar tried to nab him but the accused pushed him aside and ran away from the spot. Sunil Kumar went inside the room of Kalpana. He saw that Kalpana had been set on fire. She was lying on the floor. Sunil Kumar, Kamlesh and Jasbir asked Kalpana what had happened. She told that accused had poured kerosene oil on her and set her on fire. Kalpana was taken to the link road where Ambulance (108) had reached. Police had also reached the spot. She was taken to the hospital. Medical Officer CHC Thural had also informed the SHO about the incident. On receiving information from Medical Officer, ASI Daya Ram alongwith HHC Tilak Raj and Constable Rajesh went to the CHC Thural. ASI Daya Ram moved an application Ext. PW-12/A seeking opinion of the Medical Officer, whether Kalpana was fit to give statement. The Medical Officer opined that she was fit to give statement. ASI Daya Ram recorded the statement of Kalpana, in the presence of Medical Officer, CHC Thural. The Medical Officer attested the statement. It was read over to Kalpana. She accepted the contents to be correct and put her thumb impression on the statement. MLC of Kalpana Ext. PW-12/C was obtained by Daya Ram. Statement of Sunil Kumar was recorded under Section 154 CrPC vide Ext. PW-1/A. Spot was inspected. One Can containing kerosene oil Ext. P7, *Dupatta* Ext. P2, burnt pieces of clothes Ext. P3 and match box Ext. P5 were recovered vide recovery memo Ext. PW-1/B. Case property was deposited through MHC. On 10.8.2013, at 9 PM, accused was

arrested. On 12.8.2013, articles recovered from the spot were sent to RFSL Dharamshala vide receipt Ext. PW-15/A. On the same day, accused got recovered a T-shirt Ext. P9 and Nikker Ext. P10 (Capri) from his house. On 13.8.2013, IO moved an application Ext. PW-20/K for recording statement of Kalpana before a Magistrate and also obtained the opinion of the Medical Officer whether she was fit to make statement. SHO moved an application Ext. PW-8/B to Sub Divisional Officer (Civil) Kangra to record the statement of Kalpana. Thereafter, Tehsildar Nagrota Bagwan, Bal Krishan Chaudhary came to RPGMC Tanda alongwith Patwari Bir Singh and recorded statement of Kalpana. On 18.8.2013, SHO received information that Kalpana had expired in RPGMC Tanda. Inquest papers were prepared. Post-mortem examination was got conducted. Post-mortem report is Ext. PW-13/B. Medical Officer, RPGMC Tanda handed over viscera of Kalpana, sample seal and envelope addressed to RFSL Dharamshala. It was handed over to MHC. Case property was sent to the RFSL Dharamshala. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as twenty witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He denied the allegations levelled against him. He was convicted and sentenced by the learned trial Court, as noticed herein above. Hence, this appeal.

4. Mr. R.L. Chaudhary, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. M.A. Khan, Additional Advocate General has supported the Judgment dated 30.5.2016.

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

7. PW-1 Sunil Kumar is a material witness. He testified that the house of Swaroop Chand was adjacent to his house. On 10.8.2013, at about 2-2.30 PM, he was at his home. He heard cries from the house of Swaroop Chand. He went to his house. When he reached his house, Kamlesh and Jasbir were also present. The accused was trying to run away from the room of house of Swaroop Chand. He tried to catch the accused. He pushed him and ran away from the spot. Thereafter, they went inside the room of Kalpana and saw that Kalpana was burnt. They asked Kalpana about the incident. She told that accused had thrown kerosene oil on her and set her on fire. They took Kalpana towards the link road where Ambulance and police had also reached. They took Kalpana to the hospital. Police recorded his statement Ext. PW-1/A. He showed the spot to the police. Police took photographs of Can containing kerosene oil, *Dupatta*, burnt pieces of clothes and match stick on the spot. These were taken into possession by the police and sealed in three parcels on the spot. In his cross-examination, he deposed that on 10.8.2013, he had not gone for work. Room of Kalpana was not bolted from outside at that time. He came to know that Kalpana had died nine days after the incident.

8. PW-2 ASI Amar Nath testified that on 10.8.2013, he alongwith HC Ranjeet Singh, SHO Sunil Kumar Rana and HC Ranjeet Singh was on patrolling. At around 3.45 PM, when they were present at village Gandar, SHO received a telephone call that in village Gandar Fallan, one girl had been burnt by a boy of the same village by sprinkling kerosene oil on her and she was being taken in burnt condition to the hospital. He alongwith SHO and HC Ranjeet Singh went towards Gandar Fallan. When they reached near link road, injured girl was being taken by her family and at that time, Ambulance had also reached there. SHO recorded statement of Sunil Kumar vide Ext. PW-1/A. It was sent to the Police Station, for registering FIR. They went to the spot. Site plan was prepared. Photographs were taken. They recovered one plastic Can containing kerosene, one *Dupatta*, burnt pieces of clothes and one match box. These were put into parcel and sealed.

9. PW-3 Smt. Asha Devi deposed that she was Ward Panch of Gram Panchayat. On 12.8.2013, Police called her to the house of accused. Police officials sealed the clothes of accused in a cloth parcel. She was declared hostile and cross-examined by the learned Public Prosecutor.

In her cross-examination, she admitted that when the police took the clothes from accused at that time, Up Pradhan Shashi Kant and Sunil Kumar were also present. She also admitted that Sunil Kumar identified the clothes.

10. PW-4 Swaroop Chand deposed that on 10.8.2013, he alongwith his wife and mother had gone for work. At about 2.50 PM, Kamlesh Kumari telephonically called him and disclosed that the accused entered his house and poured kerosene oil on his daughter and had set her on fire. They came back to their house. His daughter was lying on the floor in the room. She was burnt badly. He asked her about the incident. She disclosed that accused had entered her room and compelled her to marry him. When she refused to do so, he set her on fire and ran away from the spot. They took Kalpana to Thural Hospital. After giving first aid, doctor referred her to Tanda Hospital. She expired at Tanda. In his cross-examination, he deposed that the signatures of Kalpana were not taken on her statement as she could not hold pen or pencil. He denied the suggestion that Kalpana has not informed him about the incident. He denied the suggestion that the accused has not asked his daughter to marry him.

11. PW-5 Shashi Kant deposed that on 12.8.2013, he came from his shop. Police was present in the house of accused. Police sealed parcel and disclosed that they had recovered clothes of accused. He did not see the clothes as they were already sealed inside the parcel. Clothes were not recovered in his presence. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination by the learned Public Prosecutor, he admitted that, whenever he puts his signatures, he puts them after reading the contents. He was plus two pass. He has admitted his signatures on Ext. PW-1/C and specimen seal cloth Ext. PW-1/E.

12. PW-6 Master Jasbir Singh is a child witness. He testified that on 10.8.2013 at about 2.15 PM, he was watching TV in his new house. His sister was in the old house. His father, mother and grandmother were not at home. He heard cries of his sister. He went outside. His aunt Kamlesh and Sunil Kumar were already on the spot. He saw the accused on the spot. He was coming out of the room of the old house. He tried to run away. Sunil tried to catch him. Accused ran away from the spot. After that his aunt and Sunil Kumar entered the room and found his sister in burnt condition. They asked his sister about the incident. She told that the accused had entered the room. He started compelling her to marry him and when she refused, he set her on fire.

13. PW-8 Bal Krishan testified that on 13.8.2013, Sub Divisional Magistrate Kangra forwarded an application to him for recording the statement of Kalpana. Thereafter, he alongwith Bir Singh went to RPGMC Tanda for recording the statement of Kalpana Kumari. Her statement was recorded. Thereafter, he read over the statement to Kalpana Kumari vide Ext. PW-8/A. Injured was not able to put her signatures. Therefore, he appended a certificate regarding recording of the statement on Ext. PW-8/A. He signed the same. Bir Singh also signed it as a witness. He admitted that Ext. PW-8/B was not written by him. Volunteered that it was written by the Patwari.

14. PW-10 Rakesh Kumar deposed that on 29.8.2013, SHO Police Station, Lambagaon moved an application Ext. PW-10/A and inspected the record of the case. According to the register, on 28.7.2013, three litres of kerosene oil was bought by Swaroop Chand.

15. PW-11 Bir Singh Patwari testified that on 13.8.2013, he went to RPGMC Tanda alongwith Tehsildar Bal Krishan. They recorded the statement of Kalpana as per her version. Contents of Ext PW-8/A were read over to Kalpana. It was scribed by him. Thereafter, Tehsildar gave a certificate on the statement in red circle. He also signed the statement.

16. PW-12 Dr. Shagun Sharma deposed that the Police moved an application Ext. PW-12/A for medical examination of Kalpana, whether she was fit to make statement. She opined on Ext PW-12/A that Kalpana was fit to make statement. In her presence, the police recorded the statement of the injured Kalpana vide Ext. PW-12/B as per her version. Thereafter, injured put right thumb impression on the statement. Statement was also attested by her. She identified her

signatures on Ext. PW-12/B in red circle, 'Y'. She examined Kalpana. She was 17 years of age. Injured was brought with the history of burn injuries. Probable duration of injuries was 2 to 6 hours. She issued MLC Ext. PW-12/C. These injuries were possible if somebody poured kerosene oil on her and set her on fire.

17. PW-13 Dr. Vijay Arora has conducted post-mortem examination. He issued post-mortem report Ext. PW-13/B. According to him, cause of death was shock due to ante-mortem burns which were sufficient to cause death in the ordinary course of nature. He proved his final opinion, Ext. PW-13/D. Probable time that elapsed between injury and death was consistent with the hospital record. Probable time that elapsed between death of post-mortem was 12-24 hours.

18. PW-19 ASI Daya Ram testified that on 10.8.2013, he received a telephonic message from the Medical Officer, CHC Thural, who informed that a case of burning had come in the hospital. He alongwith HHC Tilak Raj and Constable Rajesh went to the CHC Thural. He moved an application Ext. PW-12/A to Medical Officer to take the opinion whether the injured was fit to make statement. Medical Officer opined that the injured was fit to give statement. He recorded the statement of the injured (Kalpana), in the presence of Medical Officer, CHC Thural. Statement was recorded as per the version given by the injured. Contents were read over to her. Thereafter, Kalpana put her thumb impression on the statement. Statement was attested by the Medical Officer, CHC Thural. He obtained MLC, Ext. PW-12/C.

19. PW-20 Inspector Sunil Kumar deposed that after receiving information he went to the village. Statement of Sunil Kumar (PW-1) was recorded under Section 154 CrPC. FIR was registered on the basis of *Rukka*. Photographs were taken. Can containing some kerosene oil and one match box were also recovered. Bal Krishan came to RPGMC Tanda alongwith Patwari Bir Singh and recorded the statement of the injured vide Ext. PW-8/A.

20. What emerges from the appraisal of statements of the witnesses is that the accused trespassed into the house where Kalpana was present, on 10.8.2013. He forced Kalpana to marry him. She refused to marry him. Thereafter he poured kerosene oil on her and put her on fire. He was seen at the spot by PW-1 Sunil Kumar. PW-1 Sunil Kumar has categorically stated that he was present in his house on 10.8.2013 at about 2-2.30 PM. He heard cries coming from the house of Swaroop Chand. He reached the spot. Kamlesh and Jasbir were present there. Accused tried to run away. He tried to catch him. However, accused pushed him and ran way. Thereafter, they went inside the room and found that Kalpana was burnt. They inquired from Kalpana about the incident. She told that accused had poured kerosene oil on her and had put her on fire. Statement of PW-1 Sunil Kumar is duly corroborated by PW-4 Swaroop Chand. He testified that on 10.8.2013, he was out of house. He received a telephone call at 2.50 PM from Kamlesh Kumari. She disclosed that accused had entered his house and poured kerosene oil on his daughter and set her ablaze. He reached his house and found that his daughter was lying on the floor. She was badly burnt. Thereafter, she was taken to the hospital. Kalpana has told him that accused was insisting her to marry him and when she refused, he set her on fire. PW-6 Jasbir is the brother of the deceased. He has also testified that his mother, father and grandmother were not at home. He heard cries of his sister. He went to the spot. His Aunt Kamlesh and one Sunil Kumar were already on the spot. He saw accused coming out of the room of old house. Accused tried to run away. Sunil Kumar tried to catch him. However, accused ran away from the spot. After that his aunt and Sunil Kumar went inside the room and found his sister in a burnt condition. They asked his sister about the incident. She told that accused entered the room. He asked her to marry him and when she refused to do so, he set her on fire by pouring kerosene oil. PW-13 Dr. Vijay Arora has conducted the post-mortem. According to him, cause of death was shock due to ante-mortem burns, which were sufficient to cause death in the ordinary course of nature. According to the FSL report, Ext. PB, kerosene oil was detected in parcels P/1, P/2 and P/3.

21. PW-20 Inspector Sunil Kumar has deposed that on 13.8.2013, he moved an application Ext. PW-20/K for recording the statement of Kalpana before a Magistrate and sought opinion of the Medical Officer RPGMC Tanda, whether Kalpana was fit to make statement.

Medical Officer, RPGMC Tanda on the application, in red circle, 'Y', opined that Kalpana was fit to make statement. Thereafter, he moved an application Ext. PW-8/B to the Sub Divisional Officer (Civil), Kangra to appoint some Magistrate for recording the statement. Sub Divisional Officer (Civil) Kangra appointed Tehsildar Nagrota Bagwan to record the statement of Kalpana. Bal Krishan, Tehsildar, Nagrota Bagwan came to RPGMC Tanda alongwith Patwari Bir Singh and recorded statement of Kalpana Ext. PW-8/A.

22. PW-19 ASI Daya Ram testified that he moved an application to the Medical Officer to take opinion whether the injured was fit to make statement, vide Ext. PW-12/A and Medical Officer opined that the injured was fit to make statement. He recorded the statement of Kalpana in the presence of the Medical Officer, CHC Thural, as per her version. Contents of the statement were read over to Kalpana. Thereafter, she put thumb impression on the statement. Statement was also attested by the Medical Officer, CHC Thural.

23. PW-12 Dr. Shagun Sharma deposed that the police moved an application Ext. PW-12/A for medical examination and recording the statement of the injured. Injured was fit for making statement. She opined regarding the fitness of the injured in Ext. PW-12/A. In her presence, the police recorded the statement of injured vide Ext. PW-12/B as per her version. Thereafter, injured put her right thumb impression over the statement after it was read over to her. Statement was attested by her. She identified her signatures on Ext. PW-12/B.

24. Statement of child witness also inspires confidence. He has reached the spot when he heard cries of his sister. Similarly, PW-1 Sunil Kumar reached the spot when he heard cries of Kalpana. Recoveries have been made strictly in accordance with law. PW-1 Sunil Kumar, PW-4 Swaroop Chand and PW-6 Master Jasbir are natural witnesses of the incident dated 10.8.2013.

25. We have perused Ext. PW-12/A and the dying declaration Ext. PW-12/B dated 10.8.2013. Kalpana stated that the accused came to her house. He was carrying a plastic Can. Accused told her that she should elope with him and when she refused to do, he poured kerosene oil on her and put her on fire. Statement Ext. PW-12/B is voluntary in nature. Injured was fit to make the statement as per PW-12 Dr. Shagun Sharma as mentioned on Ext. PW-12/A itself. One more dying declaration of the injured was recorded on 13.8.2013. PW-8 Bal Krishan has deposed that on 13.8.2013 SDM Kangra forwarded one application to him for recording the statement of Kalpana. Thereafter, he alongwith Bir Singh (PW-11) went to the RPGMC Tanda and recorded the statement of Kalpana as per her version. Thereafter, he read over the statement to Kalpana vide Ext. PW-8/A. Injured was not able to put her signature. Therefore, he appended a certificate on Ext. PW-8/A. Statement of PW-8 Bal Krishan has been duly corroborated by PW-11 Bir Singh. She has reiterated the manner in which accused has put her on fire when she refused to marry him.

26. Dying declarations have been made by Kalpana, after she was found fit to make statement as per the opinion of the Doctors.

27. Their Lordships of the Hon'ble Supreme Court in **Gulzari Lal v. State of Haryana**, reported in AIR 2016 SC 795, have held that a valid declaration maybe made without obtaining the certificate of fitness from a Medical Officer. Their lordships have held as under:

> We find no infirmities with the statements made by the deceased and recorded by the Head Constable Manphool Singh (PW-7). A valid dying declaration may be made without obtaining a certificate of fitness of the declarant by a medical officer. The law regarding the same is well-settled by this Court in the decision of Laxman v. State of Maharashtra[6], wherein this Court observed thus:
>
> > "3. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and

> circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

Further, clarity on the issue may be established by the judgment of this Court in the case of Paras Yadav & Ors. v. State of Bihar[7], wherein this Court addressed the question regarding the dying declaration that was not recorded by the doctor and where the doctor had not been examined to say that the injured was fit to give the statement. It has been held by this Court as under :

> "8....In such a situation, the lapse on the part of the Investigating Officer should not be taken in favour of the accused, may be that such lapse is committed designedly or because of negligence. Hence, the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not."

In reference to the position of law laid down by this Court, we find no reason to question the reliability of the dying declaration of the deceased for the reason that at the time of recording his statement by Head Constable, Manphool Singh (PW-7),he was found to be mentally fit to give his statement regarding the occurrence. Further, evidence of Head Constable Manphhol Singh (PW-7) was shown to be trustworthy and has been accepted by the courts below. The view taken by the High Court does not suffer from any infirmity and the same is in order.

28. In this case, both the dying declarations Ext. PW-12/B and Ext. PW-8/A are unanimous and minor discrepancies inter se two dying declarations can not be a ground to acquit the accused, particularly when one of the dying declarations has been recorded by a Tehsildar i.e. PW-8 Bal Krishan. PW-12 Dr. Shagun Sharma, has also testified that Kalpana was fit to make statement Ext. PW-12/B. Doctor has certified on Ext. PW-20/K that Kalpana was fit to make statement.

29. Mr. Chaudhary, Advocate has also drawn the attention of the Court to the fact that the learned trial Court has framed two points for determination and findings returned on Issue No. 1 are 'No' and findings on Issue No.2 are, "*Accused person acquitted of the alleged offences as per operative part of the judgment.*". It is a typographical error. The trial judge should have been more careful while dictating the judgment. Learned trial Court has considered the entire ocular and documentary evidence while convicting the accused as per the operative potion of the judgment. Judgment in fact was pronounced on 30.5.2016 and convict was also heard on quantum of sentence on 30.5.2016. However, due to typographical error, date of pronouncement of judgment has been shown as 31.5.2016. It has not prejudiced the case of the accused in any manner. Accused can not take the benefit of a typographical error, which has inadvertently crept into the judgment.

30. Mr. Chaudhary, Advocate, has also argued that all the details have not been given in the FIR. It is settled law by now that an FIR is not an encyclopaedia. Now, so far as the evidence of child witness is concerned, same can be relied upon but it is to be read with caution.

31. Accused has trespassed into the room of Kalpana with an intention to cause grievous hurt and has wrongfully restrained Kalpana on 10.8.2013. Thereafter, the accused poured kerosene oil on her and set her on fire.

32. Prosecution has duly proved its case against the accused under Sections 302 and 452 IPC.

33. In view of the discussion and analysis made hereinabove, there is no merit in the appeal and the same is dismissed. Pending applications, if any, are also disposed of.

34. However, before parting with the Judgment, it would be pertinent to mention that the police in inquest report, statement recorded under Section 154 CrPC, recovery memo and dying declaration have separately stated the caste of the accused as well as of the victim. This is not permissible. Mentioning of caste/status separately in the criminal proceedings is a colonial legacy and requires to be stopped forthwith. **Right to dignity is a fundamental right and a basic human right. Human dignity is one of the basic features of the Constitution**. The Constitution of India also guarantees a casteless and classless society. Segmentation of the society into groups can not be determined by birth. All are born equal.

35. The expression, "right to life', includes right to live with human dignity. It is the bounden duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction. In the German Constitution, human dignity under Article 1 is 'inviolable'. Human dignity is the foundation of constitutional rights/ values.

36. Their Lordships of the Hon'ble Supreme Court in **Jeeja Ghosh and another v. Union of India and others**, reported in (2016) 7 SCC 761, have held that human dignity which is the core value of human right and is treated as a significant facet of right to life and liberty. Jurisprudentially, three types of models for determining the content of the constitutional value of human dignity are recognised. These are: (i) Theological Models, (ii) Philosophical Models, and (iii) Constitutional Models. Aquinas and Kant discussed the jurisprudential aspects of human dignity based on the aforesaid philosophies. Over a period of time, human dignity has found its way through constitutionalism, whether written or unwritten. Their lordships have held as under:

> "37. The rights that are guaranteed to differently abled persons under the Act, 1995 are founded on the sound principle of human dignity which is the core value of human right and is treated as a significant facet of right to life and liberty. Such a right, now treated as human right of the persons who are disabled, has it roots in Article 21 of the Constitution. Jurisprudentially, three types of models for determining the content of the constitutional value of human dignity are recognised. These are: (i) Theological Models, (ii) Philosophical Models, and (iii) Constitutional Models. Legal scholars were called upon to determine the theological basis of human dignity as a constitutional value and as a constitutional right. Philosophers also came out with their views justifying human dignity as core human value. Legal understanding is influenced by theological and philosophical views, though these two are not identical. Aquinas and Kant discussed the jurisprudential aspects of human dignity based on the aforesaid philosophies. Over a period of time, human dignity has found its way through constitutionalism, whether written or unwritten. Even right to equality is interpreted based on the value of human dignity. Insofar as India is concerned, we are not even required to take shelter under theological or philosophical theories. We have a written Constitution which guarantees human rights that are contained in Part III with the caption "Fundamental Rights". One such right enshrined in Article 21 is right to life and liberty. Right to life is given a purposeful meaning by this Court to include right to live with dignity. It is the purposive interpretation which has been adopted by this Court to give a content of the right to human dignity as the fulfillment of the constitutional value enshrined in Article 21. Thus, human dignity is a constitutional value and a constitutional goal. What are the dimensions of constitutional value of human dignity? It is beautifully illustrated by Aharon Barak[2] (former Chief Justice of the Supreme Court of Israel) in the following manner:

"The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in the three ways: first, the value of human dignity serves as a normative basis for constitutional rights set out in the constitution; second, it serves as an interpretative principle for determining the scope of constitutional rights, including the right to human dignity; third, the value of human dignity has an important role in determining the proportionality of a statute limiting a constitutional right."

38. All the three goals of human dignity as a constitutional value are expanded by the author in a scholarly manner. Some of the excerpts thereof, are reproduced below which give a glimpse of these goals:

"The first role of human dignity as a constitutional value is expressed in the approach that it comprises the foundation for all of the constitutional rights. Human dignity is the central argument for the existence of human rights. It is the rationale for them all. It is the justification for the existence of rights. According to Christoph Enders, it is the constitutional value that determines that every person has the right to have rights...

The second role of human dignity as a constitutional value is to provide meaning to the norms of the legal system. According to purposive interpretation, all of the provisions of the constitution, and particularly all of the rights in the constitutional bill of rights, are interpreted in light of human dignity...

Lastly, human dignity as a constitutional value influences the development of the common law. Indeed, where common law is recognized, judges have the duty to develop it, and if necessary modify it, so that it expresses constitutional values, including the constitutional value of human dignity. To the extent that common law determines rights and duties between individuals, it might limit the human dignity of one individual and protect the human dignity of the other."

37. The founding fathers of the Indian Constitution, were of utmost belief that the caste system would come to an end with the passage of time. However, unfortunately, the caste system is still prevalent. There is no scientific, intellectual, social and logical basis for caste system. The caste system is profoundly illogical and is also against the basic tenets of the Constitution.

38. Accordingly, the Principal Secretary (Home) to the Government of Himachal Pradesh, is directed to issue instructions to all the Investigating Officers in Himachal Pradesh not to separately state/mention the caste of the accused, victims or witnesses in recovery memos, FIR's, seizure memos, inquest papers and other forms prescribed under the Code of Criminal Procedure, 1973 and Punjab Police Rules. **We should, as a public policy, shun the caste system.**

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

M/s Gorsi Construction Pvt Ltd .....Appellant

Vs

Vinod Kumar ....Respondent.

Cr.MP(M) No.752 of 2016 IN
Cr. Appeal No.426 of 2016
Date of decision: 16.9.2016

Code of Criminal Procedure, 1973- Section 256- Complaint filed by the appellant was dismissed in default by the trial Magistrate for want of appearance - complaint was listed for filing of process fee and correct address of the accused- Court had not come to the conclusion that presence of the complainant was absolutely essential and had straightaway dismissed the complaint under Section 256 of Cr.P.C- dismissal of the complaint for non-appearance is not automatic- there has to be an application of mind to determine whether order of dismissal should be passed or not- the Court has to see whether personal attendance of the complainant is essential and whether the situation does not justify the adjournment of the complaint-, dismissal of the complaint is not proper on singular default in appearance on the part of the complainant - order set aside. (Para-4 to 6)

For the applicant/Appellant. Ms.Ambika Kotwal, Advocate.
For the Respondent: Mr. Arush Matlotia, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J (Oral):

Heard. By the medium of this application, appellant has sought condonation of delay of 55 days i.e. crept in filing of the appeal. Though the application has vehemently opposed by the learned counsel for the respondent, however, I find that there is sufficient cause for condoning the delay as has been spelt out in para 3 of the application. Moreover, the application is duly supported by an affidavit of the applicant. Accordingly, the application is allowed and the delay of 55 days in filing the appeal is condoned. Application disposed of.

Cr.MP(M) No. 753 of 2016

2. Leave to appeal granted. Appeal be registered.

Cr. Appeal No.426 of 2016

3. This appeal is directed against the order dated 25.2.2016, whereby complaint filed by the appellant came to be dismissed by the learned Trial Magistrate and further ordered the statutory acquittal of the accused/respondent.

4. The impugned order reads thus:

"25.2.2016

Present: None.

Case called again and again none has appeared on behalf of complaint. Let be called after lunch.

Sd/-

Present: None.

Case called repeatedly but none appeared on behalf of complainant. Today case was fixed for filing PF and CA and summon to accused, but despite having knowledge of the date of the hearing neither complainant nor his counsel appear. Hence this court is of view that complainant conduct does not deserve any further leniency. It is not a fit case to call through fresh notice, accordingly appreciating his conduct and also being the right of speedy trial of accused which is also fundamental right. This court is of a considered opinion that it is a fit case where for want of non appearance of complainant, complaint is liable to be dismissed. Accordingly, the complaint is dismissed under Section 256 of Cr.P.C for non appearance. Statutory acquittal is announced in favour of accused. File after due completion be consigned to record room."

5. Section 256 of the Code of Criminal Procedure reads thus:

" *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. It is evident from the aforesaid order that the case was listed for filing of process fee and correct address of the accused, but the learned trial court has not at all come to the conclusion that presence of the complainant on the said date was absolutely essential and has straightaway dismissed the application by invoking the provisions of Section 256 of Cr.PC.

7. Furthermore, the learned trial Magistrate has not even recorded its satisfaction as to why it was dismissing the complaint and in such circumstances mainly by holding that 'this court is of the considered opinion that it is a fit case where for want of non appearance of complainant, complaint is liable to be dismissed.", would not suffice.

8. Acquittal of the accused under this section is not automatic. It cannot be said that this section contemplates that the order of acquittal should be a matter of routine and followed automatically on the absence of the complainant. There has to be an application of mind to the question as to whether the order of acquittal under the aforesaid section should be passed.

9. When the court notices that the complainant is absent on a particular day, it is imperative for the court to see whether personal attendance of the complainant is essential on that date and also whether the situation does not justify the case being adjourned. On account of singular default in appearance on the part of complainant, dismissal of the complaint would not be proper and can also be termed as arbitrary.

10. In view of the aforesaid discussion, the impugned order passed by the learned trial Magistrate on 25.2.2016 is not sustainable in the eyes of law and the same is accordingly set aide. Petition is allowed in the aforesaid terms. The parties through their counsels are directed to cause appearance before the court below on 5.10.2016.

Petition disposed of in the aforesaid terms, so also the pending application(s), if any.

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

Shyam Lal son of late Shri Jai Ram ....Petitioner/Accused

Versus

State of H.P. & others ....Non-petitioners

Cr.MMO No. 193 of 2015
Order reserved on 29th July 2016
Date of Order 16th September 2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Sections 409, 467, 468, 471 and 120(B) IPC- present petition has been filed for quashing the same and the consequent proceedings- held, that question of fact cannot be decided in the proceedings for quashing the FIR- inquiry report in departmental proceedings is

not sufficient to quash the proceedings as nature of departmental and criminal proceedings is different- there are sufficient grounds to proceed against the accused on the basis of the statements made by the witnesses- truth or falsity of the prosecution version will be seen at the conclusion of the trial- petition dismissed.(Para-5 to 14)

For the Petitioner:	Mr. S.D. Gill Advocate.
For Non-petitioners Nos. 1 to 3	Mr. M.L. Chauhan Addl.Advocate General.
For Non-petitioner No.4:	Mr. Satyen Vaidya Sr. Advocate with Mr.Vivek Sharma Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Section 482 of Code of Criminal Procedure 1973 to quash FIR No. 32 of 2013 dated 16.7.2013 registered under Sections 409, 467, 468, 471 and 120(B) IPC at P.S. Reckeong Peo District Kinnaur H.P. and also to quash criminal proceedings of case No. 20/2 of 2014 title State of H.P. vs. Shyam Lal and another.

Brief facts of the case

2. It is alleged that Senior Executive Engineer Electrical Division HPSEBL Reckongpeo filed FIR No. 32 of 2013 dated 16.7.2013 against accused persons namely Shyam Lal and Piare Lal alleging that Shri Shyam Lal draftsman was working in Electricity Division and has committed embezzlement of public money amounting to Rs. 30055/- (Rupees thirty thousand fifty five). FIR was registered and investigation conducted by Investigating Agency. Investigating Agency filed charge sheet against Shyam Lal petitioner and Piare Lal before learned Chief Judicial Magistrate Kinnaur at Reckongpeo on 30.5.2014. Feeling aggrieved against FIR and consequential criminal proceedings petitioner filed present petition.

3. Court heard learned Advocate appearing on behalf of petitioner and learned Additional Advocate General appearing on behalf of non-petitioners Nos. 1 to 3 and learned Advocate appearing on behalf of non-petitioner No.4 and also perused the record carefully.

4. Following points arise for determination in present petition:-

Point No.1

Whether petition filed under Section 482 of Code of Criminal Procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of petition?

Point No.2

Final order.

Findings upon Point No. 1 with reasons

5. Submission of learned Advocate appearing on behalf of petitioner that petitioner was asked to assist the tender process committee to complete the formality of tender work and petitioner was asked to fill up the register and was asked to help the Superintendent of office for completion of tender process and petitioner did not receive any tender earnest money from contractors and same was received by Shri Piare Lal Sr. Assistant who actually issued the receipts against money received by him and on this ground petition be allowed is rejected being devoid of any force. Fact whether petitioner received tender earnest money from contractors or not is a complicated issue of facts. Judicial findings relating to complicated issue of facts cannot be given at this stage of case. Judicial findings would be given after giving due opportunity to both parties to lead evidence in support of their case.

6. Submission of learned Advocate appearing on behalf of petitioner that separate disciplinary proceedings were initiated against the petitioner and inquiry officer submitted the report that petitioner is not liable and thereafter findings of inquiry officer remitted back and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter

mentioned. It is well settled law that departmental proceedings and criminal proceedings under Indian Penal Code 1860 are distinct proceedings. It is well settled law that criminal proceedings under Indian Penal Code 1860 cannot be dropped automatically simply on ground that separate departmental proceedings are under process relating to same facts. It is well settled law that two parallel proceedings relating to same facts qua distinct offence could continue in accordance with law. ***See AIR 1961 SC 578 title State of Bombay vs. S.L.Apte. See AIR 1954 SC 375 title S.A.Venkataraman vs. Union of India.***

7. Submission of learned Advocate appearing on behalf of petitioner that Senior Executive Engineer Electric Division HPSEBL Reckongpeo Kinnaur H.P. has enmity with petitioner because when Senior Executive Engineer Electric Division was posted at Kaza along with petitioner there was case of embezzlement registered against official who was close friend of Senior Executive Engineer and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Fact whether Senior Executive Engineer has enmity with petitioner because petitioner has registered embezzlement case against friend of Senior Executive Engineer at Kaza is also complicated issue of facts. It is held that judicial findings relating to complicated issue of facts cannot be given at this stage of case unless opportunity is granted to both parties to lead evidence in support of their case.

8. Submission of learned Advocate appearing on behalf of petitioner that petitioner is not involved in embezzlement of amount because earnest money of tender is received by Sr. Assistant Piare Lal and same is counter signed by SDO and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Whether earnest money of tender was received by Senior Assistant Shri Piare Lal or not is also complicated issue of facts. It is not exepdient in the ends of justice to give judicial findings relating to complicated issue of facts at this stage of case unless opportunity is granted to both parties to lead evidence in support of their case.

9. Submission of learned Advocate appearing on behalf of petitioner that petitioner has no malafide intention in recording the entry in register because if petitioner would have intention for embezzlement then he would actually record less amount in register than the money received and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Issue relating to absence of *mensrea* on part of petitioner cannot be decided at this stage of case because issue relating to absence of *mensrea* is a complicated issue of facts and it is not exepdient in the ends of justice to give judicial findings relating to complicated issue of facts unless opportunity is granted to both parties to lead evidence in support of their case.

10. Submission of learned Advocate appearing on behalf of petitioner that tender processing committee did not adopt the proper procedure as per manual and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Issue whether tender committee did not adopt the proper procedure is also complicated issue of facts. Judicial findings relating to non-adoption of proper procedure cannot be given at this stage of case unless opportunity is granted to both parties to lead evidence in support of their case.

11. After perusal of statement of prosecution witnesses annxed with charge sheet i.e. (1) Ajit Singh Negi (2) Piar Pur Negi (3) Jai Pal Singh (4) Deepak Chauhan (5) Jagdish Chand (6) Uveesh Chander (7) Mohan Singh (8) Bhupender Singh (9) Inder Singh (10) Kaami Lama (11) Dr.Visheshwar Sharma (12) Punya Ram (13) HC Sarju Ram (14) C. Rajesh Kumar (15) Deputy Superintendent Yadav Chand, (16) Yodha Ram and (17) Laxman Kumar recorded under Section 161 Cr.P.C. prima facie there are sufficient grounds to proceed against the accused/petitioner.

12. After perusal of documentary evidence placed on record i.e. (1) Challan form (2) FIR (3) Complaint along with documents (4) Recovery memo (5) Letter No. 434(Sectt.)FTE/2/DOFP/2011 (6) Tender form sale register (7) Tender opening register (8) Notice Inviting tender (9) Applications of contractors for tender (10) Tender document dated 3.7.2013 (11) Receipt Book No. 0084201 to 0084300 (12) Receipt Book No. 0084201 to 0084400 (13)

Applications of contractors to withdraw deposited earnest money (14) Letter No. 8120 dated 2.1.2014 alongwith cash book page No. 72 dated 4.7.2013 (15) Copies of appointment and posting order of petitioner Shyam Lal draftsman (16) Copies of appointment and posting order of co-accused Piare Lal cashier (17) Specimen handwriting and signatures of petitioner/co-accused Shyam Lal Draftsman S-1 to S-24. (18) Specimen hand writing and signatures of co-accused Piare Lal cashier S-25 to S-48. (19) Report filed by SFSL Junga it is held that prima facie there are sufficient grounds to proceed against the petitioner.

13. Offence under Sections 409, 468, 471 IPC are cognizable criminal offence. It is well settled law that investigating agency is under statutory obligation to investigate the case relating to FIR filed in cognizable criminal cases. It is well settled law that disputed and controversial facts should not be made basis for quashing criminal proceedings. It is well settled law that High Court should exercise jurisdiction under Section 482 Cr.P.C. for quashing FIR and criminal proceedings sparingly and with circumspection. It is well settled law that evaluation of truth and falsity would be possible when evidence would be recorded by learned Trial Court in accordance with law. ***See AIR 2014 SC 3352 title Mosiruddin Munshi vs. Md. Siraj and another. See (2009)1 SCC 516 title R. Kalyani vs. Janak C. Mehta. See (2009)4 SCC 439 title Mahesh Chaudhary vs. State of Rajasthan. See AIR 2014 SC 2567 title Rishi Pal Singh vs. State of U.P. See (2004)1 SCC 691 title State of M.P. vs. Awadh Kishore Gupta. See AIR 2005 SC 359 title State of Orissa vs. Debendra Nath. See (1995)2 SCC 449 State of T.N. vs. Thirukkural Perumal. See (1992) Supp 1 SCC 335 title State of Haryana vs. Bhajan Lal. See (2012)10 SCC 155 title State of M.P. vs. Surendra Kori. See AIR 1981 SC 1548 title Mohd. Akbar Das and others vs. State of J&K.***

In view of above stated facts and case law cited supra point No. 1 is answered in negative.

Point No.2(Final Order)

14. In view of findings upon point No.1 petition filed under Section 482 Cr.P.C. is dismissed. Parties are directed to appear before learned Trial Court on ***30.9.2016.*** Observations will not effect merits of case in any manner and will be strictly confine to disposal of present petition. File of learned Trial Court along with certify copy of order be sent back forthwith. Cr.MMO No. 193 of 2015 is disposed of. Pending miscellaneous application(s) if any also stands disposed of.

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

State of H.P. .....Appellant.

Versus

Ramswaroop & Ors. .....Respondents.

RSA No.185 of 2004

Date of Decision: 16.09.2016

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for declaration pleading that they are owners in possession of the suit land- half share of the suit land was owned by predecessor-in-interest of the plaintiffs and remaining half share was owned by M- M mortgaged his share with the predecessor-in-interest of the plaintiffs- mutation was sanctioned to this effect- mortgage was never redeemed either by M or by his successors- the right of redemption was extinguished by efflux of time and the plaintiffs became owners of the suit land – the land has been wrongly shown in the ownership and possession of S – hence, the suit was filed for seeking the declaration- the defendant denied the averments of the plaint- the suit was decreed by the trial Court- an appeal was filed, which was allowed and the case was remanded to the trial Court- again the suit was decreed- an appeal was filed, which was dismissed – held, in second appeal that an issue regarding the lack of jurisdiction was framed by the trial Court which was not pressed, therefore, it is not permissible to raise the question of jurisdiction in the second appeal-

further, the suit was filed regarding the declaration of the right of a person which falls exclusively within the jurisdiction of the Civil Court- the suit land was shown to be in the ownership and possession of M, who had mortgaged it with the predecessor-in-interest of the plaintiffs- plaintiffs are in continuous possession of the suit land since then M had not redeemed the mortgaged at any point of time- even successors of M had not filed an application for redemption, therefore, Courts had rightly decreed the suit- appeal dismissed. (Para-17 to 27)

For the Appellant:	Mr. Rupinder Thakur, Additional Advocate General with Mr. Rajat Chauhan, Law Officer.
For the Respondents:	Mr. Sanjay Jaswal, Advocate for respondents No. 1(a), 2(a, 4(a) to 4(c), 6(a) to 6(e), 7, 8 and 10. Respondents No. 3(a) to 3(i) and 9(a) to 9(c) already exparte. Respondents No. 5 to 11 already delected.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

Instant Regular Second Appeal filed under Section 100 of the Code of Civil procedure is directed against the judgment and decree dated 30.11.2002, passed by learned Additional District Judge, Nahan, District Sirmaur, H.P. in Civil Appeal No. 49-N/13 of 2002, affirming the judgment and decree dated 8.5.2002, passed by learned Senior Sub Judge, Sirmaur District at Nahan, H.P. in Civil Suit No. 253/1 of 2001/96, whereby suit filed by plaintiffs was decreed by declaring him to be owner in possession of entire suit land including disputed share of Shri Mohar singh (Original mortgagor) comprised under Khewat No. 8, Khatauni Nos. 25, 26 and 27, total measuring 23-16 bighas as per jamabandi for the year 1992-93 situated in village Chamba Sheel, Tehsil Nahan, District Sirmaur, H.P. Learned trial Court while allowing aforesaid suit of the plaintiffs also declared revenue entries showing defendant i.e. State of H.P. as owner of mortgagor of suit land to the extent of ½ share, illegal, null and void and not binding upon the right of the plaintiffs.

2. Briefly stated facts, as emerged from the record are that the plaintiffs (hereinafter after referred to as the 'respondents-plaintiffs') filed suit for declaration against defendant (hereinafter referred to as the 'appellant-defendant') averring therein that they are owner in possession of suit land comprised in Khewat No. 8, Khatauni Nos. 25, 26 & 27, measuring 23 bighas and 16 biswas as per jamabandi for the year 1992-93 situated in village Chamba Sheel, Tehsil Nahan, District Sirmaur, H.P. , which has been recorded in the column of ownership to the extent of ½ share in the name of the appellant-defendant and the remaining ½ share in the names of the plaintiffs-respondents. Plaintiffs-respondents further averred that half share of the suit land was owned by predecessor-in-interest of plaintiffs-respondents, namely, S/Shri Dharmu & Bir Singh sons of Shri Ganga Ram to the extent of the of ½ share and the remaining ½ share was owned by Shri Mohar Singh son of Shri Mangal Singh. As per plaintiffs-respondents, Shri Mohar Singh mortgaged his share with the predecessor-in-interest of plaintiffs-respondents vide mutation No. 16 attested on 20th Chait BK Sambat 1970. Plaintiffs-respondents further contended that predecessor-in-interest of plaintiffs-respondents remained in possession of entire suit land and mortgage was never redeemed either by Shri Mohar Singh or his successor-in-interest, as a result of which, the plaintiffs-respondents, who succeeded the suit land, became owner of the entire suit land. Plaintiffs-respondents further contended that half share of Shri Mohar Singh in the suit land was inherited by Smt. Sandla Devi widow of Shri Mohar Singh, but since she also failed to get the mortgage of the suit land redeemed till 31.12.1970, her right to get the suit land redeemed got extinguished, as a result of which, plaintiffs-respondents became absolute owner of the suit land. Plaintiffs-respondents further alleged that Smt. Sandla Devi in connivance with the appellant-defendant surrendered half share of the suit land in favour of appellant-defendant, as a result of which, appellant-defendant was shown mortgagor of the suit

land, but fact remains that entire suit land was in possession of the plaintiffs-respondents and same was wrongly shown in the ownership of Smt. Sandla Devi after 31.12.1970. In the aforesaid background, plaintiffs-respondents filed suit for declaration as has been detailed hereinabove.

3. Present appellant-defendant by way of written statement refuted the claim of the plaintiffs-respondents by stating that total area of holding was 8-9 bighas whereas now the plaintiffs-respondents are claiming ownership and possession of 23-16 bighas. Appellant-defendant further contended that plaintiffs-respondents got the revenue entries changed in their favour in connivance with the revenue officials by playing fraud upon the appellant-defendant. Appellant-defendant further stated that mortgage created by Shri Mohar Singh in favour of predecessor-in-interest of the plaintiffs-respondents was without any share in shamlat, as such, plaintiffs-respondents cannot be treated owner in possession of 23-16 bighas of land. In the aforesaid background, appellant-defendant sought dismissal of the suit filed by the plaintiffs-respondents.

4. Plaintiffs-respondents by way of replication reiterated its case as made out in plaint and denied all the averments contained in the written statement. Learned trial Court on the basis of pleadings available on record framed following issues on 11.12.1997:-

"1. Whether the plaintiffs are entitled for the decree of declaration, as alleged? ...OPP

2. Whether the suit is not maintainable in the present form? ...OPD

3. Whether plaintiff has no enforceable cause of action? OPD

4. Whether the suit is not within time? OPD

5. Whether this Court has no jurisdiction to entertain the present suit? OPD

6. Whether the plaintiffs have no locus-standi to file the present suit? OPD

7. Whether the suit is not properly valued for the purpose of court fees and jurisdiction? OPD

8. Whether no valid and legal notice as required under Section 80, C.P.C. served upon the defendant? If so, its effect? OPD.

9. Relief."

5. Thereafter, vide judgment and decree dated 5.11.1999, learned trial Court decreed the suit of the plaintiffs-respondents. Present appellant-defendant i.e. State of H.P. being aggrieved with the passing of judgment and decree dated 5.11.1999, preferred an appeal before Appellate Court i.e. learned District Judge, Sirmaur at Nahan. The learned Appellate Court vide judgment dated 15.11.2001 set aside the impugned judgment and decree dated 5.11.1999 and remanded the case to the learned trial Court for fresh trial after recasting issue No. 1, which is as under:-

"Whether the entire suit land was mortgaged with possession with the predecessor-in-interest of the plaintiffs and as such they are entitled to the decree for declaration, as prayed for? ...OPP"

6. Accordingly, learned trial Court in terms of judgment dated 15.11.2001 called upon the parties to lead evidence on additional re-casted issue No. 1, but fact remains that no oral or documentary evidence was led on record by the parties. Learned trial Court on the basis of evidence adduced on record by the respective parties, decreed the suit of the plaintiffs-respondents, as has been detailed hereinabove.

7. Being aggrieved and dis-satisfied with the impugned judgment passed by learned trial Court, present appellant-defendant filed an appeal before learned Additional District Judge, Sirmaur District at Nahan, which came to be registered as Civil Appeal No. 49-N/13 of 2002 and learned Additional District Judge vide judgment 30.11.2002 dismissed the appeal preferred by the present appellant-defendant and upheld the trial Court judgment dated 8.5.2002.

8. Hence, present Regular Second Appeal by present appellant-defendant praying therein for setting aside the judgments and decrees passed by both the Courts below.

9. This Regular Second Appeal was admitted on the following substantial questions of law:-

> *"1 That the Judgment and Decree dated 30.11.2002 passed by Addl. District Judge, Nahan, District Sirmaur by affording the Judgment and Decree passed by Senior Sub-Judge, Nahan dated 8.5.2002 is against the provision of H.P. Mortgage Redemption Act, 1971 with the result the Judgment and decree passed by the Ld. Courts below are liable to be set aside.*
>
> *2. That the both Courts below has acted beyond the jurisdiction vested in it under Law with the result the Judgment and decree passed by the Courts below are not tenable in the eyes of law and needs to be set-aside.*
>
> *3. Whether the Judgment and decree passed by the Courts below are exercised the jurisdiction nor vested in it as the jurisdiction cannot be assumed by the consent of the parties and specific findings were required for the issues framed by the Courts below. Particularly issue No. 5 with the result, the judgment and decree passed by the Courts below are liable to be set aside.*
>
> *4. Whether the both Courts below have mis-read and misinterpreted the evidence and documents of the parties with the result the judgment and decree passed by Courts below are liable to be set aside.*
>
> *5. Whether the Courts below were having jurisdiction to triable beyond his scope of jurisdiction and to decide the matter where it was neither the pleading of the necessary party nor it was evidence of the party at the case not pleaded and proved."*

10. Shri Rupinder Singh Thakur, learned Additional Advocate General representing the appellant-defendant vehemently argued that judgments passed by both the Courts below are not sustainable as the same are not based upon the correct appreciation of evidence available on record, as such, same deserves to be quashed and set aside. Mr. Thakur forcefully contended that both the Courts below have gravely erred in exercising their jurisdiction, which is not vested in it, specifically in the matter arising / falling within the scope of H.P. Mortgage Redemption Act, 1971 and H.P. Restitution of Mortgaged Lands Act, 1976. As per Mr. Thakur, Collector of District u/s 2 (2) and 13 of the Acts decided the matter arising out of this matter and whereas the jurisdiction of Civil Court is completely barred, as such, he prayed for quashing and setting aside of the impugned judgments passed by both the Courts below. As per Mr. Thakur, since plaintiffs-respondents in Civil Suit has questioned the validity of vestment of land, which admittedly falls under Himachal Pradesh Restitution of Mortgaged Lands Act, 1976, jurisdiction of the Civil Court is completely barred under Section 13 of the Act No. 20 of 1976, as such, judgments passed by both the Courts below are quashed and set aside being illegal.

11. Mr. Thakur further contended that both the Courts below have traveled beyond the jurisdiction and has not decided the matter on the question of jurisdiction and Courts below have failed to return findings on issue No. 5 framed by Senior Sub Judge, Nahan, as such, prayed for quashing and setting aside the judgments passed by both the Courts below. Mr. Thakur while concluding his arguments strenuously argued that subject matter decided by the Courts below was pure question of law and issue No. 5 as framed by the learned Senior Sub Judge, Nahan, ought to have been decided as preliminary issue by the Court without adverting to the merits of the case, as such, grave injustice has been caused to the present appellant-defendant. Similarly, Mr. Thakur made this Court to travel through the statements of witnesses adduced on record by the plaintiffs-respondents to demonstrate that plaintiff himself never stepped into witness box though he was alive, at that relevant time, as such, in absence, Courts below should have refrained from granting discretionary relief of declaration. In the aforesaid background, Mr. Thakur prayed that present appeal may be accepted by quashing and setting aside the impugned judgment passed by both the Courts below.

12. Mr. Sanjay Jaswal, counsel representing the plaintiffs-respondents supported the judgments passed by both the Courts below. Mr. Jaswal vehemently argued that bare perusal of the impugned judgment passed by First Appellate Court clearly suggests that same is based upon the correct appreciation of evidence adduced on record by the respective parties. He solely with a view to substantiate his aforesaid plea, invited the attention of the Court to the judgments passed by both the Courts below to demonstrate that Courts below have dealt with each and every aspect of the matter meticulously, as such, no interference, whatsoever, of this Court is warranted in the present facts and circumstances of the case.

13. While refuting arguments having been made on behalf of counsel representing the appellant-defendant that Civil Court had no jurisdiction, he invited the attention of this Court to the plaint filed by plaintiffs-respondents, whereby they sought declaration that revenue entries showing appellant-defendant as owner with respect to Khewat No. 8, Khatauni No. 25, 26 & 27, measuring 23 bighas and 16 biswas as per jamabandi for the year 1992-93 situated in village Chamba Sheel, Tehsil Nahan, District Sirmaur may be declared illegal, null and void and not binding upon the right of the plaintiffs-respondents qua ownership of the suit land. Perusal of plaint, as shown to the Court, clearly suggests that, at no point of time, plaintiffs-respondents in Civil Suit questioned the validity of vestment of land with the appellant-defendant, rather, by way of Civil Suit, plaintiffs-respondents made a prayer to declare revenue entries illegal, null & void showing appellant-defendant as owner qua the suit land as per jamabandi for the year 1992-93.

14. Mr. Jaswal further contended that since suit was filed for granting decree of declaration declaring that entries showing appellant-defendant as owner qua the suit land, dispute, if any, as alleged by the appellant-defendant could not be decided in terms of provisions of H.P. Mortgage Redemption Act, 1971 and the Civil Court had all the jurisdiction to look into the controversy at hand. Mr. Jaswal also invited the attention of the Court to the para 16 of the judgment dated 8.5.2002 passed by learned trial Court to demonstrate that counsel representing appellant-defendant had himself not pressed issue Nos. 4, 5 and 7 and accordingly learned trial Court decided the issue as not pressed against the appellant-defendant. He also invited the attention of this Court to Issue No. 5 "*Whether this Court has no jurisdiction to entertain the present suit?,* Mr. Jaswal contended that since appellant-defendant themselves not pressed the issue of jurisdiction i.e. Issue No. 5, now it does not lie in the mouth of appellant-defendant to rake up the issue of jurisdiction at this appellate stage.

15. Mr. Jaswal while concluding his arguments also invited the attention of the Court to the evidence led on record by the plaintiffs-respondents to demonstrate that plaintiffs-respondents were successful in proving that the revenue entries showing the appellant-defendant i.e. State of H.P. as owner of the suit land to the extent of half share was illegal, null and void and not binding upon the right of the plaintiff, as such, there is no illegality and infirmity in the judgments passed by the Courts below. Mr. Jaswal further contended that this Court has very limited power to re-appreciate the evidence, especially, when both the Courts below have returned concurrent findings on the facts as well as law. In this regard, to substantiate the aforesaid plea, he placed reliance upon the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others Vs. Ranganath and Others, (2015)4 SCC 264.***

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

17. Careful perusal of substantial questions of law No. **1** to **3**, as reproduced hereinabove, suggests that same pertains to jurisdiction of Civil Court to decide controversy at hand and, as such, this Court would be taking up these issues together for consideration at the first instance.

18. It has been vehemently argued on behalf of counsel representing the appellant-defendant that learned First Appellate Court erred in upholding the judgment passed by learned trial Court, especially, when jurisdiction of Civil Court was completely barred in the facts and circumstances of the case. Mr. Rupinder Thakur, learned Additional Advocate General, argued

that Courts below have fallen in grave error while exercising their jurisdiction whereas this matter was arising / falling within the scope of the Himachal Pradesh Mortgage Redemption Act, 1971 and H.P. Restitution of Mortgaged Lands Act, 1976. Mr. Thakur also contended that plaintiffs in Civil Suit no where questioned the validity of vestment of land, which falls under the H.P. Restitution of Mortgaged Lands Act, 1976 and jurisdiction of the Civil Court was also barred under Section 13 of the Act No. 20 of 1976.

19. But perusal of judgment dated 8.5.2002 passed by learned Senior Sub Judge, District Sirmaur at Nahan clearly suggests that it had framed specific issue with regard to jurisdiction to entertain the present suit, which is as under:-

"5. Whether this Court has no jurisdiction to entertain the present suit."

20. Interestingly, as emerged from Para 16 of the judgment rendered by learned trial Court, learned ADA representing defendant-State, at that relevant time, did not press issue No. 4, 5 and 7 and moreover no arguments were addressed on specific issue of jurisdiction as mentioned in Para 16 of the judgment. Accordingly, learned trial Court decided issue Nos. 4, 5 and 7 against the defendant-State being not pressed.

21. This Court is of the view that since issue specifically framed by learned trial Court with regard to jurisdiction of Court was not pressed by appellant-defendant, now it is not open for it to raise the issue of jurisdiction, that too, during the second appeal. Moreover, there is no explanation noted even in the grounds of appeal before this Court while maintaining present appeal that why issue Nos. 4, 5 and 7 were not pressed by learned counsel representing the defendant-State during trial stage, as such, this Court is unable to accept the contention put-forth on behalf of counsel representing the appellant-defendant that issue No. 5 framed by trial Court was not taken up for consideration and no findings were returned. Appellant-defendant in its grounds of appeal as well as submission having been made during the arguments specifically stated that judgments passed by Courts below deserves to be quashed and set aside solely on the ground that Courts below miserably failed to return findings qua issue No. 5, but as has been discussed above, issue Nos. 4, 5 and 7, which also includes issue of jurisdiction were not pressed by the present appellant-defendant, as such, learned trial Court had no occasion whatsoever, to return findings qua the same. Moreover, as emerged from the record, learned A.D.A., at that relevant time, had not addressed any arguments qua issue of jurisdiction, as such, this Court sees no force in the contention put-forth on behalf of counsel representing the appellant-defendant that issue No. 5 was not dealt with by the learned trial Court while deciding the suit.

22. Moreover, this Court after perusing the relief clause contained in the plaint, is in total disagreement with the contention put-forth on behalf of appellant-defendant that since plaintiffs in civil suit did not question the validity of vestment of land, which falls under **H.P. Restitution of Mortgaged Lands Act, 1976**, jurisdiction of Civil Court was barred under Section 13 of the Act No. 20 of 1976. The Section 13 of the Act No. 20 of 1976 is reproduced here-in-below:-

> "13. Jurisdiction of civil courts barred. – No civil court shall have jurisdiction to entertain any claim to enforce any right under a mortgage declared extinguished under this Act, or to question the validity of any proceedings under this Act.

Otherwise also bare perusal of averments contained in plaint as well as relief, clearly suggests that by way of civil suit, plaintiffs prayed for granting decree of declaration that the revenue entries showing the appellant-defendant as owner in respect of Khewat No. 8, Khatauni No. 25, 26 and 27, total area measuring 23 bighas, 16 biswas per jamabandi for the year, 1992-93, situated in village Chamba sheel, Tehsil Nahan, District Sirmaur be declared illegal, null & void and not binding upon the right of the plaintiffs qua ownership of the suit land.

23. Careful perusal of documents Exts.P1 to P11 clearly suggest that suit land to the extent of ½ share was earlier in ownership of predecessor-in-interest of plaintiffs, whereas ½ share of one Shri Mohar Singh, who had mortgaged it with predecessor-in-interest of plaintiff. It is also undisputed that since then plaintiffs-respondents are in continuous possession of the suit

land, which was earlier in possession of predecessor-in-interest. Similarly, appellant-defendant has not been able to prove on record that suit land mortgaged by Mohar Singh in favour of predecessor-in-interest of plaintiffs was, at any point of time, got redeemed by his widow Smt. Sandla Devi within stipulated period. Since, Smt. Sandla Devi and any LRs of late Mohar Singh failed to redeem the property mortgaged with the predecessor-in-interest of plaintiffs-respondents, plaintiffs-respondents became owner of the same after expiry of stipulated time.

24. Hence, this Court sees no illegality and infirmity in the findings returned by the Courts below that even if it is presumed that Smt. Sandla Devi after inheriting half share of Shri Mohar Singh relinquished her share in favour of State of H.P., she had no right, title or interest in the suit land after 31.12.1970, when plaintiffs-respondents had became absolute owner due to failure of Smt. Sandla Devi or other LRs of Shri Mohar Singh to redeem the land within stipulated period. Since, by way present suit, plaintiffs-respondents had only sought decree of declaration that the revenue entries showing appellant-defendant as owner of the suit land may be declared illegal, null and void, Civil Court had all jurisdiction to decide the controversy at hand and, as such, there is no force in the arguments having been advanced on behalf of appellant-defendant. Hence, substantial questions of law No. 1 to 3 are answered accordingly.

25. Now, this Court would be taking up substantial question of law No. 4. Since, this Court while exploring answer to aforesaid substantial question of law, as has been decided in earlier part of judgment, had an opportunity to peruse the entire evidence, be it ocular or documentary, led on the record by the respective parties, it can be safely concluded that both the Courts below have dealt with each and every aspect of the matter very meticulously and there is no mis-reading and mis-interpretation of the evidence led on record by the respective parties, rather both the Courts below have examined each and every aspect of the matter minutely before arriving at final conclusion. Hence, this Court sees no force in the contention put-forth on behalf of counsel representing the appellant-defendant that learned Courts below mis-read and min-interpreted the evidence, as a result of which, suit of the plaintiff was decreed. Accordingly, substantial question No. 4 is answered accordingly.

26. This Court sees no illegality and infirmity, if any, in the judgments passed by the Courts below, rather, same are based upon correct appreciation of the evidence available on record. This Court is fully satisfied that both the Courts below have critically examined the issue involved in the matter and there is no scope of interference, whatsoever, in the present matter. Since, both the Courts below have returned concurrent findings, which otherwise appear to be based upon proper appreciation of evidence, this Court has very limited jurisdiction/scope to interfere in the matter. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,* (2015)4 SCC 264**, herein below:-

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

27. Consequently, in view of the discussion made hereinabove, this Court is of the view that the judgments passed by both the Courts below are based on correct appreciation of the

evidence, be it ocular or documentary on the record and, as such, present appeal fails and same is accordingly dismissed.

28. Interim directions, if any, are vacated. All miscellaneous applications are disposed of.

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

State of H.P. .....Appellant.
Versus
Sarwan Kumar & anr. .....Respondents.

Cr. Appeal No. 291 of 2008.
Reserved on: September 15, 2016.
Decided on: September 16, 2016.

Indian Penal Code, 1860- Section 420, 120-B and 511- Accused S produced two General Power of Attorneys for registration- S appeared as L- FIR was lodged against the accused- he was tried and acquitted by the trial Court- held, in appeal that incident had taken place in the presence of 'M' but he was not examined as witness- no identification parade was conducted- trial Court had rightly acquitted the accused- appeal dismissed. (Para-14 and 15)

For the appellant: Mr. P.M.Negi, Dy. AG.
For the respondents: Mr. R.R.Rahi, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted at the instance of the State against the judgment dated 1.12.2005, rendered by the learned Chief Judicial Magistrate, Mandi, H.P., in Police Challan No. 54-I/2000, whereby the respondents-accused (hereinafter referred to as the accused), who were charged with and tried for offences punishable under Sections 420, 120-B and 511 IPC, have been acquitted.

2. The case of the prosecution, in a nut shell, is that on 23.8.1999 at about 4:30 PM accused Sarwan Kumar produced two General Power of Attorneys before Sub Registrar (Tehsildar), Sadar, Mandi for registration in the presence of Manohar Lal, Advocate. Accused Sunder Lal has appeared as Lekh Ram son of Mahant Ram. On the basis of the complaint, FIR was registered against the accused. The police arrested the accused and took into possession two General Power of Attorneys. The police also procured specimen signatures of the accused and on completion of the investigation, challan was put up before the Court after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as eight witnesses. The accused were also examined under Section 313 Cr.P.C. They pleaded innocence and stated that the witnesses have stated falsely. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. P.M.Negi, Dy Advocate General, for the State has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. R.R.Rahi, Advocate has supported the judgment of the learned trial Court dated 1.12.2005.

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

6. PW-1 Prabodh Saxena, Deputy Commissioner, has stated that in the year 1999, he was posted as Deputy Commissioner, Mandi. On 23.8.1999, Sub Registrar (Tehsildar) informed him that two General Power of Attorneys were produced before him through Sh. Manohar Lal, Advocate and when he made inquiry from Lekh Ram, he could not satisfy him and ran away from the Tehsil Office. The complaint is Ext. PW-1/A.

7. PW-2 Pratap Singh testified that on 23.8.1999 accused Sarwan Kumar produced two General Power of Attorneys through Sh. Manohar Lal, Advocate for registration in which there were nine executors and in another there were four executors. Sh. Manohar Lal, Advocate disclosed that some other person had appeared on behalf of Lekh Ram and when he made inquiry Sunder Lal disclosed that he was Lekh Ram but he could not satisfy him and ran away from the Court Room. The police was informed. Complaint Ext. PW-2/A was registered. The police took into possession two General Power of Attorneys vide seizure memo Ext. PW-2/B. In his cross-examination, he admitted that he told the police that the person who appeared in place of Lekh Ram disclosed his name as Sunder Lal, however, this fact was not recorded in his statement recorded under Section 161 Cr.P.C.

8. PW-3 Amin Chand testified that in the year 1999, Sarwan Kumar produced two General Power of Attorneys for registration before Tehsildar and Sh. Manohar Lal, Advocate was also present at that time. When Tehsildar made inquiry from Lekh Ram, he could not reply satisfactorily. Later on, they came to know that Sunder Lal appeared as Lekh Ram and Tehsildar handed over the General Power of Attorneys to the police.

9. PW-4 Bhagi Rath Sharma testified that he typed the General Power of Attorneys.

10. PW-5 HC Sanjay Kumar has taken the General Power of Attorneys into possession. He arrested the accused and procured specimen signatures before the Naib Tehsildar Gopal Chand. These documents were sent to GEQD for opinion.

11. PW-6 Bishan Dass testified that on the request of police, he issued certificate Ext. PW-6/A.

12. PW-7 Gokal Chand, Naib Tehsildar testified that on 10.9.1999, police produced Sunder Lal before him for obtaining specimen hand writing and Sunder Lal gave specimen hand writing Ext. PW-7/A-1 to PW-7/A-8. On 9.9.1999, the police obtained the specimen hand writing of Sarwan Kumar vide Ext. PW-7/B-1 to Ext. PW-7/B-8.

13. PW-8 Dr. Ravinder Sharma, Asstt. Government Examiner of Question Documents has testified that he was posted as Asstt. Government Examiner of Question Documents in the office of GEQD, Chandigarh. The documents were received in the laboratory through Superintendent of Police, Mandi with question documents marked as Q-1, Q-2, Q-3 and Q-4. He proved his opinion vide Ext. PW-1/F.

14. The case of the prosecution, in a nut shell, is that accused Sarwan Kumar has represented himself to be Lekh Ram and attempted to cheat the Sub Registrar (Tehsildar), Sadar, Mandi. According to the prosecution case, this incident has taken place in the presence of Sh. Manohar Lal, Advocate. Sh. Manohar Lal, Advocate was a material witness, however, fact of the matter is that Sh. Manohar Lal, Advocate has not been examined by the prosecution as a witness.

15. PW-2 Pratap Singh testified that he came to know that some other person was appearing on behalf of Lekh Ram when accused appeared in the Court. Surprisingly, PW-3 Amin Chand deposed that he came to know about this fact after 1-2 days of the incident. No identification parade of the accused was conducted by the police. It has also come on record that the accused were not previously known to the witnesses. The prosecution has failed to prove the case against the accused for offences punishable under Sections 420, 120-B and 511 IPC. Thus, there is no occasion for us to interfere with the well reasoned judgment of the learned trial Court dated 1.12.2005.

16. Accordingly, there is no merit in this appeal and the same is dismissed.

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

State of Himachal Pradesh .....Appellant.

Vs.

Prithvi Raj @ Joull .....Respondent.

Cr. Appeal No.: 79 of 2012
Reserved on : 29.08.2016
Date of Decision: 16.09.2016

Indian Penal Code, 1860- Section 363, 366-A and 376- Prosecutrix went for tuition but did not return- accused told the father of the prosecutrix that she had been taken away by some boys- he was going to search for her - subsequently he informed father of the prosecutrix that she was with him – matter was reported to police- accused and prosecutrix were found in Khad- prosecutrix told that accused had sexual intercourse with her at Chintpurni without her consent and against her will- some documents were prepared at Nadaun- she was taken to Jawalamukhi, where she was again assaulted sexually by the accused- accused was tried and acquitted by the trial Court- held, in appeal that prosecutrix had talked to her mother on telephone- despite this complaint was lodged after 4 days- justification given by the informant that he had reported the matter to panchayat was not substantiated from any material on record – the fact that matter was not reported to the police immediately is highly unnatural- an inference which can be drawn from his conduct is that he was aware of the fact that the prosecutrix had not been kidnapped by the accused and that she had gone with him out of her free will and volition- prosecutrix was taken in public transport to various places - no attempt was made by her to escape from wrongful custody- prosecutrix had not raised any hue and cry at the public place- no external injuries were found on the person of the prosecutrix, which falsifies her version that she had resisted the attempt of molestation - conviction can be based on the sole testimony of the prosecutrix, if found reliable- however, where there are contradictions and improvements in the testimony, it requires corroboration- evidence of the prosecutrix in the present case is not satisfactory or creditworthy- prosecution version was not proved beyond reasonable doubt- trial Court had rightly acquitted the accused- appeal dismissed. (Para-22 to 46)

Cases referred:

Rameshwar Vs. State of Rajasthan AIR 1952 SC 54
State of Punjab Vs. Gurmit Singh and others, (1996) 2 Supreme Court Cases 384
Radhu Vs. State of Madhya Pradesh, (2007) 12 Supreme Court Cases 57
Narender Kumar Vs. State (NCT of Delhi), (2012) 7 Supreme Court Cases 171
Munna Vs. State of Madhya Pradesh, (2014) 10 Supreme Court Cases 254
Manoharlal Vs. State of Madhya Pradesh, (2014) 15 Supreme Court Cases 587
Tilak Raj Vs. State of Himachal Pradesh, AIR 2016 Supreme Court 406

For the appellant : Mr. V.S. Chauhan, Addl. A.G., with Mr. Vikram Thakur, Dy. A.G.
For the respondent : Mr. Kanta Thakur, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *:*

By way of this appeal, the State has challenged judgment dated 30.09.2011 passed by the Court of learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala in RBT SC No. 70-N/VII/10/00, Sessions Trial No. 20/11 vide which, learned trial

Court has acquitted the accused for commission of offences punishable under Sections 363, 366-A & 376 of the Indian Penal Code.

2. The case of the prosecution in brief was that prosecutrix, daughter of Sher Singh, resident of Jhhikli Khanny was away to Jassur for tution on 16.07.2008, but she did not come back to her house in the evening. Complainant Sher Singh remained under this impression that she might have gone to the house of his relatives. Both on 17.07.2008 and 18.07.2008, Sher Singh searched for his daughter at the houses of his relatives. However, on 18.07.2008 at 10:00 a.m., accused came and asked Sher Singh about the prosecutrix and at the same time, accused told him that she had been taken away by some boys and he was going to search for her. Further, as per the prosecution, on 19.07.2008 accused contacted Sher Singh on mobile and informed him that the prosecutrix was with him. Sher Singh suspected that his daughter had been taken away by the accused to marry with him and accordingly *rapat* Ex. PW1/A was lodged on 23.07.2008, on the basis of which, police made inquiries from the parents of the accused and in the meantime, accused was contacted by his parents on his mobile phone. In the morning of 27.07.2008, accused and prosecutrix were found in a *Khad* and they were apprehended there by Sher Singh with the help of villagers. It was disclosed to the police by the prosecutrix that on 16.07.2008, while she was coming back from tution, accused met her in his vehicle at Nagbari and asked her to board the same. Accused waited there for some time for passengers and asked prosecutrix to marry him, to which prosecutrix told him that she was only 17 years old and she wanted to study. Further, she was Rajput by caste, whereas accused was Ghirth Choudhary. As per the prosecution, accused took prosecutrix to Pathankot in his vehicle and on 17.07.2008, he brought her back to Nagbari and thereafter took her to Chintpurani in a bus. On the night of 17.07.2008 and 18.07.2008, accused kept the prosecutrix in a *Saraye* at Chintpurani and had sexual intercourse with her without her consent and against her will. On 19.07.2008, accused took the prosecutrix to Nadaun before a Notary Public and prepared certain documents with regard to marriage, in which the age of the prosecutrix was falsely mentioned as 19 years. In the evening, accused took the prosecutrix to Jawalamukhi and there they stayed in a room in *Saraye*, where again the prosecutrix was sexually molested by the accused without her consent and against her will.

3. After the accused was apprehended with the prosecutrix, both were taken to the Police Station, from where they were referred to CHC, Nurpur for medical examination.

4. After the completion of investigation, as sufficient evidence was found against the accused for commission of offences punishable under Sections 363, 366-A & 376 of the Indian Penal Code, a challan was filed in the Court and as a prima facie case was found against the accused, accordingly he was charged for having committed offences punishable under Sections 363, 366-A & 376 of the Indian Penal Code, to which he pleaded not guilty and claimed trial.

5. In order to substantiate its case, 16 witnesses in all were examined by the prosecution.

6. Dr. Subati Saha Roy entered the witness box as PW-1 and stated that on 27.07.2008 at about 5:00 p.m., the prosecutrix was brought by the police for medical examination with history of sexual assault by the accused. This witness stated that there was no evidence of external injuries over the body of the prosecutrix. This witness further stated that in her opinion, it seemed that there was no evidence of any recent sexual intercourse, but the prosecutrix seemed to be habitual of sexual intercourse. This witness further stated that according to the findings of P/C and P/S examination alongwith above reports, victim was habitual of sexual intercourse, but rape could not be ruled out.

7. Dr. P.K. Aluwalia entered the witness box as PW-2 and stated that accused Prithvi Raj was brought for medical examination by the police on 27.07.2008 with history of having been beaten up by Sher Singh and his son Anku and other villagers. This witness stated that he had issued MLC Ex. PW2/B and that accused was having multiple abrasions on back of

neck and bruise, two in number. This witness further opined that the injuries were simple in nature caused within 24 hours with a blunt object.

8. Purshotam Ram entered the witness box as PW-3 and stated that the prosecutrix was his niece and on 16.07.2008, he was informed by his brother Sher Singh that Prithvi Raj had kidnapped the prosecutrix.

9. PW-4 Satpal stated that on 27.07.2008 at about 6:30 a.m., Sher Singh came to his house and told that his daughter had been kidnapped by the accused, who was forcing her to marry him. On 27.07.2008 itself, accused alongwith prosecutrix were caught by Mohinder, Kewal, Sher Singh and his son at Jabbal Khad and they were brought to the house of Sher Singh, where PW-4 was also present. In his cross-examination, this witness admitted it to be correct that on asking, prosecutrix told all the persons present there that she had performed marriage with Prithvi Raj, i.e. accused. He also admitted that prosecutrix was Rajput by caste and the accused was Chaudhary (Ghirth). He also stated in his cross-examination that accused used to teach prosecutrix.

10. Rakesh Kumar entered the witness box as PW-5 and he stated that he was Sevadar at Rurka Kalan *Saraye* at Chintpurni and the accused had come with a lady and had stated that they were married and they stayed for two days and booking was done in the name of Des Raj.

11. Kamal Kishore entered the witness box as PW-6 and stated that he was posted as Assistant Secretary with Gram Panchayat, Khanni Jhhikali and he placed on record birth certificate of the prosecutrix Ex. PW6/B. In his cross-examination, he has stated that one has to report the date of birth to Panchayat within 21 days and in the present case, entry was made on 30.06.1991, whereas date of birth was 02.06.1991. He also stated that an entry made after 21 days is effected only when it is certified by the Tehsildar.

12. PW-7 Constable Sushil Katoch is a formal witness.

13. PW-8 Constable Siridev proved on record the factum of xtract of registers recovered by the police during the course of investigation from the relevant *Saraye* at Chintpurani and Jawalamukhi, where the accused had stayed with the prosecutrix.

14. PW-9 LC Anita Kumar is also a formal witness.

15. PW-10 HC Bir Singh stated that in the year 2008, he was posted as MHC, Police Station Nurpur and on 27.07.2008, case property was deposited with him and on 05.08.2008 vide RC No. 168/08, the same was sent through Constable Shiv Kumar to FSL Junga for chemical examination and after depositing the same at FSL Junga, Constable Shiv Kumar had handed over the receipt to him.

16. PW-11 ASI Rakesh Kumar is also a formal witness.

17. PW-12 Dr. Teena Gupta deposed that on 27.07.2008, she was on emergency duty at CHC, Indora, when at about 5:00 p.m., victim was brought by the police for medical examination with history of sexual assault. This witness deposed that there was no evidence of any external injury over the body of the prosecutrix. She further reported that as per systematic and physical examination of the prosecutrix, it seemed that there was no evidence of any recent sexual intercourse, but at the time of examination, victim seemed to be habitual of sexual intercourse. This witness also deposed that according to the findings of P/C and P/S examination alongwith FSL report victim was found habitual of sexual assault, but possibility of rape could not be ruled out.

18. Prosecutrix entered the witness box as PW-13. She stated in the Court that she was a student of 10+2 in Government School, Jassur and that there were holidays in the School and the accused was her uncle and used to park his vehicle in their field. This witness also deposed that accused was B.Sc. pass and used to come to there house occasionally. She further deposed that on 16.07.2008, she was away for tution to Jassur and while on her way back at

village Nagwari, accused met her in his vehicle and asked her to accompany him in his vehicle as he was also going home. Prosecutrix accordingly boarded the vehicle of the accused, who waited there some time for other passengers, however, no other passenger came. Further, as per the prosecutrix, thereafter accused asked her to marry him. As per the prosecutrix, she replied that as she was 17 years old and belonged to Rajput caste, she wanted to study and not to marry the accused. Further, as per the prosecutrix, accused took her to Pathankot from Nagbari in his vehicle and at Railway Station and Bus stop at Pathankot, he was enticing her to marry him. On 18.07.2008, accused took her to Jassur from Chintpurni and asked her to stay there on the pretext that he was going to her parents' house to persuade them. Further, as per the prosecutrix, after some time, accused came back and told her that her parents had consented for marriage. Thereafter, accused took her to Chintpurni in the same *Saraye*, where they stayed for the entire night of 18.07.2008. In the night of 18.07.2008, accused had sexual intercourse with the prosecutrix against her consent to which she objected, but she was given kicks and fist blows by the accused and her mouth was also gagged by the accused. As per the prosecutrix, accused did all these activities despite her objections. On the morning of 19.07.2008, accused asked her to talk with her mother on telephone and to inform her that she was with him of his own accord. As per the prosecutrix, she told her mother that the accused had taken her on the pretext of visiting Pathankot and other places and as she started crying, accused disconnected the telephone. Further, as per the prosecutrix, on the same day, accused took her to a lawyer at Nadaun and with his help prepared marriage documents against her wishes mentioning therein that her age was 19 years. Prosecutrix also stated that they stayed in a *Saraye* at Jawalamukhi on 19.07.2008 and 20.07.2008 and again accused had sexual intercourse with her against her wish and without her consent. On 21.07.2008, accused took her to Mertatak at the house of his Bua, where they stayed and there also accused had sexual intercourse with her without her consent. On 22.07.2008, she remained in the house of the Bua of accused, whereas accused went to his sister's house at Basa Wazira for money. On 23.07.2008, accused took her to Vaishno Devi, where they stayed till 25.07.2008. As per the prosecutrix, she was kept in between and was not taken to the temple. During this period, accused again had sexual intercourse with her without her consent and despite her objections. On 26.07.2008, accused talked with his mother on telephone. On the night of 26.07.2008, accused brought the prosecutrix to his own village Jhhikali Khani from where his brother and parents took her to a Khad, which was 3 Kms. away from the house and there she was kept for the entire night. In the morning, she noticed her father near the Khad and she freed herself from the accused and ran to her father. Her father called Satpaul and Kartar to the spot in the Khad and from there, they took the prosecutrix to the house of her parents. Prosecutrix further stated that Police came and took her to the Police Station, from where she was sent for medical examination. In her cross-examination, this witness stated that at the time of making the statement she was 21 years old. She also admitted that she used to travel in the vehicle of the accused before 16.07.2008. This witness further deposed that on 16.07.2008, they were at Pathankot and remained in the vehicle. She further stated that on 17.07.2008, she remained alone at village Nagabarion for about half an hour. She further stated that she remained all alone for 20 minutes on 18.07.2008 and there were about 15-20 shops in the market. She stated that neither on 17.07.2008 nor on 18.07.2008, she tried to go to her house. She admitted that when they went to different places in the bus, there were other passengers in the bus. She also admitted it to be correct that neither she raised any noise nor did she tell any passenger anything who were travelling in the bus. She stated that in the Saraye, they were all alone and no person was there. She denied that on 23.07.2008, she was in the Court at Nadaun, though she admitted that photographs Ex. D1 to Ex. D4 were her and those of the accused. She admitted that on the face of it, photographs appear to have been taken in the temple. She denied that on 19.07.2008 they performed marriage at Chintpurni temple. She denied that she was not subjected to any sexual intercourse by the accused against her consent. She stated in her cross-examination that she had told the police that the accused alongnwith her parents and brother kept her in a Khad on the night of 26.07.2008 and this witness was confronted with her statement Mark-X, in which it was not so recorded. This witness was also confronted with her statement Mark-X, in which it was also not so recorded that when she saw

her father near the Khad, she ran towards him and she was also confronted with Mark-X in which it was also not so recorded that the accused being uncle was like her father. She denied the suggestion that she had friendly relations with the accused and had gone with him of her own volition and the accused did not entice and compel her to accompany him. She denied that on their return, accused was given merciless beatings by her father, Satpaul, Kartar and other villagers.

19. Sher Singh entered the witness box as PW-14 and deposed that on 16.07.2008, prosecutrix went to Jassur for tuiton at about 12:30 noon, but did not return back in the evening and he thought that she might have gone to the house of some relatives. However, she did not return back on 17.07.2008 and on 18.07.2008 at about 10:00 a.m., accused came to his house and asked about whereabouts of the prosecutrix, on which Sher Singh told him that she had not come back to home for the last two days. As per this witness, at this stage, accused told him that he will search for the prosecutrix as some boys had taken her with them. He further stated that on 19.07.2008, accused rang on his mobile and told him that prosecutrix was with him and when the prosecutrix was talking with his wife, she was weeping. This witness further deposed that they tried their best to search for the prosecutrix, but could not do so and accordingly on 23.07.2008, they reported the matter to the police against the accused on the basis of suspicion. He further stated that on 27.07.2008 at about 6:30 a.m., he was away to his field and had gone towards the Khad when he noticed the prosecutrix with the accused. Prosecutrix came running to him and thereafter he called Kartar and Satpal on the spot and with their help he brought the prosecutrix to his house alongwith the accused and also informed the police. Thereafter, police came and took both the accused and his daughter to the Police Station, from where his daughter was sent for medical examination. This witness further deposed that the accused used to park his vehicle near his fields and he also used to come to their house. He further stated that his daughter told him that accused took her away without her consent and committed sexual intercourse with her. In his cross-examination, he admitted that before 16.07.2008, prosecutrix used to talk with the accused. He also admitted the suggestion that though they had come to know on 19.07.2008 that the prosecutrix was with the accused, however, they did not report the matter to the police till 23.07.2008. He further stated that the matter was reported to the Panchayat on 20.07.2008. He admitted that the prosecutrix used to travel in the vehicle of the accused before 16.07.2008 but stated that she used to pay money for the same and denied the suggestion that she did not use to pay money in this regard. He denied that prosecutrix and accused had a love affair and which was not acceptable to him due to caste factor. He admitted that prosecutrix had told them that she travelled in bus and stayed in the *Sarayes* of the temples.

20. Sawan Kumar Sindhia entered the witness box as PW-15 and he stated that he was Safaie Karamchari in Bansal Dharamshala Jawalamukhi and the accused had come with his wife to the Dharamshala in the year 2008. This witness further stated that as there was no room in the Dharamshala, he took the accused and his wife to the house of Poozari Krishan Swarup Sharma and they resided there. In his cross-examination, he mentioned that the lady accompanying the accused appeared to be newly married as per her clothes and other wearings.

21. I.O. Daya Sagar entered the witness box as PW-16 and he stated that *rapa*t Ex. PW11/A was entered on 23.07.2008, on the basis of which, FIR Ex. PW16/A was registered. He further deposed that on 27.07.2008, he received information on telephone from the father of the prosecutrix that accused has been seen in *Nallah* alongwith the prosecutrix. He further deposed that he went to village of father of the victim and found accused and victim sitting in the courtyard of Sher Singh. He further deposed that both of them were brought to the Police Station, from where prosecutrix was taken for medical examination. Thereafter, this witness deposed about the factum of investigation being carried out in this regard and recovery of the case property. In his cross-examination, he admitted that on 16.07.2008, the prosecutrix had left her house of her own. He admitted that it had come in the course of investigation that from 16.07.2008 to 26.07.2008, prosecutrix had travelled both in bus as well as in car. He also stated that he had taken into possession affidavit regarding marriage of the prosecutrix and the accused. He denied that it had come in the investigation that prosecutrix was about 18 years of

age and that is why he did not record any statement of the Advocate, Notary Public etc. He stated in his cross-examination that it had come in the FIR that prosecutrix had talked with her parents on telephone and FIR was lodged only on 23.07.2008.

22. On the basis of testimonies of the said witnesses and other material produced on record by the prosecution, learned trial Court vide its judgment under challenge held that the prosecution was not able to establish the guilt of the accused beyond all reasonable doubts and on these basis, it ordered acquittal of the accused for charges punishable under Sections 363, 366-A and 376 of the Indian Penal Code. While returning the said findings, learned trial Court took into consideration that it had come on record that the accused was well known to the prosecutrix and she used to travel with the accused in his vehicle and there was no evidence which could demonstrate that past conduct of the accused was in any manner bad towards the prosecutrix. Learned trial Court further held that material produced on record demonstrated that the prosecutrix had ample time and opportunity to escape from the custody of the accused and to lodge a complaint against him had she really been forcibly taken by the accused as alleged, however, neither she lodged any complaint nor she made any attempt to escape which clearly reflected that she remained willingly with the accused throughout. It was further held by learned trial Court that prosecution was not able to establish on the basis of evidence on record that the accused in fact had kidnapped the prosecutrix on 16.07.2008 from village Nagbari from the lawful guardianship of her parents with intention to have sexual intercourse and marry her against her will. Learned trial Court further held that prosecution was not able to prove that on 17.07.2008, 18.07.2008 and 19.07.2008 accused had sexual intercourse with the prosecutrix against her will and without her consent. On the basis of said evidence, learned trial Court acquitted the accused.

23. Mr. V.S. Chauhan, learned Additional Advocate General has vehemently argued that the findings of acquittal returned by learned trial Court were perverse and not sustainable both on facts and law. Mr. Chauhan argued that the prosecution had proved beyond reasonable doubt that the prosecutrix was kidnapped by the accused from the lawful guardianship of her parents on 16.07.2008 and thereafter she was subjected to sexual intercourse by the accused against the will and consent of the prosecutrix. It was further argued by Mr. V.S. Chauhan, that learned trial Court had erred in not appreciating the testimonies of the prosecution witnesses in its correct perspective, which had resulted in great travesty of justice. According to Mr. Chauhan, it categorically stood proved from the statements of PW-13 and PW-14, i.e. prosecutrix and her father that the prosecutrix was kidnapped by the accused, who thereafter sexually molested the prosecutrix on the pretext of false promise of marriage. According to Mr. Chauhan, this very importance aspect of the matter had not been appreciated by learned trial Court in correct perspective. He further argued that the testimonies of prosecution witnesses on all material points nailed the guilt of the accused and, therefore, the judgment of acquittal passed by learned trial Court was not sustainable.

24. On the other hand, Ms. Kanta Thakur, learned counsel appearing for the respondent argued that there was neither any perversity nor any infirmity with the judgment passed by learned trial Court and according to her, learned trial Court had rightly acquitted the accused from charges punishable under Sections 363, 366-A and 376 of the Indian Penal Code as the prosecution had failed to prove beyond reasonable doubt that the accused was guilty of commission of said offences. Ms. Kanta Thakur further argued that the evidence on record was self speaking that the prosecutrix was neither minor nor she was kidnapped from the lawful custody of her parents by the accused. According to Ms. Thakur, the prosecutrix was in love with the accused and she had willfully of her own volition gone with the accused and had solemnized marriage also. According to Ms. Thakur, as the parents of the prosecutrix were not willing to accept the relation of the prosecutrix with the accused due to caste factor, it was on these basis that a false case was made against the accused in which he was implicated. On these basis, it was submitted by Ms. Thakur that the conclusion arrived at by learned trial Court to the effect that the prosecution had miserably failed to prove the charges for commission of offences

punishable under Sections 363, 366-A and 376 of the Indian Penal Code called for no interference and she prayed that as there was no merit in the appeal, the same be dismissed.

25. We have heard the learned counsel for the parties and also gone through the records of the case and the judgment passed by the learned trial Court.

26. In the present case, the accused was charged for commission of offences punishable under Sections 363, 366-A and 376 of the Indian Penal Code. As per the case put forth by the prosecution, prosecutrix who was a minor was kidnapped from the lawful guardianship of her parents by the accused on 16.07.2008 with the intention to compel her to have sexual intercourse and marry him against her will.

27. Admittedly, the prosecutrix went missing on 16.07.2008 and rapat in this regard was lodged by the father of the prosecutrix against the accused on suspicion on 23.07.2008. Admittedly, accused personally met the father of the prosecutrix on 18.07.2008 and had thereafter contacted him on telephone on 19.07.2008. It has come in the testimonies of prosecution witnesses PW-13 and PW14, i.e. prosecutrix as well as her father that on 19.07.2008, the prosecutrix had conversion with her mother on telephone. Despite this, it took four days for the father of the prosecutrix to lodge a complaint against the accused with the police. The justification given by the father of the prosecutrix to explain the delay in lodging the FIR that he had reported the matter to the Panchayat on 20.07.2008 is not substantiated from any material on record. Neither any complaint has been placed on record nor Pradhan of the Gram Panchayat or any responsible officer/official of the Gram Panchayat has entered the witness box to substantiate that the factum of prosecutrix having been kidnapped by the accused was reported by the father of the prosecutrix to the Gram Panchayat.

28. In our considered view, this conduct of the father of a girl who was missing since 16.07.2008 of not reporting the matter to the police till 27.07.2008 despite the factum of her being with the accused being in his express knowledge since 19.07.2008 is highly unnatural. The only inference which can be drawn from this conduct of the father of the prosecutrix is that he was aware of the fact that the prosecutrix had not been kidnapped by the accused, but rather she had gone with the accused out of her free will and volition. This conclusion of our's is fortified by the testimony of PW-3, PW-4 as well as PW-13, i.e. the prosecutrix. According to PW-13, she was allegedly kidnapped by the accused on 16.07.2008. Thereafter, as per the version put forth by her in the Court, she was taken to various places by the accused both in car as well as by way of travelling in public transport, i.e. by bus to Pathankot, Jawalamukhi and Vaishno Devi. This witness has also stated that she was also taken by the accused to the house of his Bua, where she stayed. It is apparent and evident from her testimony that no attempt at any stage was made by her to either escape from the alleged wrongful custody of the accused nor at any stage she raised any hue and cry to the effect that she had been kidnapped by the accused. This fact assumes importance because admittedly it is not the case of the prosecutrix that after her alleged kidnapping, she was kept in a secluded place by the accused. The places where the prosecutrix was taken by the accused, even as per her testimony, were places where public at large was present. No cogent and plausible explanation has come forth from the prosecutrix as to why she did not raise any hue and cry and alarmed the public that she had been kidnapped by the accused. The factum of her being sexually molested by the accused against her will and consent has also not been proved by the prosecution at all. The statements of the doctors who examined the prosecutrix coupled with the MLCs. which are on record demonstrate that the doctors have categorically stated that there was no evidence of recent sexual intercourse with the prosecutrix and the prosecutrix seemed to be habitual of sexual intercourse. No external injuries etc. were found on the body of the prosecutrix which belied her contention that when she resisted the accused from outraging her modesty, when he physically assaulted her. The story put forth by the prosecutrix as to how the prosecutrix was recovered in a Nallah where she was kept for the entire night of 26.07.2008 by the parents of the accused is also purportedly a concocted story because this version of the prosecution has not been proved by any of the independent witnesses. The persons who had allegedly gone with the father of the prosecutrix to the Nallah from where

prosecutrix was recovered and brought back to her house alongwith the accused have not been examined by the prosecution. Besides this, it has come on record that when the accused was medically examined after he and the prosecutrix were allegedly recovered from the Nallah, injuries were found on the body of the accused, which as per the accused were inflicted upon him by the father of the prosecutrix.

29. Before proceeding further, it is relevant to take note of the fact that this Court is not oblivious to the fact that in a case under Section 376 of the Indian Penal Code, conviction of the accused can be based on the sole testimony of the prosecutrix itself if the same is cogent, trustworthy and reliable.

30. It is settled law that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. This is for the reason that the prosecutrix stands at a higher pedestal than an injured witness. However, the fact still remains that the testimony of the prosecutrix on the face of it has to be acceptable. {See State of U.P. Vs. Pappu alias Yunus and another (2005) 3 Supreme Court Cases 594}.

31. Though it is settled law that corroboration is not sine qua non for conviction in a rape case, however, it is relevant to refer to the judgment of Hon'ble Supreme Court in **Rameshwar** Vs. **State of Rajasthan** AIR 1952 SC 54, in which it has been observed as under:

> *"The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge...."*

32. In our considered view, in the facts of the present case, as they emerge from the evidence which has been placed on record by the prosecution, it cannot be said that the testimony of the prosecutrix is either cogent or it is trustworthy, reliable or the same seems to be truthful. Further, the credibility of the testimony of the prosecutrix has also been impinged by the defence in her cross-examination. Not only there are inconsistencies and contradictions in her statement recorded in the Court of law and which was previously recorded with the police, but she has also made improvements in the same which have gone unexplained. At the cost of repetition, we state that the prosecution has not been able to produce iota of evidence to substantiate that the prosecutrix was in fact kidnapped from the lawful guardianship of her parents by the accused in the mode and manner in which the prosecution wants this Court to believe. Admittedly, there is delay in lodging of FIR and there is no cogent explanation to explain said delay in lodging of the FIR. The conduct of the father of the prosecutrix is also unnatural as is expected from a father whose young girl is found missing from the house. In fact, this possibility cannot be ruled out that the prosecutrix willfully ran away with the accused and thereafter returned back after 5-6 days and it was for this reason that the family of the prosecutrix being aware of the fact that she had willfully gone with the accused, they immediately did not lodge any FIR with the police.

33. The Hon'ble Supreme Court has held in ***State of Punjab Vs. Gurmit Singh and others, (1996) 2 Supreme Court Cases 384***:

> *"x x x x x x x x x The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not over-look. The testimony of the victim in such cases is vital and unless*

there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl of a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another persons's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In State of Maharashtra Vs. Chandraprakash Kewalchand Jain (1990 (1) SCC 550) Ahmadi, J. (as the Lord Chief Justice then was) speaking for the Bench summarised the position in the following words: (SCC p. 559, para 16)

"A prosecutrix of a sex offence cannot be put on 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 prosecurtix 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 of 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. "

34. The Hon'ble Supreme Court in ***Radhu Vs. State of Madhya Pradesh, (2007) 12 Supreme Court Cases 57*** has held:

" 6. It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a 'rape', if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim especially on the forearms, writs, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault. The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case."

35. In ***Narender Kumar Vs. State (NCT of Delhi), (2012) 7 Supreme Court Cases 171,*** the Hon'ble Supreme Court has held:

"*20. It is a settled legal proposition that once the statement of prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under 1 Page 12 the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.*

21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial, which may lend assurance to her testimony. (Vide: Vimal Suresh Kamble v. Chaluverapinake Apal S.P and Vishnu v. State of Maharashtra).

22. Where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, prosecutrix making deliberate improvements on material point with a view to rule out consent on her part and there being no injury on her person even though her version may be otherwise, no reliance can be placed upon her evidence. (Vide: Suresh N. Bhusare & Ors. v. State of Maharashtra.

23. In Jai Krishna Mandal & Anr. v. State of Jharkhand, this Court while dealing with the issue held: (SCC p. 535, para 4)

"4.....the only evidence of rape was the statement of the prosecutrix herself and when this evidence was read in its totality, the story projected by the prosecutrix was so improbable that it could not be believed."

36. In ***Munna Vs. State of Madhya Pradesh, (2014) 10 Supreme Court Cases 254***, the Hon'ble Supreme Court has been pleased to held:

"7. We are conscious that testimony of the prosecutrix is almost at par with an injured witness and can be acted upon without corroboration as held in various decisions of this Court. Reference may be made to some of the leading judgments.

8. In Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat, this Court held as under (SCC pp. 224-26, paras 9-10)

"9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. 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? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and 1 (1983) 3 SCC 217 Page 5 5 its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical.

10. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault …….. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because (1) A girl or a woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends, and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition-bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social Page 6 6 stigma on the family name

and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by counsel for the culprit, and the risk of being disbelieved, acts as a deterrent."

9. In State of Maharashtra vs. Chandraprakash Kewalchand Jain, this Court held as under : (SCC pp. 558-60, paras 15-17)

"15. It is necessary at the outset to state what the approach of the court should be while evaluating the prosecution evidence, particularly the evidence of the prosecutrix, in sex offences. Is it essential that the evidence of the prosecutrix should be corroborated in material particulars before the court bases a conviction on her testimony ? Does the rule of prudence demand that in all cases save the rarest of rare the court should look for corroboration before acting on the evidence of the prosecutrix ? Let us see if the Evidence Act provides the clue. Under the said statute 'Evidence' means and includes all statements which the court permits or requires to be made before it by witnesses, in relation to the matters of fact under inquiry. Under Section 59 all facts, except the contents of documents, may be proved by oral evidence. Section 118 then tells us who may give oral evidence. According to that section all persons are 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. Even in the case of an accomplice Section 133 provides that he shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. However, illustration (b) to Section 114, which lays down a rule of practice, says that the court 'may' presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. Thus under Section 133, which lays down a rule of law, an accomplice is a competent witness and a conviction based solely on his uncorroborated evidence is not 2 (1990) 1 SCC 550 Page 7 7 illegal although in view of Section 114, illustration (b), courts do not as a matter of practice do so and look for corroboration in material particulars. This is the conjoint effect of Sections 133 and 114, illustration (b).

16. A prosecutrix of a sex offence cannot be put on 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. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness. For the above reasons we think that exception has rightly been taken to the approach of the High Court as is reflected in the following passage:

"It is only in the rarest of rare cases if the court finds that the testimony of the prosecutrix is so trustworthy, truthful and reliable that other corroboration may not be necessary."

With respect, the law is not correctly stated. If we may say so, it is just the reverse. Ordinarily the evidence of a prosecutrix must carry the same weight as is attached to an injured person who is a victim of violence, unless there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony if there is independent evidence lending assurance to her accusation.

17. We think it proper, having regard to the increase in the number of sex violation cases in the recent past, particularly cases of molestation and rape in custody, to remove the notion, if it persists, that the testimony of a woman who is a victim of sexual violence must ordinarily be corroborated in material particulars except in the rarest of rare cases. To insist on corroboration except in the rarest of rare cases is to equate a woman 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 story of woe will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime. Ours is a conservative society where it concerns sexual behaviour. Ours is not a permissive society as in some of the western and European countries. Our standard of decency and morality in public life is not the same as in those countries. It is, however, unfortunate that respect for womanhood in our country is on the decline and cases of molestation and rape are steadily growing. An Indian woman is now required to suffer indignities in different forms, from lewd remarks to eve-teasing, from molestation to rape. Decency and morality in public life can be promoted and protected only if we deal strictly with those who violate the societal norms. The standard of proof to be expected by the court in such cases must take into account the fact that such crimes are generally committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. Courts must also realise that ordinarily a woman, more so a young girl, will not stake her reputation by levelling a false charge concerning her chastity."

10. Similar observations were made in State of Punjab vs. Gurmit Singh, as under : (SCC pp. 395-96, para 8)

"8……The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to

injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial 3 (1996) 2 SCC 384 Page 10 10 credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

(emphasis in original)

11. Thus, while absence of injuries or absence of raising alarm or delay in FIR may not by itself be enough to disbelieve the version of prosecutrix in view of the statutory presumption under Section 114A of the Evidence Act but if such statement has inherent infirmities, creating doubt about its veracity, the same may not be acted upon. We are conscious of the sensitivity with which heinous offence under Section 376, IPC has to be treated but in the present case the circumstances taken as a whole create doubt about the correctness of the prosecution version. We are, thus, of the opinion that a case is made out for giving benefit of doubt to the accused."

37. The Hon'ble Supreme Court of India in ***Manoharlal Vs. State of Madhya Pradesh, (2014) 15 Supreme Court Cases 587*** has held:

"8. Though as a matter of law the sole testimony of the prosecutrix can sufficiently be relied upon to bring home the case against the accused, in the instant case we find her version to be improbable and difficult to accept on its face value. The law on the point is very succinctly stated in Narender Kumar v. State (NCT of Delhi), to which one of us (Dipak Misra, J). was a party, in following terms: (SCC p. 178, paras 29 and 21)

"20. It is a settled legal proposition that once the statement of the prosecutrix inspires confidence 4 Page 5 and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.

21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle

of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject-matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial which may lend assurance to her testimony." ***(emphasis in original)***

9. Having found it difficult to accept her testimony on its face value, we searched for support from other material but find complete lack of corroboration on material particulars. First, the medical examination of the victim did not result in any definite opinion that she was subjected to rape. Secondly, Riyaz who was like a brother to the victim and thus a close confidant, has not supported the case of the prosecution and has completely denied having met her when she allegedly narrated the incident to him. Thirdly the person who was 5 Page 6 suffering from fever and to whose house she was first taken by the appellant was not examined at all. Fourthly, the policeman who the victim met during the night was also not examined. Fifthly, neither the brother nor any of the parents of the victim were examined to corroborate the version that she had come from the village of her brother and alighted around 10:00 P.M. at Bajna bus stand. Lastly, the sequence of events as narrated would show that she had allegedly accompanied the appellant to various places. In the circumstances, we find extreme difficulty in relying upon the version of the victim alone to bring home the charge against the appellant. We are inclined to give benefit of doubt to the appellant."

38. It is also relevant to refer to the judgment of the Hon'ble Supreme Court in ***Tilak Raj Vs. State of Himachal Pradesh, AIR 2016 Supreme Court 406,*** in which the Hon'ble Supreme Court has held:

"19. We have carefully heard both the parties at length and have also given our conscious thought to the material on record and relevant provisions of The Indian Penal Code (in short "the IPC"). In the instant case, the prosecutrix was an adult and mature lady of around 40 years at the time of incident. It is admitted by the prosecutrix in her testimony before the trial court that she was in relationship with the appellant for the last two years prior to the incident and the appellant used to stay overnight at her residence. After a perusal of copy of FIR and evidence on record the case set up by the prosecutrix seems to be highly unrealistic and unbelievable.

23. From the aforesaid, it is clear that the evidence of the prosecution is neither believable nor reliable to bring home the charges leveled against the appellant. We are of the view that the impugned judgment and order passed by the High Court is not based on a careful re-appraisal of the evidence on record by the High Court and there is no material evidence on record to show that the appellant is guilty of the charged offences i.e., offence of cheating punishable under Section 417 of IPC and offence of criminal intimidation punishable under Section 506 part I of IPC. "

39. In view of the ratio laid down in the cases mentioned above and discussion held by us above, in our considered view, it cannot be said the prosecution was able to prove beyond reasonable doubt that the accused had either kidnapped the prosecutrix from the lawful guardianship of her parents or had committed forcible sexual intercourse with her. Besides perusing the records of the case, we have also perused the judgment passed by learned trial Court in detail. Learned trial Court after taking into consideration entire evidence which was produced on record by the prosecution has by way of a reasoned and speaking judgment disbelieved the case of the prosecution and acquitted the accused by holding that the prosecution could not prove beyond reasonable doubt that the accused was guilty of charges alleged against him.

40. In our considered view also, on the basis of material produced on record by the prosecution, it could not be said beyond reasonable doubt that the accused in fact was guilty of

the charges framed against him. Accordingly, keeping in view the fact that the accused has got the benefit of being acquitted by the learned trial Court and further that the State has not been able to persuade us to differ from the view that was taken by the learned trial Court in the case, while upholding the judgment passed by learned trial Court, we dismiss the present appeal being devoid of any merit.

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

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

Criminal Appeal No. 250 of 2008
Judgment reserved on : 20.6.2016
Date of Decision : September 16, 2016

Indian Penal Code, 1860- Section 302- Deceased was married to the accused- she suffered burn injuries and was brought to the hospital- she made a statement that she had sustained injuries as a result of accidental fire- she was referred to Chandigarh, where she died- brother of the deceased stated that accused had set the deceased on fire, on which FIR was registered and challan was presented before the Court- accused was tried and acquitted by the trial Court- held, in appeal that compromise was executed between the accused and the deceased - accused had sworn an affidavit that he would not beat the deceased- parties resided together thereafter and no complaint was made - deceased had disclosed to the neighbour who arrived at the spot on hearing her cries that she had caught fire while preparing meals on gas stove – Doctor had not found any smell of kerosene – deceased had sustained burn injury to the extent of 30%- doctor had certified that deceased was fit to make the statement after which her statement was recorded- relatives of the deceased had not disputed the veracity of the dying declaration- there are several improvements, exaggerations and embellishments in the testimonies of prosecution witnesses making their version unbelievable- delay in lodging FIR has also not been explained- no motive to commit murder was established- in these circumstances, guilt of the accused was not established- trial Court had rightly acquitted the accused- appeal dismissed. (Para-8 to 42)

Cases referred:

Prandas v. The State, AIR 1954 SC 36
State of A. P. vs. Shaik Moin, (2004) 6 SCC 34
Sher Singh & another vs. State of Punjab, (2008) 4 SCC 265
Amol Singh vs. State of Madhya Pradesh, (2008) 5 SCC 468
Nanhar & others vs. State of Haryana, (2010) 11 SCC 423
Mukehsbhai Gopalbhai Barot vs. State of Gujarat, (2010) 12 SCC 224
Krishan vs. State of Haryana, (2013) 3 SCC 280
Panchanand Mandal alias Pachan Mandal & others vs. State of Jharkhand, (2013) 9 SCC 800
Bhadragiri Venkata Ravi vs. Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, (2013) 14 SCC 145
Vijay Pal vs. State (Government of NCT of Delhi), (2015) 5 SCC 749
Rajeevan & another vs. State of Kerala, (2003) 3 SCC 355
Shankarlal vs. State of Rajasthan, (2004) 10 SCC 632
State of Rajasthan vs. Bhanwar Singh, (2004) 13 SCC 147
A. Shankar vs. State of Karnataka, (2011) 6 SCC 279

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

For the appellant	:	Mr. V. S. Chauhan, Addl. Advocate General with Mr. Vikram Thakur, Deputy Advocate General for the appellant/State.
For the respondent	:	Mr. R. K. Bawa, Senior Advocate with Mr. Amit Dhuman, Advocate, for the respondent.

The following judgment of the Court was delivered:

Sanjay Karol, J. (oral)

Assailing the judgment dated 29.11.2007, passed by Addl. Sessions Judge-II, Kangra at Dharamshala, H.P., in Sessions Case No. 35-K/VII/2003, titled as *State of Himachal Pradesh vs. Sumit Kumar,* whereby accused stands acquitted, State has filed the present appeal under the provisions of Section 378 of the Code of Criminal Procedure, 1973.

2. Smt. Reeta Kumari (deceased) was married to accused Sumit Kumar sometime in the year 1997. On 26.11.2002 at about 2.30 a.m., deceased suffered burn injuries and was brought to Civil Hospital Kangra, where she was examined by Dr. Amar Verma (PW-2). Police was immediately informed and HC Dalip Kumar (PW-15), after reaching the hospital, recorded statement (Ext. PW-2/D) of the deceased to the effect that she sustained injuries as a result of an accidental fire. For better treatment, she was referred to another hospital and eventually admitted at Government Hospital, Sector 32 Chandigarh. However unfortunately, on 2.12.2002 she breathed her last at 4.45 p.m. and when police learnt about such fact, SI Prem Chand (PW-21) travelled to Chandigarh, where on 3.12.2002 at about 4.00 p.m., he recorded statement of complainant Vinod Kumar (PW-3), brother of the deceased, which led to registration of F.I.R. No. 394 of 2002 (Ext. PW-17/A) in the early hours of 4.12.2002. Investigation so conducted by SI Pritam Singh (PW-20) and SI Prem Chand (PW-21) revealed it to be a case of murder. By sprinkling kerosene oil accused had set the deceased on fire resulting into her death.

3. Prima facie, on the presentation of challan, finding the prosecution to have made out its case, trial Court charged the accused of having committed an offence punishable under the provisions of Section 302 of the Indian Penal Code. From the testimonies of 22 prosecution witnesses, trial Court did not find the prosecution to have established the guilt of the accused and as such acquitted him of the charged offence.

4. Hence the present appeal.

5. Having heard learned counsel for the parties and also perused the record, Court is of the considered view that in the instant case no ground for interference is made out at all. Judgment rendered by the trial Court is reasoned and based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity, resulting into miscarriage of justice.

6. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. Having considered the material on record, we are of the considered view that prosecution has failed to establish the essential ingredients so required to constitute the charged offence.

7. In *Prandas v. The State*, AIR 1954 SC 36, Constitution Bench of the apex Court, has held as under:

> "(6) It must be observed at the very outset that we cannot support the view which has been expressed in several cases that the High Court has no power under S. 417, Criminal P.c., to reverse a judgment of acquittal, unless the judgment is perverse or the subordinate Court has in some way or other misdirected itself so as to produce a miscarriage of justice. In our opinion, the

true position in regard to the jurisdiction of the High Court under S. 417, Criminal P.c. in an appeal from an order of acquittal has been stated in – 'Sheo Swarup v. Emperor', AIR 1934 PC 227 (2) at pp.229, 230 (A), in these words:

> "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice." "

8. Court below acquitted the accused for the reason that: (a) Dying declaration (Ext.PW-2/D) of the deceased was a genuine piece of evidence and worthy of credence; (ii) testimony of close relatives of the deceased did not establish any motive for murder. Also oral dying declaration so made by the deceased with her relatives was unworthy of credence; and (iii) prosecution failed to establish by way of link evidence that the accused sustained burn injuries as a result of kerosene oil.

9. Certain facts are not in dispute. (i) That accused and the deceased were married some time in the year 1997 stands admitted; (ii) Incident took place on 25.11.2002 in the matrimonial house; (iii) deceased died within seven years of marriage.

10. It also stands established through the testimony of Jagdish Kumar (PW-6) and Sh. Madan Chauhan (PW-16) who have proved document (Ext. PW-3/D), which fact is also not disputed by the accused, as is evident from Question No. 10 so put to him during the course of his examination under Section 313 Cr.P.C., that all was not well within the parties. Earlier in the year 1999, parties had entered into a compromise when the accused had sworn an affidavit (Ext. PW-3/D) to the effect that in future he would not beat the deceased and live with her in peace. Also the deceased would not visit her parents without his or his parents' prior permission.

11. Evidently there was dispute inter se the parties. It was of economic dependence and behavioural attitude. It is a matter of record that though thereafter parties continued to reside together and no complaint ever came to be lodged with anyone. It is also a matter of record that deceased was working as a Patwari in the office of the Tehsildar. She was deeply in love with the accused and had wanted him to find a better job.

12. Identity of the deceased not being in dispute, it stands established through the testimony of Dr. Virender Pal Singh (PW-22), who conducted and proved the post mortem (Ext. PW-21/E), that except in the area of perineum, lateral side of left thigh, left leg and left hip deceased had sustained dermo-epidermal burns all over her body.

13. Even Dr. Amar Verma (PW-2) who proved the medical history sheet of deceased (Ext.PW-2/B) has documented the victim of suffering superficial burn injuries over the neck, interior abdomen, both arms, thigh and feet to the extent of 30%. This document also records the cause of fire. In fact it affirmatively states that "*mujhe koi shak nahi hai*" (I have no suspicion).

14. With these undisputed and proven facts, this court is called upon to examine six essential facts: (i) As to whether the dying declaration (Ext. PW-2/D) can be said to be the true, genuine and convincing version of the deceased? (ii) As to whether it can be relied upon to prove the innocence of the accused? (iii) Whether any dying declaration, ocular in nature, so made by the deceased to her near relatives, including brother Vinod Kumar (PW-3) can be relied upon to convict the accused? (iv) Whether there has been inordinate and unexplainable delay of eight days (26th November 2002 to 3rd December, 2002) in registration of the F.I.R., rendering the prosecution case to be fatal? (v) Whether there is enough material on record to establish that after pouring kerosene oil, accused had set the deceased on fire; and (vi) Whether accused committed murder of the deceased or not?

15. In Court Munshi Ram (PW-8) who was neighbour and a colleague of the deceased states that on 25.11.2002, at about 11.00 – 11.30 p.m., he heard cries of the deceased coming from her residence. Immediately he went and knocked the door which was opened by the accused. After entering the house, he saw the deceased sitting on the bed and crying. Some kerosene like smell was there. As desired by the accused, deceased disclosed that she caught fire while preparing meals on a gas stove. Immediately he went to the Tehsildar Medh Raj Sharma (not examined) and narrated the incident. By the time he returned with the Tehsildar, Reeta Kumari had changed her clothes. Thereafter he along with the Tehsildar and the accused, took the deceased to the hospital. Thereafter he returned to his residence. Later on he learnt that deceased who had been referred to Chandigarh, died on 2.12.2002.

16. Now significantly this witness, who was the first one to have reached the spot, did not find anything unusual in the house. Except for burn injuries on the body of the victim no other burnt article was found. He did not find any can of kerosene oil. It is not the case of this witness that the accused had threatened, intimidated or persuaded the deceased to narrate the cause of fire which she did to him. This witness did not find the conduct of the accused to be suspicious or the deceased to be frightened. Significantly, despite being a revenue official, he did not report the matter to anyone, save and except the Tehsildar, who also did not take any action and remains unexamined in Court. Though statement of this witness was recorded by the police only on 5.12.2002, but did not report anything about the kerosene oil to the police. Significantly in cross examination he admits it to be correct that "*when I asked the deceased about the cause of burn, she disclosed that she was caught fire while preparing the meals with the gas in the kitchen".*

17. On this count, we also find that Doctor Amar Verma (PW-2) did not notice any smell of kerosene oil when the victim was first examined by him. The Doctor observed that the deceased suffered burn injuries to the extent of 30%. It is a matter of record that the incident came to be reported to the police when entry in the daily diary (Ext.PW-15/B) was made and when HC Dalip Kumar (PW-15) reached the hospital, he moved application (Ext. PW-2/C) seeking opinion of the Doctor as to whether deceased was fit to make any statement or not. The Doctor certified the victim to be medically fit and only thereafter, this officer recorded statement (Ext. PW-2/D) made and signed by the deceased and attested by the Doctor and Tehsildar, Kangra. Testimony of the Doctor is evidently clear to such effect. He is categorical that in his presence, deceased made a statement which she signed. Such statement was made voluntarily without any fear, pressure or persuasion. On this count version of HC Dalip Kumar that at that time, victim was frightened is a mere exaggeration and an improvement which never came to be recorded in his previous statement (Mark Z-1) with which he was confronted. Further, from the testimony of this witness it is evident that after the family members of the victim reached the hospital, they were proclaiming that the victim was burnt. They were also quarreling with the accused. Yet, he did not take any action in the matter and the reason is not far to seek, for as is so admitted by him in the cross examination part of his testimony, that statement of the victim was to the effect what was recorded in the presence of the Doctor and the Tehsildar. He also admits that the relatives of the victim were aware of such statement recorded in the hospital.

18. Conjoint reading of the statements of close relatives of the victim, namely Vinod Kumar (PW-3), Ram Krishan (PW-7), Shakuntla Devi (PW-9), Kashmiro Devi (PW-10), Ram Chand Bhatia (PW-11), Shashi Bala (PW-12) and Karam Chand (PW-14) reveals that they were fully aware of the dying declaration (Ext.PW2/D), yet till 3.12.2002 none disputed the veracity or contents thereof.

19. Statement (Ext.PW-2/D) is to the following effect:

> 'Statement of Smt. Geeta Kumari w/o Sumit Kumar, Caste Dalit R/o V.P.O. Kuhna, Tehsil Dehra, P.S. Jawalaji, Distt. Kangra, Age 28 years, At present Patwari, Tehsil Office Kangra.
>
> Stated that I am resident of the aforesaid address and working on the post of Patwari at Tehsil Office Kangra for the last seven years. My marriage was solemnized with Sumit Kumar s/o Sh. Kesar Chand as per Hindu rites and customs about five and a half years back. I have a daughter namely Prekshika who is aged three and a half years. I reside at my official residence, Kanungo Hut, along with my husband Sumit. My husband Sumit Kumar is employed as Daily Wages Lab Attendant, Dharamshala. On dated 25.11.2002 at 9.30 p.m. when I started preparing meals on the gas stove and lit the same, then all of a sudden gas came out in large quantity as a result of which the shirt which I was wearing caught fire. At that time my husband was in the room next to the kitchen. I screamed for help and started running towards the room of my husband on which my husband tried to extinguish the fire as a result of which he also sustained burn injuries on his hands. My husband poured water on me to douse off the fire. Then my neighbour Munshi, his family members and Tehsildar Medh Ram Sharma brought me to S.D.H. Kangra for treatment. This incident occurred at the time of lighting the gas stove suddenly. As the result of fire my stomach, arm and neck have burnt. In this incident, no one is at fault.'

20. There is no evidence, even remotely suggesting that this statement came to be made under any threat, fear or intimidation. It does not even remotely link the accused to the crime. No role whatsoever is ascribed to him. From the statement of Vinod Kumar (PW-3) it is evidently clear that deceased was working in the office of the attesting witness (Tehsildar). It is nobody's case that accused was in a position to or had exercised any influence over the revenue officials, Doctor or the deceased.

21. Hence, keeping in view the law laid down by the apex Court in *State of A. P. vs. Shaik Moin,* (2004) 6 SCC 34; *Sher Singh & another vs. State of Punjab,* (2008) 4 SCC 265; *Amol Singh vs. State of Madhya Pradesh,* (2008) 5 SCC 468; *Nanhar & others vs. State of Haryana,* (2010) 11 SCC 423; *Mukehsbhai Gopalbhai Barot vs. State of Gujarat,* (2010) 12 SCC 224; *Krishan vs. State of Haryana,* (2013) 3 SCC 280; *Panchanand Mandal alias Pachan Mandal & others vs. State of Jharkhand,* (2013) 9 SCC 800; *Bhadragiri Venkata Ravi vs. Public Prosecutor, High Court of Andhra Pradesh, Hyderabad,* (2013) 14 SCC 145; and *Vijay Pal vs. State (Government of NCT of Delhi),* (2015) 5 SCC 749, dying declaration (Ext. PW-2/D) which stands proven on record, being voluntary in nature, can safely be relied upon as a relevant piece of evidence.

22. Relatives of the victim admit that deceased was in love with the accused; both were residing alone in the accommodation allotted by the government; deceased who was working as a Patwari had wanted her husband to get a better job.

23. On record, two versions have emerged, as to who had locked the house, after accused took the deceased to the hospital. On the date of the incident accused first took the deceased to the hospital, Kangra and thereafter to Chandigarh where he continued to remain with her till the last breath. It is nobody's case that in between, accused ever accessed his house. HC Dalip Kumar is categorical that he immediately "locked" the "premises so as to preserve the same". This was so done when family members of the victim "proclaimed that she was burnt". SI

Prem Chand (PW-21) states that he opened the lock during the course of investigation, which undisputedly began after registration of the F.I.R. (dated 4.12.2002). However, when we peruse the testimony of close relatives of the victim, including that of acquaintance Ram Krishan (PW-7), we find that keys of the lock were actually with him. In fact this witness admits that before leaving for Chandigarh, both he and his niece (here he refers to Shashi Bala PW-12) had opened the lock and entered the premises when he noticed smell of kerosene oil, burnt match sticks and broken bangles.

24. From the testimony of these witnesses it is evident that in the Kangra hospital itself, motive of crime came to be disclosed to them. Deceased had informed that accused had demanded money and despite her having given Rs.900/-, he persisted with such demands. She was beaten up, and after sprinkling kerosene oil accused had set her on fire. Now all this was so disclosed not only to Ram Krishan (PW-7) but also to Vinod Kumar (PW-3), yet no recovery was effected by the police or any report lodged by anyone.

25. These witnesses want the Court to believe that the cause of fire came to be narrated by the deceased also at the hospital at Chandigarh. Vinod Kumar wants the court to believe that only under threat of the accused that her daughter would be killed, she made the dying declaration (Ext. PW-2/D). We do not find such version to be inspiring in confidence, for such fact never came to be recorded by the police in his statement (Ext.PW-3/A) made under Section 154 Cr. P.C., with which he was confronted. It is not his case that police wrongly recorded such statement. Undisputedly between 26.11.2002 and 2.12.2002, accused who was alone, was attending to the deceased. Relatives of the victim, in large number, were also there. Now if the deceased had disclosed the real cause of incident, then why is it that the matter never came to be reported to anyone, including the Doctors in the hospital; police officials at Kangra or Chandigarh. Also why is it that any one of the relatives did not lodge any protest against the illegal acts of the police officials/Tehsildar in wrongful recording of the dying declaration.

26. Further, Vinod Kumar admits that for better treatment, accused had got the deceased referred to Chandigarh where Doctors kept on attending to her. He did not even ask anyone to have the statement of the deceased recorded afresh. In his previous statement, he does not record the date of his discussion with the deceased. He admits that accused himself had also sustained burn injuries. His version about misconduct of the accused never came to be disclosed by him in his previous statement.

27. Ram Krishan (PW-7) admits that he never went to Chandigarh. Keys of the house were with him. He does not state that the room was not tampered with. His version of having learnt about the real cause of the incident from the deceased is a mere exaggeration, for it not to have been recorded in his previous statement (Ext. DX) with which he was confronted. In fact, he goes to admit that statement (Ext. PW-2/D) was signed by the deceased in his presence.

28. To similar effect is the statement of Shakuntla Devi (PW-9) mother of the deceased. She has made several improvements and exaggerations. Her version that accused had married the deceased out of love for money; deceased had (i) narrated the real cause of the incident to her; (ii) made statement out of fear for her daughter's welfare; (iii) desired that she be saved; and that accused had demanded money and thereafter set her on fire, are all exaggerations and improvements as it is nowhere recorded in her previous statement (Ext. DW-1) with which she was confronted.

29. We need not elaborately discuss, but find that the version of Kashmiro Devi (PW-10), Ram Chand Bhatia (PW-11), Shashi Bala (PW-12) and Karam Chand (PW-14) is unbelievable for the very same reason. Police has not sided with the accused or incorrectly recorded such statement.

30. Careful perusal of cross examination part of the testimonies of relatives of the deceased would only reveal that there are several improvements, exaggerations and embellishments, rendering their version to be unbelievable and witnesses to be unreliable.

31. Hence, it cannot be said that these witnesses have been able to establish the real cause of the incident to have been disclosed to them by the deceased. Dying declaration, ocular in nature, cannot be said to be proven on record by leading clear, cogent, consistent and reliable piece of evidence.

32. The delay of eight days in lodging the F.I.R. (Ext. PW-17/A) remains unexplained by the prosecution. As already discussed, relatives of the victim did not lodge any protest against anyone. They remained silent despite the fact that they suspected involvement of the accused in the alleged crime. Where is this daughter? how old is she? remains unexplained on record. It is not the case of neighbour Munshi Ram (PW-8) that at the time of incident, child was at home. Also initially police did not register any case against the accused. In fact, spot of crime also never came to be inspected by them. Statements of the witnesses came to be recorded much after lodging of the complaint by Vinod Kumar (PW-3) which was done on 3.12.2002.

33. It is not the case of the prosecution that health of the victim was improving and the relatives wanted the marriage to be saved. Accused was alone, unable to exhibit or exercise any influence. His economic and social status was far lower than that of the deceased. Even the colleagues of the deceased did not suspect any hand of the accused in the alleged crime.

34. Hence in the given facts and circumstances delay of eight days in lodging the F.I.R. is fatal to the prosecution [*Rajeevan & another vs. State of Kerala,* (2003) 3 SCC 355; *Shankarlal vs. State of Rajasthan,* (2004) 10 SCC 632; *State of Rajasthan vs. Bhanwar Singh,* (2004) 13 SCC 147; and *A. Shankar vs. State of Karnataka,* (2011) 6 SCC 279].

35. Through the testimony of Madan Lal (PW-4) prosecution wants the court to believe that there was no malfunction of the regulator of the gas cylinder. Well it is not the case of the deceased that the gas cylinder had burst. It is the specific case that clothes worn by the deceased caught fire from the gas stove while preparing the meals.

36. In order to establish that the accused, after pouring kerosene oil set the deceased on fire, our attention is invited to the testimonies of Vinod Kumar (PW-3) and SI Prem Chand (PW-21). The Investigating Officer states that from the room he recovered broken bangles, burnt pieces of cloth, hair clip, one match box and one plastic can of five litres containing drops of kerosene oil. Repetitive though, but it is relevant to reiterate that the Doctor did not find any smell of kerosene oil at the time of the examination of the victim. Also Vinod Kumar (PW-3) and Ram Krishan (PW-7) did not notice any can of kerosene oil (Ext. P-5), so recovered by the police, at the time they visited the house, prior to the victim being taken to Chandigarh. Significantly Ram Krishan wants the court to believe that he visited the house with Shashi Bala (PW-12) who is conspicuously silent about any such visit. In fact, she is categorical of having visited the house only once i.e. on 5.12.2002. In view of the aforesaid contradictions having emerged on record, not much credence can be lent to the recovery of can of kerosene oil (Ext.P-5) or burnt match sticks from the house of the accused. None has come forward to depose that the spot of crime was kept safe and not tampered with.

37. By way of corroborative link evidence, that of the experts, accused is not linked to the crime. Report of State Forensic Science Laboratory, Shimla (Ext.PW-21/K) evidences that in the can (Ext.P-5) and pieces of cloth (Ex.P6 to Ex.P9), traces of kerosene oil were found. But then, how did the can reach the spot of crime, remains a mystery and why is it that pieces of clothes worn by the deceased not taken into possession in the hospital itself remains unexplained. No charred portions of clothes were noticed by the Doctor.

38. In the instant case, prosecution has failed to establish any motive. It is not a case of bride burning or death as a result of dowry demand. It is case of murder. There is no spot witness to the crime. The neighbour (PW-8) who was the first one to have reached the spot, never suspected role of the accused in the alleged crime. Deceased voluntarily made statement (ExtPW2/D) in the presence of government officers.

39. From the material placed on record, prosecution has failed to establish that the accused is guilty of having committed the offence, he stands charged for. The circumstances cannot be said to have been proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused does not stand proved beyond reasonable doubt to the hilt.

40. Having perused the testimony of prosecution witnesses on record, it cannot be said that prosecution has been able to prove its case, beyond reasonable doubt, to the effect that accused murdered the deceased, by leading clear, cogent, convincing and reliable material on record.

41. The Court below, in our considered view, has correctly and completely appreciated the evidence so placed on record by the prosecution. It cannot be said that the findings returned by the trial Court are perverse, illegal, erroneous or based on incorrect and incomplete appreciation of material on record resulting into miscarriage of justice.

42. The accused has had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in *Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad,* (2010) 1 SCC 94, since it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice, no interference is warranted in the instant case.

For all the aforesaid reasons, present appeal, devoid of merit, is dismissed, so also pending applications, if any. Bail bonds, if any, furnished by the accused are discharged. Records of the Court below be immediately sent back.

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

Shri Varun Samra son of Shri Vijay Kumar and others ....Petitioners/Accused persons

Versus

State of H.P. ....Non-petitioner

Cr.MMO No. 4125 of 2013
Order reserved on 21st July 2016
Date of Order 16th September 2016

Code of Criminal Procedure, 1973- Section 482- A complaint was filed for the commission of offence punishable under Section 27 (b) (ii) of Drugs and Cosmetics Act 1940 before Ld. C.J.M. who issued summons- it was contended that cognizance can be taken only by the Court of Sessions and C.J.M. was not competent to take cognizance - held, that C.J.M. committed irregularity by recording pre-charge evidence- he was bound to send the complaint to the Sessions Judge- however, it cannot be determined, whether accused persons were in-charge of and were responsible to the company for its conduct as it is a complicated question of fact, which cannot be determined at this stage- sanction for prosecution will be required at the time of framing of charge and not prior to that - petition partly allowed- Complaint withdrawn from the Court of C.J.M. and assigned to the Court of Sessions Judge for disposal in accordance with law. (Para-5 to 12)

Cases referred:

Gopal Das Sindhi and others vs. State of Assam and another, AIR 1961 SC 986

Narsingh Das Tapadia vs. Goverdhan Das Partani and another, AIR 2000 SC 2946

S.K. Sinha Chief Enforcement Officer vs. M/s Videocon International Ltd. & ors, AIR 2008 SC 1213

Nagawwa vs. Veeranna Shivalingappa, AIR 1976 SC 1947

Chandra Deo Singh vs. Prokash Chandra Bose alias Chabi Bose & anr, AIR 1963 SC 1430

Madan Razak vs. State of Bihar, AIR 2016 SCW 122
Mosiruddin Munshi vs. Md. Siraj and another, AIR 2014 SC 3352
State of M.P. vs. Awadh Kishore Gupta, (2004)1 SCC 691
State of Haryana vs. Bhajan Lal, (1992) Supp 1 SCC 335
S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla, 2005(8) SCC 89
David Methew vs. State of H.P, 2011(6) RCR (Cri.) 2194
National Small Industries Corporation Ltd. vs. Harmeet Singh Paittal & another, (2010)3 SCC 330
State of Haryana vs. Bhajan Lal, AIR 1992 SC 604

For Petitioners: M/s Sandeep Wadhawan and Dheeraj K. Vashishat Advocate.
For Non-petitioner: Mr. M.L. Chauhan Addl. Advocate General with Mr.R.K.Sharma Deputy Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Section 482 of Code of Criminal Procedure 1973 for quashing criminal complaint No. 240-1 of 2010 title State of H.P. through Drug Inspector District Kangra vs. Varun Samra and others filed under Drugs and Cosmetics Act 1940 for punishment of accused persons under Section 27 (b) (ii) of Drugs and Cosmetics Act 1940.

Brief facts of the case

2. It is alleged that on 15.10.2010 State of H.P. through Drug Inspector District Kangra filed complaint under Drugs and Cosmetics Act 1940 against accused persons alleging that on 13.5.2010 Inspector from the office of S.P. CBI Shimla came to office of Drug Inspector and disclosed that M/s Jackson Laboratories Plot 56-61 Industrial Area Phase III Sansarpur Terrace District Kangra is engaged in manufacture of Tablet Comiflam allegdly appearing to be similar and under imitation of Tablet Comiflam being manufactured by M/s Aventis Pharma. There is recital in complaint that thereafter premises of M/s Jackson Laboratories inspected on 13.5.2010 in afternoon. There is recital in complaint that licence to manufacture Tablet Comiflam was granted to M/s Jackson Laboratories Pvt. Limited in the month of November 2009. There is recital in complaint that M/s Jackson Laboratories Private Limited manufactured Tablet Comiflam in the month of October 2009 and circulated in the market for sale to general public. There is recital in complaint that Tablets Comiflam Batch Nos. T-0977 and T-0982 were manufactured relating to drug Tablet Comiflam in the month of October 2009 prior to the issuance of licence. There is recital in complaint that 1118900 Tablet Comiflam purchased by M/s Antex Pharma Private Limited vide invoice No. 00235 dated 27.10.2009 and thereafter sold to M/s Tirupati Pharma and thereafter sold to various dealers at Delhi and outside Delhi. There is recital in complaint that prosecution sanction obtained from Assistant Drug Controller H.P. on 29.9.2010. Complaint before learned Chief Judicial Magistrate Kangra filed on 25.10.2010 and learned Chief Judicial Magistrate Kangra issued summons to accused persons under Section 27 (b) (ii) of Drugs and Cosmetics Act 1940 on 27.10.2010. Thereafter learned Chief Judicial Magistrate listed the case for pre-charge evidence for 18.3.2014. Thereafter learned Chief Judicial Magistrate recorded pre-charge evidence of Shri Avinash Saini working as Inspector in CBI Branch Shimla H.P. on 18.03.2014 and listed the case for remaining pre-charge evidence of complainant for 24.5.2014. Petitioners filed Cr.MMO No. 4125 of 2013 before Hon'ble H.P. High Court. Hon'ble H.P. High Court called entire record of learned Trial Court on dated 19.3.2014 through special messanger.

3. Court heard learned Advocate appearing on behalf of petitioners and learned Additional Advocate General appearing on behalf of State and also perused the record carefully.

4. Following points arise for determination in present petition:-

Point No.1

Whether petition filed under Section 482 of Code of Criminal Procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of petition?

Point No.2

Final order.

Findings upon Point No. 1 with reasons

5. Submission of learned Advocate appearing on behalf of petitioners that after amendment of Section 32 w.e.f. 10.8.2009 cognizance of offence under Chapter IV of Drugs and Cosmetics Act 1940 could be taken only by Court of Sessions and Chief Judicial Magistrate is not legally competent to take cognizance of offence and on this ground petition be allowed is partly answered in yes and partly answered in no. As per Section 32(2) of Drugs and Cosmetics Act 1940 no Court inferior to that of a Court of Sessions would try the offence under Chapter IV of Drugs and Cosmetics Act 1940 w.e.f. 10.8.2009. The complaint was filed before learned Chief Judicial Magistrate on 25.10.2010 after amendment of Section 32 of Drugs and Cosmetics Act 1940. It is held that learned Chief Judicial Magistrate committed irregularity by way of recording pre-charge evidence in present case. It is held that learned Chief Judicial Magistrate was under legal obligation to send the complaint to learned Sessions Judge for trial as mentioned under Section 32 of Drugs and Cosmetics Act 1940. It is well settled law that filing of complaint itself does not amount to taking cognizance of case. It is well settled law that Court takes cognizance of case when it applies its mind to frame charge against the accused. It is well settled law that cognizance is *sine-qua-non* for trial and it cannot be equated with issuance of process. It is well settled law that initiation of criminal proceedings is different from commencement of criminal trial under Section 32(2) of Drugs and Cosmetics Act 1940. No Court inferior to that of Court of Sessions would try an offence punishable under Chapter IV of Drugs and Cosmetics Act 1940. It is well settled law that trial of criminal case starts after framing of charge. In the present case charge has not been framed against accused persons. ***See AIR 1961 SC 986 title Gopal Das Sindhi and others vs. State of Assam and another. See AIR 2000 SC 2946 title Narsingh Das Tapadia vs. Goverdhan Das Partani and another. See AIR 2008 SC 1213 title S.K. Sinha Chief Enforcement Officer vs. M/s Videocon International Ltd. and others.***

6. Submission of learned Advocate appearing on behalf of petitioners that as per Section 34 of Drugs and Cosmetics Act accused persons are not liable and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Facts whether accused persons were incharge of and were responsible to the company for conduct of business of company is complicated issue of facts. Judicial findings relating to complicated issue of facts cannot be given at this stage of case. Same complicated would be decided by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case. It is not expedient in the ends of justice to give judicial findings at this stage of case upon complicated issue of facts unless opportunity is granted to both the parties to lead evidence in support of their case.

7. Submission of learned Advocate appearing on behalf of petitioners that M/s Jackson Laboratories Pvt. Ltd. was permitted to manufacture Tablet Comiflam in October 2009 and in view of circular of Ministry of Health Government of India dated 1.10.2012 there was no necessity to obtain prior permission and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Circular of Ministry of Health Government of India came into operation on 1.10.2012 and present complaint was filed against accused persons on 25.10.2010. Hence it is held that circular of Ministry of Health Government of India dated 1.10.2012 is prospective in nature and not retrospective in nature. It is held that effect of circular dated 1.10.2012 will be decided by learned Trial Court when case shall be disposed of finally by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case.

8. Submission of learned Advocate appearing on behalf of petitioners that prima facie case for summoning the petitioners under Section 27 (b) (ii) of Drugs and Cosmetics Act 1940 is not made out and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. The facts whether petitioners have comitted offence or not cannot be decided at this stage. Judicial findings to the effect whether petitioners have committed offence under Drugs and Cosmetics Act 1940 would be given by learned Trial Court after recording statement of oral witnesses namely (1) Ashish Raina Drug Inspector, (2) Rajinder Thapa, (3) M.S. Hazare Dy.S.P.(B), (4) Kapil Dhiman Drugs Licensing Authority and after proof of annexures in accordance with law i.e. (1) Annexure A copy of notification (2) Annexure B Direction under Section 22 (i) (cca) for production of record (3) Annexure C1 to C2 Form No. 17 and 17-A for taking samples (4) Annexure D Intimation to Drug Licensing Authority regarding raid in M/s Jackson Laboratories Sansarpur Terrace (5) Annexure E Postal receipt No. SPEE725770803IN dated 15.5.2010 (6) Annexure F Postal receipt No. SPEE725770817IN dated 15.5.2010 (7) Annexure G1 to G2 Two memoranda to Governemnt Analyst on Form 18 for the two samples marked DS/2010-28 and DS/2010-29 (8) Annexure H Reply of M/s Jackson Laboratories Sansarpur Terrace dated 14.5.2010. (9) Annexure I-1 to I-95 second reply of M/s Jackson Laboratories Sansarpur Terrace dated 19.5.2010. (10) Annexure J-1 to J-2 Analysis report of Tab Comiflam for the two samples. (11) Annexure K-1 to K-2 Show cause notice to M/s Jackson Laboratories Sansarpur Terrace. (12) Annexure L Withdrawal of permission to manufacture Tab Comiflam by M/s Jackson Laboratories Sansarpur Terrace. (13) Annexure M-1 to M-2 Prosecution sanction dated 28.9.2010. (14) Annexure N-1 to N-2 Letter No. 9779 RC SIB 2010 E0004 EOU-V, ND dated 23/27.9.2010 issued by S.P., CBI, EOU-V, New Delhi for instruction to lodge complaint against accused. (15) Annexure N-3 to N-188 Investigation report and supporting documents of M S Hazare Dy.S.P. CBI, EOU-V New Delhi annexed with complaint. It is prima facie proved on record that Drug Controller Administration H.P. issued show cause notice to M/s Jackson Laboratories Pvt. Ltd. to the effect that M/s Jackson Laboratories Pvt. Ltd. had manufactured and sold drug Tablet Comiflam without obtaining prior permission as required under Drugs and Cosmetics Act 1940. It is also prima facie proved on record that Drug Controller Administration H.P. vide office order dated 28.5.2010 held that M/s Jackson Laboratories Pvt. Ltd. had manufactured and sold Tablet Comiflam without prior permission from competent authority. It is also prima facie proved on record that Drug Controller Administration H.P. had cancelled the licence of M/s Jackson Laboratories Pvt. Ltd. to manufacture Tablet Comiflam on dated 28.5.2010. It is also prima facie proved on record that Assistant Drug Controller Licensing Authority-cum-Controlling Authority Baddi had given prosecution sanction to prosecute co-accused persons namely (1) Jugal Kishore Samra, (2) Ramesh Kumar Samra, (3) Sudhir Kumar Samra.

9. Submission of learned Advocate appearing on behalf of petitioners that there is no sanction to prosecute Varun Samra and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that prosecution starts when charge is framed against accused persons. It is held that sanction to prosecute Varun Samra is required when charge would be framed and when trial would commence in accordance with law. Court is of the opinion that Varun Samra can raise the plea at the time of framing of charge and at the time of commencement of trial before learned Trial Court relating to non-prosecution sanction.

10. It is well settled law that evaluation of truth or falsity would be possible only after evidence is recorded by learned Trial Court. Issue of absence of *mensrea* or *actus reus* cannot be decided at this stage of case when charge is not framed against accused persons as of today. ***See AIR 1976 SC 1947 title Smt. Nagawwa vs. Veeranna Shivalingappa. See AIR 1963 SC 1430 title Chandra Deo Singh vs. Prokash Chandra Bose alias Chabi Bose and another. See AIR 2016 SCW 122 title Madan Razak vs. State of Bihar. See AIR 2014 SC 3352 title Mosiruddin Munshi vs. Md. Siraj and another. See (2004)1 SCC 691 title State of M.P. vs. Awadh Kishore Gupta. See (1992) Supp 1 SCC 335 title State of Haryana vs. Bhajan Lal.***

11. Case law cited by learned Advocate appearing on behalf of petitioners i.e. ***2005(8) SCC 89 title S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla, 2011(6) RCR (Cri.) 2194 title David Methew vs. State of H.P. (2010)3 SCC 330 title National Small Industries Corporation Ltd. vs. Harmeet Singh Paittal and another, AIR 1992 SC 604 title State of Haryana vs. Bhajan Lal*** are not applicable at pre-charge stage of case being distinguished facts. In view of above stated facts point No.1 is answered partly in affirmative and partly in negative.

Point No.2(Final Order)

12. In view of findings upon point No.1 petition filed under Section 482 Cr.P.C. is partly allowed and complaint No. 240-1 of 2010 title State of H.P. through Drug Inspector District Kangra vs. Varun Samra and others is withdrawn from the Court of learned Chief Judicial Magistrate Kangra (H.P.) forthwith and is assigned to learned Sessions Judge Kangra at Dharamshala for disposal in accordance with law. Parties are directed to appear before learned Sessions Judge Kangra (H.P.) at Dharamshala on ***30.9.2016.*** Observations will not effect merits of case in any manner and will be strictly confine to disposal of present petition. File of learned Chief Judicial Magistrate be sent to learned Sessions Judge Kangra (H.P.) at Dharamshala forthwith. Learned Registrar (Judicial) will send certify copy of order to learned Sessions Judge Kangra (H.P.) and learned Chief Judicial Magistrate Kangra (H.P.) forthwith for compliance. Cr.MMO No. 4125 of 2013 is disposed of. Pending miscellaneous application(s) if any also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Hari Chand .....Petitioner

Versus

Hon'ble High Court of HP ..... Respondent.

CWP No. 1660 of 2016.
Date of decision: 19th September, 2016.

Constitution of India, 1950- Article 226- Petition has been filed after 34 years - no explanation has been given for the delay- held, that petition of a person who does not seek relief within time has to be dismissed only on the ground of delay and laches, otherwise it would amount to gross misuse of jurisdiction and disturb the settled position- petition dismissed. (Para-7 to 10)

Cases referred:

R & M Trust versus Koramangala Residents Vigilance Group and others, (2005) 3 SCC 91
S.D.O. Grid Corporation of Orissa Ltd. and others versus Timudu Oram, 2005 AIR SCW 3715
Srinivasa Bhat (Dead) by L.Rs. & Ors. versus A. Sarvothama Kini (Dead) by L.Rs. & Ors., AIR 2010 Supreme Court 2106
Bhakra Beas Management Board versus Kirshan Kumar Vij & Anr., AIR 2010 Supreme Court 3342
State of Jammu & Kashmir versus R.K. Zalpuri and others, JT 2015 (9) SC 214
Inderjit Kumar Dhir versus State of H.P. and others, I L R 2014 (V) HP 142
Bhim Sen Sharma versus HP University and another, I L R 2016 (III) HP 157 (D.B.)

For the petitioner: Ms. Archana Dutt, Advocate.
For the respondent: Mr. Rajnish Maniktala, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

By the medium of this writ petition, the petitioner has come out of deep slumber after 34 years. On the last date of hearing, the learned counsel for the petitioner was asked to justify the maintainability of the writ petition, to explain the delay and laches, was not in a position to do so. Today, the learned counsel for the petitioner prayed that notice be issued to the respondents.

2. Mr. Rajnish Maniktala, Advocate, appears and prayed that the petition be dismissed in *limine.*

3. We have gone through the writ petition. The petitioner has not explained the delay of one day's, not to speak of 34 years.

4. It is beaten law of land that delay takes away the settings of law. A person who does not seek relief within time, his petition has to be dismissed only on the grounds of delay and laches, otherwise, it would amount to gross misuse of jurisdiction and disturb the settled position.

5. The Apex Court in a case titled as **R & M Trust versus Koramangala Residents Vigilance Group and others,** reported in **(2005) 3 Supreme Court Cases 91,** held that delay is a very important factor while exercising extraordinary jurisdiction under Article 226 of the Constitution; delay defeats equity and it cannot be brushed aside without any plausible explanation. It is apt to reproduce para 34 of the judgment herein:

> *"34. There is no doubt that delay is a very important factor while exercising extraordinary jurisdiction under Article 226 of the Constitution. We cannot disturb the third-party interest created on account of delay. Even otherwise also why should the Court come to the rescue of a person who is not vigilant of his rights?"*

6. The Apex Court in cases titled as **S.D.O. Grid Corporation of Orissa Ltd. and others versus Timudu Oram,** reported in **2005 AIR SCW 3715,** and **Srinivasa Bhat (Dead) by L.Rs. & Ors. versus A. Sarvothama Kini (Dead) by L.Rs. & Ors.,** reported in **AIR 2010 Supreme Court 2106,** has also discussed the same principle. It is profitable to reproduce para 9 of the judgment in **Timudu Oram's case (supra)** herein:

> *"9. In the present case, the appellants had disputed the negligence attributed to it and no finding has been recorded by the High Court that the GRIDCO was in any way negligent in the performance of its duty. The present case is squarely covered by the decision of this Court in Chairman, Grid Corporation of Orissa Ltd. (GRIDCO) and others (supra), 1999 AIR SCW 3383 : AIR 1999 SC 3412. The High Court has also erred in awarding compensation in Civil Appeal No. ..... of 2005 (arising out of SLP (C) No. 9788 of 1998). The subsequent suit or writ petition would not be maintainable in view of the dismissal of the suit. The writ petition was filed after a lapse of 10 years. No reasons have been given for such an inordinate delay. The High Court erred in entertaining the writ petition after a lapse of 10 years. In such a case, awarding of compensation in exercise of its jurisdiction under Article 226 cannot be justified."*

7. It would also be apt to reproduce para 39 of the judgment rendered by the Apex Court in **Bhakra Beas Management Board versus Kirshan Kumar Vij & Anr.,** reported in **AIR 2010 Supreme Court 3342,** herein:

> *"39. Yet, another question that draws our attention is with regard to delay and laches. In fact, respondent No. 1's petition deserved to be dismissed only on that ground but surprisingly the High Court overlooked that aspect of the mater and dealt with it in a rather casual and cursory manner. The appellant had categorically raised the ground of delay of over eight years in approaching the*

High Court for grant of the said relief. But the High Court has simply brushed it aside and condoned such an inordinate, long and unexplained delay in a casual manner. Since, we have decided the matter on merits, thus it is not proper to make avoidable observations, except to say that the approach of the High Court was neither proper nor legal."

8. The Apex Court in the case titled as **State of Jammu & Kashmir versus R.K. Zalpuri and others,** reported in **JT 2015 (9) SC 214,** held that a Writ Court while deciding a writ petition, is required to remain alive to the nature of the claim and the unexplained delay on the part of the writ petitioner. It is apt to reproduce paras 26 to 28 of the judgment herein:

"26. In the case at hand, the employee was dismissed from service in the year 1999, but he chose not to avail any departmental remedy. He woke up from his slumber to knock at the doors of the High Court after a lapse of five years. The staleness of the claim remained stale and it could not have been allowed to rise like a phoenix by the writ court.

27. The grievance agitated by the respondent did not deserve to be addressed on merits, for doctrine of delay and laches had already visited his claim like the chill of death which does not spare anyone even the one who fosters the idea and nurtures the attitude that he can sleep to avoid death and eventually proclaim "Deo gratias" - 'thanks to God'.

28. Another aspect needs to be stated. A writ court while deciding a writ petition is required to remain alive to the nature of the claim and the unexplained delay on the part of the writ petitioner. Stale claims are not to be adjudicated unless non-interference would cause grave injustice. The present case, need less to emphasise, did not justify adjudication. It deserved to be thrown overboard at the very threshold, for the writ petitioner had accepted the order of dismissal for half a decade and cultivated the feeling that he could freeze time and forever remain in the realm of constant present."

9. This Court also in **LPA No. 48 of 2011** titled ***Shri Satija Rajesh N. vs. State of Himachal Pradesh and others*** decided on 26.8.2014, ***LPA No. 150 of 2014*** titled ***Mr. Inderjit Kumar Dhir versus State of H.P. and others***, decided on 17th September, 2014, batch of LPAs lead case of which is ***LPA No. 107 of 2014*** titled ***Amit Attri and others versus Anil Verma and others*** decided on 3rd December, 2014 and ***LPA 270 of 2010*** titled *Bhim Sen Sharma versus HP University and another* decided on 2nd May, 2016, has laid down the similar principles of law.

10. Having said so, the petition is dismissed in *limine,* alongwith pending applications, if any. Dasti copy.

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

M/s Embark Life Science Private Limited and another. ..Petitioners/accused persons.

Vs.

State of HP and another. ..Non-petitioners.

Cr.MMO No. 73 of 2014.
Order reserved on: 15.7.2016
Date of Order: September 19, 2016.

Code of Criminal Procedure, 1973- Section 482- Present petition has been field for quashing the complaint for the commission of offence punishable under Section 18 (a) (i) of Drugs & Cosmetics Act 1940 pending before C.J.M.- - held, the fact that accused was in-charge or responsible for day to day affairs and conduct of business of company cannot be seen in the proceedings for quashing the complaint but will be seen during the trial - similarly effect of guidelines of CDSCO will be determined after the trial- question of delay is complicated question

of fact, which cannot be determined at this stage- there is sufficient material on record to proceed against the accused and the accused was rightly summoned by the trial Court- petition dismissed. (Para-6 to 20)

Cases referred:

State of T.N. Vs. Thirukkural Perumal, 1995 (2) SCC 449
State of Haryana and others Vs. Bhajan Lal and others, 1992 Supp (1) SCC 335
State of Madhya Pradesh Vs. Surendra Kori, 2012 (10) SCC 155
Tarnamani Parakh Vs. State of M.P. and others, JT 2015 (3) SC 185
Madam Razak Vs. State of Bihar and others, AIR 2016 SC 122
State of M.P. Vs. Awadh Kishore Gupta and others, 2004 (1) SCC 691
State of Orissa Vs. Debendra Nath Padhi, AIR 2005 SC 359
Mahesh Chaudhary Vs. State of Rajasthan, 2009 (4) SCC 443
Rishipal Singh Vs. State of U.P., AIR 2014 SC 2567
Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and others, AIR 1976 SC 1947
Chandra Deo Singh Vs. Prokash Chandra Bose and another, AIR 1963 SC 1430
N.K.Wahi Vs. Shekhar Singh and others, 2007 (2) ACR 1346 (SC)
S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and another, 2005 (3) ACR 3082
Ramrajsingh Vs. State of M.P., 2009 (2) ACR 1650 (SC)
Aneeta Hada Vs. Godfather Travels and Tours Pvt. Ltd., AIR 2012 SC 2795
Vishal Pharmaceuticals and another Vs. State of M.P, ILR (1999) MP 704
State of Karnataka Vs. C.B.Sheelavanth, ILR 1991 Karnataka 2368
State by Inspector of Drugs Chidambaram Vs. J.Mohamed Rafic, 2005 (2) GLR 1518 2012 Cri.L.J 4115
Medicamen Biotech Ltd. and another Vs. Rubina Bose Drug inspector, 2008 (7) SCC 196
Rekha Vs. State of Tamil Nadu, 2011 (2) ACR 1592 (SC)
State of Haryana Vs. Unique Farmaid P.Ltd. ors., 1999 (2) ALD (Cr.) 908
State of Haryana Vs. Brij Lal Mittal and others, AIR 1998 SC 2327
Umesh Sharma Vs. S.G.Bhakta Drugs Inspector and others, 2003 Bom CR (Cri.) 1522
Venkaiah Chowdary Nannapaneni and others Vs. State of Maharashtra, 2003 AllMR (Cri) 758
Ramanbhai B.Patel and others Vs. S.R.Sharma and another, 1997 (99) BOMLR 438
D.K.Javer and others Vs. State,1985 Cri. L.J 1572
United Phosphorus Ltd Vs. State of Maharashtra and others, 2009 (111) BOMLR 973
Indofil Chemical Company Vs. State of H.P., 2009 (1) Shim. L.C 284
Shashank Bhargava Vs. State of Punjab and another, 2005 (14) criminal 87
Rajendra Kumar Mohanty Vs. P.K.Das, 1998 Cri. L.J 3920
Gopal Dass Vs. State of Assam, AIR 1961 SC 986
Narsing Dass Tapadia Vs. Goverdhan Dass, AIR 2000 SC 2946
S.K.Sinha Chief Enforcement Officer Vs. M/s Videocon International Ltd., AIR 2008 SC 1213

For the petitioners:	Mr. Sushant Mahapatra Advocate.
For non-petitioners.	Mr. M.L.Chauhan, Addl Advocate General with Mr. R.K.Sharma Dy Advocate General.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present petition is filed under Section 482 of the Code of Criminal Procedure 1973 for quashing summoning order dated 10.6.2013 and to quash criminal complaint No. 90/3

of 2013 filed under section 18 (a) (i) of Drugs & Cosmetics Act 1940 and rules framed thereunder pending before learned chief Judicial Magistrate Sirmour District at Nahan H.P.

BRIEF FACTS OF THE CASE:

2. Complainant Drug inspector head quarter at Nahan received complaint by way of telephone on dated 29.5.2010 relating to sale of Rabcer injection batch No. ERZ-06 and Rabcer injection batch No. ERZ-15 purchased from co-accused No.1 namely Anil Gupta proprietor of M/s Anil Medicos new market District Sirmour HP. Drug inspector inspected the stock of Rabcer injection kept for sale in premises. Sample of batch No. ERZ-06 and sample of batch No. ERZ-15 were obtained and sent for analysis by government analyst. Government analyst HP Kandaghat submitted report placed on record relating to batch No.ERZ-06 that out of five Rabcer injection vials one Rabcer vial injection does not comply with description and content of Sterile Rabeprazole Sodium. As per report the sample referred was not of standard quality as defined under Drugs & Cosmetics Act 1940 and rules framed thereunder because Sterile Rabeprazole Sodium was found 19.3 mg and standard requirement was 20 mg. Similarly Government analyst Kandaghat HP submitted chemical analyst report relating to batch No ERZ-15. As per report sample referred was not of standard quality as defined under Drugs & Cosmetic Act 1940 and the rules framed thereunder. As per report out of five Rabcer injection vials, one vial of Rabcer injection does not comply the description and content of Rabeprazole Sodium. As per report Rabeprazole Sodium was found 19.58 mg against requirement of 20 mg. Co-accused No.1 proprietor of M/s Anil Medicos new market Nahan District Sirmour HP produced invoice before Drug inspector and informed that he has purchased batch of Rabcer injection from M/s Astron Life sciences Ludhiana Punjab. Thereafter Drug inspector issued notice to co-accused No.2 Sh Krishan Garg proprietor of M/s Astron Life Science Ludhiana Punjab. Thereafter proprietor M/s Astron Life Science Ludhiana Punjab produced invoice bill and submitted that he has purchased Rabcer injection from M/s Vision Medilink Ahmedabad and thereafter Drug inspector issued notice to Subhash S. Lohia proprietor of M/s Vision Medilink and he also produced invoice bill and submitted that he has purchased batch of Rabcer injection from M/s Embark Life Science private limited. Thereafter Drug inspector issued notice to M/s Embark Life Science private limited through Managing director and Managing director of M/s Embark Life Science has submitted that co-accused Sunil Arora is responsible for day today affairs and conduct of business of M/s Embark Life Science private limited for purposes of section 34 of Drugs & Cosmetics Act 1940.

3. Feeling aggrieved against summoning order co accused Nos. 4 and 5 filed present petition.

4. Court heard learned Advocate appearing on behalf of petitioners and learned Additional Advocate General appearing on behalf of non-petitioners and also perused entire records carefully.

5. Following points arise for determination in present petition.

(1) Whether petition filed under Section 482 of the Code of civil procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of petition?.

(2) Final Order.

Findings upon Point No.1 with reasons.

6. Submission of learned Advocate appearing on behalf of petitioners that report of Drug analyst is without application of mind and is based with malafide intention and is contravention of sections 16,20,21,22,23,25 and rules 45,46,49,57, 124 and 124-A of Drugs & Cosmetics Act 1940 and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Issue whether report of Drug analyst is malafide and without application of mind and is contravention of sections and rules of Drugs & Cosmetics Act 1940 is complicated issues of facts. Complicated issues of facts will be decided by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case. It is not

expedient in the ends of justice to give judicial findings at this stage of case without giving any opportunity to parties to prove their case at this stage of case. Petitioners would be at liberty to summon and examine expert during trial of case as require under section 293(2) Code of criminal procedure 1973. See 2002 criminal Law Journal 2512 (DB) State of Kerala vs. Arun Valenchary.

7. Submission of learned Advocate appearing on behalf of petitioners that State Drug Controller has given sanction to prosecute petitioners without application of mind and without giving any reason when drug batch No. ERZ-06 was already expired at the time of prosecution sanction and on this ground petition be allowed is also rejected being devoid of any force for reasons hereinafter mentioned. Issue whether State Drug Controller has given sanction without application of mind is also complicated issues of facts. Judicial findings relating to complicated issues of facts will be given by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case. At this stage of case it is not expedient in the ends of justice to give judicial findings relating to complicated issues of facts unless opportunity is granted to both parties to lead evidence in support of their case. Petitioners would be at liberty to cross examine State Drug Controller during trial of case. Even in the present case it is prima facie proved on record that expiry date of batch No. ERZ-15 was 8/2011 and prosecution sanction was given on 14.7.2011 prior to expiry date. Expiry date of ERZ-06 was 01/2011 and offence was committed on 29.5.2010 before expiry date.

8. Submission of learned Advocate appearing on behalf of petitioners that State Drug Controller did not give sanction to prosecute Mr. Sunil Arora co-accused No.4 personally and on this ground petition be allowed is also rejected being devoid of any force for reasons hereinafter mentioned. As per sub section 34 of Drugs & Cosmetics Act 1940 when an offence was committed by company then every person who at the time of offence were in charge of and were responsible to the company for the conduct of business of the company would be deemed to be guilty of offence and would be liable to be proceeded and punished accordingly. Sh Sunil Arora has given affidavit Annexure P45/3 placed on record that he was Director of M/s Embark life science private limited and he was responsible for day today affairs and conduct of business of M/s Embark life science private limited for purposes of section 34 of Drugs & Cosmetics Act 1940. In view of statutory provision mentioned under section 34 of Drugs & Cosmetics Act 1940 and in view of affidavit placed on record filed by Sh Sunil Arora co-accused No.4 it is not expedient in the ends of justice to quash proceedings against co-accused Sunil Arora at this stage of case because State Drug Controller has given sanction to prosecute M/s Embark life science private limited on dated 14.7.2011 and Sh Sunil Arora has given affidavit annexure 45/3 placed on record that he was responsible for day today affairs and conduct of business of M/s Embark life science private limited.

9. Submission of learned Advocate appearing on behalf of petitioners that mandate of section 23 (4)(1) and mandate of rule 57 of Drugs & Cosmetics Act 1940 relating to dispatch is violated in the present case and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Issue relating to violation of section 23(4)(1) and rule 57 of Drugs & Cosmetics Act 1940 is issue of complicated facts. It is not expedient in the ends of justice to give judicial findings at this stage of case unless opportunity is granted to the parties to prove their case by way of adducing oral and documentaries evidence.

10. Submission of learned Advocate appearing on behalf of petitioners that as per guidelines given by CDSCO no prosecution could have been filed when Drug found at 70% purity on test and on this ground petition be allowed is also rejected being devoid of any force for reasons hereinafter mentioned. The effect of guideline given by CDSCO will be decided by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case. It is not expedient in the ends of justice to give any judicial finding at this stage of case being complicated issues of facts.

11. Submission of learned Advocate appearing on behalf of petitioners that petitioners have lost their right which was conferred on them in view of section 25(4) of Drugs & Cosmetics Act 1940 for retesting and on this ground petition be allowed is rejected being devoid

of any force for reasons hereinafter mentioned. Judicial findings relating to section 25(4) of Drugs and Cosmetics Act 1940 will be given by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case. It is not expedient in the ends of justice to give judicial findings upon section 25(4) of Drugs & Cosmetics Act 1940 at this stage of case being complicated issues of facts.

12. Submission of learned Advocate appearing on behalf of petitioners that Drug inspector had not conducted any inquiry to ascertain whether co-petitioner No.2 was in charge of the company and on this ground petition be allowed is also rejected being devoid of any force for reasons hereinafter mentioned. In view of affidavit Annexure P45/3 placed on record whereby Sh Sunil Arora has himself admitted that he was responsible for day today affairs and conduct of the business of M/s Embark Life Science Private Limited.

13. Submission of learned Advocate appearing on behalf of petitioners that delay in filing complaint has not been explained by Drug inspector because prosecution sanction was granted on 14.7.2011 and complaint was filed on 23.5.2013 and on this ground petition be allowed is also rejected being devoid of any force for reasons hereinafter mentioned. Issue of delay is complicated issue of law and facts. Complicated issues of law and facts will be decided by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case. It is not expedient in the ends of justice to give judicial findings relating to delay in filing complaint at this stage of case unless opportunity is granted to both parties to lead evidence in support of their case.

14. Submission of learned Advocate appearing on behalf of petitioners that prosecution is motivated with malafide intention and to settle personal ego and is abuse of process of law and on this ground petition be allowed is also rejected being devoid of any force for reasons hereinafter mentioned. Issue whether prosecution filed with malafide motive or to settle personal egos is a complicated issue of facts and the same will be decided by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case. It is not expedient in the ends of justice to give judicial findings unless opportunity is granted to both parties to lead evidence in support of their case at this stage of case.

15. After perusal of complaint and after perusal of entire documents annexed with complaint i.e. (1) Copy of notification HP government notification No. health-AB(1)2/2001 dated 28.03.2012 annexure P-1. (2) Copy of notification health-B (2)5/95 dated 28.05.2008 annexure-P2. (3) Form 17 dated 29.05.2010 annexure P-3 (4) Copy of invoice No-687 dated 29.05.2010 annexure P-4. (5) Form 15 dated 29.05.2010 annexure P-5. (6) Form 18 No. drugs/2010/77 dated 31.05.2010 annexure P-6 (7) Form 18 No. drugs/2010/77 dated 31.05.2010 annexure P-7. (8) Receipt of government analyst dated 01.06.2010 annexure- P8. (9) Copy of notification No health-A-B(1)2/2001-loose-II dated 09.06.2010 annexure P-9. (10) Letter dated 21.06.2010 (attached as annexure P-10. (11) Form 15 dated 21.06.2010 annexure P-11. (12) Form 13 vide No. CTL-drugs/2010-5901 dated 30.08.2010 annexure-P-12. (13) Form 13 vide no. CTL drugs/2010-5904 dated 30.08.2010 annexure P-13. (14) Copy of letter No. NHN/drugs/10/94 dated 16.09.2010 annexure P-14. (15) Copy of letter No. NHN/drugs/10/95 dated 16.09.2010 annexure P-15. (16)Copy of form 16 dated 16.09.2010 annexure P-16. (17) Copy of custody orders application dated 16.09.2010 annexure P-17. (18) Copy of custody orders annexure P-18. (19) Reply letter of accused No.1 dated 17.9.2010 annexure P-19. (20) Copy of invoice no. R 590 dated 23.02.2010 annexure P-20. (21) Copy of invoice no. R 593 dated 25.02.2010 annexure P-21. (22) Copy of invoice no. R 667 dated 10.05.2010 annexure P-22. (23) Copy of invoice no. R 668 dated 11.05.2010 annexure P-23. (24) Copy of invoice No R 672 dated 18.05.2010 annexure P-24. (25) Copy of letter No. NHN/drugs/10/99 dated 30.09.2010 annexure P-25. (26) Copy of letter No. NHN/drugs/10/100 dated 30.09.2010 annexureP-26 (27) Speed post receipt No. EE 707294060 dated 30.09.2010 annexure P-27. (28) Copy of invoice no. 030-000431 dated 04.05.2010 annexure P-28. (29) Copy of invoice No. 030-000358 dated 28.04.2010 annexure P-29. (30) Copy of invoice no. 030-004297 dated 16.02.2010 annexure P-30. (31) Copy of wholesale license on form 20B annexure P-31. (32) Copy of wholesale license on form 21B annexure P-32.

(33) Copy of letter No. NHN/drugs/10/109 dated 28.10.2010 annexure P-33. (34) Copy of letter No.NHN/drug/10/110 dated 28.10.2010 annexure P-34. (35) Speed post receipt No. EE 707425295 dated 30.10.2010 annexure P-35. (36) Copy of letter dated 23.11.2010 alongwith other document annexure P-36/1 to 36/12. (37) Copy of letter dated 23.11.2010 along with other documents annexure P-37/1 to P-37/11. (38) Copy of letter No. NHN/drugs/10/134 dated 08.12.2010 annexure P-38. (39) Copy of letter No. NHN/drugs/10/135 dated 08.12.2010 annexure P-39. (40) Speed post receipt No. EE734800755 dated 10.12.2010 annexure P-40 (41) Reply dated 27.12.2010 of manufacturing company pertaining to batch No. ERZ-06 along with documents supplied annexure P41/1 to P41/22. (42) Reply dated 27.12.2010 of manufacturing company pertaining to batch No. ERZ-15 along with documents supplied annexures P-42/1 to P-42/23. (43) Copy of letter No.HFW-NHN/drugs/10/223 dated 03.02.2011 annexure P-43. (44) Permission to launch prosecution dated 14.07.2011 annexure P-44. (45) Letter No. HFW-H (drugs) 148/07 dated 14.02.2013 along with copies of documents supplied by drugs controller Uttarakhand annexures P-45/1 to P-45/13, it is held that there are sufficient grounds for proceedings against petitioners in present case.

16. It is well settled law that at the stage of issue of process Magistrate is mainly concerned with allegations made in the complaint. At the summoning stage Magistrate should not enter into detailed discussions of merits or demerits of the case. It is well settled law that evaluation of truth or falsity of complaint would be possible only after evidence is recorded. It is well settled law that disputed and controversial facts should not be made basis for quashing criminal proceedings. It is well settled law that in complicated facts the High court power to quash criminal proceedings should be exercised sparingly with circumspection. See 1995 (2) SCC 449 title State of T.N. Vs. Thirukkural Perumal. See 1992 Supp (1) SCC 335 title State of Haryana and others Vs. Bhajan Lal and others. See 2012 (10) SCC 155 title State of Madhya Pradesh Vs. Surendra Kori. See JT 2015 (3) SC 185 title Tarnamani Parakh Vs. State of M.P. and others. See AIR 2016 SC 122 title Madam Razak Vs. State of Bihar and others. See 2004 (1) SCC 691 title State of M.P. Vs. Awadh Kishore Gupta and others. See AIR 2005 SC 359 State of Orissa Vs. Debendra Nath Padhi. See 2009 (4) SCC 443 title Mahesh Chaudhary Vs. State of Rajasthan. See AIR 2014 SC 2567 title Rishipal Singh Vs. State of U.P. See AIR 1976 SC 1947 title Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and others. See AIR 1963 SC 1430 title Chandra Deo Singh Vs. Prokash Chandra Bose and another.

17. Rulings cited by learned Advocate appearing on behalf of petitioners i.e. 2007 (2) ACR 1346 (SC) title N.K.Wahi Vs. Shekhar Singh and others, 2005 (3) ACR 3082 title S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and another, 2009 (2) ACR 1650 (SC) title Ramrajsingh Vs. State of M.P., AIR 2012 SC 2795 title Aneeta Hada Vs. Godfather Travels and Tours Pvt. Ltd. are relating to Negotiable Instrument Act 1881 and are not relating to Drugs & Cosmetic Act 1940. Hence rulings cited supra are not applicable in Drugs & Cosmetics Act 1940 case.

18. Ruling cited by learned Advocate appearing on behalf of petitioners i.e. 2013 (5) ALLMR 551 title Shashank Yankatesh Manohar Vs. Union of India is relating to Foreign Exchange Management Act 1999 (FEMA) and is not relating to Drugs & Cosmetics Act 1940. Hence ruling cited supra is not applicable in Drugs& Cosmetics Act 1940 case.

19. Rulings cited by learned Advocate appearing on behalf of petitioners i.e. ILR (1999) MP 704 title Vishal Pharmaceuticals and another Vs. State of M.P, ILR 1991 Karnataka 2368 title State of Karnataka Vs. C.B.Sheelavanth, 2005 (2) GLR 1518 Vallabhbhai Popatbhal Vs. State of Gujarat, 2012 Cri.L.J 4115 title State by Inspector of Drugs Chidambaram Vs. J.Mohamed Rafic, 2008 (7) SCC 196 title Medicamen Biotech Ltd. and another Vs. Rubina Bose Drug inspetor, 2011 (2) ACR 1592 (SC) title Rekha Vs. State of Tamil Nadu, 1999 (2) ALD (Cr.) 908 title State of Haryana Vs. Unique Farmaid P.Ltd. ors. AIR 1998 SC 2327 title State of Haryana Vs. Brij Lal Mittal and others, 2003 Bom CR (Cri.) 1522 title Umesh Sharma Vs. S.G.Bhakta Drugs Inspector and others are relating to final judgments after completion of entire trial. Rulings are not relating to summoning order. Ruling would be appreciated at the time of announcement of final judgment by learned Trial Court after completion of entire trial.

20. Rulings cited by learned Advocate appearing on behalf of petitioners i.e. 2003 AllMR (Cri) 758 title Venkaiah Chowdary Nannapaneni and others Vs. State of Maharashtra, 1997 (99) BOMLR 438 title Ramanbhai B.Patel and others Vs. S.R.Sharma and another, 1985 Cri. L.J 1572 title D.K.Javer and others Vs. State, 2009 (111) BOMLR 973 title United Phosphorus Ltd Vs. State of Maharashtra and others, 2009 (1) Shim. L.C 284 title Indofil Chemical Company Vs. State of H.P., 2005 (14) criminal 87 title Shashank Bhargava Vs. State of Punjab and another, 1998 Cri. L.J 3920 title Rajendra Kumar Mohanty Vs. P.K.Das would be considered by learned Trial Court at the stage of notice of accusation or at the stage of framing charge in accordance with law when cognizance of offence would be taken. Present case is at the stage of enquiry before learned Trial Court. It is well settled law that mere filing of complaint is not taking cognizance of offence. Taking cognizance of offence is different from filing complaint. Court take cognizance of offence when it applies its mind to give notice of accusation or notice of charge to accused persons. It is sine qua non for trial and it cannot be equated with issuance of process. See AIR 1961 SC 986 title Gopal Dass Vs. State of Assam. See AIR 2000 SC 2946 Narsing Dass Tapadia Vs. Goverdhan Dass. See AIR 2008 SC 1213 title S.K.Sinha Chief Enforcement Officer Vs. M/s Videocon International Ltd. It is not expedient in the ends of justice to consider rulings at the stage of enquiry of criminal case. It is well settled law that at the stage of summoning accused persons under section 204 of code of criminal procedure 1973 Judicial Magistrate should simply satisfy himself whether there are sufficient grounds for proceedings against accused persons or not. In view of above stated facts point No.1 is answered in negative.

Point No.2 (Final Order).

21. In view of findings upon point No.1 petition is dismissed. Observation made hereinabove is strictly for the purpose of deciding present petition and shall not effect merits of the case in any manner. File of learned Trial Court along with certify copy of order be sent back forthwith. Parties are directed to appear before learned Trial Court on 30.9.2016. Petition filed under Section 482 of the code of criminal procedure 1973 is disposed of. All pending application(s) if any are also disposed of.

**********8

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

Oriental Insurance Company. .....Appellant.

Versus

Smt. Malti & others. .....Respondents.

FAO No. 393 of 2011
Reserved on: 14.09.2016
Date of on: 19.09.2016

Motor Vehicles Act, 1988- Section 166- Deceased was travelling in the vehicle as owner of goods- he died when the vehicle met with an accident - his monthly salary was Rs. 14,676/- and he was stated to be earning Rs. 5,000/- from agriculture- petition was allowed by MACT- held, that claimants had led the evidence to prove the rashness and negligence of the driver- no evidence was led by the respondent to prove that accident had taken place due to mechanical defect or any other reason- it was duly established that vehicle was hired for carrying goods for marriage and therefore, deceased could not be said to be a gratuitous passenger - no cross objections were filed and enhancement cannot be granted in absence of the same- appeal dismissed. (Para-8 to 13)

For the appellant: Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents: Mr. Vinod Thakur, Advocate, for respondents No. 1 to 5.
Mr. Nimish Gupta, Advocate, for respondent No. 6.
Mr. N.S. Chandel, Advocate, for respondent No. 7.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant-Oriental Insurance Company, who was respondent No. 1 before the learned Tribunal below (hereinafter referred to as "the appellant"), under Section 173 of the Motor Vehicles Act, 1988 (as amended by the Act of 1994) (hereinafter referred to as "the Act") against the award dated 16.07.2011, passed by the Motor Accident Claims Tribunal, Fast Track Court, Chamba, H.P., in M.A.C. No. 1/2011.

2. Briefly stating the facts giving rise to the present appeal are that respondents No. 1 to 5/claimants, who were the petitioners before the learned Tribunal below (hereinafter referred to as "the claimants), maintained a petition under Section 166 of the Act against the appellant/Insurance Company/respondent No. 1 in the learned Tribunal below (hereinafter referred to as "respondent No. 1"), respondents No. 6 and 7 herein, who were respondents No. 2 and 3, respectively, being owner and driver of the ill fated vehicle, which met with an accident, (hereinafter referred to as "respondents No. 2 and 3") for compensation on account of death of husband of petitioner No. 1, Smt. Malti, and father of petitioners No. 2 to 5, which was caused due to the rash and negligent driving of respondent No. 3 while driving the vehicle, bearing registration No. HP 68-0186 (pick up) owned by respondent No. 2.

3. As per the petitioners Shri Man Singh (deceased), who was husband of petitioner No. 1 and father of petitioners No. 2 to 5, on 04.10.2010 was traveling from Dand to Chakhotar, being owner of goods, in vehicle No. HP 68-0186. the said vehicle was being driven by respondent No. 3 in a rash and negligent manner and while negotiating a curve near Falanju Nallah the vehicle fell down into the gorge, which resulted into the death of the deceased. It is further contended that the deceased was 53 years of age at that time and was employed as Beldar/Mate in HPPWD, Salooni. His monthly salary was Rs.14,676/- and he was earning Rs.5000/- from agriculture. The report qua accident was registered at Police Station, Kihar, vide FIR No. 70/2010 and post mortem of the deceased was also conducted. As per post mortem, the deceased had died due to intra cranial haemorrhage and head injury. Vehicle was owned by respondent No. 2 and it was insured with respondent No. 1 (appellant herein). As per the petitioners, they were dependent upon the deceased and they have been deprived of the love and affection and they have also suffered mental agony, pain, financial loss etc.

4. The petition filed before the learned Tribunal was resisted by the respondents and they have filed separate replies. Respondent No. 1/Insurance Company took preliminary objection viz., maintainability, driver of the vehicle was not having valid driving license, the deceased was traveling as a gratuitous passenger and the vehicle met with an accident due to overloading, as more than ten passengers were traveling in it at the time of accident. On merits, respondent No. 1 denied the contents of the petition and reiterated that the deceased was traveling as a gratuitous passenger and the amount claimed is excessive. It is also contended that the vehicle was not having valid route permit. Respondent No. 2, while filing reply to the petition, took preliminary objection that he is not liable to pay any amount as the vehicle was duly insured with respondent No. 1/Insurance Company, vide Police No. 91189902, w.e.f. 14.11.2009 to 13.11.2010. Therefore, the liability to indemnify the claim is on respondent No. 1. On merits, it is contended that the deceased was traveling in the vehicle as owner of the goods. On the other hand, respondent No. 3 also filed reply, wherein he has stated that FIR was recorded on twisted facts and that he was driving the vehicle carefully, but due to mechanical defect the vehicle went out of control and fell into a gorge.

5. The learned Tribunal below has framed the following issues:

> *"1. Whether deceased Man Singh had died on 04.10.2010 in the motor vehicle accident involving vehicle No. HP 68-0186 (pick up) near Nallah Falanju, Tehsil Salooni due to rash or negligent driving of the driver rattan Chand of the offending vehicle? OPP.*

2. *If issue No. 1 is proved in affirmative, whether the petitioners being dependent on deceased are entitled for the grant of compensation. If so, to what amount? OPP.*

3. *Whether the petition is not maintainable? OPR.*

4. *Whether the driver of the vehicle was not having valid driving licence? OPR.*

5. *Whether the deceased was gratuitous passenger? OPR.*

6. *Whether the accident had taken place due to over loading of the passengers in the ill fated vehicle? OPR.*

7. *Whether the vehicle waqs not having valid registration certificate? OPR.*

8. *Whether the petition is not maintainable? OPR-2.*

9. *Relief."*

After deciding issues No. 1 and 2 in favour of the petitioners and issues No. 3 to 8 against the respondent, allowed the petition. Hence the present appeal.

6. Heard. Learned Senior Counsel for the appellant herein has argued that the learned Tribunal below has not appreciated the evidence as well as the pleadings of the parties correctly. He has also argued that the learned Tribunal below has failed to take into consideration the fact that the deceased was a gratuitous passenger. He has further argued that even the compensation awarded is on a very higher side as well as the petition was collusive *inter se* the petitioners and respondents No. 2 and 3. He has further argued that even the negligence on the part of the driver was not proved on record. On the other hand, learned counsel for the claimants (respondents No. 1 to 5 herein) has argued that the deceased was carrying the goods, that is, ration for the marriage of his son and this fact has come on record. He has further argued that by oral evidence and from FIR, the negligence on the part of respondent No. 3 (driver of the vehicle) is proved and also the fact that other witnesses have also stated that the accident has occurred due to the negligence of the driver. He has argued that the learned Tribunal below has awarded less compensation, but at the same time he has averred that he has neither filed any appeal nor any cross objection. The learned counsel for respondent No. 6 herein (owner of the vehicle) has argued that it is amply proved on record that goods were being transported in the said vehicle, which belonged to the deceased and the vehicle was hired for Rs.800/-. He has further argued that the appeal deserves dismissal. Learned counsel for respondent No. 7 herein has adopted the arguments, as advanced by the learned counsel for respondent No. 6.

7. To appreciate the rival contentions of the learned counsel for the parties I have gone through the record in detail.

8. In order to prove their case, the respondents No. 1 to 5 (petitioners before the Tribunal below) have examined petitioner No. 1, Smt. Malti, as PW-1, who has tendered her affidavit, Ex. PW-1/A. PW-2, Shri Tula Ram, has tended his affidavit, Ex. PW-2/A. PW-3, Shri Pushpender Singh, Clerk, of HPPWD was examined to prove the income of the deceased. PW-4 HHC Diwan Chand, Police Station Kihar was examined to prove the FIR and PW-5 Dr. Manoj Thakur, conducted the post mortem of the deceased and he has proved on record the post mortem report, Ex. PW-5/A.

9. Smt. Malti (PW-1) has filed affidavit, Ex. PW-1/A, which corroborates the contents of the petition she deposed that on 04.10.2010 at about 4:15 p.m. the deceased was traveling in the vehicle No. HP 68-0186, as owner of the goods. The said vehicle met with accident near Nallah Falanju on Dand Chakotar road due to the rash and negligent driving of respondent No. 3. PW-1 has further stated that the deceased died on account of injuries sustained in the accident. As per her, she is wife of the deceased and petitioners No. 2 to 5 are sons and daughter of the deceased. She was subjected to extensive cross-examination but nothing contradictory has come qua the accident. She has denied that the accident occurred due to mechanical failure and that the accident was not the result of rash and negligent driving. PW-1 has disclosed for the first time that her husband was traveling as owner of the goods, but there was no occasion for her to state this fact anywhere else. She has denied that her husband was

gratuitous passenger and more than ten persons were there in the vehicle due to overloading the accident had occurred. There is no reason to disbelieve petitioner No. 1, as she lost her husband. Her version stands fortified by PW-2, Shri Tula Ram, who has also tendered his affidavit of evidence, Ex. PW-2/A. PW-2 has stated that the deceased was traveling in the ill fated vehicle alongwith the goods of marriage, but the vehicle fell into the Nallah, which was the result of rash and negligent driving of the driver of the vehicle. He has denied in his cross-examination that the accident had taken place due to the mechanical defect or that the driver was not rash or negligent. He has also denied that no goods of marriage were being transported by the deceased claiming that the deceased had bought the articles of marriage/Dham in his presence from the shop of Pawan Kumar. The version of this witness is fortified by the version of PW-1, therefore the versions of PW-1 and PW-2 cannot at all be doubted. This witness has also denied that the deceased was traveling as gratuitous passenger or there were ten persons sitting in the vehicle and the accident had occurred due to the overloading of the vehicle.

10. The petitioners have also examined HHC Diwan Chand (PW-4) who has proved FIR No. 70/10, dated 04.10.2010, under Sections 279, 337 and 304-A IPC, Ex. PW-4/A. As per the contents of FIR, Ex. PW-4/A, the ill fated vehicle met with accident at about 4:15 p.m. at Falanju Nallah, due to rash and negligent driving. It is mentioned in the FIR, Ex. PW-4/A, that the deceased was walking on foot alongwith Khajanu and boarded the ill fated vehicle near Dand and Iqbal, Pawan Kumar, Subhan, Ahamad Deen and Yog Raj were also sitting in the vehicle, who sustained injuries. However, said Khajanu was not examined by respondent No. 1 that the deceased was not having any goods. Neither any injured was examined nor their MLCs have been placed on record demonstrating that they sustained the injuries in the said accident. If so, there are no merits in the stand of respondent No. 1 that the deceased was not traveling as owner of the goods or that there were more than 10 persons in the vehicle or that overloading was the cause of accident.

11. In the instant case the post mortem of the deceased was conducted at CHC, Salooni, and Dr. Manoj Thakur, M.O. (PW-5) conducted the post mortem of the deceased on 05.10.2010 and he has issued report, Ex. PW-5/A. As per him, the cause of death was intra cranial haemorrhage and the injury was possible in a vehicular accident. On the other hand, respondent No. 2 has appeared in the witness-box as RW-1. However, he did not utter a single word that the accident took place due to the mechanical failure or overloading. Respondent No. 1 did not produce any evidence. Respondent No. 3 has also not stepped into the witness-box to substantiate that the mechanical defect was the cause of accident. In the absence of any cogent evidence, it stands duly established that the accident was the result of rash and negligent driving of respondent No. 3.

12. It has come on record that while PW-2, Shri Tula Ram, was being cross-examined by respondent No. 1 (appellant herein) that the ill fated vehicle was hired for Rs.800/- by the deceased and the deceased was carrying the goods for marriage. The onus was on respondent no. 1/Insurance Company to prove that the deceased was a gratuitous passenger and no positive evidence has been led by respondent No. 1 to discharge its onus, which was on respondent No. 1. Therefore, I find no illegality in the findings arrived at by the learned Tribunal below, holding that the deceased was not the gratuitous passenger. It has also come on record that the vehicle met with an accident when respondent No. 3 (driver) could not control the vehicle and the vehicle fell into a *khud.* No mechanical defect in the vehicle has been proved on record by respondents No. 2 and 3 and, therefore, the only conclusion is that the vehicle met with an accident due to rash and negligent driving of respondent No. 3. I find no infirmity with the impugned award, so passed by the learned Tribunal below. At the same time, as far as the compensation is concerned, there is no cross-objection filed on behalf of the petitioners in the appeal and simply on the basis of arguments here and there no enhancement can be granted to the petitioners, as there is no cross-objection in the appeal, otherwise also the quantum of compensation is in accordance with settled principles.

13. Resultantly, the findings arrived at by the learned Tribunal below are just, reasoned and after appreciating the facts and evidence, which has come on record, to their true perspective and the law has been applied correctly. Thus, no interference is required. Consequently, the appeal is dismissed with no orders as to costs.

14. In view of the above, the appeal stands disposed of, as also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J

Rajeev Chauhan ... Petitioner

Versus

State of Himachal Pradesh & others ...Respondents

CWP No. 2748 of 2014-E
Judgment reserved on : 2.09.2016.
Date of Decision : September 19, 2016

Constitution of India, 1950- Article 226- Petitioner had sold the forest produce grown over his private land to the Corporation- petitioner was entitled to 50% of the basic rate on the basis of royalty- petitioner sought the increase of the amount as per notification dated 3.4.1991, which was upheld repeatedly by the Courts- notification provides for grant of benefit of higher prices to the owner of the produce - deprivation of statutory claim is nothing but an infringement of a constitutional right- right cannot be negated on the basis of delay- petitioner approached the authorities after the delivery of the judgment of the Apex Court- order rejecting claim of the petitioner quashed with a direction to the Corporation to calculate value of the forest produce sold by the petitioner in terms of notification dated 3.4.1991 along with interest @ 6% per annum. (Para-1 to 29)

Cases referred:

Tukaram Kana Joshi and others vs. Maharashtra Industrial Development Corporation and others, (2013) 1 SCC 353

K. Thimmappa & others vs. Chairman, Central Board of Directors, State Bank of India & another, (2001) 2 SCC 259

Ramchandra Shankar Deodhar vs. State of Maharashtra, (1974) 1 SCC 317

Godavari Sugar Mills Limited v. State of Maharashtra and others, (2011) 2 SCC 439

Kunha Yammed & others vs. State of Kerala & another, (2000) 6 SCC 359

U.P. Pollution Control Board & others vs. Kanoria Industrial Ltd. & another, (2001) 2 SCC 549

Bharat Sanchar Nigam Limited vs. Ghanshyam Dass (2) & others, (2011) 4 SCC 374

State of Uttar Pradesh & others vs. Arvind Kumar Srivastava & others, (2015) 1 SCC 347

Prabhjot Singh Mand & others vs. Bhagwant Singh & others, (2009) 9 SCC 435

Arvinder Singh Bains vs. State of Punjab, (2006) 6 SCC 673

Eastern Coalfields Limited vs. Tetulia coke Plant Private Limited & others, (2011) 14 SCC 624

Ashoka Smokeless Coal India (P) Ltd. vs. Union of India, (2007) 2 SCC 640

S. J. Coke Industries Private Limited & others vs. Central Coalfields Limited & others, (2015) 8 SCC 72

Delhi Administration vs. Gurdip Singh Uban & others, (1999) 7 SCC 44

For the petitioner : Mr. Bipin C. Negi, Sr. Advocate with Mr. Narender Thakur, Advocate, for the petitioner.

For the respondent : Mr. Ram Murti Bisht and Mr. R. S. Verma, Addl. Advocate Generals for respondent No. 1/State.

Mr. Bhupinder Pathania, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In exercise of powers vested under Section 7 of the Himachal Pradesh Forest Produce (Regulation of Trade), Act, 1982 (hereinafter referred to as the 'Act') the Government of Himachal Pradesh issued notification dated 3.4.1991 (Annexure P-1), regulating the manner in which payments were required to be made to the owners of private forests, whose forest produce was purchased by the H.P. State Forest Corporation. The notification itself provides for complete mechanism of payment on economic basis/system.

2. Validity of such notification came up for consideration before a Division Bench of this Court in CWP No. 629 of 1991, titled as *Ishwar Dutt & others vs. State of Himachal Pradesh & others,* which was disposed of vide judgment dated 18.12.1996, wherein the Court not only held it to be valid, but also clarified as under:

> "5. As regards the notification, which is found in Annexure P-11, we do not find any merit in the contention urged by learned counsel for the petitioners. We are not able to find out anything, which is contrary to the provisions of the Act or Rules or any provisions of the Constitution and the principles of natural justice. The economic system, which has been invoked and adopted by the Forest Corporation has been found by the Government to be enforceable and acceptable and on that basis, the notification has been issued. Section 7 of the Act contains two provisos. Under the first proviso, if the Committee fails to tender advice by the 15th of February proceeding the financial year, the State Government may proceed to fix the price without consultation of the Committee. That will arise only if there is a Committee and it fails to tender advice for fixing the price in different forest Divisions. The second proviso reads that the State Government through its authorized officer or agent may purchase the forest produce till the constitution of the Committees at a price mutually agreed upon between the parties to the sale. Under the second proviso, it is open to the State Government to fix the price even if there is no Advisory Committee, under Sections 6 and 7 of the Act. It is only the said provision, under which the notification dated 3.4.1991 has been issued by the Government fixing the price for different forest produce. We do not find any illegality whatever in the said notification.
>
> 6. The said provision referred to the price mutually agreed upon between the parties to the sale. In this case, there is an agreement between the power agent of the parties and the Forest Corporation. Under the agreement, the party had agreed to the fixation of the price, as per the economic system, which was in vogue previously. The Government notification fixing the price at a particular rate says that if the price obtained under the economic system is higher that has to be paid. The Government notification says that whichever is the higher price it is to be adopted and paid for the trees in question. In such a situation, we do not find any illegality whatever in the notification dated 3.4.1991. Consequently, that contention fails." [Emphasis supplied]

3. It is a matter of record that not only the respondent/Corporation accepted the aforesaid findings but moved an application, seeking implementation thereof, in letter and spirit.

4. One Sh. Ashok Pal Sen, who perforce had to sell his produce to the State Forest Corporation, filed a petition before this Court, being CWP No. 900 of 2000, titled as *Ashok Pal Sen vs. The H.P. State Forest Corporation,* seeking benefits under the very same notification dated 3.4.1991, for the reason that the State Government had not issued any other notification under Section 7 of the Act, for the Financial Year 1994 – 1995. Learned Single Judge vide judgment dated 5.1.2004, by relying upon the decision rendered in *Ishwar Dutt (supra)* allowed the petition by according benefits under the very same notification. In effect, petitioner was held entitled to

the price of forest produce at a rate which was higher than the agreed rates, on the basis of royalty. Criterion adopted was that of economic basis. Eventually petition came to be allowed in the following terms:

> "25. In view of the aforesaid discussion, this writ petition is allowed and as a result of it, petitioner is held entitled for a sum of Rs. 6,31,604/- and the respondent-Corporation is directed to pay the same as per Annexure P-8 having been worked out on economic basis, by or before 1.3.2004 by remitting the same through the banker's cheque or demand draft to the petitioner at its own expense. In case needful is not done by or before this date, respondent shall also be liable for payment of interest on this amount at the rate of 6% per annum with effect from 1.7.1996 till the date of its payment. No costs."

5. It is not in dispute that the said decision came to be affirmed by the Division Bench of this Court in terms of judgment dated 22.3.2004, rendered in LPA No. 6 of 2004, titled as *The H.P. State Forest Corporation vs. Ashok Pal Sen.*

6. Still aggrieved, the Corporation unsuccessfully agitated the issue before the apex Court, but however, on 2.12.2010, Civil Appeal No. 531 of 2005, titled as *H.P. State Forest Corporation Ltd. vs. Ashok Pal Sen,* came to be dismissed on merits in the following terms:

> "We have heard learned counsel for the parties.
>
> We find no merit whatsoever in this appeal preferred by the Corporation against the impugned judgment. The impugned judgment merely followed the decision of another Division Bench in Ishwar Dutt and others vs. State of Himachal Pradesh and others made in Civil Writ Petition No. 629 of 1991 dated 18.12.1996. The said judgment squarely applies to the facts on hand.
>
> This appeal is accordingly dismissed."

7. Even a Review Petition [Rev. Pet. (C) No. 1279 of 2011 in Civil Appeal No. 531 of 2005] came to be dismissed by the apex Court on 25.8.2011.

8. It is a matter of record that even the present petitioner, vide agreement dated 8.2.1995 (Annexure P-6) had sold the forest produce grown over his private land, to the respondent-Corporation. In terms of the agreement, petitioner was entitled to 50% of the basic rate on the basis of royalty. It is not in dispute that case of the present petitioner is identical to that of the petitioner(s) in Ishwar Dutt (supra) and Ashok Pal Sen (supra). Undisputedly no other notification under Section 6/7 of the Act came to be issued by the respondent-Corporation, and the only notification governing the field was dated 3.4.1991, subject matter of earlier cases. With the matter having come to rest in the case of Ashok Pal Sen (supra), present petitioner, vide communication dated 30.11.2011, seeking parity, requested the Corporation for release of payments, on the basis of very same notification and in terms of the aforesaid decisions. But however, such claim came to be refuted by the Corporation for the reason that benefit accorded by the Court was specific to the petitioner(s) therein and that, in any event, petitioner's claim was barred by limitation.

9. Noticeably the Act itself postulates mutually binding reciprocal obligations upon the parties. (i) Owner of the forest produce grown over private land is under an obligation to sell the same only to the State Government or its agent; (ii) Equally the State/its agent is to compensate the owner by making payment of the produce. All such payments are regulated by and are required to be made in consonance with the statutory provisions. Significantly relationship between the parties is governed by and under the Statute and not the contract alone.

10. The notification in question categorically provides for grant of benefit of higher price to the owner of the produce. And this is notwithstanding the agreement having entered into between the parties.

11. Deprivation of statutory claim is nothing but an infringement of a constitutional right. When the State deprives the citizens of their properties, it is a clear violation of Article 21 of

the Constitution of India. In a Welfare State, the statutory authorities are bound to pay adequate compensation.

12. After observing that Article 300-A of the Constitution of India only limits the power of the State that no person shall be deprived of his property, save by authority of law, the apex Court in *Tukaram Kana Joshi and others vs. Maharashtra Industrial Development Corporation and others,* (2013) 1 SCC 353, clarified that even after cessation of right of property as a fundamental right, acquiring the property of a citizen most certainly tantamounts to deprivation and such deprivation can take place only in accordance with "law".

13. The Court in *Tukaram (supra)* further observed that the right to property is now considered to be, not only a constitutional or a statutory right, but also a human right. Though, it is not a basic feature of the Constitution or a fundamental right. Human rights are considered to be in the realm of individual rights, such as the right to health, the right to livelihood, the right to shelter and employment.

14. Whether on the ground of laches and delay itself, such right can be defeated and petition thrown or not, more so after its admission, is an issue which requires consideration, in view of the stand taken by the respondent. The answer to the same, in my considered view lies in the Statute and Part-III of the Constitution itself. Such right cannot be negated purely on account of delay and laches for the following reasons. (i) Relationship *inter se* the parties is governed by the Statute/Subordinate Legislation in the shape of notification; (ii) The Government/its agent is under an obligation to pay the amount to the owner of the forest produce. This has to be in terms of the Statute/notification issued there under. Failure to comply with the statutory notifications, cannot come in the way of the rightful claimant, in having his produce sold at marketable rates. Significantly acquisition of forest produce is by force of law, leaving the owner no choice but to perforce sell it to the State Government/its agent; (iii) There is a corresponding obligation cast upon the State/its agent to pay the amount in terms of the Statute. This has to be so done with promptitude. Of its own, State is under an obligation to discharge its statutory obligations and make payments, more so in the absence of any disputed claim. In the year 1996 and 2004 itself, this Court had settled the issue of rights and obligation of the State. They ought to have come forward in releasing the payments with certain amount of speed and dispatch, rather than forcing the parties to litigate for adjudication of their claims; (iv) The matter attained finality with the dismissal of Civil Appeal on 2.12.2010 as also Review Petition by the Apex Court on 25.8.2011, whereafter petitioner promptly agitated the issue in terms of his communication dated 30.11.2011 (Annexure P-8).

15. An identical issue came up for consideration before the apex Court in *K. Thimmappa & others vs. Chairman, Central Board of Directors, State Bank of India & another,* (2001) 2 SCC 259 wherein it was argued that if treatment meted out to the petitioners was found to be discriminatory and as such violative of Article 14 of the Constitution of India, the Court would not throw away the petitions merely on the ground of laches. Despite the issue having been agitated after a period of one/ two decades, such contention came to be accepted by the Court. Petitioner had sought reliance on the following observations made by the apex Court in *Ramchandra Shankar Deodhar vs. State of Maharashtra,* (1974) 1 SCC 317:

> "Moreover, it may be noticed that the claim for enforcement of the fundamental right of equal opportunity under Article 16 is itself a fundamental right guaranteed under Article 32 and this Court which has been assigned the role of a sentinel on the *qui vive* for protection of the fundamental rights cannot easily allow itself to be persuaded to refuse relief solely on the jujune ground of laches, delay or the like."

16. In *Godavari Sugar Mills Limited v. State of Maharashtra and others,* (2011) 2 SCC 439, the apex Court culled out the following principles:

> "(i) Normally a petition under Article 226 of the Constitution of India will not be entertained to enforce a civil liability arising out of a breach of a contract or a tort

to pay an amount of money due to the claimants. The aggrieved party will have to agitate the question in a civil suit. *But an order for payment of money may be made in a writ proceeding, in enforcement of statutory functions of the State or its officers*, [vide *Burmah Construction Co. v. State of Orissa*, 1962 Supp(1) SCR 242].

(ii) If a right has been infringed -whether a fundamental right or a statutory right and - the aggrieved party comes to the court for enforcement of the right, it will not be giving complete relief if the court merely declares the existence of such right or the fact that existing right has been infringed. The High Court, while enforcing fundamental or statutory rights, has the power to give consequential relief by ordering payment of money realized by the government without the authority of law [vide *State of M.P. v. Bhailal Bhai*, AIR 1964 SC 1006].

(iii) A petition for issue of writ of mandamus will not normally be entertained for the purpose of merely ordering a refund of money, to the return of which the Petitioner claims a right. The aggrieved party seeking refund has to approach the civil court for claiming the amount, *though the High Courts have the power to pass appropriate orders in the exercise of the power conferred under Article 226 for payment of money*, [vide *Suganmal v. State of M.P.*, AIR 1965 SC 1740].

(iv) *There is a distinction between cases where a claimant approaches the High Court seeking the relief of obtaining only refund and those where refund is sought as a consequential relief after striking down the order of assessment etc*. While a petition praying for mere issue of a writ of mandamus to the state to refund the money alleged to have been illegally collected is not ordinarily maintainable, if the allegation is that the assessment was without a jurisdiction and the taxes collected was without authority of law and therefore the Respondents had no authority to retain the money collected without any authority of law, the High Court has the power to direct refund in a writ petition [vide *Salonah Tea Co. Ltd. v. Superintendent of Taxes*, (1988) 1 SCC 401].

(v) It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, where the facts are not in dispute, where the collection of money was without the authority of law and there was no case of undue enrichment, there is no good reason to deny a relief of refund to the citizens. But even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be refused on several grounds depending on facts and circumstances of a given case. [Vide *U.P. Pollution Control Board v. Kanoria Industrial Ltd*, (2001) 2 SCC 549].

(vi) Where the lis has a public law character, or involves a question arising out of public law functions on the part of the State or its authorities, access to justice by way of a public law remedy under Article 226 of the Constitution will not be denied. [Vide *Sanjana M. Wig v. Hindustan Petroleum Corporation Ltd.*, (2005) 8 SCC 242.] [Emphasis supplied]

17. On the question of delay, the Court in *Tukaram (supra)* observed as under:

"12. The State, especially a welfare State which is governed by the Rule of Law, cannot arrogate itself to a status beyond one that is provided by the Constitution. Our Constitution is an organic and flexible one. Delay and laches is adopted as a mode of discretion to decline exercise of jurisdiction to grant relief. There is another facet. The Court is required to exercise judicial discretion. The said discretion is dependent on facts and circumstances of the cases. Delay and laches is one of the facets to deny exercise of discretion. It is not an absolute

impediment. There can be mitigating factors, continuity of cause action, etc. That apart, if the whole thing shocks the judicial conscience, then the Court should exercise the discretion more so, when no third party interest is involved. Thus analysed, the petition is not hit by the doctrine of delay and laches as the same is not a constitutional limitation, the cause of action is continuous and further the situation certainly shocks judicial conscience.

13. The question of condonation of delay is one of discretion and has to be decided on the basis of the facts of the case at hand, as the same vary from case to case. It will depend upon what the breach of fundamental right and the remedy claimed are and when and how the delay arose. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226, nor is it that there can never be a case where the Courts cannot interfere in a matter, after the passage of a certain length of time. There may be a case where the demand for justice is so compelling, that the High Court would be inclined to interfere in spite of delay. Ultimately, it would be a matter within the discretion of the Court and such discretion, must be exercised fairly and justly so as to promote justice and not to defeat it. The validity of the party's defence must be tried upon principles substantially equitable. (Vide: *P.S. Sadasivaswamy v. State of T.N.*, 1974 AIR (SC) 2271; *State of M.P. & Ors. v. Nandlal Jaiswal & Ors.*, 1987 AIR(SC) 251; and *Tridip Kumar Dingal & Ors. v. State of West Bengal & Ors.*, (2009) 1 SCC 768;)

14. No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. Discretion must be exercised judiciously and reasonably. In the event that the claim made by the applicant is legally sustainable, delay should be condoned. In other words, where circumstances justifying the conduct exist, the illegality which is manifest, cannot be sustained on the sole ground of laches. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in the injustice being done, because of a non- deliberate delay. The court should not harm innocent parties if their rights have infact emerged, by delay on the part of the Petitioners. (Vide: *Durga Prasad v. Chief Controller of Imports and Exports & Ors.*, 1970 AIR(SC) 769; *Collector, Land Acquisition, Anantnag & Anr. v. Mst. Katiji & Ors.*, 1987 AIR(SC) 1353; *Dehri Rohtas Light Railway Company Ltd. v. District Board, Bhojpur & Ors.*, 1993 AIR(SC) 802; *Dayal Singh & Ors. v. Union of India & Ors.*, 2003 AIR(SC) 1140; and *Shankara Co-op Housing Society Ltd. v. M. Prabhakar & Ors.*, 2011 AIR(SC) 2161)

15. In the case of *H. D. Vora v. State of Maharashtra & Ors.*, 1984 AIR(SC) 866, this Court condoned a 30 year delay in approaching the court where it found violation of substantive legal rights of the applicant. In that case, the requisition of premises made by the State was assailed."

18. It is a settled principle of law that with the leave to appeal having been granted and the appellate jurisdiction of the Supreme Court having been invoked, order passed in the appeal would attract the doctrine of merger which order may be of reversal, modification or mere affirmation. [See: *Kunha Yammed & others vs. State of Kerala & another,* (2000) 6 SCC 359]

19. Hence there is no question of delay in the adjudication of petitioner's rights or invocation of equitable jurisdiction of this Court in seeking redressal of grievances emanating out of statutory obligation.

20. On a serious note, present petition is also opposed on the ground that the judgment rendered in Ishwar Dutt (supra) and Ashok Pal Sen (supra) is *personam* in nature and

the ratio of law laid down therein, applicable and confined only to those writ petitioners, not extendable to the present petitioner who was not a party therein. Such contention needs to be rejected in view of law laid down by the apex Court in *U.P. Pollution Control Board & others vs. Kanoria Industrial Ltd. & another,* (2001) 2 SCC 549 wherein it is observed that:-

> "18. … … But in matters arising under public law when the validity of a particular provision of levy is under challenge, this Court has explained the legal position in M/s. Shenoy and Co. v. Commercial Tax Officer, Circle II, Bangalore, (1985) 2 SCC 512 : (AIR 1985 SC 621) that when the Supreme Court declares a law and holds either a particular levy as valid or invalid it is idle to contend that the law laid down by this Court in that judgment would bind only those parties who are before the Court and not others in respect of whom appeal had not been filed. To do so is to ignore the binding nature of a judgment of this Court under Article 141 of the Constitution. To contend that the conclusion reached in such a case as to the validity of a levy would apply only to the parties before the Court is to destroy the efficacy and integrity of the judgment and to make the mandate of Article 141 illusory. When the main judgment of the High Court has been rendered ineffective, it would be applicable even in other cases, for exercise to bring those decisions in conformity with the decisions of the Supreme Court will be absolutely necessary. Viewed from that angle, we find this contention to be futile and deserves to be rejected." [Emphasis supplied]

21. Further the apex Court in *Bharat Sanchar Nigam Limited vs. Ghanshyam Dass (2) & others,* (2011) 4 SCC 374 has observed as under:

> "25. The principle laid down in K.I. Shephard v. Union of India, (1987) 4 SCC 431, that it is not necessary for every person to approach the court for relief and it is the duty of the authority to extend the benefit of a concluded decision in all similar cases without driving every affected person to court to seek relief would apply only in the following circumstances:
>
> a) where the order is made in a petition filed in a representative capacity on behalf of all similarly situated employees;
>
> b) where the relief granted by the court is a declaratory relief which is intended to apply to all employees in a particular category, irrespective of whether they are parties to the litigation or not;
>
> c) where an order or rule of general application to employees is quashed without any condition or reservation that the relief is restricted to the petitioners before the court; and
>
> d) where the court expressly directs that the relief granted should be extended to those who have not approached the court."

22. In reference to the aforesaid decision Mr. Ram Murti Bisht, learned Addl. Advocate General invites attention of this Court to para – 26 of the said report. The fact situation being different, observation made by the Apex Court is not applicable in the instant case. No right whatsoever can be said to have accrued in favour of any third party.

23. To a similar effect is the decision rendered by the apex Court in *State of Uttar Pradesh & others vs. Arvind Kumar Srivastava & others,* (2015) 1 SCC 347 wherein the Court has held as under:

> "22. The legal principles which emerge from the reading of the aforesaid judgments, cited both by the appellants as well as the respondents, can be summed up as under:
>
> 22.1. Normal rule is that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and

> would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently.
>
> 22.2. However, this principle is subject to well recognized exceptions in the form of laches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the Court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim.
>
> 22.3. However, this exception may not apply in those cases where the judgment pronounced by the Court was judgment in rem with intention to give benefit to all similarly situated persons, whether they approached the Court or not. With such a pronouncement the obligation is cast upon the authorities to itself extend the benefit thereof to all similarly situated person. Such a situation can occur when the subject matter of the decision touches upon the policy matters, like scheme of regularisation and the like [see *K.C. Sharma & Ors. v. Union of India*, (1997) 6 SCC 721]. On the other hand, if the judgment of the Court was in personam holding that benefit of the said judgment shall accrue to the parties before the Court and such an intention is stated expressly in the judgment or it can be impliedly found out from the tenor and language of the judgment, those who want to get the benefit of the said judgment extended to them shall have to satisfy that their petition does not suffer from either laches and delays or acquiescence."
>
> [Emphasis supplied]

24. The apex Court in *Prabhjot Singh Mand & others vs. Bhagwant Singh & others,* (2009) 9 SCC 435 has held that "it is one thing to say that judgment delivered by this Court in *Arvinder Singh Bains vs. State of Punjab,* (2006) 6 SCC 673 is not a judgment in rem but prima facie this Court has interpreted the Rules, which would be a law declared in terms of Article 141 of the Constitution of India. The High Court before arriving at a finding that the first respondent would be entitled to be promoted to the cadre of Indian Administrative Service, in our considered opinion, should have bestowed serious consideration in regard to the implementation of the said judgment and the effect thereof. It was for the said purpose, the High Court should have assigned some reasons in support of its order".

25. To a similar effect is the decision rendered by the apex Court in *Eastern Coalfields Limited vs. Tetulia coke Plant Private Limited & others,* (2011) 14 SCC 624 wherein the Court has held that "it must be indicated herein that the present respondent also filed the writ petition in question in the Calcutta High Court before the aforesaid decision was rendered and in his case also interim order was passed by the Calcutta High Court. After the disposal of *Ashoka Smokeless Coal India (P) Ltd. vs. Union of India*, (2007) 2 SCC 640, the writ petition filed by the respondent herein which was pending was also considered and the same was allowed following the decision of this Court in *Ashoka Smokeless Coal India (P) Ltd.* (supra) as by that decision, this Court has declared the entire scheme to be invalid and ultra vires to the Constitution. Therefore, any action taken pursuant to the said scheme is also illegal and null and void. Following the ratio of the said decision this Court directed the coal companies to refund the price of the coal paid in excess of the notified price under e-auction scheme. Certain guidelines were also laid down as to how such payments is to be made. The said decision of the learned Single Judge was upheld by

the Division Bench of the High Court by affirming the conclusions and analysing all the issues that were raised before it". The Court further held that "We are unable to accept the contention of the learned Additional Solicitor General that whatever is challenged in the present petition is only an interim order. It is not so because the respondents herein also challenged the legality of the e-auction scheme in the writ petition. The High Court has not disposed of only an interim prayer but has disposed of the entire writ petition by its judgment and order dated 25.03.2010. Consequently, it must also be held that when the entire scheme is set at naught by this Court, whatever action has been taken following the said e-auction by the coal company has also been declared to be illegal and, therefore, the coal company has become liable to refund the entire money which was collected in excess of the notified price. That is the consequence of quashing of the scheme and the same came to be reiterated by this Court while contempt petitions were filed and were disposed of. Therefore, it cannot be said that the effect of the decision of *Ashoka Smokeless Coal India (P) Ltd.* (supra) would be restricted only to those cases which were before this Court and not for all cases which were pending in different High Courts at that stage, at least to the issues which are common in nature".

26. It be only observed that neither this Court nor did the apex Court confine the decision to the parties before them.

27. In the instant case, petitioner cannot be said to be a fence-sitter. Immediately with the merger of the judgment of this Court, with that of the Apex Court, he approached the authorities, reminding them of complying with their statutory obligations.

28. The matter in support of the petitioner further stands fortified from the observations noticed by the apex Court in *S. J. Coke Industries Private Limited & others vs. Central Coalfields Limited & others,* (2015) 8 SCC 72 in the following terms:

> "37. Before parting with the case, we consider it opposite to state that this case reminds us of the subtle observations made by Justice M.C. Chagla, Chief Justice of Bombay High Court in *Firm Kaluram Sitaram Vs. The Dominion of India*, 1953 SCC OnLine Bom 39 : 1954 AIR (Bom) 50. The learned Chief Justice in his distinctive style of writing held as under: (SCC OnLine Bom para 19)
>
> > "19 ....we have often had occasion to say that when the State deals with a citizen it should not ordinarily rely on technicalities, and if the State is satisfied that the case of the citizen is a just one, even though legal defences may be open to it, it must act, as has been said by eminent judges, as an honest person."
>
> 38. Keeping in view the stand taken by the CCL and the manner in which they contested the cases at all stages in different High Courts and in this Court by raising same pleas despite their adjudication by this Court lead us to draw a conclusion that untenable pleas were being raised by CCL just to defeat the legitimate claim of the citizens determined in their favour by this Court in earlier litigations and which was known to CCL."

29. Relentlessly to drive home his point, Sh. Ram Murti Bisht, learned Addl. Advocate General draws attention of this Court to a decision rendered by the apex Court in *Delhi Administration vs. Gurdip Singh Uban & others,* (1999) 7 SCC 44. Bare reading of the judgment reveals that the Court was dealing with such of those parties who had never chosen to file objections to the acquisition proceedings and it is in this backdrop, while construing the specific provisions of the Land Acquisition Act, 1894, the Court held the acquisition proceedings with respect to the parties before them not to have lapsed. Opposition to the acquisition proceedings was *sine qua non* for assailing such action in Court.

30. No other point urged.

31. Hence for all the aforesaid reasons, communications dated 20.12.2011 (Annexure P-9) and 21.3.2012 (Annexure P-12) rejecting the petitioner's claim are quashed and set aside

with a further direction to the respondent-Corporation to calculate the value of the forest produce sold by the petitioner to the State Forest Corporation in terms of agreement dated 8.2.1995 (Annexure P-6) on economic basis i.e. in terms of notification dated 3.4.1991 (Annexure P-1) and pay the amount within a period of four weeks from today. Since obligation to pay the amount within time, in accordance with law, vested solely with the respondent-Corporation and for the reason that it was not so done, petitioner shall be entitled to interest @ 6% per annum, in terms of decision rendered in Ashok Pal Sen's case (supra).

Petition stands disposed of accordingly, so also pending applications, if any.

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

Shiv Ram (since dead) through LRs. .....Appellants.

Versus

Partap Singh (since dead) through LRs & others. .....Respondents.

RSA No. 258 of 2006
Reserved on: 08.09.2016
Decided on: 19.09.2016

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for restraining the defendant from interfering with their possession and to remove construction over the parts of the land and to restore the possession pleading that plaintiff No. 1 is owner of the suit land and defendant was appointed as Manager- defendant failed to produce the register containing the inventory of the property qua income and expenditure - plaintiff No. 1 terminated the agency of the defendant and asked him to hand over the charge of the property- defendant had constructed structure without the consent of the plaintiffs - suit was partly decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that oral evidence does not prove that defendant was appointed as Manager – witnesses examined by the plaintiffs are either interested witness or they do not inspire confidence- appointment letter was not produced on record – PW-1 also admitted in cross-examination that his servant used to collect rent from the defendant- witnesses of the defendant also proved that defendant was tenant- it was also established on record that plaintiffs used to receive galla batai from the defendant- defendant was tenant who has become the owner after the commencement of H.P. Tenancy and Land Reforms Act – Appellate Court had given perverse findings and had misconstrued, misread and misinterpreted the pleadings of the parties as well as the evidence- appeal allowed - judgment and decree passed by the Appellate Court set aside and that of the trial Court affirmed. (Para-10 to 30)

Case referred:
State of Himachal Pradesh and others vs. Ajay Vij and others, 2011(1) Shimla Law Case 452

For the appellants: Mr. J.L. Kashyap, Advocate, for LRs No. 1(a) to 1(c).
For the respondents: Shri K.D. Sood, Sr. Advocate, with Mr. Rajnish K. Lall, Advocate, vice Mr. Sanjeev Sood, Advocate, for respondents No. 3 and 4.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal is maintained by the appellant/defendant, Shri Shiv Ram, who has died during the pendency of the appeal herein and the appeal is being pursued by his legal representatives (hereinafter referred to as 'the defendant') laying challenge to the judgment and decree passed by the learned Additional District Judge, Fast Track Court,

Shimla, H.P., in Civil Appeal No. 13-S/13 of 2004/88, decided on 21.03.2006, whereby the appeal preferred by the respondents/plaintiffs (hereinafter referred to as 'the plaintiffs') was allowed and the judgment and decree of the learned Trial Court passed in Case No. 104/1 of 1985, decided on 24.12.1987, was set aside.

2. The brief facts giving rise to the present regular second appeal are that the plaintiffs sought a decree for permanent prohibitory injunction against the defendant, restraining the defendant from interfering in any manner with the possession of the plaintiffs over the suit properties, details whereof find mention in paras 1 and 2 of the plaint. Plaintiffs had also sought decree for mandatory injunction with a direction to the defendant to remove the construction over a part of the suit land. Plaintiffs have also sought a direction to restore their possession over plots of land, as per jamabandi for the year 1981-82, measuring 13 bighas, 14 biswas comprised in khasras No. 50, 51, 53, 56, 68, 302/51/1 (2 bighas), 302/52/3 (0-17 biswas) and 303/52/1 (6.17 bighas) entered at Khewat No. 1 min, Khatauni No. 1 min, situated at mauza Kanori Pargana Dhamer, Tehsil and District Shimla. Simultaneously, the plaintiffs have also sought a decree for rendition of accounts, directing the defendants to render true and accurate accounts and on accounts being taken to grant a decree for recovery of amount alongwith a decree for recovery of Rs.500/- as damages till the date of filing of the suit and future damages @ Rs.1000/- per annum from the date of filing of the suit till the date of delivery of possession. In the event of defendants succeed in dispossessing the plaintiffs from any part of the suit land, then decree for possession was also prayed for.

3. As per the plaintiffs, plaintiff No. 1 is the owner of the land, that is, 40 plots, as per jamabandi for the year 1981-82, measuring 53 bighas 11 biswas, comprised in Khasras No. 2, 4, 12, 301/31, 299/32, 300/32, 41 min, 50, 51, 302/52 min, 303/52/1, 53, 54, 55, 56, 368/57, 370/58, 379/304, 381/305/61, 382/305/61, 62, 306/61, 67, 69 min, 68, 71, 72, 372/358/76, 359/76, 361/76, 80, 88/1, 203, 386/244, 387/244, 208/251, 392/263 and 393/263, entered at Khewat No. 1, Khatauni No. 1 of mauza Kanori Pargana Dhamer, Tehsil and District Shimla. As per the plaintiffs, plaintiff No. 2 is stated to be owner of the land, that is 15 plots, as per jamabandi for the year 1979-80, measuring 12 bighas, 16 biaswas, comprised in Khasras No. 1349/186, 1355/188, 1359/190, 1360/190, 1362/192, 1363/1092, 159, 159/1, 180, 1336/181, 1337/181, 1339/182, 1342/183, 1346/1, 85 and 1347/185, entered at Khewat No. 74, Khatauni No. 151, situated at Mauza Majhar, Pargana Dhamer, Tehsil and District, Shimla. It is also averred in the plaint that plaintiff No. 1, being ex-Ruler of erstwhile princely State of Dhami, has to remain out of the village usually for substantial period and he was getting his property managed through various persons. The defendant, who was the father of the present appellants, was appointed as a Manager to look after and manage the properties of plaintiffs No. 1 and 2 and he was authorized to keep all accounts of the income and expenditure and defendant was liable to render accounts to the plaintiff after harvest of each crop, viz., twice a year. It also included looking after the building of the plaintiffs, situated over the above mentioned land and management of Parao as well as moveable and immoveable property of the plaintiffs. The defendant acting upon the instructions of the plaintiffs used to render the accounts to the plaintiffs, through plaintiff No. 1, after each harvest and for the work done by the defendant for and on behalf of the plaintiff. It is also averred that the defendant used to pay 10% management charges of the income of properties. The defendant was also required to maintain a register for keeping the account of income and expenditure as well as inventory of the properties of the plaintiffs.

4. It is further averred by the plaintiffs that in the month of March, 1982, the defendant got checked from the Officials of the Forest Department, that the rosin, which belonged to plaintiff No. 1, had been stolen from the godown in Khel-ka Chora and it was reported to the plaintiffs that 30 tins of rosin are missing from the godown. The matter was reported to the police and on investigation, 18 tins of rosin were found at Khel Ka Chora and 40 tins of rosin from godown at Kanori were missing. After conclusion of inquiry, the officials of Forest Department had to take rosin to Resin and Turpentine Factory at Bilaspur. The defendant did not open the lock when the officials of the Forest Department visited the spot. Plaintiff No. 1 had

no option but to break open the locks. In the months of February/March, 1983, plaintiff No. 1 asked the defendant to bring the register containing the inventory of the property and amount of income and expenditure as well as to hand over the charge to plaintiff No. 1, but the defendant failed to do the needful. It is further averred that defendant had been deputed by plaintiff No. 1 to perform regular *puja* in the temple of *'Narsinghji Maharaj'* situated at Kanori, Tehsil and District Shimla, which is private property of plaintiff No. 1. As per the plaintiffs, the defendant was having a residential house at Kanori Bazar, but with a view to properly look after and maintain the temple and perform the *puja,* defendant No. 1 was allowed to use a house belonging to plaintiff No. 1 in lieu of the services, which were being rendered by defendant in the temple. Defendant performed the *puja* for about ten years and the house, which was meant for the *Pujari* of the temple, was damaged by DGBR personnel. Subsequently, plaintiff No. 1 constructed two one room houses for which construction was carried out by the defendant and the funds were provided by plaintiff No. 1. One house was meant for residential purpose of defendant and other one for cooking and preparation of bhog for deity. Construction was raised on Khasra No. 303/52/1, situated at Mauza Manori, Tehsil and District Shimla. Defendant occupied both the houses and thereafter he asked permission to keep cattles, which was allowed by the plaintiffs. Till such time, the defendant used to remain in the house, but due to the act of the defendant, plaintiff No. 1 terminated the agency of the defendant and asked him to hand over the charge of the property and to stop managing the affairs of his property including the temple. In the months of February/March, plaintiff No. 1 visited the village and found that the defendant without the consent/permission of plaintiff No. 1 has constructed two scuppers upon a portion of the land comprised in Khasra No. 303/52/1. It is further averred in the plaint that defendant gradually extended his possession to the adjoining Khasras No. 51, 303/52 and has also cultivated the land comprised in Khasra No. 53 situated at Mauza Kanori. The defendant, as such has occupied the land measuring one bigha, 14 biswas, comprised in Khasra No. 50, 51 and 53 and 303/52/1 entered at Khewat No. 1 min, Khatauni No. 1 mim (as per jamabandi for the year1981-82), situated at Mauza Kanori, Pargana Dhamer, Tehsil and District Shimla. As per the plaintiffs, during the pendency of the suit, the defendant has further encroached upon land measuring 12 bighas, comprised in Khasras No. 56 (2-10), 68 (0-9), 302/52/1 (2-0), 302/52/3 (0-17) and parts of Khasra No. 303/52 (6-4), (0-13 biswas is already included in paragraph 11 of the plaint), total land measuring 12 bighas. Meaning thereby, the defendant is in occupation of 13.14 bighas of land over which he has no right, title and interest. It is further averred that the defendant has no right to raise construction or scuppers over the land and also to personally cultivate the same. With mala fide intentions the defendant intends to raise false claim upon the property of the plaintiffs and he wants to usurp the same. As per the plaintiffs, during the time when the defendant was managing the property, he sold grass out of the property and for which no accounts have been rendered by him. He has also not rendered the accounts of income received by him nor handed over the account books to the plaintiffs. Lastly, the plaintiffs pleaded that as the agency of the defendant was terminated, he is liable to render true and accurate account and he is also bound to pay the amount realized by him after deducting the expenses.

5. The defendant, who was the father of the present appellants, filed written statement and took preliminary objections, that is, over valuation of the suit, jurisdiction and mis joinder of necessary parties. On merits it is admitted that the plaintiffs are owners of the suit land, but the defendant claim himself to be the tenant on payment of half *galla batai* in respect of land measuring 13 bighas, 2 biswas, Kita 7, Khewat Khatauni No.1/1, Khasras No. 50 (6 biswas), Khasra No. 51 (3 biswas), Khasra No. 302/52/1 (2 bighas), Khasra No. 302/52/3 (17 biswas), Khasra No. 303/52/1 (6 bighas, 17 biswas), Khasra No. 56 (2 bighas 10 biswas) and Khasra No. 68 (9 biswas) situated in Village Kanauri, Pargana Dhamer, Tehsil and District Shimla for the last more than 12 years. The defendant has contended in the written statement that he has nothing to do with other land described in paras 1 and 2 of the plaint. He has also denied the entries in the jamabandi regarding the land. The defendant has admitted that plaintiff No. 1 is the ex-Ruler of erstwhile princely State of Dhami and plaintiff No. 2 is his daughter. The defendant, in his written statement, has denied the fact that he was ever employed by the plaintiff to manage the property belonging to the plaintiff. He has contended that he is only in cultivating possession of

the land described in para No. 1 of the written statement on payment of half *galla batai* to the plaintiffs and the plaintiffs are taking undue advantage of the wrong entries in the record and is now trying to threaten the defendant to interfere with his possession over this land. As per the defendant, plaintiff No. 1, being rich person, has lodged a false complaint in the police after the defendant had applied for correction of revenue entries with the concerned revenue officer. However, due to some discrepancy in the description of land, the application was withdrawn and a fresh application has already been filed. It is contended that the lock and key used to remain with plaintiff No. 1 and his wife. After conclusion of inquiry, the factual position was unearthed and no action was taken against the defendant by the police. As per the defendant, temple *Narsing Ji Maharaj* is not the private property of plaintiff No. 1 and the temple is a place of worship of all. The defendant has admitted that he alongwith his sons is regularly performing *puja* in the temple. He has also admitted that he is running a *dhaba* in Kanori bazaar and the house is meant for *Pujari* of the temple, which is damaged. As per the defendant, plaintiff No. 1 sold the slates of this house to one Shri Goria, son of Shri Ram Dyal and the wooden structure was used by plaintiff No. 1 as firewood. It is further contended that plaintiff did not spent any amount on the construction of two rooms and it is the defendant, who has spent on the construction of these rooms. The house is being used for agriculture purposes. The defendant has denied that during the pendency of the suit, he has encroached upon the land of the plaintiffs. As per the defendant, there is no question of possession of the property, as the defendant is a tenant regarding the land measuring 13 bighas, 2 biswas of land, as mentioned in para 1 of the written statement. Defendant has also denied that he is liable to render any true and correct account as he was never appointed as manager by the plaintiffs to manage their properties.

6. The learned Trial Court on 16.04.1984 framed the following issues for determination and adjudication:

"1. Whether this Court has no pecuniary jurisdiction, as alleged? OPD.

2. Whether the suit is bad for mis-joinder of parties and causes of action and for multifarious, as alleged? OPD.

3. Whether there is a relationship of landlord and tenant between the parties, as alleged. If so, regarding what property? OPD.

4. If issue No. 3 is proved, whether this Court has jurisdiction to try the suit regarding the property over which the relationship of landlord and tenant is proved between the parties? OPP.

5. Whether the defendant was appointed as a Manager for the plaintiffs' properties and is liable to render accounts? OPP.

6. If issue No. 3 with respect to the properties mentioned in para 17-C of the plaint is decided against the defendant, then whether the plaintiffs are entitled to the possession of this property? OPP.

7. Whether the defendant has raised unauthorized construction on Khasra No. 303/51/1 bearing 13 biswas as alleged in the plaint? OPP.

8. If issue No. 7 is proved in favour of the plaintiff, then whether the plaintiffs are entitled to the relief of mandatory injunction? OPP.

9. Whether the plaintiffs are entitled to the relief of permanent injunction as prayed in para 17-A of the plaint? OPP.

10. Whether the plaintiffs are entitled to damages, if so how much? OPP.

11. Whether the plaintiffs are entitled to any future damages, if so on what rate? OPP.

12. Relief."

After deciding issues No. 1 and 2 against the defendant, issues No. 3 and 4 in favour of the defendant, issues No. 5 to 8, 10 and 11 against the plaintiffs and issue No. 9 in favour of the plaintiff, decreed the suit except the land, as mentioned in para No. 12 of the written statement.

7. Now, the appeal remains only with regard to the land measuring 13.2 bighas, out of the big estate of the plaintiffs, on which the defendant claims tenancy and thereafter vesting of ownership rights, as per the mandate of H.P. Tenancy and Land Reforms Act.

8. Against the judgment of the learned Trial Court, the appellants (who were the plaintiffs before the learned Trial Court) preferred an appeal, but the same was dismissed by the learned Lower Appellate Court on 26.05.1997. Against the said judgment, the plaintiffs came in regular second appeal and the matter was remanded back to the learned District Judge and hence the impugned judgment.

9. The present appeal was admitted on the following substantial questions of law:

> "1. Whether Addl. Distt. Judge, Fast Track Court, Shimla, has mis-construed, mis-read and misinterpreted pleadings of parties as well as oral and documentary evidence on record?
>
> 2. Whether Lower Appellate Court has not been able to record reasons to differ with the findings as recorded by the learned Trial Court with the aid of legal and valid grounds, therefore, findings recorded by learned lower Appellate Court are required to be set aside?
>
> 3. Whether the findings recorded by learned Lower Appellate Court are vitiated for want of proper appreciation and consideration of pleadings of parties and evidence on record and therefore, findings recorded by him are liable to be set aside?
>
> 4. Whether Trial Court rightly declared defendant/appellant to be a tenant over area measuring 13 bighas, 2 biswas and the reasons as given by learned Trial Court for arriving at such a conclusion having not been found any fault by learned Lower Appellate Court, therefore, appellant has to be held to be a tenant?
>
> 5. Whether presumption of correctness as attached to revenue entries have amply been rebutted by appellant as held by Trial Court and the Lower Appellate Court having not considered this point, therefore, jurisdiction has not been exercised properly?"

10. The learned counsel for the appellants has argued that the learned Lower Appellate Court has failed to give findings after appreciating the evidence correctly and so the appeal may be allowed. He has also argued that presumption of truth is attached to the revenue entries, which stood rebutted by the statements of the witnesses and it is clear that the defendant was tenant over the land to the extent of 13.2 bighas on which, earlier to the defendant, Shri Liaquat Ali, was the tenant. On the other hand, learned counsel for the respondents/plaintiffs has argued that presumption of truth attached to the revenue entries has not been rebutted. He has further argued that defendant was servant of the plaintiff, Raja of Dhami, and he was never a tenant. In rebuttal, the learned counsel for the appellant/defendant has argued that the plaintiffs/respondents have not been able to show any appointment letter, though he has stated that defendant was appointed as servant by an appointment letter. The plaintiffs have also not been able to show any salary or remuneration paid to the defendant and the only possible conclusion that could be drawn is that the defendant was a tenant on the land to the extent of 13.2 bighas. To dispose of the present appeal, I would like to discuss the material, which has come on record.

11. In order to prove the contention that the defendant was inducted as a Manager of the property belonging to the plaintiff and thereafter he maintained the account in respect of the property so managed by him, one of the plaintiff, Shri Dalip Singh (who has expired during the pendency of the suit) has appeared as PW-1 and he has stated that his property is located at Kanori, Majhar, Halog, Khel ka Choura and to look after these properties he appointed various

persons, who used to mange the properties and they also used to manage the account, which were checked by him after every six months. This witness has further testified that in respect of the property situated at Kanori, Majhar and Khel ka Chaura, the defendant was appointed as a Manager and in Kanauri there is a house and a temple alongwith Parao over his property. He has further deposed that there is also land and *ghasni* belonging to him at Kanauri and at Kanauri there is about 53 bighas of land belonging to him, whereas 12 to 13 bighas of land belongs to Pawan Kumari. As per this witness, the defendant used to cultivate the land situated at Kanori and Majhar and also used to look after the temple. The defendant also used to maintain the account regarding the sales and accounts of the property alongwith inventory. One house meant for *Pujari* was also there, but the same was razed by the personnel of DGBR. This witness has deposed that rosin tins were stolen from the godown and the matter was reported to the police, however, the defendant refused to hand over the keys of the godown. The lock of the godown was broke open and 48 tins of rosin were found missing. It is only thereafter the defendant started claiming himself as tenant of the plaintiffs and not the employee. The defendant also refused to render the accounts to the plaintiff regarding the properties, which was under his management. The defendant used to sell the grass worth Rs.1000/- and he also used to earn Rs.2000/- from the land. Apart from the above the defendant also used to earn about Rs.10/- to Rs.15/- from the *Parao.* This witness has deposed that the defendant has no right over the property and this witness also tendered in evidence copies of jamabandies and khasra girdawaries.

12. Notice, copy of which is Ex. P-14, was issued to the defendant prior to filing of the suit, its postal receipts are Ex. P-15 and Ads are Ex. P-16. As per PW-1, after the institution of the suit, the defendant has started cultivating some of his land, but he has abandoned the temple as well as the remaining land belonging to the plaintiffs. This witness, in his cross-examination, has admitted that he never used to cultivate the suit land by himself, but the land was cultivated by him by engaging the labourers. He does not remember the names of the labourers and he did not know that how much land is *ghasni* and how much is cultivable land. He has further deposed in his cross-examination that when the Manager used to render accounts to him he maintained no record thereof. 10% of the total income used to be paid as remuneration to the defendant, but qua this fact no accounts was being maintained by him. This witness was certain that the defendant was appointed about 10 years back, but on which date/month the defendant was appointed it was not known to him. In his cross-examination PW-1 has further deposed that the defendant was issued letter of appointment, but the same is not in his possession. He has admitted the fact that the defendant has moved an application for correction of revenue entries, however, he has denied that after moving of that application, the suit was filed against the defendant. He has further denied that land measuring 13.3 bighas located at Kanori was earlier used to be cultivated by one Iqwal Ali and after that the defendant is cultivating the said land on payment of *galla batai.* As per this witness Shri Gusaum and Shri Tulsi Ram earlier were his employees, however, he has denied that both these persons used to collect *galla batai* from the defendant and further transmitted the same to him. The defendant till 1982 used to render accounts. PW-1 has admitted in his cross-examination that the defendant offered key of the temple to him, but he refused to take the same, as the defendant was asked to render the accounts of the property, which he used to manage. This witness has denied the suggestion that the defendant is a tenant qua land measuring 13.3 bighas on payment of *galla batai.* Therefore, it is manifest that the defendant was appointed as a Manager of the property belonging to the plaintiffs, as PW-1 has admitted that the defendant was appointed as a Manager about 10 years back through a written appointment order, however, no such appointment order was placed on record to corroborate this statement. On close scrutiny of the statement of PW-1 it has also become manifest that PW-1 has not been able to state the date or month when the defendant was appointed as a Manager nor this witness could state the time when the defendant was appointed. As per this witness, the defendant was a Manager of the property of the plaintiffs and he was not a tenant.

13. Shri Bhandaru Ram (PW-2), who is in the business of buffaloes, has stated that he went to Dhami twice for business where he met the defendant and the defendant supplied him grass and he also stayed in a Parao, which he heard belongs to Raja Sahib. As per this witness, when he stayed in the Parao, both times the charges were received by the defendant. Except the above statement of PW-2, there is nothing material emanating from the statement of this witness and the same cannot at all be relied upon. PW-2 only heard that the Parao belongs to Raja Sahib, but he did not disclose that from whom he has heard the same. The plaintiffs have examined no other witness to establish that PW-2 stayed in the Parao belonging to them. Therefore, the statement of PW-2 went uncorroborated and same is not trustworthy. PW-3 is a Bank Officer in State Bank, Shimla. Cheque No. D-20/14/330, dated 24.10.1975, copy whereof is Ex. PW-3/A, was debited in current account No. 300 and his statement is only to this effect. On perusal of Ex. PW-3/A it is emanating that this cheque was issued in favour of one Shri Shiv Ram for Rs.700/- on 24.10.1975, but this fact cannot at all be established that the defendant was appointed as a Manager by the plaintiffs for managing their property. Mere issuance of cheque to the defendant by the plaintiffs cannot prove that the defendant was a Manager of the property of the plaintiffs.

14. Shri Partap (PW-4) has deposed that the disputed property is situated at Village Kanori and the defendant is an employee of the plaintiff and he used to look after the property and also the Parao situated there, which belongs to the plaintiffs. This witness has further deposed that in the year 1983 he was sent by the plaintiff to Kanori for checking the register maintained by the defendant, but the defendant said that he will show the same after some time, as the same was not immediately available on demand. PW-1 did not state this fact that PW-4 (Shri Partap) was deputed by him for checking the registers of the defendant. In the absence of corroboration from PW-1, the statement of PW-4 cannot be relied upon and it would be unsafe to rely upon the statement of PW-4 to this extent. PW-4 in his cross-examination has admitted that his father used to be an employee of the plaintiff and he has also served the plaintiffs, which fact further goes to show that PW-4, being an employee of the plaintiffs, also can be held to be an interested witness and, therefore, much reliance cannot be placed on his testimony. PW-4 has further admitted in his cross-examination that the land was never given by the plaintiff in his presence to the defendant nor he knows under what conditions this land was given to the defendant by the plaintiffs. As per this witness, the defendant is in possession of this land for the last 7 to 8 years, which further fails to show that the defendant was in fact Manager of the property of the plaintiffs, as PW-4 could not state that under what condition this land was handed over to the defendant by the plaintiff.

15. PW-5, Shri Rup Chand, did not utter anything qua the land dispute and his statement is of no help to the plaintiffs. As per his statement this witness also used to look after the property of the plaintiffs for the last about five years and he used to receive 10% of income derived by him from the property under his management. In his cross-examination, this witness has admitted that he has not seen the suit land, therefore, the statement of this witness is of no help to the plaintiffs in proving that the defendant was not a tenant and he was a Manager appointed by the plaintiffs to manage their properties. PW-6 and PW-7 have stated that the defendant is looking after the properties belonging to the plaintiffs as an agent and as per PW-6 the defendant used to receive 10% of the total income derived from the properties managed by him. PW-6 has deposed that plaintiffs did not have any tenants, but they are having their agents, who are managing their properties. PW-6 in his cross-examination has admitted this fact that he has also served the plaintiff, however, it goes to establish that this witness is an interest witness and much reliance cannot be placed on his testimony. Moreover, PW-6 did not disclose his source of information from where he came to know that the defendant used to receive 10% of the total income of the property managed by him and that the defendant was managing the property as an agent and not as a tenant. Likewise, PW-7 has deposed that she used to purchase the grass from the defendant and the defendant was looking after the property situated at Kanori as an employee of the plaintiffs. It is undisputed that the defendant is looking after the property of the plaintiffs, but the point at controversy is that the defendant is looking after the property of the

plaintiffs as Manager or as a tenant. The mere fact that PW-7 purchased the grass from the defendant cannot at all demonstrate that the defendant was a Manager rather than a tenant. PW-7 in his cross-examination has admitted that the land situated in Village Kanori is being cultivated by the defendant and this fact is also not disputed. PW-7 did not disclose anything about his source of information. The above statement of PW-7 is not suffice to hold that the defendant is not a tenant and was a Manager looking after the properties of the plaintiffs.

16. Shri Sarupa Nand, Patwari (PW-8) was examined to testify Khasra Girdawari, Ex. P-5 to Ex. P-12, and he has stated that he carried out the Khasra girdawari as per the factual position existing on the spot. Likewise, PW-9 has stated that he remained as Patwari in Halqua from December, 1972 to August, 1975. He has also carried out the girdawari qua the land belonging to the plaintiffs in presence of the defendant and one Shri Gusaun, who were the servants of the plaintiffs. PW-9 in his cross-examination has deposed that he does not know as to what remuneration used to be paid to the defendant by the plaintiffs nor he is in a position to state as to what business the defendant was carrying out. As per this witness, he has not seen any land belonging to the plaintiffs with the defendant and he has also stated that he has not seen anyone cultivating the land situated at Kanori in front of the house of Shri Saran Dass. Therefore, it is doubtful that this witness is stating qua the land in dispute or some other property. As per deposition of this witness he has never seen the defendant in possession of the suit property and he cannot state that the land situated at village Kanori was being cultivated. Whereas, as per the plaintiffs, the defendant was in possession of the land situated in Village Kanori, which belongs to plaintiff and land situated in Village Majhar belongs to plaintiff No. 2.

17. PW-10, Shri Jagdish Chand, was examined to establish that at the instance of Raja Sahib, that is, plaintiff No. 1, tins of rosin were seized from the godown at Kanori and Khel ka Chaura and he is also used to carry out inspection of the godowns. He has further deposed that inspection used to be carried out by him with the assistance of the defendant, who was the servant of the plaintiff No. 1 and the defendant was having the key of the godown. It is noticeable that inspection was being carried out on the order of D.F.O., however, no such order was placed on record to substantiate this fact. It is also noticeable that no witness has been examined on behalf of the plaintiffs to establish that PW-10 used to inspect the godown. The testimony of this witness is marred by a glaring fact that he has deposed in his cross-examination that when the tins of rosin were stolen, he went to the spot at Khel ka Chaura and Kanori alongwith the police and the lock of the godown was lying broken, however, as per this witness lock was opened in his presence, whereas, as per the pleadings, the lock of the godown was broken as the defendant refused to handover the keys of the godown when the police went to the spot, which further makes the testimony of PW-10 unreliable. This witness does not know that how many tins were missing from the godown. PW-10 visited the godown with the police, in such circumstances, much reliance cannot at all be placed on his testimony qua the fact that he ever carried out the inspection of the godown.

18. Shri Shingaru (PW-11) was examined to establish that the plaintiffs used to cultivate their land through employees and he was also a servant of the plaintiff for the last 18-20 years. As per statement of this witness, in Village Kanori no land of the plaintiff is in possession of the tenants. However, he has admitted this fact that he is an employee of the plaintiff. Thus, he is also an interested witness, therefore, much reliance cannot be placed on his testimony.

19. The above ocular evidence does not prove that the plaintiffs have appointed the defendant as a Manager and he was not a tenant. Except the statement of PW-1 nothing has come on record that goes to establish that plaintiff was appointed as a Manager and he was not a tenant. The witnesses examined by the plaintiffs are either interested witness or they do not inspire confidence, therefore, their testimonies cannot be safely relied upon. The best evidence for the plaintiffs was the appointment letter issued to the defendant appointing him as Manager, but the same has not been produced by the plaintiffs. Moreover, PW-1 could not state that when the defendant was appointed as Manager. The plaintiffs have not brought on record any documentary evidence which demonstrates that the defendant was managing the property of the plaintiffs as Manager and not as a tenant. The plaintiffs have placed on record copies of

jamabandi, Ex. P-1 to P-4 and copies of khasra girdawari, Ex. P-5 to P-12, which depict that the suit land is in ownership and possession of the plaintiffs. No doubt presumption of truth is attached to the copy of jamabandi, but this presumption is always rebuttable. The plaintiffs have also placed on record copy of notice, Ex. P-14, which was issued to the defendant, its reply, Ex. P-17, is also on record. In reply to this notice, the defendant has refuted that he was ever appointed as Manager by the plaintiffs and he has submitted that he is a tenant of the land situated in Village Kanori and he use to pay rent regularly qua the property.

20. In fact, the defendant is claiming himself as tenant over 13.2 bighas of land situated in Village Kanori and he is not claiming any right over the rest of the property. The defendant is also denying that he was ever appointed as a Manager by the plaintiffs. The defendant examined eight witnesses in order to substantiate his claim.

21. The defendant, Shri Shiv Ram (DW-1, since dead) stated that land measuring 13.2 bighas, situated in Village Kanori, belongs to the plaintiffs and he is in possession of the same on payment of *galla batai.* As per the defendant, he is in possession of this land for the last 15 to 16 years and prior to that one Iqwal Ali was in possession of this land. He and Iqwal Ali use to pay *galla batai* to the plaintiffs. The land remained with Iqwal Ali for about 3 years and thereafter the same came into the possession of the defendant on payment of *galla batai.* The servants of the plaintiffs, that is, Gosaium and Tulsi Ram used to collect *galla batai* from him. PW-1, in his cross-examination, has admitted that Tulsi Ram and Gosaiun were his servants, however, he has denied that they used to collect any *galla batai* from the defendant qua the land situated at Kanori. As per the defendant (DW-1), his nephew, Shri Parkash was working as servant with the plaintiff during the period 1974-1976 and cheque, Ex. PW-3/A, was issued by the plaintiff in lieu of his services and the same was encashed by him. DW-1 has further deposed that in addition to the above mentioned land no other land of the plaintiffs is in his possession. He has denied that he ever rendered any account regarding the crops upto 1982 nor he has ever paid 10% of the income to the plaintiffs. The defendant used to perform *Puja* in Radha Krishan Mandir at Kanori and money received by him were used by him for the purpose of the temple. On receipt of notice, Ex. P-14, he handed over the keys of the temple to the plaintiffs. This witness has denied that any report was lodged by the plaintiffs qua theft of rosin and he has also denied that rosin was damaged by him. As per this witness, he was never appointed as Manager and so there was no question of rendering any account to the plaintiffs. In cross-examination at length this witness did not state anything contradictory and he has not been tattered. He has further denied that he received any staying charges from the persons staying in the Parao belonging to the plaintiffs. He has denied that he used to lock the rosin. He admitted in his cross-examination that he does not possess any receipt of *galla batai.* As per this witness, girdawari was carried out regularly and he has denied that he used to look after the property of the plaintiffs situated at Khel Ka Choura. He denied that he has given the land at Village Kanori to some shopkeepers of that locality. No register was being maintained by him qua the temple where he used to perform puja. He has also denied that he used to receive 10% of the total income of the property managed by him belonging to the plaintiffs. He has denied that after receipt of notice he did not hand over the possession of the land nor did he render any account to the plaintiffs.

22. Shri Iqwal Ali (DW-2), as per the defendant, is the person who used to cultivate the land prior to him. DW-2 has fully corroborated the version of the defendant. As per this witness, the land situated at Kanori was in possession of the defendant as a tenant on payment of *galla batai* and Tulsi Ram and Gosaun were the servants of the plaintiffs, who used to receive rent from him. This witness has stated that he remained in possession of 12 to 13 bighas of land for about 14 to 15 years. He has also stated that after him the defendant came into possession of the land at Village Kanori on payment of rent. This witness has denied that he used to work as Washerman and was dismissed from service on the charges of theft by the plaintiffs and due to this he is having enmity with the plaintiffs. He does not possess any receipt of rent and he has denied that no land was in his possession, as a tenant, which belongs to the plaintiffs. As per this witness, the defendant was also servant of the plaintiffs and was looking after their property.

23. Shri Tulsi Ram (DW-5), to whom DWs 1 and 2 are alleging that he used to receive the rent from them regarding the land situated at Kanori on behalf of the plaintiff and whom PW-1 has also admitted to be his servant at one time is also very imperative. As per this witness, about 15 to 16 years back he worked with the plaintiffs for about 7 to 8 years alongwith one Gosaun. He has further stated that the defendant was possessing about 12 to 13 bighas of land at Kanori and he used to pay half *galla batai.* The *galla batai* used to be paid by him at his shop and weighed at the shop of one Saran Dass. As per this witness, he used to collect the *galla batai* on behalf of the plaintiffs and thereafter used to hand over the same to the plaintiffs. Prior to the defendant, the land was in possession of Iqwal Ali. This witness, in his cross-examination, has stated that he left the service of the plaintiffs about 7 to 8 years back. He has denied that grass was sold by him without the permission of the plaintiffs and he has also denied that he was dismissed by the plaintiffs for stealing a cow. He has further denied that the defendant was servant of the plaintiffs and he (defendant) never used to pay rent to him on behalf of the plaintiffs qua the land in his possession. Animosity between the plaintiffs and this witness has not been proved, thus this witness can be safely held as an independent witness.

24. At the cost of repetition, PW-1 in his cross-examination has admitted that Tulsi Ram was his servant and he used to collect rent from the defendant qua the land at Kanori and this fact has been further substantiated by DWs 1 and 2. Therefore, the statements of DWs 1 and 2 stand fully corroborated that the defendant was, in fact, a tenant in possession of the land situated at Kanori and he used to pay rent qua that land. The rent was used to be collected by Tulsi Ram and Gasaun and prior to him, it was Iqwal Ali (DW-2), who was in possession of this land as a tenant. Mere absence of any receipt regarding the payment of rent does not make the testimony of the defendant untrustworthy, as the person to whom the defendant used to pay the rent has fully substantiated the statement of the defendant.

25. Shri Gauria (DW-4) was examined in order to establish that the defendant has purchased stone etc. from the plaintiffs in respect of the houses located on the disputed land. However, the statement of this witness went uncorroborated and thus cannot be relied upon. As regards the fact that the defendant is in possession of the land as a tenant is concerned, this witness did not whisper anything qua the same, but he has stated that it was told to him by the defendant that he is cultivating the land on payment of rent and therefore, the statement of DW-4, being hearsay, cannot be relied upon.

26. Shri Parkash (DW-6) is nephew of the defendant and he has stated that he served the plaintiff for about 2 ½ years on salary of Rs.150/- per month and during that time the defendant was his guardian appointed by the Court. As per this witness, payment of Rs.700/-, through cheque in October, 1975, was made by the plaintiffs to the defendant for the service of Parkash and after that he made no payment. Shri Tulsi Ram and Shri Gosaun were the servants of the plaintiffs, which is a undisputed fact. This witness has further asserted that Tulsi Ram and Gosaun used to receive the rent from the defendant, which fact is substantiated on record by DW-5 himself. He has denied, in his cross-examination, that defendant was a servant of the plaintiff. He has further stated that in his presence he has seen the defendant paying the rent to Tulsi Ram. However, his statement cannot be relied upon as neither Tulsi Ram nor the defendant has asserted this fact that any payment of rent was made by the defendant to Tulsi Ram in presence of DW-7. This witness, in his corss-examination, has admitted the fact that girdawari was being carried out regularly and the same was done qua this land according to the factual spot position.

27. Smt. Lalita Chauhan (DW-8) was examined in order to prove Ex. DW-8/A to Ex. DW-8/D. On close scrutiny of these documents, it is emanating that DW-8/A is the statement of Iqwal Ali, therein he has stated that for the last 12 to 13 years the defendant in in possession of the land on payment of *galla batai* and prior to this he was in possession of this land on payment of rent. Ex. DW-8/B is the statement of the defendant made before AC 2nd Grade, Shimla, whereas Ex. DW-8/C is the statement of Saran Dass made before AC 2nd Grade, wherein he has stated that the land is in possession of the defendant as a tenant on payment of *galla batai.* Ex. DW-8/D is the report of girdawar Kanungo, who reported to AC 2nd Grade, Shimla, that the land

situated at Kanori, measuring 13.2 bighas is in possession of the defendant as a tenant on payment of *galla batai* for the last 13 to 14 years and he has recommended the correction in the revenue record regarding this fact, therefore, Ex. DW-8/A to Ex. DW-8/D further go to establish that even on inquiry, which was conducted by Kanungo, pursuant to the application moved by the defendant, for correction of revenue entries, he also recommended the correction in the revenue record to the extent that the defendant is in possession of land measuring 13.2 bighas land at Kanori as a tenant on payment of half *galla batai.*

28. From the above, it stands fully established on record that the plaintiffs used to receive *galla batai* from the defendant for the land measuring 13.2 bighas and the presumption of truth attached to the revenue entries showing the plaintiff as owner-in-possession of the said land stands rebutted. Even otherwise also, as far as the possession of the defendant qua the suit land is concerned, it is admitted by the plaintiff, but the case of the plaintiff is that the defendant was his servant. At the same time, as has been observed hereinabove, the plaintiff has failed to bring any document on record with respect to the appointment of the defendant as a servant, salary paid to him and conclusion is that the defendant was a tenant of the plaintiff on the land to the extent of 13.2 bighas.

29. The Hon'ble High Court of Himachal Pradesh in ***State of Himachal Pradesh and others vs. Ajay Vij and others, 2011(1) Shimla Law Case 452,*** has held that the presumption of truth is attached to the revenue record, but the presumption of truth is rebuttable. It has been held that the tenancy is creation of contract between parties, but the contract can be oral as well as in writing. Therefore, as the defendant was a tenant by way of oral understanding and the possession of the defendant is admitted by the plaintiffs and the same has also been proved on record, the conclusion is that the defendant was a tenant on the suit land to the extent of 13.2 bighas. At the same point of time, the Hon'ble High Court of Himachal Pradesh in ***State of Himchal Pradesh and others vs. Ajay Vij and others, 2011 (2) Shimla Law Cases 43,*** has held that the conferment of property rights on a tenant is automatic in view of H.P. Tenancy and Land Reforms Act.

30. For the reasons, as discussed hereinabove, it is clear that the leaned Lower Appellate Court has given the findings, which are perverse and the Court below has misconstrued, misread and misinterpreted the pleadings of the parties and oral as well as documentary evidence. Therefore, the substantial question of law No. 1 is answered accordingly. Substantial question of law No. 2 is answered holding that the findings of the learned Lower Appellate Court are perverse and not sustainable in the eyes of law. The substantial question of law No. 3 is also answered holding that the findings of the learned Lower Appellate Court are perverse. Substantial question of law No. 4 is answered holding that the findings of the learned Lower Appellate Court are perverse, as there is no reason in setting aside the well reasoned judgment of the learned Trial Court to the extent of not decreeing the suit of the plaintiff to the extent of 13.2 bighas of land, which was under the possession of the defendant as a tenant and on which the defendant has become owner as per the provisions of H.P. Tenancy and Land Reforms Act. Substantial question of law No. 5 is answered holding that the presumption of correctness is always attached to the revenue entries, but this presumption is always rebuttable and here in this case the presumption of truth attached to the revenue entries stands rebutted.

31. The net result of the above discussion is that the appeal filed by the appellant is required to be allowed as the judgment and decree passed by the learned Lower Appellate Court is perverse and is without appreciating the law and documents on record. Accordingly, the appeal is allowed and the judgment and decree passed by the learned Lower Appellate Court is set aside and that of the learned Trial Court is affirmed.

32. In view of the above, the appeal stands disposed of, as also pending application(s), if any, with no orders as to costs.

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

State of H.P. ...Appellant
Versus
Khekh Ram and another ...Respondents

Cr. Appeal No. 218/2011
Reserved on : 16.9.2016
Date of Decision: 19.9.2016

N.D.P.S. Act, 1985- Section 20 and 29- Vehicle was signaled to stop – driver stopped the vehicle and fled away- search of the vehicle was conducted during which 14.750 kg was recovered- it was found after investigation that accused was driving the vehicle - owner of the vehicle was also arrested by the police- accused was tried and acquitted by the trial Court- held, in appeal that prosecution version was duly supported by official witnesses- no independent witness could be associated as the place was lonely- passbook of the accused was found in the dashboard of the vehicle- back portion of the accused was seen by the police- name of the accused was specifically mentioned in the ruqqa and NCB form- there was no enmity between the accused and the police- accused had not given any explanation regarding presence of his passbook in the dashboard- it was duly proved that accused was driving the vehicle from which charas was recovered- however, there is no evidence to connect the owner with the commission of offence- appeal partly allowed and driver convicted of the commission of offence punishable under Section 20 of N.D.P.S. Act.

(Para-15 to 22)

For the appellant: Mr. P.M. Negi, Deputy Advocate General.
For the respondents: Mr Lakshay Thakur, Advocate, for respondent No.1.
Mr. Y.P.S. Dhaulta, Legal Aid Counsel for respondent No.2.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

This appeal is instituted by the State against the impugned judgment dated 29.12.2010, rendered by the learned Special Judge, Kullu, H.P., in Sessions Trial No. 24/2010, whereby the respondents, Khekh Ram and Govind Singh (hereinafter referred to as the "accused" for the convenience sake), who were charged with and tried for offences punishable under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, the Act) have been acquitted.

2. The case of the prosecution, in a nutshell, is that on 19.10.2009, a police party, headed by PW8 Inspector/SHO Sanjeev Chauhan consisting of SI Tej Ram, HHC Kashmi Ram, PW1 HHC Hira Singh under the leadership of Ahmed Syed, the then Additional Superintendent of Police, Kullu, was on patrolling duty in an official vehicle bearing registration No. HP-03A-1281 being driven by Constable Tej Ram. On 20.10.2009 at about 4.00 A.M. when the police party was present at a place known as Kelti Dhar, a vehicle bearing registration No.HP-01K-0805 was noticed coming from Shallang side. The said vehicle was on the way to Kullu. It was signalled to stop. The driver of the vehicle stopped the vehicle at once and fled away from the spot towards an apple orchard on the lower side of the road. The place was secluded one. The Investigating Officer directed HHC Hira Singh to bring the independent witnesses, who came back after about 15-20 minutes and disclosed that due to odd hours, neither any independent witness nor any passer-by was available. As such, Inspector/SHO associated HHC Kashmi Ram and HHC Hira Singh as witnesses and searched the vehicle bearing registration No. HP-01K-0805 in their presence. On front seat of the vehicle, a black bag was found and on checking, it was found containing sticks and chapatti shaped black substance. After smelling the substance, it was found to be charas.

The police party also found from the dashboard of the vehicle registration certificate of the vehicle in the name of PW2 Ses Ram and a bank pass book bearing account No.3513 pertaining to Himachal Gramin Bank having been issued in the name of accused Khekh Ram. The charas weighed 14.750 kg. The charas was put in the same bag, which was sealed in a cloth parcel with nine seals of impression 'T'. Ruka was sent to the Police Station through HHC Hira Singh for registration of the case. The driver who fled away from the spot was stated to be having stout built, tall and aged about 30-35 years. He was described as Khekh Ram. On 20.10.2009, the owner of the vehicle Ses Ram was interrogated, who disclosed that on 3.8.2009 he had sold vehicle No.HP-01K-0805 to accused Govind Singh. On 20.10.2009, accused Govind Singh was also interrogated who disclosed that on 19.10.2009, his vehicle was taken by accused Khekh Ram for some personal work. Khekh Ram was searched by the police party in his house, but he was not found there. On 21.10.2009 he was arrested from Garsa while driving TATA SPACIO vehicle bearing registration No.HP-01K-1672. On 6.3.2010, the accused Govind Singh was also arrested. Thus, the accused persons were booked for the offences punishable under Sections 20 and 29 of the Act. The matter was investigated and the challan was put up in the trial court after completing all codal formalities.

3. The prosecution examined as many as 8 witnesses, in all, to prove its case against the accused persons. Statements of the accused persons under Section 313 Cr. P.C. were recorded, in which they pleaded that they were falsely implicated. The trial court acquitted the accused persons vide impugned judgment dated 29.12.2010. Hence, the present appeal.

4. Mr. P.M. Negi, learned Deputy Advocate General appearing for the appellant-State, has vehemently argued that the prosecution has proved its case against the accused persons beyond reasonable doubt.

5. M/s Lakshay Thakur and Y.P.S. Dhaulta, learned Advocates, have supported the impugned judgment dated 29.12.2010.

6. We have heard learned counsel for the parties and have gone through the impugned judgment and record meticulously.

7. PW1 HHC Hira Singh testified that on 19.10.2009 at about 10.25 P.M., police party headed by SHO Police Station Kullu, Sanjeev Chauhan, went on patrolling duty. After sometime, Ahmad Syed, the then Additional Superintendent of Police, Kullu, also joined the police party as Incharge. On 20.10.2009 at about 4.00 A.M. when the police party reached at a place known as Kelti Dhar in official vehicle No. HP-03A-1281, a Maruti Alto Car was noticed coming towards the police party. The SHO signalled the vehicle to stop. The driver stopped the vehicle at a distance of about 15-20 yards from the police party and fled away from the spot towards the orchard on the downside of the road. The police party tried to chase the driver with the help of search lights, but he could not be nabbed. Thereafter, he was deputed by SHO to bring local witnesses. No independent witness was available on the spot as it was early hour of the morning. Thereafter, the vehicle was searched. During search, contraband was recovered from the front seat of the vehicle and registration certificate and bank passbook of Gramin Bank issued in the name of accused Khekh Ram were also recovered from the dashboard of the vehicle. The charas weighed 14.750 kg. The sealing proceedings were completed on the spot. The case property i.e. Alto Car bearing registration No. HP-01K-0805 along with its key, RC and pass book, was taken into possession vide memo, Ext.PW1/A. He along with HHC Kashmi Ram and SI Tej Ram signed the recovery memo as witnesses. In his cross-examination, he deposed that the driver of the vehicle fled away from the spot before the police party reached near the vehicle. He had seen him from his back side. He volunteered that he had also seen his side face from a distance of about 40-50 yards.

8. PW2, Ses Ram, testified that on 13.8.2009 he sold vehicle bearing registration No. HP-01K-0805 to accused Govind Singh.

9. PW3, HC Harbans Singh, proved on record copy of special report, Ext.PW3/A.

10. PW4, HC Manoj Kumari, testified that on 20.10.2009 since no senior officer was present in the Police Station, she was officiating as SHO-cum-MHC, Police Station, Kullu. On 20.10.2009, at about 6.55 A.M., HHC Hira Singh brought Ruka to Police Station, on the basis of which, she recorded FIR, Ext.PW4/A. On the same day, at about 5.30 P.M., Inspector/SHO Sanjeev Chauhan deposited with her a parcel, Ext.P1, sealed with 9 seals of impression "T" along with sample seal "T", NCB form in triplicate, photocopy of seizure memo and vehicle bearing registration No. HP-01K-0805 along with its keys. She duly entered all the above articles in the relevant register No.19 at Sr. No.216. On 21.10.2009, she handed over parcel, Ext.P1 along with sample seal "T", NCB form in triplicate, photocopy of seizure memo, photocopy of FIR and docket to Constable Kishan for being deposited at SFSL Junga vide R.C. No.171/2009, Ext.PW4/C, who after depositing the same at SFSL Junga handed over the R.C. to her.

11. PW5, Constable Kishan Chand, testified that he had taken the case property to SFSL Junga.

12. PW6, Constable Narender Kumar, proved on record rapats, Ext.PW6/A, Ext.PW6/B and Ext.PW6/C.

13. PW7, Kapil Sharma, Assistant Chemical Examiner, NDPS Division, SFSL Junga, proved on record chemical examination report, Ext.PA. In his cross-examination, he deposed that the case property was received by him from Constable Kishan Lal.

14. PW8, Sanjeev Chauhan is material witness. He deposed that he was posted as SHO, Police Station, Kullu in the month of October, 2009. He deposed the manner in which the vehicle bearing registration No. HP-01K-0805 was intercepted at Kelti Dhar on 20.10.2009 at about 4.00 A.M. According to him, he deputed HHC Hira Singh to bring independent witness from nearby locality, who after 15-20 minutes returned back to spot and apprised him that no independent witness was available. Thereafter, he associated HHC Hira Singh, HHC Kashmi Ram and SI Tej Ram as witnesses. During search of the vehicle, the charas weighing 14.750 kg was found on the front seat of the vehicle. On opening dashboard of the vehicle, pass book bearing account No.3513 of Himachal Gramin Bank issued in the name of accused Khekh Ram and registration certificate of the vehicle were also found. Sealing proceedings were completed on the spot. The case property, i.e. contraband, Alto Car along with R.C., keys and bank pass-book, was taken into possession vide memo, Ext.PW1/A. Thereafter, he prepared the ruka, Ext.PW8/A and handed over the same to HHC Hira Singh for being taken to Police Station Kullu for registration of the case. During investigation, Ses Ram disclosed to the police that he had sold his vehicle bearing registration No.HP-01K-0805 to accused Govind Singh by way of an affidavit. Accused Govind Singh disclosed to the police that accused Khekh Ram had taken the said vehicle from him to bring his wife from Anni. On 21.10.2009, accused Khekh Ram was arrested when he was coming from Garsa road vide memo Ext.PW1/C. In the month of March 2010, accused Govind Singh was arrested vide memo, Ext.PW8/G. In his cross-examination conducted by learned defence counsel for accused Khekh Ram, he deposed that when the police party alighted from the police vehicle, driver of vehicle No. HP-01K-0805 fled away from the spot and jumped towards dhank (gorge) on lower side of the road. He also chased him on the road. He denied the suggestion that no bag was recovered from vehicle No. HP-01K-0805. In his cross-examination conducted by learned defence counsel for accused Govind Singh, he denied the suggestion that he forced the accused Govind Singh to depose against accused Khekh Ram and when he refused to obey, he falsely implicated him in this case. Whatever was disclosed by accused Govind Singh and Ses Ram, it was recorded in the zimini orders.

15. What emerges from appraisal of the statements of the prosecution witnesses is that on 20.10.2009 at about 4.00 A.M., when the police party was on patrolling duty at a place known as Kelti Dhar in an official vehicle No. HP-03A-1281, a Maruti Alto Car bearing registration No. HP-01K-0805 being driven by accused Khekh Ram was signalled to stop. On seeing the police party, he at once stopped the vehicle and ran away from the spot towards the orchard downside the road. The police party tried to chase him with the help of search lights, but he could not be nabbed. PW8, Investigating Officer directed HHC Hira Singh to bring the

independent witnesses, who came back after about 15-20 minutes and apprised him that due to odd hours and the place being secluded one, no independent witness was available. As such, PW8 Investigating Officer, associated HHC Kashmi Ram and HHC Hira Singh as witnesses and searched the vehicle bearing registration No. HP-01K-0805 in their presence. On search, a black bag was found on the front seat of the vehicle and it was found containing sticks and chapatti shaped black substance, which after smelling was found to be charas. The registration certificate of the vehicle in the name of one Ses Ram and a pass book bearing account No.3513 pertaining to Himachal Gramin Bank having been issued in the name of accused Khekh Ram were also found in the dashboard of the vehicle. The charas weighed 14.750 kg. The vehicle was owned by accused Govind Singh.

16. Mr. Lakshay Thakur, learned Advocate, has vehemently argued that the prosecution has failed to connect the accused Khekh Ram with the alleged offence. He has contended that accused Khekh Ram was booked in the present case merely on the basis of his bank pass-book allegedly found in the dash board of the vehicle bearing registration No. HP-01K-0805. He has also argued that in the ruka, Ext.PW8/A the name of the accused Khekh Ram was not mentioned.

17. It has come in the cross-examination of PW1 HHC Hira Singh that the accused Khekh Ram fled away from the spot before the police party reached near the vehicle. When search lights were thrown on him, the police party noticed his back portion. He had also seen him from his back side. He had also seen his side face from a distance of about 40-50 yards. The pass book bearing account No.3513 pertaining to Himachal Gramin Bank having been issued in the name of accused Khekh Ram was also found in the dashboard of the vehicle.

18. We have gone through the ruka, Ext.PW8/A. Towards end of Ruka, Ext.PW8/A, the name of the accused has been specifically mentioned from whom the charas weighing 14.750 kg was recovered. The learned trial court should have read the contents of the Ruka, Ext.PW8/A in its entirety. Even in the NCB form also, name of the accused Khekh Ram has been mentioned.

19. Mr. Lakshay Thakur, learned Advocate has also vehemently contended that the accused Khekh Ram has been falsely implicated by the police personnel by planting the contraband, but there is no merit in his contention taking into consideration the huge quantity of charas (14.750 kg). Moreover, he has not proved on record that there was any animosity between Khekh Ram and the police personnel, who intercepted the vehicle. Even the bank pass-book of the accused Khekh Ram was also found in the dashboard of the vehicle. The accused Khekh Ram also feigned ignorance when he was put question No.7 while recording his statement under Section 313 Cr.P.C. that Alto Car No. HP-01K-0805 was searched by PW8 Inspector Sanjeev Chauhan and during search a black and red colour bag, on which word “Sports” was printed, was found on the front seat of the vehicle. A pass book bearing account No.3513 of Himachal Gramin Bank issued in his name, in which about Rs. 1,79,000/- were found to have been deposited upto 3.10.2009 was found in the dashboard of the vehicle. He should have given some explanation how his bank pass-book was found in Alto Car No. HP-01K-0805. There was no occasion for the police personnel to falsely implicate him. Therefore, the prosecution has proved beyond reasonable doubt that it was the accused Khekh Ram, who was driving the vehicle bearing registration No. HP-01K-0805, on 20.10.2009 at 4.00 A.M., from which the charas weighing 14.750 kg and bank pass-book bearing account No.3513 pertaining to Himachal Gramin Bank issued in his name were recovered.

20. It is reiterated that the name of the accused Khekh Ram was mentioned in the Ruka as well as in the NCB form. The learned trial court has not correctly appreciated the Ruka, Ext.PW8/A wherein name of Khekh Ram has been specifically mentioned. Though, the learned trial court has observed that Ahmad Syed, the then Additional Superintendent of Police, Kullu, was not examined, but it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the Court to place credence on the statement.

21. Now, as far as the accused Govind Singh is concerned, the prosecution has failed

to prove the case against him. What accused Govind Singh has told the police during interrogation is that accused Khekh Ram had taken his vehicle bearing registration No. HP-01K-0805 to bring his wife from Anni on 19.10.2009. Thereafter, he moved an application under Section 457 Cr.P.C. for the release of the vehicle. Moreover, the incident is dated 20.10.2009 and Govind Singh was arrested on 19.3.2010

22. Accordingly, the appeal is partly allowed and the impugned judgment dated 29.12.2010, rendered by the learned Special Judge, Kullu, H.P., in Sessions Trial No. 24/2010, is set aside to the extent it acquitted the accused Khekh Ram under Sections 20 and 29 of the Act. Accordingly, accused Khekh Ram is convicted for the offences punishable under Section 20 of the Act. He be produced in the Court to be heard on the quantum of sentence on **22.9.2016**. The bail bonds are cancelled. The acquittal of accused Govind Singh is upheld.

23. The registry is directed to prepare the production warrant.

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

State of H.P. .....Appellant.

Versus

Mohan Lal .....Respondent.

Cr. Appeal No. 206 of 2012.
Reserved on: September 16, 2016.
Decided on: September 19, 2016.

N.D.P.S. Act, 1985- Section 20- Police party noticed one boy standing on the bridge- he tried to run away on seeing the police- he was apprehended- his search was conducted during which 250 grams charas was recovered- accused was tried and acquitted by the trial Court- held, in appeal that there are contradictions in the testimonies of official witnesses- no independent witness was associated- explanation was given that place was isolated and no vehicle passed through the bridge- further, PW-1 admitted that he had taken lift in the private vehicle to police station, Banjar- this shows that road was busy- independent witness could have been associated at the time of search, seizure and sealing- prosecution version was not proved and the trial Court had rightly acquitted the accused- appeal dismissed. (Para-11 to 13)

For the appellant: Mr. M.A.Khan, Addl. AG.
For the respondent: Mr. Sanjeev Bhushan, Sr. Advocate with Ms. Abhilasha Kaundal, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The State has come in appeal against the judgment dated 31.5.2011, rendered by the learned Special Judge (FTC), Kullu, H.P., in Sessions Trial No. 51/2010, whereby the respondent-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act), has been acquitted.

2. The case of the prosecution, in a nut shell, is that on 16.2.2010 at about 8:10 PM at place known as "Fagu Bridge" Inspector SHO along with HC Purshotam, HHC Hem Raj and HHG Sher Singh was going towards Larji in official vehicle in connection with patrolling duty. When the police party reached near Fagu bridge, they noticed one boy standing on the bridge. On seeing the police vehicle, he turned towards Ghambhir road and tried to run down towards the rivulet. The police party became suspicious and nabbed the accused. The boy disclosed his identity. SHO suspected that the boy was carrying some narcotic substance. The place was

isolated. The police waited for sometime, but when neither any vehicle nor any person passed through the road, SHO joined HC Purshotam and HHC Hem Raj as witnesses. The accused was apprised of his right to be searched either before a Gazetted Officer or a Magistrate. He consented to be searched by the police present at the spot. SHO gave his personal search. Thereafter, search of the accused was conducted and during his search one polythene envelope from the inner pocket of brown coloured coat of accused was recovered. From the envelope, marble shaped black substance was recovered. It was found to be charas. It weighed 250 grams. The same was wrapped in white coloured cloth and sealed with five impressions of seal "H". NCB-I form in triplicate was filled in and impression of seal on separate pieces of cloth was also taken. Recovery memo was prepared. Rukka was sent to the Police Station through HHC Hem Raj, on the basis of which, FIR was registered. I.O. deposited the case property with MHC along with other relevant documents at Police Station. The case property was sent to FSL, Junga. The report of the Chemical Examiner was procured. The investigation was completed and the challan was put up before the Court after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as nine witnesses. The accused was also examined under Section 313 Cr.P.C. According to him, he was falsely implicated. He denied the prosecution case in entirety. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Mr. M.A.Khan, Addl. AG, has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. Sanjeev Bhushan, Sr. Advocate for the accused has supported the judgment of the learned trial Court dated 31.5.2011.

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

6. PW-1 HHC Hem Raj testified that on 16.2.2010, he along with HC Purshotam and HHG Sher Singh was accompanying Insp. Prem Dass. They reached at Fagu bridge at about 8:10 PM. They noticed one boy standing on the bridge. On seeing the police vehicle, the boy turned towards Ghambhir road and tried to run away down towards the nullah (rivulet). The police party became suspicious and nabbed the accused. The boy disclosed his identity. The place was isolated. Insp. SHO suspected that the boy was carrying some narcotic substance. The police party waited for arrival of some vehicle passing through the road, but when neither any vehicle nor any person passed through the road, SHO joined him and HC Purshotam as witnesses. In their presence, the accused was apprised of his right to be searched either before a Gazetted Officer or a Magistrate. The accused consented to be searched by the police present at the spot. Consent memo Ext. PW-1/A was prepared to this effect. Insp./SHO gave his personal search but nothing incriminating was recovered and memo Ext. PW-1/B was prepared. Thereafter, personal search of the accused was conducted and during his search one round shaped material kept inside the polythene envelope from the left pocket of coat of accused was recovered. It was found to be charas. It weighed 250 grams. The same was wrapped in white coloured cloth and sealed with five impressions of seal "H". NCB-I form in triplicate was filled in and impression of seal on separate pieces of cloth was also taken. Recovery memo was prepared. Rukka was sent to the Police Station through HHC Hem Raj, on the basis of which, FIR was registered. In his cross-examination, he deposed that he did not know when the last bus starts from Kullu to Banjar but deposed that last bus from Banjar to Kullu starts at 6:00 PM. He along with Purshotam Lal was associated by the I.O. He did not remember that there were 9-10 houses in village Jol. He did not remember the exact distance between Village Jol and the bridge. He did not remember that village Bihali was also situated by the side of Ghambhir road. He admitted that cemented stairs also originate from other side of the bridge. He did not remember that house of Gurbachan Singh was situated near the foot path which originates from other side of the bridge. He did not know that five houses of sons of Mal Singh were also situated on the other side of the bridge. He denied that village Trigyali was at a distance of 1 km. from the spot. Voluntarily deposed that it was more than 1 km. The SHO came out from the vehicle first and ran towards the accused and thereafter other police officials followed him. There was no street light at the place of incident. The accused ran about 15-20 paces and then climbed down. He

did not remember as to how far the accused went down from the bridge towards the rivulet. SHO nabbed the accused first. They waited for the arrival of vehicle and people passing through that place for 15 minutes only. He admitted that SDM and Tehsildar are also housed at Banjar. Consent memo Ext. PW-1/A was in the hand writing of HC Purshotam which was dictated by the SHO.

7. PW-2 HC Purshotam testified the manner in which the accused was apprehended near the bridge and all the codal formalities were completed on the spot. In his cross-examination, he deposed that new bus stand was about 1 km. from the Police Station and old one was about 200 meters from the Police Station. The distance of village Sidhwan from Police Station was about 2 kms. He did not remember the distance from Police Station to Village Trigyali. Fagu bridge was about 7 kms from the Police Station. He did not know that village Bihali was about 400 meters from Fagu bridge. He did not know that there were 4-5 families in village Bihali. He admitted that there were 10-12 houses at village Jol. He also admitted that there was pucca path situated on other side of bridge leading to some village. He did not know that the house of Gurbachan Singh was situated on the other side of Fagu bridge. He also testified that the accused was nabbed by the SHO.

8. PW-4 HC Chaman Lal testified that on 16.2.2010, Insp./SHO Prem Dass handed over one parcel containing 250 grams of charas sealed with five seal impressions of seal "H" along with the sample seals and NCB form in triplicate. Insp./SHO Prem Dass handed over these articles to him at 11:50 PM. He made entry of the same in the relevant register at Sr. No. 124 vide Ext. PW-4/A. On 18.2.2010, he handed over the case property along with the relevant documents to Const. Vijay Kumar for depositing the same with FSL, Junga vide RC No. 26/10.

9. PW-6 Const. Vijay Kumar deposed that on 18.2.2010, MHC Chaman Lal handed over to him one parcel containing 250 grams of charas sealed with five seal impressions of seal "H" along with the sample seal, NCB form in triplicate and other relevant documents vide RC No. 26/10 with direction to deposit the same at FSL, Junga. He handed over the same to the official of FSL, Junga and handed over the receipt to the MHC.

10. PW-9 Insp./SHO Prem Dass also deposed the manner in which the accused was apprehended on 16.10.2010 at 8:00 PM. He gave his personal search to the accused in the presence of witnesses. Thereafter, personal search of accused was conducted and during his search one polythene transparent envelope from the left pocket of coat was recovered. It was found to be charas. It weighed 250 grams. Rukka Ext. PW-8/A was sent to the Police Station through HHC Hem Raj, on the basis of which, FIR Ext. PW-8/B was registered at PS Banjar. In his cross-examination, he deposed that HHC Hem Raj chased the accused and he was apprehended by Hem Raj and Purshotam. The accused was apprehended at about 10 mtrs. below towards river side from the road. The accused ran about 25 meters from the place where he was standing before running towards river side. He has arrested the accused after sending the rukka to the Police Station. HHC Hem Raj handed over the case file to him at 11:00 PM at the spot. He denied the suggestion that some houses were visible from the place of incident. He denied that house of Gurbachan Singh was visible from the spot. He did not know that 5-6 houses were also situated near to the house which belongs to the children of Mal Singh. According to him, village Trigyali was about 1 ½ km. before Fagu bridge. He denied that village Bihali was also near to the spot. Volunteered that it was about 2 kms. away from the spot.

11. According to PW-1 HHC Hem Raj, Insp. /SHO Prem Singh nabbed the accused. PW-2 HC Purshotam also deposed that the accused was nabbed by PW-9 Insp./SHO Prem Dass. However, PW-9 Insp./SHO Prem Dass deposed that HHC Hem Raj chased the accused and he was apprehended by Hem Raj and Purshotam. The prosecution has not examined any independent witness. The case of the prosecution is that the place where the accused was apprehended was isolated and desolate and no vehicle passed through the bridge at the relevant time. However, it has come on record in the statement of PW-1 HHC Hem Raj that he took lift in the private vehicle to Police Station, Banjar.

12. PW-1 HHC Hem Raj has categorically testified in his cross-examination that the accused was arrested before he took rukka to the Police Station. However, PW-9 Insp./SHO Prem Dass deposed that accused was arrested after sending the rukka to the Police Station. PW-1 HHC Hem Raj deposed that he handed over the case file to SHO when he reached at the Police Station. However, PW-9 Insp./SHO Prem Dass deposed that PW-1 HHC Hem Raj has handed over the case file to him on the spot. These are major contradictions in the statements of the official witnesses.

13. PW-1 HHC Hem Raj deposed that he has taken lift in the private vehicle to reach Police Station, Banjar. Thus, it is evident that it was a busy road and police could easily associate independent witnesses at the time of search, seizure and sealing proceedings on the spot. The police officials instead of denying the suggestions in their cross-examinations have testified that they did not remember or that they did not know whether human habitation was nearby the place where the accused was apprehended. Thus, no credence can be given to the statements of the official witnesses.

14. The prosecution has failed to prove that the charas weighing 250 grams was recovered from the conscious and exclusive possession of the accused and thus this Court has no occasion to interfere with the well reasoned judgment of the learned trial Court dated 31.5.2011.

15. Accordingly, there is no merit in this appeal and the same is dismissed.

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

State of Himachal Pradesh .....Appellant

Versus

Pawan Kumar & another ....Respondents

Cr. Appeal No. 474 of 2009
Reserved on : 20.07.2016
Date of Decision: 19.09.2016

Indian Penal Code, 1860- Section 302 read with Section 34- Deceased was returning to his village in a vehicle being driven by PW-12- PW-11 and L were also with them- their vehicle scratched car of the accused coming from opposite side – PW-12 did not stop the vehicle, whereupon accused chased the vehicle of PW-12- they stopped their car in front of the pickup vehicle, pulled PW-12 out of the vehicle and started beating him- he was taken to police station, Jubbal and a case under Motor Vehicles Act was registered against him- the deceased was found missing after the incident- subsequently, his dead body was recovered with injuries- as per the prosecution version, the deceased had tried to save PW-12 and was killed by throwing him from the cliff – the accused were tried and acquitted by the trial Court- held, in appeal that there is no evidence to prove the guilt of the accused- PW-12 who was present with the deceased at the time of incident has not supported the prosecution version- the possibility of registration of the case under public pressure cannot be ruled out- the trial Court had rightly appreciated the evidence- appeal dismissed. (Para-7 to 18)

For the Appellant: Mr. Vikram Thakur, Deputy Advocate General.
For the Respondents: Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Respondents have been acquitted vide judgment dated 22.04.2009 passed by learned Additional Sessions Judge in Sessions Trial No. 14-R/7 of 2008 in case FIR No. 107 of

2006 under Section 302 readwith Section 34 IPC, registered in Police Station Jubbal District Shimla H.P. The acquittal of respondents has been assailed by State of H.P. in present appeal.

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

3. Deceased Sanju son of PW-1 Sandhira Sharma was running business of tent house. On 12.12.2006 he was returning from village Raika to his village Hatkoti with his tents in pickup vehicle driven by PW-12 Nand Lal. PW-11 Papu Ram and Lalit Kumar were also with them. Near Palothi Dhar, their vehicle scratched car of respondents coming from opposite side. PW-12 Nand Lal did not stop his vehicle whereupon respondents came back and after chasing pickup vehicle, stopped their car in front of pickup vehicle. Respondents pulled PW-12 Nand Lal out of pickup vehicle and started beating him. PW-11 Papu Ram and Lalit Kumar ran away from spot, approached PW-1 Sandhira Sharma at Hatkoti and narrated the incident. PW-12 Nand Lal was taken by respondents to Police Station Jubbal. A case under Motor Vehicle Act was registered against PW-12 Nand Lal and he was arrested and was sent for medical examination.

4. Deceased Sanju neither reached Hatkoti nor was found with PW-12 Nand Lal. PW-1 Sandhira Sharma tried to locate her deceased son Sanju by making telephonic calls to her relations as well as Police Station Jubbal. On finding no clue or link about her son on 13.12.2006 at about 9.30 AM. she lodged missing report Ex. PW-14/B in Police Station Jubbal PW-12 Nand Lal was released on 13.12.2006 on furnishing surety by PW-1 Sandhira Sharma.

5. During intervening night between 12th and 13th December, 2006 respondents had approached PW-2 Keshav Ram for searching one missing person with the help of Mashal. PW-2 Keshav Ram also unsuccessfully tried to search that person in bushes. Respondents went towards Jubbal and PW-2 Keshav Ram returned to his house.

6. After registering missing report police also searched deceased Sanju. PW-1 Sandhira Sharma, PW-11 Papu Ram and PW-12 Nand Lal and Lalit Kumar were also accompanying the police. PW-1 Sandhira Sharma noticed shoe of deceased Sanju and after spotting shoes they all went down the cliff and found dead body of Sanju lying in the water with injuries on various parts of his body. Dead body was sent for postmortem.

7. On 14.12.2006 PW-1 Sandhira Sharma made statement Ex. PA under Section 154 Cr.P.C. suspecting that deceased Sanju was thrown from cliff by respondents after killing him. On the basis of her statement, FIR Ex. PW-9/A was registered in Police Station Jubal and respondents were arrested and after completion of investigation challan was put in the Court under Section 302 readwith Section 34 IPC against respondents.

8. Including respondents there were six persons on the spot and PW-11 Papu Ram and Lalit Kumar had left place immediately after PW-12 Nand Lal was pulled out from vehicle by respondents. As per prosecution story deceased Sanju tried to intervene to save PW-12 Nand Lal but he was pushed below the road by respondents and thereafter took PW-12 Nand Lal to Police Station Jubbal. Therefore, besides respondents there was only PW-12 Nand Lal who was present on the spot to tell about deceased Sanju. PW-12 Nand Lal deposed that when he was being beaten by respondents then Sanju, Lalit Kumar and PW-11 Papu Ram came out of vehicle and thereafter respondents forced him to drive the pickup to the Police Station Jubbal. He was declared hostile on the request of learned public prosecutor and was subjected to cross examination. During cross examination he denied suggestions of prosecution that Sanju had tried to save him from clutches of accused and respondents had caught hold of Sanju and started beating him in presence of this witness. He also denied that respondent Pawan Kumar had thrown deceased Sanju from cliff after taking him towards cliff. He resiled from his earlier statement recorded under Section 161 Cr.P.C. and denied to have made such statement to the police. In cross examination by defence counsel this witness stated that they stayed on the spot for five minutes after stopping his vehicle by respondents and respondents took him to Police Station Jubbal and respondents did not beat Sanju in his presence. He stated that they were not knowing that Sanju had fallen down on 13.12.2006 and they searched him for about an hour.

There is no direct evidence on record to link respondents with killing of deceased Sanju. PW-2 Keshav Ram has been examined to prove that respondents were knowing that deceased had fallen from cliff or had been thrown by them below the road. This witness deposed that respondents approached him and he provided a Mashal and accompanied them for searching one persons fallen below the road in bushes. As per respondents, someone informed in Police Station Jubbal that out of three persons running towards Hatkoti, one person had fallen from the cliff and thereupon police official told them that there was shortage of staff and asked to search person fallen from cliff and for this reason they took help of PW-2 Keshav Ram for searching said person.

9. Therefore, the statement of PW-2 Keshav Ram is not a conclusive proof to infer that respondents had thrown deceased from cliff and therefore they were searching for him during night.

10. PW-11 Papu Ram deposed that respondents tried to catch them and because of their fear he and Lalit Kumar ran away from spot to house of Sanju and at that time deceased Sanju was there in the vehicle. He stated that they narrated the incident to mother of Sanju after reaching his house and mother of Sanju i.e. PW-1 Sandhira Sharma rang up to Police Station Jubbal and she was replied that persons had been sent for medical examination. But later on police official conveyed her that only Nand Lal was there in police Station. He also admitted that on 13.12.2006 he, Nand Lal, Lalit Kumar were interrogated by Police and their statements were recorded by Police.

11. PW-1 Sandhira Sharma visited Police Station Jubbal on 13.12.2006 and bailed out PW-12 Nand Lal but at that time PW-12 Nand Lal did not state anything with regard to pushing deceased by respondents from cliff on the day of incident. Respondents took PW-12 Nand Lal from spot to the police and lodged report against him resulting into his arrest on 12.12.2006. he was not having any sympathy for respondents especially on that day. Even if, it is considered that on 12.12.2006 he was feeling himself guilty and was under pressure of respondent as well as of police because of his conduct and situation then also after bailing out on furnishing surety by PW-1 mother of Sanju, there was no impediment to him for not disclosing to her about killing of deceased Sanju by pushing from cliff by respondent Pawan Kumar. PW-12 Nand Lal was alongwith PW-1 Sandhira Sharma and PW-11 Papu Ram on 13.12.2006 and 14.12.2006 but till 14.12.2006 no such statement/disclosure was ever made by PW-12 Nand Lal.

12. Statement of PW-1 Sandhira Sharma under Section 154 Cr.P.C. was recorded on 14.12.2006 on the basis of which FIR against respondents was registered. PW-7 Sanjeev Kumar admitted that statement of Sandhira Sharma was recorded on the spot in presence of Deputy Superintendent of Police, Sub Divisional Magistrate and 50-100 other persons and respondents, Papu Ram, Nand Lal and Lalit Kumar were also present on the spot. PW-11 Papu Ram also admitted that on 14.12.2006 he was in the house of Sanju deceased and several persons had assembled in Hatkoti Rest house where Sub Divisional Magistrate and Deputy Superintendent of Police were called there. Deputy Superintendent of Police called respondent Pawan Kumar there and his statement was also recorded in the presence of Sub Divisional Magistrate. PW-12 Nand Lal also admitted that on 14.12.2006 he was present in Hatkoti Rest House and his statement was recorded by the Sub Divisional Magistrate in the Rest house in presence of 100 persons including Sub Divisional Magistrate and Deputy Superintendent of Police. He admitted that people present in Rest House were angry but he showed ignorance about pressurizing by those persons for registration of case against respondents. PW-14 Investigating Officer also admitted that statement of Sandhira Sharma was recorded in Hatkoti Rest House in presence of villagers, Deputy Superintendent of Police and Sub Divisional Magistrate. He admitted presence of both respondents in the rest house. He stated that residents of area were agitating and were demanding registration of case against respondents. He admitted that on that day PW-11 Papu Ram and PW-12 Nand Lal and Lalit Kumar did not say anything against the respondents. The circumstances in which statement of PW-1 was recorded under Section 154 Cr.P.C. also create doubt about fair investigation.

13. Even if Ex. PA statement of PW-1 Sandhira Sharma is considered to be correct, even then in that statement she only suspected that her son was thrown from cliff by respondents after killing him. PW-11 Papu Ram and PW-12 Nand Lal were present in the rest house who were staying in the house of PW-1 Sandhira Sharma. In case deceased Sanju was thrown from cliff by respondents in presence of PW-12 Nand Lal, then he must have told this fact of PW-1 Sandhira Sharma. But, in her statement she did not state specifically that deceased Sanju tried to save Nand Lal upon which deceased Sanju was also beaten by respondents and pushed from cliff as was claimed by prosecution on the basis of statement of PW-12 Nand Lal recorded under Section 161 Cr.P.C.

14. PW-12 Nand Lal resiled from his statement recorded by police under Section 161 Cr.P.C. and did not state in the Court that deceased Sanju was pushed or thrown by respondents from cliff in his presence. His version deposed in Court appeared to be correct as had respondents have pushed deceased Sanju from cliff in his presence while deceased was trying to save him, he would have definitely disclosed this fact PW-1 Sandhira Sharma who had bailed out him on 13.12.2006 or to PW-11 Papu who was resident of his area.

15. PW-1 Sandhira Sharma in her deposition in the Court stated that she made telephonic call to police at 11.00 PM to talk with her son but police people replied that her son was not there in Police Station but driver etc were there, who were telling that three persons ran away from the spot. Therefore, it can be inferred that from the very beginning PW-12 Nand Lal was saying that three persons i.e. Papu, Lalit Kumar and Sanju fled from the spot.

16. Respondents have also examined DW-1 as defence witness but his statement is not necessary to be discussed as there is no sufficient material on record to prove guilt of respondent. The only eye-witness PW-12 Nand Lal who was companion of deceased at the time of incident had not supported prosecution case. Even if entire evidence is considered to be correct then also the material on record leads to suspicion only. Suspicion however strong can not take place of proof. Therefore, it cannot be said with certainty beyond all reasonable doubts that respondents had thrown deceased Sanju from the cliff to kill or after killing him.

17. PW-11 Papu Ram and PW-12 Nand Lal and Lalit Kumar in their statements under Section 161 Cr. P.C. did not state anything against respondents at first instance but they stated so in supplementary statements recorded by PW-13 Ram Rattan. In his cross examination PW-13 stated that these witnesses were eye witness to the incident and their statements under Section 161 Cr.P.C. were already on record at the time of recording their supplementary statements and he admitted that at the time of recording supplementary statements of these witnesses, their earlier statements were not read by him and these witnesses did not said at all that their previous statement were incorrect. There is possibility of registration of case succumbing to public pressure.

18. Respondents have been acquitted by the trial Court. From perusal and scrutiny of evidence, it cannot be said that the learned trial court has not appreciated the evidence correctly and completely and acquittal of accused has resulted into travesty of justice or has caused miscarriage of justice. After considering arguments of respective counsel for the parties and minutely examining the testimonies of the witnesses and other documentary evidence placed on record, we are of the considered view that prosecution has failed to prove the guilt of respondents-accused beyond reasonable doubt and thus, no case for interference is made out.

19. The present appeal, devoid of any merit, is dismissed, as also pending applications, if any. Bail bonds, if any, furnished by the accused are discharged. Records of the Court below be immediately sent back.

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

State of Himachal Pradesh ....Appellant
Versus
Rajeev Kumar & others ...Respondents

Criminal Appeal No. 14 of 2011
Judgment reserved on: 07.07.2016
Date of Decision: 19.09.2016

Indian Penal Code, 1860- Section 366, 376, 212, 109 and 417- accused R kidnapped the prosecutrix and kept her in the house of his Aunt – prosecutrix was admitted in the hospital with the suspicion that she had consumed poison - she made a statement that she was taken by accused R with the assurance that he would marry her- she had consumed wrong medicine by mistake and was brought to hospital- accused had not completed his promise to marry her-other accused had abetted the commission of crime by R - accused were tried and acquitted by the trial Court- held, in appeal that it was custom in the tribe of the parties to perform customary marriage with the consent of the male and female by leaving their houses- accused R had left their village as per custom- FIR was lodged after the marriage of accused with another girl- prosecutrix and accused were 20-25 years old respectively- prosecutrix admitted that she had knowledge about the engagement of the accused – accused was proclaiming to marry the prosecutrix- prosecutrix was accompanying him in accordance with the prevailing custom in the belief that accused was her husband or would be her husband- her consent was not free consent- accused R held guilty of the commission of offences punishable under Sections 366 and 376 of I.P.C - Respondent No. 3 had allowed R to continue with the drama and abetted him in committing crime- appeal partly allowed- accused R held guilty for commission of offences punishable under Sections 366 and 376 of I.P.C and respondent No.3 held guilty for the commission of offences punishable under Sections 366 and 376 IPC read with Section 109 IPC.

(Para-9 to 43)

Case referred:
Deepak Gulati Versus State of Haryana, (2013) 7 Supreme Court Cases 675

For the appellant : Mr. M.A. Khan, Additional Advocate General.
For the respondents : Mr. Vinay Thakur, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

Assailing acquittal of respondents in case FIR No. 38 of 2006, dated 07.12.2006 under Sections 366, 376, 212, 109 and 417 of Indian Penal Code registered in Police Station Pooh District Kinnaur H.P., vide judgment dated 25.09.2010 passed in Sessions Trial No. 25 of 2007 by H.P., present appeal has been preferred by State of Himachal Pradesh.

2. On 07.12.2006 at about 4.40 PM, PW-7 Chhewang Lamo lodged FIR Ex. PW-7/A in Police Station, Pooh stating therein that her youngest daughter prosecutrix, aged 22 years was taken away by respondent Rajeev Kumar on 21.09.2006 from her village without their consent by alluring her under assurance of marriage. Respondent Rajeev Kumar kept their daughter in same village in the house of his maternal uncle PW-1 Thakursain for about 14 days thereafter he kept his daughter in village Rarang in the house of his Aunt (Bari Maa) (Mausi) PW-5 Hira Dassi. They asked Rajeev Kumar through the Vice President, Gram Panchayat, Labrang to complete ceremonies of marriage but Rajeev Kumar stated that his parents were yet in tension and he will send his parents to them after having their concurrence but till date of

lodging complaint no one approached them and on approaching Rajeev Kumar he again said that he will send his parents to them very soon. Since the day Rajeev Kumar took their daughter, he did not allow her to talk with them. Circumstances in which their daughter was living were not known to them and they did not visit the village Rarang apprehending clash. They were waiting for performance of ceremonies of marriage on behalf of parents of the boy but neither parents of boy nor boy came to them nor was anything communicated to them. It was believed by them that Rajeev Kumar was misguiding her and was interested to keep her by giving false assurance of marriage.

3. On the same day i.e. 07.12.2006 prosecutrix was admitted in PHC Skiba by PWs Hira Dassi and on her son suspecting that she had consumed poison where from she was referred to Reckong Peo. On that day, HC Bhoop Singh from Police Post Moorang visited PHC Skiba and approached Medical Officer vide application Ex. PW-11/A for issuance of MLC of prosecutrix. Perusal of Ex. PW-11/A reflected that at that time prosecutrix was identified as wife of respondent Rajeev Kumar.

4. On 8th December 2006, PW-10 SI Lekh Ram approached Medical Officer Reckong Peo with application Ex.PW-16/B for recording statement of prosecutrix for investigation of FIR lodged by her mother PW-7 Chewang Lamo. After seeking opinion of Medical Officer, statement of prosecutrix Ex. PW-3/A was recorded by police which was attested by the Medical officer.

5. In this statement prosecutrix stated that she was resident of Village Labrang and studying in +2. Respondent Rajeev Kumar of his village expressed love with her with the desire to marry her. Since 2004, he chased her where ever she used to go. She advised him that in case he was in love with her and wanted to marry her then he should sent his parents to her parents so as to finalize marriage. He compelled her repeatedly and on 21.09.2016 when she was going to her home, he took her with him by enticing her and saying that from that day they will live like husband and wife and he will complete ceremonies of marriage by sending his parents. On that day Rajeev Kumar took her to the house of his relatives at Sangla. On 22.09.2006 (respondent No. 3) Sanam Medup father of respondent, Rajeev Kumar, Thakur Sain, Ajay Kumar and Kamal Kishore etc. residents of Village Labrang reached Sangla and brought her and Rajeev Kumar alongwith them back to village Labrang and kept them in the house of PW-1 Thakur Sain for 14 days. Rajeev Kumar lived with her in that house. Thereafter Rajeev Kumar kept her for 2-3 nights in residences of Ward Member and other people in his acquaintance. On 7.10.2006, respondent took her to house of his Massi PW-5 Hira Dassi in village Rarang and since then till 07.12.2006 she remained there. Rajeev Kumar stayed there only for 5 days. On 07.12.2006, she consumed wrong medicine by mistake and she was brought to hospital by PW-5 Hira Dassi and her son. Rajeev Kumar also reached there. Police from Moorang also came and recorded her statement. She was referred to District Hospital Reckong Peo and Rajeev Kumar accompanied her and admitted her in the Hospital. Because of taking wrong medicine, she lost her consciousness for short interval. After reaching Hospital, she did not see Rajeev Kumar nor did he inquire about her condition. His whereabouts were not known. Late night her parents and father of Rajeev Kumar, Sanam Medup and Kamal Kishore also arrived at Hospital and at that time she was not completely conscious. She was unconscious for short interval. Vomiting had started after some time of taking medicine. On inquiring reason for vomiting by Lata daughter of Hira Dassi and Meson she had told them about consuming medicine from Almirah assuming that the same was cough syrup which was, perhaps, spray for apples. When she was being taken to Hospital she over heard some ladies talking that Rajeev Kumar had performed marriage with some one else which was not believed by her and she was stunned and was not able to inquire from them. She was repeatedly asking Rajeev Kumar to complete ceremonies of marriage but every time he deferred it by saying that ceremony of marriage will be completed very soon by the consensus of his parents. Her parents had also asked parents of Rajeev Kumar to complete ceremonies of marriage by sending Pradhan and Up Pradhan and Ward members but every time they deferred it on one pretext or other. As and when Rajeev Kumar stayed with her, they lived as husband and wife and Rajeev Kumar developed physical relations without marrying her and

without her desire by deceiving her with assurances to marry and as such Rajeev Kumar spoiled her life. As it was heard that he had solemnized another marriage definitely his parents were behind the same who were not agreeing for marriage of Rajeev Kumar with her. Parents of respondent Rajeev Kumar would have performed ceremonies of marriage on that day only when they were brought back Labrang from Sangla. Parents of prosecutrix would have agreed but parents of Rajeev Kumar did not do so. When they were brought back to Labrang, Pradhan had asked Rajeev Kumar that what he had done. Respondent Rajeev Kumar had replied that he had married according to his wish. On 21.09.2008, Rajeev Kumar was also accompanied by her God brother Funchok Chhopel who was also cousin of Rajesh Kumar and he was accompanying them at Sangla also.

6. After completion of investigation challan was put in the Court and respondent No. 1 Rajeev Kumar was charge sheeted under Sections 366 and 376 of Indian penal Code and respondent No. 2 Kamal Kishore was charge sheeted under Section 213 of the Indian Penal Code whereas respondent No. 3 Sanam Medup was charge sheeted under Sections 366 read with Sections 109 and 376 read with Section 109 of Indian Penal Code.

7. On conclusion of trial, learned trial Court acquitted the respondents.

8. We have heard learned counsel for parties and had have perused record.

9. Prosecutrix and respondents belong to tribal community residing in District Kinnaur of Himachal Pradesh. Before evaluating evidence on record, peculiar customs of tribal community came on record in suggestions put by and on behalf of respondents to witnesses during cross examination are necessary to be discussed.

10. During cross examination of witnesses, respondents highlighted customs of Tribal Community to which prosecutrix and respondent belong. PW-5 Hira Dassi, Aunt (Mausi) of respondent Rajeev Kumar, stated that in their area customary marriage was performed with consent of male and female and thereafter both of them inhabited in house of their relatives for some time after marriage on their own. It was recognized as customary marriage in Kinnaur District to which parties belong. Positive suggestion put to PW-7 Chhewang Lamo, mother of prosecutrix was admitted by her by stating that it was correct that in their area customary marriage was performed by boy and girl with mutual consent by leaving their houses. However, she qualified that ritual of custom had to be performed in the same evening or night by offering bottle of liquor by the family of boy to the family of girl. Suggestion that when boy and girl performed their marriage against wishes of parents, there was no ritual of customs for offering bottle of liquor, was denied by her. She admitted that in customary marriage parents of boy offered a liquor bottle as per rituals through Mediator to the parents of girl. Another positive suggestion was admitted by her stating that it was correct that there were many couples in Kinnaur and in their area where the marriage was celebrated without consent of parents but she qualified that rituals were performed after celebration of such marriage which was customary. Similar suggestions put to PW-8 prosecutrix were also admitted by her. PW-8 prosecutrix also admitted that there was custom in Kinnaur that male and female could marry against wishes of parents and there were many couples in Kinnaur who had married without consent of their parents. Another positive suggestion put to her was admitted by her stating that it was correct that there were couples who had married against wishes of their parents and thereby living separately from their parents as the parents had turned them out.

11. PW-9 Rajinder Singh was Pradhan of Gram Panchayat Labrang who deposed that on 22.09.2006 respondent No.3, Kamal Kishore and Yaswant Singh called him to house of PW-1 Thakur Sain where respondent Rajeev Kumar and prosecutrix were present and on inquiring respondent Rajeev Kumar disclosed that he liked prosecutrix and had married her. Thereafter he advised respondent No.3 to perform rituals of customs of Kinnaur for marriage of prosecutrix and respondent Rajeev Kumar but respondent No.3 proclaimed that he will not agree for the marriage.

12. PW-9 further stated that there was custom in Kinnaur that a male and female could marry against wishes of parents and there could be such couples in Kinnaur. He admitted

that when male and female married on their own against wishes of their parents and lived separately, no rituals of custom to perform prayer with a liquor bottle was conducted.

13. PW-10 Varinder Singh was Up Pradhan of Gram Panchayat. He deposed that on information of father of prosecutrix that his daughter was not in village, he inquired from Rajeev on telephone who in turn disclosed that prosecutrix was kept by him in Village Rarang i.e. Village of PW-5 Hira Dassi and he assured that he will prevail upon his parents for his marriage after his arrival to village from Maharashtra. This witness further deposed that rituals of customary marriage of respondent Rajeev Kumar were not performed with prosecutrix and Rajeev Kumar had married another girl of village Chagaon after the quarrel taken place after his intervention.

14. PW-10 also admitted positive suggestion of defence counsel by stating that it was correct that there were many married couples living separately from their parents who had married against their wishes.

15. It has also come in evidence of PW-7 Chhewang Lamo, mother of prosecutrix and PW-8 prosecutrix that visiting and contacting by parents with their daughter during her stay with boy in the house of relatives was not permissible till rituals of customary marriage were performed. Therefore conduct of parents of prosecutrix not to meet her during her stay in the house of PW-1 maternal uncle of boy despite having his house adjacent to the house of parents of prosecutrix, was not only natural but in accordance with customs of their Tribal community.

16. From scrutiny of statements of maternal uncle and aunt of respondent Rajeev Pw-1 and PW-5 mother of prosecutrix and prosecutrix PW-7 and PW-8, Pradhan and Up Pradhan of Gram Panchayat PW-9 and PW-10, it emerges that as per tribal custom of area, marriageable boy and girl intending to marry with their consent used to live together in families of their relatives as part performance of marriage ceremony. Both of them are considered husband and wife and during that period parents of girl wait for formal offer from side of boy generally through parents by sending a sealed bottle of liquor and acceptance of offer expressed by parents of girl by opening seal of the said bottle, completes marriage. In case of disagreement, sealed bottle is returned to parents of boy. Starting to live together in relations is a part of marriage ceremony and marriage is declared to be complete after ceremony of offering and accepting sealed bottle of liquor.

17. In case parents disagree and do not perform ceremony of offering and accepting, boy and girl used to live together as husband and wife but as a separate independent family and such couples are also accepted by society in tribal community. In this background conduct of prosecutrix and respondents is to be assessed.

18. Tribe of Kinnaur is not a primitive Tribe but a well cultured and socially awakened Tribe having due regards for dignity of a woman and such society of tribe do not permit a person to develop physical relations with young girl under the garb of custom and thereafter leaving her on the road without completing the process of marriage. Such an act will definitely attract provision of Section 366 and 376 of the Indian Penal Code.

19. As per prevailing custom prosecutrix and respondent Rajesh accompanied each other left their village on 21.09.2006, reached Sangla alongwith PW-6 Funchok Chhopel cousin of respondent Rajeev Kumar who also happened to be God-Brother of prosecutrix. At Sangla they stayed in house of a person related to PW-6.

20. Father (respondent No.3) and maternal uncle (PW-1) of respondent Rajeev with other villagers reached Sangla in search of prosecutrix and Rajeev Kumar. Respondent Rajeev Kumar informed them that he had married prosecutrix. Both of them were taken to village Labrang in house of PW-1, where also in presence of PW-1, respondent No. 3 and others. Rajeev Kumar replied to Panchayat Pradhan PW-9 Rajinder that he had married prosecutrix. Thereupon father of Rajeev left both of them in house of PW-1(maternal uncle of boy) who considered them married and allowed them to live as per custom of their tribal community.

Parents of prosecutrix and respondent Rajeev as well as maternal uncle are residents of village Labrang. But parents of girl did not contact their daughter following custom and waiting for reply/offer from parent of boy. Prosecutrix and respondent Rajeev Kumar lived as couple in house of PW-1 for 14 days but respondent No. 3 did not object or intervened nor sent prosecutrix back expressing unwillingness for marriage of prosecutrix and respondent Rajeev Kumar. Pradhan and Up Pradhan advised parents of Rajeev Kumar to complete marriage by performing ceremonies.

21. On 07.10.2006 respondent Rajeev took prosecutrix to house of his maternal aunt PW-5 Hari Dassi and introduced her as his wife. PW-5 Hari Dassi informed parents of respondent Rajeev Kumar and advised to complete marriage. Respondent Rajeev stayed in her house for five days and left prosecutrix there on the pretext to visit Maharastra to bring his testimonials but he never came back till 07.12.2006 when prosecutrix, suspecting to had consumed poison, was admitted in PHC Skiba as wife of respondent Rajeev Kumar by his maternal aunt PW-5 Hari Dasi and her son. During cohabiting with Rajeev Kumar, prosecutrix submitted herself for developing physical relation as husband and wife.

22. In aforesaid circumstances FIR initiating present case, was lodged by mother of prosecutrix on 07.12.2016. Respondent Rajeev Kumar married another girl to whom he was already engaged before taking prosecutrix to his relatives as a wife.

23. PW-8 prosecutrix reiterated her statement in the Court and her statement was corroborated by maternal uncle and aunt of respondent Rajeev Kumar PW-1 Thakur Sain and PW-5 Hira Dassi and also by mother of prosecutrix PW-7 Chhewang Lamo.

24. PW-11 Dr. Soma Negi conducted medical Examination of prosecutrix and opined that possibility of sexual intercourse could not be ruled out. PW-2 Dr. Rajinder Bisht conducted medical examination of respondent Rajeev Kumar and observed that he was physically fit for sexual intercourse.

25. PW-4 Laxmi Devi Panchayat Sahyak has proved date of birth certificate of prosecutrix as Ex. PW-4/B and that of respondent Rajeev Kumar PW-4/C. These certificates were not disputed. According to these certificates date of birth of prosecutrix and respondent was 03.12.1985 and 01.12.1980. Therefore, on 21.09.2006 prosecutrix and Rajeev Kumar were 20 and 25 years old. PW-3 had also issued letter Ex. PW-4/D to SHO, Police Station, Pooh disclosing that in Panchayat record Rajeev Kumar was not recorded as married.

26. In her deposition in court PW-8 prosecutrix stated that respondent Rajeev Kumar had married with Champa resident of Village Chagaon and was residing with her in his house and also having children from her. This fact was not disputed by respondents in cross examination rather suggestion was put to prosecution witnesses that a male was entitled to keep more than one wife as per custom of Kinnaur.

27. God brother of prosecutrix and cousin of respondent Rajeev Kumar Funchok Chhopel was examined as PW-6. He resiled from his earlier statement recorded under Section 161 Cr.PC. and was declared hostile. He was subjected to cross examination by learned Public Prosecutor as well as defence counsel. In examination –in-Chief he deposed that about 3 years back, prosecutrix met him in his village on the way and disclosed that she had married with Rajeev Kumar. Thereafter, he, Raj Kumar, Prosecutrix and Rajeev Kumar boarded one pick up van to Rickong Peo and then went to Sangla to house of his friend namely Chander Parkash. During night father of Rajeev alongwith other villagers reached there and all of them were brought back by father of Rajeev Kumar to Labrang where they had reached on the next morning. He further stated that at Labrang Rajeev Kumar and prosecutrix went to the house of PW-1 Thakur Sain and he went to his house. During his cross-examination by learned Public Prosecutor he denied suggestion put to him stating that he was not present there. He admitted that respondent No. 3 Sanam Medup father of respondent Rajeev Kumar was his maternal uncle. In cross examination, by defence counsel he stated that prosecutrix being his god sister was herself interested to marry respondent Rajeev Kumar and therefore approached him to take her to Rajeev Kumar so as to marry him. He further admitted prosecutrix was aware about engagement

of Rajeev Kumar with some other girl and was apprehending refusal of father of Rajeev Kumar to allow her in his house and for that reasons she sought his assistance for taking her alongwith Rajeev Kumar to some other place and he brought them to Sangla. He stated that Rajeev Kumar was not having any acquaintance at Sangla and he was brought to Sangla by him but before staying there, all of them were taken back by respondent No. 3 father of Rajeev Kumar and he admitted that prosecutrix had planned that after her marriage with Rajeev Kumar, his father would agree for their marriage by breaking up engagement with another girl. He admitted that prosecutrix left her house in absence of her parents by concealing herself so as to marry with Rajeev Kumar.

28. Immediately after bringing respondent Rajeev Kumar and prosecutrix in the house of PW-1 maternal uncle of respondent Rajeev Kumar, PW-9 Rajinder Singh Pradhan Gram Panchayat was called and on his inquiry respondent Rajeev Kumar had declared that he had married prosecutrix and thereafter respondent Rajeev Kumar and prosecutrix were kept in the house of PW-1 for 14 days in consonance with customs of their community.

29. Suggestions put by defence counsel indicated that keeping prosecutrix by respondent Rajeev Kumar in house of his maternal uncle and maternal Aunt (Mausi) was justified by referring custom of marriage by consent of male and female. These customs were also referred to show that prosecutrix was also consenting party in all acts of respondent Rajeev Kumar.

30. With the help of deposition of PW-6 Funchok Chhopel it had been brought on record by respondents that prosecutrix was aware about engagement of Rajeev Kumar already taken place with some other girl and that despite such knowledge prosecutrix had accompanied respondent Rajeev Kumar at her own with her consent. PW-8 prosecutrix admitted that she had knowledge that engagement of Rajeev Kumar had already taken place. But knowledge of the fact cannot be basis to hold that prosecutrix had consented for sexual intercourse to a person who was going to marry someone else. Because in present case despite having engaged with another girl, respondent Rajeev Kumar was proclaiming that he had married prosecutrix and had taken her to relatives stepping further to complete rituals of marriage so as to create an ambiance to assure prosecutrix that he was definitely going to marry her and thus creating a belief in her mind that she would be his wife and he was going to be her husband despite all hurdles. Prosecutrix was not wandering with respondent Rajeev Kumar but was accompanying him in consonance with prevailing permissible custom in their society which was recognized by all including PW-1, PW-5, PW-7, PW-9, PW-10 and all other villagers. In these circumstances consent of prosecutrix was not for free sex but was submission to her husband or would be husband rather to a person who was proclaiming that marriage had taken place and he was her husband which later on proved to be misconception.

31. Hon'ble Supreme Court in case **Deepak Gulati Versus State of Haryana reported in (2013) 7 Supreme Court Cases 675** has held as under:-

> '18. Section 114-A of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Act 1872') provides, that if the prosecutrix deposes that she did not give her consent, then the Court shall presume that she did not in fact, give such consent. The facts of the instant case do not warrant that the provisions of Section 114-A of the Act 1872 be pressed into service. Hence, the sole question involved herein is whether her consent had been obtained on the false promise of marriage. Thus, the provisions of Sections 417, 375 and 376 IPC have to be taken into consideration, alongwith the provisions of Section 90 of the Act 1872. Section 90 of the Act 1872 provides, that any consent given under a misconception of fact, would not be considered as valid consent, so far as the provisions of Section 375 IPC are concerned, and thus, such a physical relationship would tantamount to committing rape.
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> 19. This Court considered the issue involved herein at length in the case of Uday v. State of Karnataka, AIR 2003 SC 1639; Deelip Singh @ Dilip Kumar v. State of Bihar, AIR 2005 SC 203; Yedla Srinivasa Rao v. State of A.P., (2006) 11 SCC 615; and

Pradeep Kumar Verma v. State of Bihar & Anr., AIR 2007 SC 3059, and came to the conclusion that in the event that the accused's promise is not false and has not been made with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act(s) would not amount to rape. Thus, the same would only hold that where the prosecutrix, under a misconception of fact to the extent that the accused is likely to marry her, submits to the lust of the accused, such a fraudulent act cannot be said to be consensual, so far as the offence of the accused is concerned.

20. Rape is the most morally and physically reprehensible crime in a society, as it is an assault on the body, mind and privacy of the victim. While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim, and therefore a rape victim is placed on a higher pedestal than an injured witness. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, rape tantamounts to a serious blow to the supreme honour of a woman, and offends both, her esteem and dignity. It causes psychological and physical harm to the victim, leaving upon her indelible marks.

21. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of mis-representation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.

22. In Deelip Singh (supra), it has been observed as under:

> The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender, is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology."

23. This Court, while deciding Pradeep Kumar Verma (Supra), placed reliance upon the judgment of the Madras High Court delivered in N. Jaladu, Re ILR (1913) 36 Mad 453, wherein it has been observed:

> "11. '26....."We are of opinion that the expression "under a misconception of fact" is broad enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given. In Section 3 of the Evidence Act Illustration (d) states that a person has a certain intention is treated as a fact. So, here the fact about which the second and third prosecution witnesses were made to entertain a misconception was the fact that the second accused intended to get the girl married..... "thus ... if the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such a person". ... Although in cases of contracts a consent obtained by coercion or fraud is only voidable by the party affected by it, the effect of Section 90 IPC is that such consent cannot, under the criminal law, be availed of to justify what would otherwise be an offence." (N. Jaladu, In re case, ILR 456-57)(Deelip Singh case, SCC 101-02 para 26)
>
> 24. Hence, it is evident that there must be adequate evidence to show that at the relevant time, i.e. at initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term misconception of fact, the fact must have an immediate relevance." Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her".

32. Consent has been defined under Section 90 of the Indian Penal Code which reads as under:-

> 90. **Consent known to be given under fear or misconception**.—A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception;
>
> **Consent of insane person**.—if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent;
>
> **Consent of child**.—unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

33. Consent under misconception of fact by prosecutrix on the basis of act and conduct of offender is not a free consent as is intended in any section of Indian Penal Code. The consent must be voluntary and whether consent was voluntary or involuntary depends upon the facts of case which are to be appreciated on the basis of peculiar factors of each case. Keeping in view social and cultural environment, customs of the Society and other attending circumstances of the case. Further requirement of Section 90 IPC is that offender must know or has reason to believe that consent was given in consequence of such misconception.

34. In instant case, in peculiar facts, circumstances and customs, there is sufficient evidence to infer that consent of prosecutrix was under misconception of fact that respondent Rajeev Kumar was her husband or atleast would be husband in all eventualities to come. Prosecutrix was accompanying respondent Rajeev Kumar to houses of his relations as his spouse

or would be spouse. There was no instance of her involvement in sexual activity prior to that. Declaration of respondent Rajeev Kumar that he had married prosecutrix was followed by physical relations. Respondent Rajeev Kumar was also knowing that prosecutrix was submitting herself to his desires as her spouse particularly when such relations were developed in house of relations i.e. maternal uncle and aunt of respondent Rajeev Kumar.

35. In instant case maternal uncle and aunt of respondent Rajeev Kumar PW-1 Thakur Sain and PW-5 Hira Dassi, in their examination-in-Chief specifically stated that that respondent Rajeev Kumar had claimed that he had married prosecutrix. Believing respondent Rajeev Kumar PW-1 had asked respondent No.3 to celebrate marriage as per custom at home and perform ritual customary ceremonies. PW-5 had also informed parents of respondent Rajeev Kumar by visiting their house whereupon his parents had sought some time for settlement. Prosecutrix and respondent Rajeev Kumar were brought from Sangla by respondent No. 3 father of respondent Rajeev Kumar and after declaration by respondent Rajeev Kumar in present of PW-9 Rajinder Singh, Panchayat Pradhan that he had married prosecutrix, respondent No. 3 had allowed respondent Rajeev Kumar and prosecutrix to live in house of PW-1 Thakur Sain for 14 days giving an impression to prosecutrix as well as her parents that both of them were residing in process of completing rituals of customary marriage. Respondent Rajeev Kumar and prosecutrix were again permitted to live in house of PW-5 Hira Dassi despite being informed by PW-5 Hira Dassi further fortifying belief of prosecutrix that marriage was under process and respondent Rajeev Kumar had chosen her as life partner. Prosecutrix was knowing about engagement of respondent Rajeev Kumar, but the respondent Rajeev Kumar was also well aware of this fact. However by his expressed conduct respondent Rajeev Kumar had made the prosecutrix to believe that it was she to whom he was going to marry and her belief was strengthened by his declarations before his parents and relations and also by his cohabitation with her as per customs of their community. During their stay in the house of PW-5 Hira Dassi, respondent Rajeev Kumar left company of prosecutrix after 5 days and never came back till 07.12.2006 when prosecutrix was admitted in PHC Skiba suspecting that she had consumed poison. Later on respondent Rajeev Kumar solemnized marriage with Champa with whom his engagement had already taken place.

36. In aforesaid circumstances consent of prosecutrix cannot be construed to be a free consent. She had submitted herself under a misconception of fact that she was consenting for physical relation with her husband as respondent Rajeev Kumar had made her to believe that despite his engagement with another girl he was proclaiming his marriage with prosecutrix and intended to adopt her as a life partner and respondent Rajeev Kumar had also took her to his relations according to custom in such a manner that everybody contacting him had to believe that he had selected prosecutrix as a life partner but his subsequent act of leaving respondent in house of his Aunt (Mausi) PW-5 Hira Dassi and marry another girl transpired that he was deceiving respondent knowingly that at last he was going to marry according to wish of his parents. Prosecutrix stayed with him according to customary rituals treating respondent Rajeev Kumar her husband and considering herself to be wife of respondent Rajeev Kumar. Respondent Rajeev Kumar also belonged to same Tribal Community, therefore, he was also having knowledge that prosecutrix was submitting herself under mis-conception of the fact that respondent Rajeev Kumar was going to be her life partner. Therefore consent given by prosecutrix was no consent as was required under Section 375 of the Indian Penal Code. Conduct of respondent Rajeev Kumar had rendered consent of prosecutrix illegal and invalid.

37. It is apparent from conduct of Rajeev Kumar that from very beginning he was not going to marry prosecutrix without concurrence of his parents despite the fact that it was permissible in his society and he adventured to take risk at the cost of life of prosecutrix by pretending to had married prosecutrix but ultimately married as per wish of his parents.

38. Respondent Rajeev Kumar was knowing that he was seducing prosecutrix to have a intercourse with him which became illicit intercourse as respondent Rajeev Kumar, despite his declaration had not accepted prosecutrix his wife and left her waiting in house of his

Aunt with belief that he was going to bring his certificates from Maharashtra whereas later on he married some one else.

39. In view of above discussion, respondent Rajeev Kumar is guilty of offence under Section 366 and 376 of Indian Penal Code.

40. His parents particularly respondent No. 3 also allowed respondent Rajeev Kumar to continue with drama and abetted him in committing crime. Respondent No. 3 had brought back respondent Rajeev Kumar and prosecutrix from Sangla and after declaration of respondent Rajeev Kumar that he had married prosecutrix allowed both of them to stay in house of PW-1 maternal uncle of respondent Rajeev Kumar. Lateron, he had married with some one else. In case he was not intending to allow marriage of respondent Rajeev Kumar and prosecutrix he would have not allowed them to stay in the house of PW-1 as well as PW-5 according to customs of their Tribal community. Firstly he allowed both of them to live as married couple resulting into submission of prosecutrix to respondent Rajeev Kumar as wife and later on he married with some one else. Therefore for his active and passive conduct he is also guilty for abetting the offence committed by respondent Rajeev Kumar.

41. Respondent No.2 was charged sheeted under Section 212 of Indian penal Code for concealing respondent Rajeev Kumar with intention to screen him from legal punishment but there is no evidence except statement of PW-7 Chhewang Lamo that he helped respondent Rajeev Kumar to flee from Hospital. There is no cogent and reliable evidence against him for holding that he committed an offence as alleged. Therefore, he was rightly acquitted by trial Court. The trial Court has committed a mistake in acquitting respondent No.1 and respondent No.3. Prosecution has established the guilt of respondent No. 1 and respondent No. 3, beyond reasonable doubt by leading clear, cogent, convincing and reliable evidence. Findings returned by the trial Court qua respondents No. 1 and 3 cannot be said to be based on correct and complete appreciation of material on record, as such, the same are reversed. Hence, the appeal is partly allowed and respondent No.1 is held guilty for offences committed under Sections 366 and 376 IPC and respondent No. 3 is held guilty for committing offences under Sections 366 and 376 IPC read with Section 109 IPC.

42. Bail bonds furnished by the respondent-convict stand cancelled.

43. The respondents No. 1 and 3 be produced for hearing on quantum of sentence on 22.09.2016.List on 22.09.2016 Registry is directed to prepare production warrant.

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

State of Himachal Pradesh ..... Appellant

Versus

Ramesh Chand and others .....Respondents

Cr. Appeal No. 435/2010
Reserved on: September 16, 2016
Decided on: September 19, 2016

Indian Penal Code, 1860- Section 498-A, 315, 323 and 506 read with Section 34- Informant was married to accused R- accused K is mother-in-law, accused S is father-in-law and accused Surinder is brother-in-law of the informant- accused started torturing the informant mentally and physically- they used to demand dowry as well as Rs. 50,000/- from the informant- informant was forced to leave her matrimonial home while she was pregnant- accused came to the parental house of the informant and gave her beatings - matter was reported to police- accused were tried and acquitted by the trial Court- held, in appeal that prosecution had led tangible evidence to prove that accused were demanding dowry from the family of the informant- trial Court had erred

in law by holding that family of the informant owed Rs. 50,000/- for undertaking repairs of the vehicle- father of the informant specifically denied that accused had incurred expenses for the repair of the vehicle – it was also wrongly held that there was civil dispute between the parties- Medical Officer had found 14-16 weeks old dead fetus in yellow coloured blood stained underwear – miscarriage could have taken place due to beatings - accused admitted their presence in the parental home of the informant- prosecution version was duly proved- appeal allowed- accused R convicted of the commission of offences punishable under Sections 498-A, 323 and 314- accused K convicted of the commission of offences punishable under Sections 498-A and 506(I) read with Section 34 of I.P.C. (Para- 8 to 19)

For the appellant : Mr. M.A. Khan, Additional Advocate General.
For the respondents : Mr. Naresh Kaul, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The present appeal has been filed by the State against Judgment dated 3.5.2010 rendered by the learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala in S.T. No. 17/10, whereby respondents-accused (hereinafter referred to as 'accused' for convenience sake) who were charged with and tried for offence under Sections 498-A/34, 315/34, 323/34 and 506/34 IPC have been acquitted.

2. Case of the prosecution, in a nutshell, is that the complainant Sareena was married to accused No.1 Ramesh Chand on 2.3.2006. Accused No. 3 Kailasho Devi is the mother-in-law of the complainant, accused No. 2 Sunka Ram was the father-in-law of the complainant and accused No.4 Surender Kumar is the brother-in-law of the complainant. All the accused, after two months of marriage, started torturing Sareena mentally as well as physically. Accused used to demand dowry as well as Rs.50,000/- from Sareena. Accused threatened the complainant if she did not bring money, she would be thrown out of the house. When Sareena was carrying four months' pregnancy, she was forced by the accused to leave the matrimonial home. She came to her parents at Khabli. On 10.3.2007, accused Ramesh had gone to Khabli and asked Sareena to come back with him. Sareena refused. Ramesh told Sareena that his family members would come to Khabli and would beat her. Sareena did not go with the accused on 10.3.2007. On 14.3.2007, all the accused came to the house of father of Sareena and asked her to come back. Sareena again refused. All the accused used criminal force against Sareena. She was pulled down from the bed and given kick and fist blows. Accused Ramesh Chand had given blows on her stomach which resulted into bleeding. Sareena was saved from the clutches of accused by her parents. She suffered severe pain. In the next morning, police was informed and statement of Sareena under Section 154 CrPC was recorded. FIR was registered. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as seven witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. They pleaded innocence. Trial Court acquitted the accused as noticed above. Hence, this appeal.

4. During the pendency of appeal, accused No.2 Sunka Ram expired on 31.7.2016.

5. Mr. M.A. Khan, Additional Advocate General has vehemently argued that the prosecution has proved its case against the accused person.

6. Mr. Naresh Kaul, Advocate, has supported the judgment dated 3.5.2010.

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

8. PW-1 Sareena testified that she was married to the accused Ramesh as per Hindu rites and customs on 2.3.2006. Accused and his family members were decent with her for

two months. Thereafter, her husband Ramesh, brother-in-law, Surender Kumar alias Munnu, mother-in-law Kailasho Devi and father-in-law, Sunka Ram started torturing her mentally and physically. Accused used to beat her and used to demand dowry. They also used to say that they want to construct a house. They demanded Rs.50,000/- for the construction of house. Initially she did not reveal this to anybody and kept tolerating the behaviour of the accused. Her husband Ramesh continued to harass her. Remaining accused used to help him. Mother-in-law, Kailasho Devi pushed her and snatched her ornaments. Accused had been beating her for the 8-9 months. She narrated her woes to her parents. She also told the accused that her parents have no capacity to pay the money. She was carrying four months' pregnancy. She was forced to leave the house of the accused. On 10.3.2007, Ramesh came to her father's house and asked her to accompany him otherwise his family members would come and beat her. She did not go with the accused. On 14.3.2007 at 8.30 PM, all the accused alongwith complainant's sister-in-law, Shobha Devi and her husband Som Raj came to her father's house. Complainant's younger sister-in-law, Shivani was also with them. Accused asked her to come to their house. She refused. Accused Ramesh gave her beatings. Ramesh pulled her down from the bed. He gave kick and fist blows on her stomach. Her parents and one Amit saved her from the clutches of the accused. She started bleeding and suffered pain. Accused left her and went away. On the next morning she was taken to the hospital. Police came. Her statement Ext. PW-1/A was recorded. She was medically examined. Doctors told that the child was aborted. In her cross-examination, she deposed that there were two rooms in her parental house. She admitted that on 14.3.2007, they did not inform the Doctor or the police. Volunteered that there was no doctor and further her parents did not want to flare up the matter. She was a graduate.

9. Statement of PW-1 Sareena has been duly corroborated by her father, PW-2 Satpal. He deposed that, 3-4 months after the marriage, all the accused started torturing Sareena. They used to ask Sareena to bring Rs.50,000/-. They used to say that she had brought insufficient dowry and used to beat her. Initially, Sareena did not disclose these facts to him but later disclosed all these facts to him. His daughter told him that her mother-in-law, Kailasho Devi had snatched her ornaments after pushing her. He was not capable of making the payment. On 26.2.2007, Sareena came to his house and at that time, she was carrying 3-4 months' pregnancy. On 14.3.2007, all the accused came to his house. His daughter was sleeping. They said they wanted to talk to his daughter. Accused went to the room of his daughter and pulled her down from the bed. He saw accused Ramesh giving fist blows on the stomach of his daughter. Other accused were standing there but they did not aske Ramesh not to beat Sareena. On the next morning, they took Sareena to the Hospital. She was medically examined. Police came to the hospital. In his cross-examination, he denied the suggestion that the accused came to his house on 14.3.2007 and after spending only half an hour, went to Nirmala's house. Volunteered that the accused had spent about five hours in his house and they had gone to Nirmala's house at about 11.30-11.45 Pm. On 15th, they had gone to the hospital in a vehicle. They had hired the vehicle from Khabli itself. Akshay was his son. His vehicle met with an accident near Kotla. He denied the suggestion that Naresh had incurred expenses of the repair of the vehicle of Akshay at Pathankot.

10. PW-3 Amit Sharma deposed that he had gone to the house of Satpal for personal work. His house was adjacent to Satpal's house. He saw Sareena sitting on the floor and all the accused were standing in her room. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination by the learned Public Prosecutor, he deposed that the fact of beating to her was told to him by Sareena.

11. PW-4 Dr. Suman Dhiman, conducted ultrasound on 16.3.2007. Report is Ext. PW-4/C. She has also given a detailed report vide Ext. PW-4/D.

12. PW-5 Dr. Vijay Singh Chib testified that Sareena wife of Ramesh was brought with history of domestic violence. He had noticed the following injuries:

> "1. A 14-16 weeks old foetus inside yellow coloured blood stained underwear. Foetus was dead.

2. There were no marks of injury seen on abdominal wall. She complained of pain in left shoulder."

13. Nature of injury No.1 was grievous and nature of injury No.2 was simple. Probable duration of injuries was within 12 hours. Injuries were caused with blunt object. He issued MLC Ext. PW-5/A. In his cross-examination, he deposed that the dead foetus was handed over to the police to ascertain the cause of death by examination in the laboratory. He also testified that injury No. 1 could occur by fist and kick blows and sudden dragging from cot to floor. He admitted that there was no external or internal injury on vagina, uterus and genitalia. There could be so many other reasons for miscarriage of pregnancy. PW-5 Vijay Singh Chib further deposed that an application Ext. PW-5/B was put up before him by the police. He replied the same. He has given his opinion on Ext. PW-5/B.

14. PW-6 ASI Ashok Kumar was posted as IO in Police Station, Dehra in 2007. On 15.3.2007, an information was received from CH Dehra from a Doctor. He alongwith other police official went to Dehra Hospital and recorded statement of Sareena Ext. PW-1/A. *Rukka* was prepared and sent to the Police Station. He recorded the statements of Satpal and Neelam. He obtained MLC Ext. PW-5/A from the Doctor.

15. PW-7 Dharam Chand testified that on 15.3.2007, *Rukka* Ext. PW-1/A alongwith endorsement was received in the Police Station upon which FIR Ext. PW-7/A was registered. He carried out part investigation of the case. On 2.4.2007, he had visited the spot and prepared site plan, Ext. PW-7/C. He recorded statement of Amit. On 28.3.2007, he had moved an application Ext. PW-5/B before the Doctor and on the same day, his opinion was obtained.

16. What emerges from the appraisal of the statements and evidence as discussed herein above is that PW-1 Sareena and Ramesh were married on 2.3.2006. Relations between husband and wife were normal. Thereafter, accused and his family members started harassing PW-1 Sareena. Accused were asking Sareena to tell her parents to pay them Rs.50,000/-. Her ornaments were snatched by her mother-in-law, i.e. accused No.3, Kailasho Devi. Ramesh Chand alongwith other accused went to the house of PW-1 Sareena. Ramesh pulled down Sareena and gave kick and fist blows to her stomach. PW-1 Sareena started bleeding. She also suffered pain. She was moved to the hospital. In the morning, medical examination was conducted. Thereafter, FIR was registered. Prosecution has led tangible evidence that accused Ramesh Chand and Kailasho Devi were demanding dowry from the family of PW-1. Kailasho Devi has snatched ornaments of Sareena. Learned trial Court has erred in law by holding that family of Sareena owed Rs.50,000/- for undertaking repairs of the vehicle of Sareena's family. PW-2 Satpal, father of PW-1 Sareena, though has admitted that Akshay was his son and he met with an accident near Kotla. However, he has categorically denied that Naresh, brother-in-law of accused Ramesh Chand incurred expenses of repairs of the vehicle of Akshay at Pathankot. The learned trial Court has come to a wrong conclusion that there was a civil dispute between the parties. Accused Ramesh Chand has visited the house of PW-1 Sareena on 14.3.2007. PW-1 Sareena has categorically deposed that accused Ramesh Chand gave kick and fist blows on her stomach. She started bleeding. She was taken to the hospital. Statement of PW-1 Sareena has been duly corroborated by her father PW-2 Satpal. He has deposed that on 14.3.2007, accused went to the room of his daughter and pulled down his daughter from the bed. Thereafter, he saw accused giving fist blows on the stomach of his daughter. Ultrasound was conducted by PW-4 Suman Dhiman. She issued MLC Ext. PW-4/C and Ext. PW-4/D. According to the report, it was a case of incomplete evacuation with retained products of conception i.e. incomplete abortion. PW-5 Dr. Vijay Singh has medically examined PW-1 Sareena. According to him, 14-16 weeks old foetus in yellow coloured blood stained underwear was found. Foetus was dead. According to him, nature of injury No.1 was grievous and nature of injury No. 2 was simple. Probable duration of injuries was within 12 hours and caused with blunt object. Opinion of PW-5 Dr. Vijay Singh was again sought by the police by submitting application Ext. PW-5/B. PW-5 Vijay Singh has stated that in his opinion, miscarriage in this particular case could have occurred due to either of two possibilities as given in application Ext. PW-5/B dated 28.3.2007. Abortion/miscarriage has

taken place due to the beatings administered by the accused Ramesh to PW-1 Sareena on her stomach.

17. Mr. Naresh Kaul, Advocate, has vehemently argued that there is delay in lodging FIR and that the PW-1 Sareena was not taken to the hospital immediately. It has come on record that no Doctor was available and PW-2 Satpal initially thought that matter should not be flared up. Ramesh and Kailasho Devi have forced PW-1 Sareena to leave the matrimonial home. Accused have admitted their presence in the house of Sareena's parents on 14.3.2007. Learned trial Court has also erred in holding that matter should have been reported by the parents of the victim to the police or Panchayat. In the Indian society, first attempt of the parents is that matter should be settled amicably and going to the police or Panchayat is the last resort. PW-3 Amit though declared hostile, but in his cross-examination, he has admitted that he was told by Sareena about the manner in which she was beaten up by the accused. Learned trial Court has perversely come to the conclusion that the accused were falsely implicated. Accused Ramesh and Kailasho Devi have criminally intimidated Sareena by going to her house. Accused Ramesh was aware that his wife was pregnant and despite that, he has given kick and fist blows on the stomach of Sareena resulting into miscarriage of pregnancy, thus, preventing the child from being born alive. Ramesh Chand and Kailasho Devi have caused mental as well as physical cruelty to PW-1 Sareena by demanding dowry. Sareena was forced to leave the matrimonial home and to live with her parents.

18. Prosecution has duly proved that accused Ramesh Chand and Kailasho Devi have caused physical and mental cruelty to Sareena by demanding a sum of Rs.50,000/- and administering beatings to her. Accused Ramesh Chand has prevented the child from being borne alive by giving fist and kick blows to the stomach of Sareena resulting into miscarriage of pregnancy. Accused Ramesh and Kailasho Devi have criminally intimidated Sareena. According to PW-5 Vijay Singh, injury No.1 was grievous but accused have been charged only under Section 323 IPC. Ramesh has voluntarily caused hurt by giving beatings to Sareena. However, there is no evidence against Surender Kumar, brother-in-law of the complainant Sareena.

19. Accordingly, the present appeal is allowed. Judgment dated 3.5.2010 rendered by the learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala in S.T. No. 17/10, is set aside. Accused Ramesh Chand is convicted under Sections 498-A/34, 323/34 and 315/34 IPC. Kailasho Devi is convicted for the commission of offence under Sections 498-A/34 and 506-I/34 IPC. Convicts be produced to be heard on quantum of sentence on 22.9.2016.

20. Registry is directed to prepare and send the production warrants forthwith.

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

State of Himachal Pradesh ...Appellant

Versus

Sanjay Kumar ...Respondent

Criminal Appeal No. 213 of 2013
Judgment reserved on: 01.07.2016
Date of Decision: 19.09.2016

Indian Penal Code, 1860- Section 302 and 201- Deceased was doing shuttering business- he left home for arranging shuttering- however, he went to a place called Taras along with some residents of village- they took meals and all except three went to Talwara for shopping - thereafter they went to police station for compromise in a complaint filed against PW-6- they went to their homes in a vehicle and got down at various places- however, deceased did not reach home- his dead body was found with injuries on his head- PW-4 made a statement that S and

deceased had got down the vehicle together- S was arrested on the same day- he made a disclosure statement which led to the recovery of the clothes of the deceased- cause of death was head injury- accused was tried and acquitted by the trial Court- held in appeal, the fact that deceased was last seen with the accused was not proved satisfactorily- PW-4 had also not informed the police immediately about the deceased having been last seen with the accused- recovery was also not established- prosecution version was not proved beyond reasonable doubt- trial Court had rightly acquitted the accused- appeal dismissed. (Para-13 to 25)

For the appellant :Mr. Neeraj K. Sharma, Deputy Advocate General.
For the respondent :Mr. Rajnish Maniktala, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur,Judge.

Aggrieved by acquittal of respondent-accused vide judgment dated 30.10.2012 passed by the learned Additional Sessions Judge (I) Kangra at Dharamshala H.P. in Sessions Case No. 89-G/2010, in case FIR No. 69 /2010 registered under Sections 302 and 201 of the Indian Penal Code in Police Station Dehra District Kangra H.P., the State has preferred present appeal with prayer to set aside impugned judgment and to convict respondent-accused.

2. We have heard learned Deputy Advocate General for the appellant-State and counsel for respondent and have also perused record of the case.

3. On 12.06.2010 Crime Investigation Agency was set in motion by Lekh Raj Ward Panch Gram Panchayat Bhaner by telephonically informing Police Post Teras that dead body of Om Parkash was found on side of Kuhal near the road. Said information was further telephonically disseminated to Police Station Dehra by PW-14 ASI Manmohan, Chowki Incharge Police Post Taras. Police parties from Police Post Taras and Police Station Dehra headed by PW-14 ASI Manmohan Singh and PW-16 SI Tilak Raj reached on the spot. During investigation, it surfaced that deceased Om Parkash was unmarried and was doing shuttering business. His three brothers were serving out stations and Salochna wife and Vinod son of Krishan one brother of deceased, were residing with deceased Om Parkash in native village. On 11.06.2010 after taking meal at 10.00 AM, deceased Om Parkash left home for arranging shuttering. However he went Taras alongwith some residents of village namely Surinder Singh, Sat Pal, Rasal Singh, Ram Dei, Bishan Dutt Sharma and Sanjeev Kumar in vehicle No. HP-36-3291 driven by PW-4 Rajesh Kumar. All of them took meals in Langar at Lal Tanki Chowk in Taras and except Rasal Singh, Ram Dei and Bishan Dutt, all others visited Talwara for shopping. Thereafter they came to Police Post, Taras in connection with a complaint against PW-6 Surinder Singh made by one Parladh Singh. After compromising the said matter, they consumed liquor at liquor vend and had drinks at Lal Tanki also and thereafter started back to home. First of all Bishan Dutt had de-boarded vehicle near his house and thereafter Surinder Singh, Sat Pal Singh, Rasal Singh and Ram Dei alighted vehicle near their respective residences. Rajesh Kumar, Sanjeev Kumar and Om Parkash reached near Shiv Mandir where at a distance of about 500 yards, deceased Om Parkash alighted from vehicle after stopping it by compelling driver. Thereafter PW-4 Rajesh Kumar and Sanjeev Kumar also went to their respective houses but Om Parkash did not reach in his house but his dead body was noticed by people with small injury on his head with oozing blood out from nose and mouth. There were no other injuries or bruises on his body but his clothes and slippers were not there.

4. Aforesaid information was entered at General Diary Entry No. 36(A) on 12.06.2010 in Police Station Dehra, copy of which Ex. 16/G is on record. Police including Deputy Superintendent of Police, Dehra visited spot and inquired villagers on 12.06.2010, 13.06.2010, 14.06.2010 and 17.06.2010. Villagers, including persons accompanying deceased on 11.06.2010, were interrogated by the police. Brothers and other family members were also associated in the interrogation.

5. Till 17th June 2010 there was no change of circumstances. On that day suddenly statement of PW-4 Rajesh Kumar was reduced into writing and in the said statement it was narrated by him that on 11.06.2010 Sanjay Kumar alighted from vehicle and compelled Om Parkash to get down from vehicle despite his resistance and on next day dead body of Om Parkash was noticed by villagers at 6.30 AM. Statement of PW-4 Rajesh Kumar was also recorded under Section 164 Cr.PC stating therein that near Shiv Mandir, Sanjay Kumar and deceased Om Parkash alighted from vehicle and he went home.

6. On the basis of statement of PW-4 Rajesh Kumar respondent Sanjay Kumar was arrested on the same day. As per prosecution case police was searching for clothes of deceased Om Parkash since 12.06.2010 in all probable places including houses of Rajesh Kumar and Sanjeev Kumar. It is claimed by prosecution that on 18th June 2010 during his custody, respondent in presence of Harnam Singh and Gian Singh made disclosure statement Ex.P-7/B in presence of PW-7 Harnam Singh and Gian Singh in Police Station Dehra and on the basis of said statement clothes of deceased were recovered at the instance of respondent from place pointed out by him near water source at a distance of 400 yards from Shiv temple and 50 feet below the road. Those clothes were identified by PW-5 Vinod Kumar nephew of deceased.

7. Postmortem of dead body of deceased was conducted by PW-8 Dr. Vivek Kaushal and viscera of deceased was sent to State FSL, Junga for chemical analysis. Alcohol was detected in parts of stomach, small intestine, spleen and kidney and no other poison could be detected in these parts. Cause of death, as per opinion of Doctor, was shock due to head injury.

8. Present case of prosecution is based on circumstantial evidence. Prosecution has relied upon 'last seen together' supported by 'motive' and disclosure statement of the respondent-accused.

9. It is a settled law that in case of circumstantial evidence conviction should be recorded only if the chain pointing to the guilt of respondent-accused is firmly established linking the accused with crime firmly and not only creating suspicion as the suspicion however strong evidence itself may not take place of proof. All the circumstances must be consistent only with hypothesis of the guilt.

10. Though, murders are also committed even without any pre-emptive motive. In cases based on circumstantial evidence motive, however is an important factor and a strong circumstance.

11. In present case prosecution has relied upon circumstances of 'last seen together', disclosure statement followed by recovery of clothes and enmity.

12. After completing investigation challan was put in the court against respondent-accused only and 16 witnesses were examined by prosecution and statement of respondent under Section 313 of the Code of Criminal Procedure was recorded.

13. To prove 'motive, only evidence on record is testimony of PW-2 Krishan Chand who is brother of deceased Om Parkash. He stated that deceased Om Parkash was former Panch of Panchayat. Joginder Singh used to come to Om Parkash twice in a week for consultation in a case pending at Shimla against Arjun Singh who was father of respondent and as such family of respondent was inimical towards deceased Om Parkash and they suspected that respondent had committed murder. During cross examination this witness admitted that till 20.06.2010 he did not suspect any person having committed murder. He also admitted that there was no land dispute or any other dispute of their family with family of respondent but he again stated that there was some dispute about 10 years ago with mother of Arjun Singh. He further added that in the year 2004-2006 girls of their family and family of respondent had some dispute and matter was adjudicated before Panchayat and therefore they were not in talking terms with family of respondent. Respondent was arrested on 17.06.2010 but till 20.06.2010 no suspicion about murder was there. Despite arrest of respondent, PW-2 Krishan Chand or other family members of deceased Om Parkash did not utter even a single word about enmity pointed out by PW-2

Krishan Chand that too for first time in the Court. He admitted in cross examination that all these facts were not been stated by him before police on 20.06.2010 at the time of making statement, he gave explanation that these facts were not asked by any one from him. It appears that in order to ascertain conviction of respondent after believing story put forth by police, PW-2 tried to exaggerate and improve his statement and thus his statement is to be ignored. Statement of PW-2 with respect to enmity is not confidence inspiring and there is no other evidence on record indicating any motive attributable to respondent for committing murder of deceased OM Parkash.

14. PW-7 Harnam Singh Panch of Gram Panchayat Bhaner also admitted that deceased Om Parkash did not make any complaint to Panchayat against respondent or his family members. Prosecution also never placed on record any document to show that family of respondent was inimical towards deceased Om Parkash. However, absence of motive or failure to prove motive cannot be a basis to conclude that respondent had not murdered deceased Om Parkash. Therefore, rest of evidence is to be assessed for arriving at final conclusion.

15. Prosecution also relied upon disclosure statement Ex. PW-7/B. PW-7 Harnam Singh stated that on 18.06.2010 they were called to Police Station Dehra and Gian Chand Chowkidar was accompanying him and respondent who was also there gave statement Ex.PW-7/B in presence of SHO and 2-3 other police officials. In cross examination this witness stated that on 18.06.2010 he received telephonic message from PW-16 SI Tilak Raj, SHO Police Station Dehra asking him to come at Dehra as statement of respondent was to be recorded. He further stated that he reached Police Station around 11.00 AM but he could not tell as to since when questioning was going in Police Station and SHO did not tell as to what facts were disclosed during questioning. PW-7 further stated that SHO informed that Sanjay had told about clothes to be recovered and thereafter signatures of witnesses were obtained. He further admitted that SHO asked him to bring one more respectable person to be present in Police Station alongwith him. He stated that police was having his telephone number. This witness admitted that they signed on the basis of information supplied by SHO. Admission of this witness in cross examination rendered veracity of disclosure statement Ex. PW-7/B under suspicions. Out of two independent witnesses, only PW-7 Harnam Singh was examined and PW Gian Singh was given up by prosecution. Therefore, Ex.PW-7/B cannot be considered a valid disclosure statement under Section 27 of the Indian Evidence Act so as to rely upon to convict respondent.

16. Prosecution claimed recovery of clothes of deceased at the instance of respondent in presence of PW-7 Harnam Singh and PW Gian Singh. In absence of valid and admissible disclosure statement alleged recovery of clothes cannot be considered as incriminating evidence against respondent. Moreover, PW-7 Harnam Singh admitted that place from where clothes were recovered was on the way of a short cut leading to 'Bowary' (Water Source) for bringing water which was being used by people throughout the year and the place from where clothes were recovered was also not secluded or hidden place but was an open place. PW-5 Vinod Kumar identified clothes of deceased Om Parkash but the said identification of clothes cannot be said to be sufficient proof to consider disclosure statement and recovery of clothes to prove guilt of respondent.

17. To prove 'last seen together' prosecution relied upon testimony of PW-3 Kamal Kumar, PW-4 Rajesh Kumar and PW-6 Surinder Singh.

18. PW-3 Kamal Kumar stated that he asked PW-4 Rajesh Kumar to bring feed for cattle from Sansarpur Taras and at about 10.20–11.00 PM he unloaded said feed from vehicle of PW-4 Rajesh Kumar and at that time there was no one in the vehicle except Rajesh Kumar and thereafter Rajesh Kumar went to his home. He further stated that on 12.06.2010 Roshan Lal, at the time of going to answer the call of nature at around 5-6 AM noticed dead body lying near the Kuhal. He admitted that he was questioned by police but his statement was recorded on 20.06.2010. Testimony of this witness is not reliable for reason that police made request vide application Ex. PW-8/A on 12.06.2010 to Medical Officer SDH Dehra for postmortem of dead body of deceased narrating entire episode of 11.06.2010 as disclosed by Rajesh Kumar but in

that application fact of bringing cattle feed for PW-3 Kamal Kumar did not find mention. Similarly this fact did not find mention in 'Rukka', PW-16/C prepared on 13.06.2010 and DD report Ex. PW-16/G recorded in 12.06.2010. Statement PW-3 Kamal Kumar was recorded on 20.06.2010 and no reasons were assigned by this witness for not disclosing this fact prior to that despite the fact that he was being questioned by police since beginning. Therefore, this witness is not trustworthy.

19. Statement of PW-6 Surinder Singh is also not sufficient to hold that it was respondent only who was 'last seen together' with deceased as at the time of leaving vehicle by this witness there were three persons in the vehicle namely PW-4 Rajesh Kumar, respondent Sanjay Kumar and deceased Om Parkash. This witness admitted that on 11.06.2010 they had no quarrel with each other after consuming liquor and also during their return in the vehicle to village. He stated that he was not having any suspicion against any persons.

20. In the aforesaid circumstances, testimony of PW-4 is only evidence to prove 'last seen together' of respondent with deceased but his veracity is also doubtful. He was being interrogated since 12.06.2010 to 17.06.2010 and his stand was that deceased Om Parkash himself alighted from vehicle after compelling him and he and Sanjay Kumar were last persons together with each other after alighting vehicle by deceased Om Parkash. Suddenly on 17.06.2010, he came with story that it was Sanjay who forcibly alighted deceased Om Parkash from vehicle near Shiv Temple and he also introduced fact of bringing cattle feed for PW-3 Kamal Kumar. Prosuection tried to explain with the help of PW-7 Harnam Singh by introducing the fact in his statement that PW-4 Rajesh Kumar had disclosed it to him on 12.06.2010 and PW-7 Harnam Singh had advised PW-4 to tell truth whenever police would come to village. PW-7 Harnam Singh stated that thereafter police came in village on 17.06.2010 but the said stand of PW-7 is false as PW-16 SI Tilak Raj clearly stated that he visited the spot 12.06.2010, 13.06.2010 and 14.06.2010. Not only PW-16 SI Tilak Raj but Deputy Superintendent of Police, Dehra had also visited spot between 12.06.2010 to 17.06.2010. It is also again a mystery which prevented PW-7 Harnam Singh to inform the police regarding facts disclosed by PW-4 Rajesh Kumar to him on 12.06.2010. PW-4 Rajesh Kumar stated in cross examination that he disclosed to Pradhan on 13.06.2010 and police came in village on 14.06.2010 but did not record his statement and recorded it only on 17.06.2010 and he was asked not to disclose this fact to any other person. PW-14 ASI Manmohan stated that he had not advised PW-4 Rajesh Kumar to make his statement only before SHO Dehra and not to disclose his statement to any other person. What emerges from all these contradictory statements that testimony of PW-4 is not reliable.

21. Postmortem of deceased was conducted on 12.06.2010 and viscera was also handed over to police on the same day which was further handed over to MHC Police Station, Dehra on 12.06.2010 but said viscera was sent to State FSL Junga on 17.06.2010. Clothes of deceased were recovered on 18.06.2010 but same were also sent to State FSL, Junga on 24.06.2010. PW-16 admitted these facts but no reason has been assigned for keeping these parcels for seven days in waiting for sending State FSL Junga. In normal circumstances delay in sending parcels to State FSL Junga may not be of any significance but in the circumstances of present case delay in sending these parcels to State FSL Junga also fortifies doubt on fairness of investigation.

22. It is evident from aforesaid discussion that chain of circumstantial evidence to prove the guilt of accused is not complete and prosecution evidence cannot be treated as cogent, reliable, credible and trustworthy to prove guilt of the accused-respondent beyond reasonable doubt. There are material contradictions and discrepancies in the testimonies of material witnesses. Thus, it cannot be said that prosecution has been able to prove that respondent-accused has committed offence under Sections 302 and 201 of the Indian Penal Code.

23. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. It cannot be said that learned trial court has not appreciated evidence correctly and completely and acquittal

of accused has resulted into travesty of justice or has caused mis-carriage of justice. The accused has been acquitted by the trial Court. No case for interference is made out.

24. The present appeal, devoid of any merit, is dismissed, so also pending applications, if any. Bail bonds, if any, furnished by the accused are discharged. Records of the Court below be sent back forthwith.

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

CWP No. 5521 of 2010 a/w
CWPs No. 5520, 5522 and
5561 of 2010.
Date of Decision: 20.09.2016

CWP No. 5521 of 2010
Agya Ram ...Petitioner.
Versus
State of H.P. & others. ..Respondents.
CWP No. 5520 of 2010
Lal Chand ...Petitioner.
Versus
State of H.P. & others. ..Respondents.
CWP No. 5522 of 2010
Kuldeep Kumar ...Petitioner.
Versus
State of H.P. & others. ..Respondents.
CWP No. 5561 of 2010
Khem Raj ...Petitioner.
Versus
State of H.P. & others. ..Respondents.

Industrial Disputes Act, 1947- Section 25- Petitioners were appointed as Fire and Safety Supervisors in the month of September, 1993 by the respondents – they continued till 1997 when their services were disengaged by the respondents – they raised an industrial dispute- the Tribunal dismissed the reference holding that petitioners had not proved themselves to be the employees of the respondents – held, in the writ petition that no appointment letters have been placed on record to demonstrate that petitioners were engaged by the respondents- no salary slip was placed on record- petitioners themselves stated before the Tribunal that they were not employees/workers of respondent No. 2- hence the Tribunal has rightly concluded that the dispute does not fall within the definition of industrial dispute- further, the finding of the fact recorded by the Tribunal cannot be interfered with in exercise of writ jurisdiction- petition dismissed. (Para-22 to 31)

Cases referred:
Balwant Raj Saluja and Anr. Vs. Air India Limited and Ors. (2014) 9 Supreme Court Cases 407
Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157

For the petitioner(s): Mr. Rahul Mahajan, Advocate.
For the respondent(s): Mr. Rupinder Singh Thakur, Additional Advocate General, with Mr. Rajat Chauhan, Law Officer, for respondent No.1.
Mr. K.D. Sood, Senior Advocate, with Mr. Sanjeev Sood, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

By way of aforesaid Civil Writ petitions filed under Articles 226 and 227 of the Constitution of India, petitioners therein have laid challenge to the common award dated 21.06.2010, passed by H.P. Industrial Tribunal-cum-Labour Court, Shimla (in short '***Tribunal'***), in reference No. 65 of 1998, 63 of 1998, 66 of 1998 and 67 of 1998, whereby claim of the aforesaid petitioners were rejected and references were answered accordingly. Since common award dated 21.6.2010 passed by learned Tribunal is under challenge by way of aforesaid petitions, same are being taken together for adjudication with the consent of counsel representing the parties.

2. Briefly stated facts as emerged from the record are that petitioners Agya Ram, Lal Chand, Kuldeep Kumar and Khem Raj being aggrieved with the illegal dis-engagement of their services by M/s Gujrat Ambuja Cement Ltd. (in short '***GACL***') raised industrial dispute. Appropriate government in terms of Section 10 of Industrial Disputes Act, 1947 (in short '**Act**') made following references to the learned Industrial Tribunal-cum-Labour Court, Shimla for adjudication:-

> "Whether the plea of the contractor of M/s Ess Ess Engineering Contractor to M/s Gujarat Ambuja Cement Ltd. Darlaghat, District Solan, Himachal Pradesh that S/Shri Agya Ram s/o Badri Ram, Lal Chand s/o Dhani Ram, Khem Raj s/o Daulat Ram and Kuldeep Kumar s/o Hukum Chand, workmen have abandoned the services of their own accord is legal and justified? If not, what relief service benefits and post the concerned workmen are entitled to?"
>
> "Whether the demand of S/Shri Agya Ram s/o Badri Ram, Lal Chand s/o Dhani Ram, Khem Raj s/o Daulat Ram and Kuldeep Kumar s/o Hukum Chand, workmen that their services be taken on the permanent service/roll of the principal company i.e. Gujarat Ambuja Cement Ltd., Darlaghat is legal and justified? If yes, to what relief and service benefits concerned workmen are entitled to form the concerned principal employer?"

3. Learned Tribunal below vide order dated 21.5.2002 passed in Reference No. 65 of 1998 ordered for consolidation of Reference Nos. 63/1998, 64/1998, 66/1998, 101/1998, 103/1998, 104/1998 and 105/1998 with Reference No. 65 of 1998. However, fact remains that except Reference Nos. 63/1998, 66/1998, 67/1998, which stood consolidated with reference No. 65/1998, Reference Nos. 101/1998, 103/1998, 104/1998 and 105/1998 were compromised, as such, no decision qua the same was made by the learned Tribunal below. Present petitioners claimed before learned Tribunal that they were appointed as Fire and Safety Supervisors in the month of September, 1993 by GACL and they continued, as such, till 1997, when they were not allowed to work. Petitioners further claimed that though record clearly reveals that they worked under the direct control and supervision of GACL but their names were shown on the attendance Roll of M/s Ess Ess Engineerings (in short '***Contractor'***) with ulterior motives by GACL to avoid its liability under the Labour Law / legislation. Petitioners also stated before learned Tribunal that they drew their last wages @ Rs.1950/-, Rs.2250/-, Rs.1950 and Rs.2250/-, respectively. Petitioners also stated that they worked for more than 240 days in each calendar year and during this period there was no complaint against them and their illegal termination, that too, in violation of provisions contained in the Act, deserves to be quashed and set aside. Petitioners also claimed regular employment under respondent No. 2-GACL in terms of settlement arrived at between GACL and State Government of H.P., namely, "***Scheme for the Settlement and Rehabilitation of Oustees of Himachal Ambuja Cement Factory Darlaghat, District Solan, Himachal Pradesh***."

4. Petitioners contended that respondents while dis-engaging their services failed to comply with the provisions of Section 25-N of the Act and they are required to be re-instated in

services with the benefit of continuity of services or in alternate claimed that they may be taken on roll of GACL by re-instating their services alongwith all consequential benefits.

5. Respondent by way of detailed reply refuted the claim put-forth on behalf of the petitioners by stating therein that petitioners were on the roll of Respondent No.3-Contractor and, at no point of time, their services were ever hired/engaged by respondent No. 2-GACL. Respondent No. 2-GACL specifically stated that petitioners are not covered under the definition of workman under Section 2(s) of the Act and, as such, present petitions are not maintainable and deserves to be quashed and set aside. Respondent No.2-GACL specifically contended that in the absence of employer and employee relationship, petitioners cannot raise industrial dispute against the replying respondent. Respondent No.2-GACL further contended that matter pertains to Contract Labour (Regulation and Abolition) Act, 1970, as such, proper recourse available to the petitioners was to approach the authorities envisaged under Contract Labour (Regulation and Abolition) Act, 1970 and not under the Industrial Disputes Act. Respondents No. 2 -GACL further claimed that since Cement Industries has been declared as controlled industry, appropriate government under the Contract Labour Act is the Central Government, as such, Labour Commissioner had no power to entertain and refer the matter pertaining to petitioners qua the replying respondent (principal employer) to the H.P. Labour Court. Respondent No. 2-GACL has also contended that the appropriate government could only exercise its power under Section 10 only when there exists an industrial dispute as defined under Section 2 (k) of the Act. But in the present case, since petitioners had not been able to prove on record that there is any relationship between petitioners and respondent No. 2-GACL, as such, same is not maintainable before the learned Tribunal. Respondent No. 2-GACL further contended that petitioners are employees of respondent No. 3-Contractor, as such, they cannot claim for any preferential claim of employment in terms of settlement arrived at between them and the State Government.

6. Similarly, respondent No. 3-Contractor also refuted the claim put-forth on behalf of petitioners by stating that GACL had given certain project/work to respondent No. 3-Contractor, wherein, petitioners were engaged by Contractor from June, 1996 as Khalasis at its project site. Respondent No. 3-Contractor has further stated that petitioners themselves refused to do the job assigned to them and they left the job without notice. Respondent No. 3-contractor also reiterated like respondent No. 2-GACL that present petitioners are not covered by definition of workman as provided under Section 2(s), as such, no dispute, if any can be raised under Industrial Disputes Act. Factum with regard to petitioners having worked continuously for 240 days also denied by the replying respondent, rather, claimed that petitioners themselves left the job on their own.

7. In view of aforesaid background, respondent No. 2-GACL and Respondent No. 3-Contractor prayed for dismissal of the claim put-forth on behalf of the petitioners.

8. Record further reveals that learned Tribunal below on the basis of pleadings made available on record by the respective parties, framed following issues:-

> "1. Whether the plea of the contractor that petitioners have abandoned the service, on their own accord, is justified or not? If so, its effect.
>
> 2. Whether the petitioners are entitled to be taken on permanent service rolls of respondent no. 1 as alleged and to what effect?
>
> 3. Whether the petitioners are not workmen and the dispute is not an industrial dispute as alleged?
>
> 4. Whether there is no relationship between petitioners and employers as alleged?
>
> 5. Relief."

9. Learned Tribunal below on the basis of evidence adduced on record by the respective parties came to the conclusion that neither the petitioners have proved themselves to be the employees of respondent No. 2-GACL nor of respondent No. 3-contractor and, as such, no

relationship of employees and employer has been established between the petitioners and respondent No. 2-GACL and accordingly dispute cannot be said to have fallen under Industrial Disputes Act, as per Section 2(s) of the Act.

10. Learned Tribunal below in view of the aforesaid findings, dismissed the reference petitions as filed by the petitioners.

11. In view of the aforesaid background, present petitioners have approached this Court by way of writ petitions, as referred hereinabove, praying therein for quashing of the common award dated 21.6.2010, passed by learned Tribunal.

12. Shri Rahul Mahajan, counsel representing the petitioners vehemently argued that impugned award passed by learned Industrial Tribunal is not sustainable in the eyes of law as the same is not based upon the correct appreciation of evidence as well as law and, as such, same deserves to be quashed and set aside. Mr. Mahajan contended that impugned award passed in reference No. 65/1998, titled Agya Ram & others vs. Gujrat Ambuja Cement Ltd., reference has been wrongly answered in negative against the petitioners because evidence led on record by the petitioner has not been dealt with in its right perspective while rejecting the reference referred to it by the appropriate government. Mr. Mahajan further argued that bare perusal of impugned award itself suggests that the same suffers from material irregularities and illegalities in law and same is based upon surmises and conjectures, as such, same cannot be allowed to sustain.

13. With a view to substantiate his aforesaid arguments that error of law is apparent on the face of the record, Mr. Mahajan invited the attention of the Court to the impugned award to demonstrate that candid, cogent and convincing evidence led on record by the petitioners in support of their claims have been brushed aside by the learned Tribunal on a very flimsy ground, as such, great prejudice has been caused to the present petitioners, who admittedly worked more than 7 years with the respondents before there illegal termination. Mr. Mahajan also stated that bare perusal of reply filed by respondent No. 2-GACL itself suggests that there was no specific denial of the averments made in the claim of the petitioners and, as such, same should have been implied considered to be admitted. Mr. Mahajan also stated that learned Tribunal has fallen in grave error while appreciating the statement of the petitioner, wherein, he categorically stated that when he was engaged in the employment of GACL as Fire and Safety Supervisor and as such worked till 1.1.1997, when his services were illegally terminated without any show cause notice, retrenchment compensation and charge sheet. Mr. Mahajan further stated that once it stood proved on record that Shri M.K. Verma, the then Manager Safety in M/s Gujarat Ambuja Cement Ltd. had issued circular for the work to be done by the petitioners while engagement with respondent No. 2-GACL, learned Tribunal had no occasion to return the findings that petitioners have not been able to prove on record that there was a relationship of employer and employees between the petitioners and respondent No. 2.

14. Mr. Mahajan also invited the attention of this Court to the monthly work report submitted by Mr. M.K. Verma, the then Safety Manager to demonstrate that petitioners were directly working under his control and supervision and as such, contention put-forth on behalf of respondent No. 2-GACL that petitioners were never engaged by it could not be accepted by learned Tribunal below on its face value. Mr. Mahajan further contended that learned Tribunal below has fallen in grave error in not appreciating the fact that petitioners had placed on record monthly report submitted by Shri M.K. Verma regarding the work done, daily progress report regarding work done and duties performed by the petitioners, which was sufficient to demonstrate that petitioners worked directly under the supervision and control of the Manager Safety, who was the employee of GACL. Similarly, Mr. Mahajan stated that Mr. S.S. Sahni, Manager (Personnel) in his affidavit and cross-examination admitted that he is not aware of the provision of Contract Labour (Regulation and Abolition) Act, 1970 and expressed his inability to produce the Registration Certificate and license under Contract Labour (Regulation and Abolition) Act, 1970. As per Mr. Mahajan, learned Tribunal miserably failed to appreciate that no registration or license as required under the Contract Labour (Regulation and Abolition) Act, 1970 was produced by M/s Gujarat Ambuja Cement Ltd. and Contractor- respondent No. 3 and, as

such, adverse inference ought to have been drawn by learned Tribunal below against the respondents.

15. Mr. Mahajan also invited attention of this Court to the specific portion of impugned award, wherein, it finds mentioned that signatures of Mr. M.K. Verma, Safety Manager, was sent for Govt. Examiner of Questioned Documents for opinion, who categorically reported that signatures are of Mr. M.K. Verma, Manager (Safety), as such, same could not be ignored. He further contended that specific report rendered therein by Govt. examiner could not have been brushed aside by the leaned Tribunal below on the ground that respondent No. 2-GACL was not given opportunity to file objection and examine the Government Examiner. He stated that objections, if any, could only filed by respondent No. 2-GACL, who could move an application for examination of Government Examiner and, as such, M/s Gujrat Ambuja Cement Ltd. Cannot take any advantage and the claim put-forth on behalf of petitioners could not be rejected. Similarly, Mr. Mahajan further contended that learned Tribunal has also failed to appreciate that petitioners are workmen under Section 2(s) of the Act and even under the Contractor Labour (Regulation and Abolition Act), 1970 and learned Tribunal had jurisdiction to adjudicate the dispute, as such, impugned award deserves to be quashed and set aside.

16. Mr. Mahajan while concluding his arguments forcefully contended that findings of learned Tribunal, wherein, drawing adverse inference under Section 114 (g) of the Evidence Act against petitioners, namely S/Shri Lal Chand, Khem Raj and Kuldeep Kumar in References Nos. 63 of 1998, 66 of 1998 and 67 of 1998 rejected the claims, since they never stepped into witness box to prove their case, is bad in law because learned Tribunal has failed to appreciate that vide order dated 21.5.2000 of Labour Court, all the references as mentioned above were ordered to be consolidated with Reference No. 65 of 1998. Since, authorized representative of the petitioners in Reference Nos. 65 of 1998, 63/1998, 66/1998, 67/1998 led evidence only in Reference No. 65 of 1998, it was incumbent upon the learned Tribunal to consider evidence led in Reference No. 65 of 1998, in all cases. Moreover, once the references were consolidated by learned Tribunal in view of identical references made to it by Appellate Court, leading of evidence in one reference would not have resulted in drawing adverse inference in other references as the issues to be proved in all references were similar and statement of claim, reply had already been filed in references, as such, learned Tribunal took hyper technical view while rejecting reference Nos. 66 of 98, 63 of 98 and 67 of 98, on the ground that petitioners therein never stepped into witness box to prove their claims.

17. Mr. Mahajan while terming award dated 21.6.2010 harsh, unjust and illegal, prayed for accepting the present petitions by quashing and setting aside the award passed by learned Tribunal in reference petitions.

18. Mr. K.D. Sood, Senior Advocate, duly assisted by Mr. Sanjeev Sood, Advocate, supported the award passed by learned Tribunal below. Mr. Sood vehemently argued that bare perusal of impugned award itself suggests that same is based upon the correct appreciation of evidence available on record as well as law, as such, no interference, whatsoever is warranted in the present facts and circumstances. Mr. Sood strenuously argued that there is no illegality and infirmity in the impugned award because bare perusal of award itself suggests that, at no point of time, petitioners were able to prove their case. Mr. Sood with a view to demonstrate that petitioners were unable to prove its case invited the attention of the Court to the impugned award passed by the learned Tribunal, whereby learned Tribunal while rejecting the claims put-forth on behalf of petitioners specifically returned the findings that neither petitioners were able to prove themselves to be the employees of respondent No. 2-GACL nor relationship, if any, of employees and employer between them and replying respondent.

19. Apart from above, Mr. Sood forcefully contended that there is no document adduced on record by the petitioner to demonstrate that they, at no point of time, were given appointment by the replying respondent, which could entitle them to raise dispute being "workman" as defined under Section 2(s) of Industrial Disputes Act, 1947. Mr. Sood contended that no appointment letter, if any, has been placed on record by either of the petitioners to

suggests that they were offered appointment by the replying respondent and as such there is no force in the contention put-forth on behalf of counsel representing the petitioners that learned Tribunal below has fallen in error while holding that dispute cannot be said to have fallen under definition of industrial dispute as prescribed under Section 2(s) of the I.D. Act.

20. Mr. Sood further contended that there is no illegality and infirmity in the award, wherein, references bearing No. 63 of 1998, 66 of 1998 and 67 of 1998 have been rejected on the ground that petitioners have not entered into witness box to prove their claims by leading cogent and convincing evidence. But in the present case, since only petitioner, namely, Agya Ram made deposition before the learned Tribunal, that too, qua his claim, there was no occasion, whatsoever, for the learned Tribunal below to return findings qua the claims made by other petitioners. In view of the aforesaid background, Mr. Sood prayed that present petitions may be dismissed being devoid of any merit.

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

22. At this stage, it may be pointed out that during proceedings of the case, this Court had an occasion to peruse the impugned award as well as evidence led on record by the parties and this Court has no hesitation to conclude that impugned award passed by learned Tribunal is based upon the correct appreciation of evidence led on record by the respective parties, as such, no interference, whatsoever of this Court is called for in the present case. Though during arguments, Mr. Mahajan made an attempt to point out certain illegalities having been allegedly committed by learned Tribunal below while passing impugned award but close scrutiny of impugned award suggests that Court below has dealt with each and every aspect of the matter meticulously and it cannot be said that impugned award is not based upon the correct appreciation of evidence adduced on record. But, this Court after perusing material available on record is unable to conclude that there is any perversity in the impugned award passed by the learned Tribunal, which could compel this Court to interfere in the impugned award, which definitely appears to be based upon the proper appreciation of the evidence on record.

23. Apart from above, undisputably no appointment letters, if any, have been placed on record by all the petitioners to demonstrate that they were engaged by respondent No. 2-GACL or respondent No.3. Similarly, though petitioners in their claim stated that they were paid salary/remuneration by respondent No. 2-GACL, but no document worth the name was placed on record to substantiate their aforesaid claims. In this case, petitioners have also not been able to prove that their services were terminated by the respondent No. 2-GACL, whereas respondent No. 2-GACL categorically denied that petitioners were engaged by it. Respondent No. 3 though admitted that services of the petitioners were hired/engaged by it w.e.f. June 1996 as Khalasis at project site but they specifically denied the claim of the petitioners that they were being paid salary @ of Rs.1950/-, Rs.2250/-, Rs.1950 and Rs.2250/- respectively. Respondent No.3 - Contractor further stated that petitioners were being paid wages @ Rs. 65/- per day but the claim of the petitioners that they worked more than 240 days continuously with the replying respondent was specifically denied. Similarly, respondent No. 3 stated that M/s Gujrat Ambuja Cement Ltd. had given some project/ work to respondent No. 3-Contractor and petitioners were engaged by respondent No. 3 and their services were never terminated rather they themselves left job on their own.

24. After perusing the entire evidence led on record by the petitioners as well as respondents, there is no doubt that, at any point of time, petitioners were able to prove their appointment as Fire & Safety Supervisors by respondent No. 2-GACL. Similarly, petitioners themselves stated before the learned Tribunal below that they were not employees/workers of respondent No. 2-GACL.

25. PW1 specifically stated before the learned Tribunal that he was inducted into employment of respondent No. 2-GACL as Fire & Safety Supervisor and, as such, he continued till 1.1.1997, but as has been observed above, none of the petitioners have placed on record

appointment letters, if any, given by respondent No. 2, while engaging them as Fire & Safety Supervisors. As such, this Court sees no illegality and infirmity in order passed by the learned Tribunal below, wherein, it concluded that neither petitioners have proved themselves to be the employees of respondent No. 2-GACL nor that of respondent No. 3-Contractor. Since, petitioners were unable to prove on record relationship of employees and employer between them and respondent No. 2-GACL, learned Tribunal rightly concluded that dispute cannot be said to have fallen under the definition of "Industrial Disputes" as per Section 2(s) of the I.D. Act. At this stage, it would be profitable to refer the judgment passed by Hon'ble Apex Court titled ***Balwant Raj Saluja and Anr. Vs. Air India Limited and Ors. (2014) 9 Supreme Court Cases 407***, wherein, Hon'ble Apex Court laid relevant factors to be taken into consideration while determining the relationship between the employer and employee, which are as under:

> "64. It was concluded by this Court in Nalco case that there may have been some element of control with Nalco because its officials were nominated to the Managing Committee of the said schools. However, it was observed that the abovesaid fact was only to ensure that the schools run smoothly and properly. In this regard, the Court observed as follows:
>
> > "30. … However, this kind of 'remote control' would not make Nalco the employer of these workers. This only shows that since Nalco is shouldering and meeting financial deficits, it wants to ensure that the money is spent for the rightful purposes."
>
> 65. Thus, it can be concluded that the relevant factors to be taken into consideration to establish an employer-employee relationship would include, inter alia:
>
> > (i) who appoints the workers;
> >
> > (ii) who pays the salary/remuneration;
> >
> > (iii) who has the authority to dismiss;
> >
> > (iv) who can take disciplinary action;
> >
> > (v) Whether there is continuity of service; and
> >
> > (vi) extent of control and supervision i.e. whether there exists complete control and supervision.
>
> As regards extent of control and supervision, we have already taken note of the observations in Bengal Nagpur Cotton Mills case, International Airport Authority of India case and Nalco case."

26. Careful perusal of aforesaid law passed by Hon'ble Apex Court clearly suggests that Court while examining the question of employer and employee relationship is required to consider several factors as have been culled hereinabove by the Hon'ble Apex Court. Perusal of facts and circumstances of the case as well as evidence adduced on record, nowhere suggests that petitioners herein were able to prove aforesaid factors while claiming employer and employees relationship between them and respondents No. 2 and 3. As has been discussed in detail, petitioners have not placed on record appointment letters, if any, issued either by respondent No. 2 or respondent No. 3. Since, petitioners herein were unable to prove on record that they were appointed by respondents No. 2 and 3, several other factors as have been indicated hereinabove may not have much relevance as far as present cases are concerned. But otherwise also, perusal of impugned award nowhere suggests that petitioners were able to prove that they were being paid salary/remuneration by respondents herein. Similarly, petitioners have not led on record any evidence to demonstrate that respondents No. 2 and 3 had control and supervision over them while discharging official duties.

27. Hence, in view of the above, this Court finds no force in the contention put-forth on behalf of counsel representing petitioners that learned Tribunal below has fallen in error while rendering the findings that petitioners do not fall under definition of Section 2(s) of Industrial

Disputes Act. Admittedly, in the present case petitioners were not able to prove on record relationship of employees and employer between them and respondents and, as such, it cannot be said that impugned award passed by learned Tribunal deserves to be quashed and set aside being perverse.

28. Similarly, this Court sees no illegality and infirmity in the impugned award passed by learned Tribunal below wherein reference Nos. 66/1998, 63/1998 and 67/1998 were rejected by learned Tribunal drawing adverse inference under Section 114 G of Evidence Act against Lal Chand, Khem Raj and Kuldeep Kumar because they never stepped in witness box to prove their case. It is well settled that one who claim need to prove the same by leading best piece of evidence. In the present case, though vide order dated 21.5.2002, learned Tribunal had consolidated the aforesaid references but that could not be a ground for the petitioners to not step into witness box to prove their claim. In the present case authorized representative of the petitioner in Reference No. 65/1998 made an attempt to prove the claim of the petitioner, namely, Agya Ram only and by no stretch of imagination it can be concluded that evidence led on record by Shri Agya Ram in Reference No. 65 of 1998 could be read in evidence in other references. Moreover, perusal of evidence led on record by petitioner-Agya Ram in reference No. 65/1998 nowhere suggests that he made any mention with regard to other petitioners and, as such, this Court sees no illegality and infirmity in the impugned award passed by the learned Tribunal. Onus was upon each petitioner to prove their respective claims by leading cogent and convincing evidence, which they failed to discharge by not entering into witness box.

29. Hence, in totality of facts and circumstances, this Court finds no reason, whatsoever, to intervene in the well reasoned award passed by the learned Labour Court. Moreover, this Court has very limited jurisdiction while exercising power under Section 226 to re-appreciate the evidence.

30. Apart from above, findings of fact recorded by learned Tribunal below on the basis of appreciation of evidence cannot be questioned in writ proceedings and writ court cannot act as an appellate court. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in case titled ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157***. It is profitable to reproduce paras 16, 17 and 18 of the judgment herein:

> "16. .....The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or tribunals: these are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is no entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened for questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of

certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the interference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

17. The judgments mentioned above can be read with the judgment of this Court in Harjinder Singh's case (supra), the relevant paragraph of which reads as under:

21. Before concluding, we consider it necessary to observe that while exercising jurisdiction under Articles 226 and / or 227 of the Constitution in matters like the present one, the High Courts are duty bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the Preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43-A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of the community to subserve the common good and also ensure that the workers get their dues. More than 41 years ago, Gajendragadkar, J. opined that:

10.... The concept of social and economic justice is a living concept of revolutionary import; it gives sustenance to the rule of law and meaning and significance to the ideal of welfare State.

18. A careful reading of the judgments reveals that the High Court can interfere with an order of the Tribunal only on the procedural level and in cases, where the decision of the lower Courts has been arrived at in gross violation of the legal principles. The High Court shall interfere with factual aspect placed before the Labour Courts only when it is convinced that the Labour Court has made patent mistakes in admitting evidence illegally or have made grave errors in law in coming to the conclusion on facts. The High Court granting contrary relief under Articles 226 and 227 of the Constitution amounts to exceeding its jurisdiction conferred upon it. Therefore, we accordingly answer the point No. 1 in favour of the appellant." *[Emphasis added]*

31. Consequently, in view of the aforesaid discussion, this Court sees no force in these writ petitions, as such, the same are dismissed being devoid of any merit.

****

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

Ms. Neelam Sharma .....Appellant.

Versus

Sh. Satish Kumar and others .....Respondents.

Cr. Appeal No. 126 of 2013.
Reserved on : 9th September, 2016.
Date of Decision: 20th September, 2016.

Indian Penal Code, 1860- Section 302, 201 read with Section 34- **Indian Arms Act, 1959**- Section 25- Deceased had left home by telling his daughter that he would first go to the house of K and thereafter to attend his duty - when he did not return, his daughter called him on his mobile phone but the phone was found to be switched off – when inquiry was made from the Office, it was found that her father had not attended the duties – accused S had a case pending with the deceased in the High Court- accused S and R made a disclosure statement leading to the recovery of the dead body- two pellets marks were found on the stems of bushes- accused R made a disclosure statement leading to the recovery of empty/blank cartridge- cause of death was found to be gunshot injury- accused was tried and acquitted by the trial Court- held, in appeal that case of the prosecution is based upon circumstantial evidence- it was proved by medical evidence that deceased had died due to gunshot injury- recovery of the dead body at the instance of accused was duly proved- trial Court had wrongly held that I.O. had prior information regarding the place of hiding – gun licence was issued in the name of accused L- prosecution version was duly proved beyond reasonable doubt- trial Court had wrongly acquitted the accused- appeal allowed- accused convicted of the commission of offences punishable under Sections 302 read with Section 34 of the IPC and Section 25 of Indian Arms Act. (Para-10 to 17)

For the Appellant:	Mr. V.D. Khditta,Advocate.
For Respondents No.1 to 3:	Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj Vashist, Advocate.
For Respondent No. 4:	Mr. M.A. Khan, Addl. A.G.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

The instant appeal stands directed by the complainant/appellant against the judgment of the learned Additional Sessions Judge, Ghumarwin, District Bilaspur, Himachal Pradesh, rendered on 30.11.2012 in Sessions trial No. 13/7 of 2010, whereby, it acquitted the accused/respondents for offences punishable under Sections 302, 201 read with Section 34 of the Indian Penal Code and Section 25-27 of the Indian Arms Act.

2. The facts relevant to decide the instant case are that on 22.12.2009, Inspector Ram Singh, PW-15, received an information on telephone from accused Satish Kumar that a person had died due to gunshot injury in Balh Churani forest on which rapat, Ext. PW15/A, was entered. PW-15 along with other police officials thereafter proceeded to the spot where statement, Ex.PW1/A of Neelam Sharma, PW-1, daughter of deceased Ratti Ram was recorded. Rukka was sent for registration of the case on which FIR Ex.PW13/C was registered. On 21.12.2009, Ratti Ram had left his house at about 8.00a.m. by saying to his daughter Neelam Sharma that he would first go to the house of Karma in village Chujala and thereafter would go to attend his duties in Harlog. He did not come on 21.12.2009 and thereafter Neelam Sharma rang him on his cell phone No.98164-11152, but it was switched off. Subsequently, she rang up to forest guard Harlog beat and inquired about her father who told her that her father did not attend duties on 21.12.2009. Thereafter, Neelam Sharma rang up to accused Satish Kumar and inquired about her father and accused Satish Kumar told her that her father was alright and would come back home. Accused Satish Kumar was not having good terms with the family of Ratti Ram because a case regarding land was pending in the High Court. Disclosure statements under Sections 27 of the Indian Evidence Act of accused Satish Kumar and Rajeev Kumar, Ext. PW2/A and Ex.PW15/C were recorded in the presence of Jaswant Singh, (PW-2) and Kuldeep Singh, (PW-3). Both accused disclosed to the police that dead body of Ratti Ram was concealed in the jungle and they were having knowledge of the same and could get recovered the same. In pursuance to their disclosure statements, both accused persons led the police party and the witnesses to a place situated in Bal Churani Jungle and on their demarcation of the spot, dead body of Ratti Ram was recovered which was covered with branches of tree vide recovery memo Ex.PW1/B.

Dead body was identified by Neelam Sharma, (PW-1). A bag was also recovered lying nearby the dead body which was also identified by PW-1 belonging to her father. Dry soil was also taken from the spot by the police. Inspector Ram Singh, prepared spot map of recovery of dead body, Ex.PW15/D. Both accused also led police party to a place in the jungle where gun shot was fired by accused Satish Kumar. C. Raj Kumar conducted videography of the spot where dead body was lying and took photographs with digital camera. Blood drops were visible on dry leaves and on stones as well as soil. Front denture containing five teeth was lying on the spot. Two pellets marks were visible on the stems of bushes. Pellets were found embedded and removed with a stone. Pellets Ex.P-2 and Ex.P-3, Wad Ex. P-4, match box Ex.P-5, stone Ex.P-7, dry leaves Ex.P-8, soil Ex.P-9 and denture Ex.P-11 were taken into possession vide recovery memo Ex.PW2/B sealed on the spot and separate seal taken on cloth. Spot map, Ex.PWQ15/F was prepared. Dead body of Ratti Ram was sent for postmortem examination to C.H. Ghumarwin vide docket Ex.PW7/A. Inquest papers, Ex.PW1/C and Ex.PW1/D were prepared. Accused Rajeev Kumar vide his disclosure statement, Ex.PW15/C in the presence of PW-2 and PW-3 had effected the recovery of gun, Ex.P-27, vide memo Ex.PW15/G, from his house. Accused Lekh Ram on 25.12.2009 produced gun licence, Ex.P-28 vide recovery memo, Ex.PW6/A. Rattan Lal, PW-5, on 21.12.2009 at about 6.00 a.m., when he left his house for duty, heard some noise of foot steps and on inquiry found accused Satish Kumar and Chottu going some where and identified them. Accused Rajeev Kumar also gave disclosure statement, Ex.PW8/A before the police that he had concealed empty/blank cartridge after use inside his house. Empty cartridge Ex.P-23 was recovered vide memo Ex.PW2/F. Accused Rajeev Kumar also produced to the police vide memo Ex.PW2/C, his jeans, inner and sweater Ex.P-17. Accused Satish Kumar also produced to the police pants, T-shirt, black inner and half sweater vide memo Ex.PW2/D. SI Megh Singh on 27.12.2009, conducted search of house of accused Lekh Ram and during search two live cartridges Ex.P-36 and Ex.P-37 were recovered vide memo Ex.PW9/A. Si Megh Singh took into possession jamabandi Ex.PW27/A vide memo Ex.PW4/A.

3. Dr. N.K. Sankhyan, on 23.12.2009 conducted postmortem examination of dead body of Ratti Ram and found multiple perforated wounds without charring, blackening, tattooing, signing of hair, these were due to pellets. Three pallets were taken out from skin and subcutaneous tissue. Total perforated wound on front of chest were 45, on left side of abdomen 3, over right shoulder 24, over right side of face 4, over chin 3, over medial side of thigh left side one, over right thigh 12, proximal part of nose 1 with fracture nasal bone. Total 93 perforated wounds and total six pellets were taken out. There was no exist wound. He prepared postmortem report, Ex.PW7/B and as per his final opinion, Ex.PW7/D, deceased Ratti Ram died due to cardio respiratory failure as a result of injuries to lungs and heart and hypovolumic shock as a result of gun shot injury. The probable time that elapsed between injury and death was instantaneous to half an hour. Injury No.7 was sufficient to cause death in a normal course and was due to gun shot. He also handed over to the police viscera along with shirt, brown sweater, pants, under shirt, underwear, parna and woolen shawl of Ratti Ram. The case property was entered in Malkhana register at serial No. 439 as well as at serial No.440 on 29.12.2009, C. Gulam Hussain deposited seven parcels having seal of Hospital along with specimen seal and docket addressed to FSL, Junga and same was entered at serial No.440 of Malkhana register. Abstract is Ext.PW13/A. On 31.12.2009, H.C. Jogesh Kumar, handed over 16 parcels along with specimen seal and docket to C. Shyam Lal vide R.C. No.197/2009,Ex.PW13/B and the same was deposited with FSL Junga. Report of the FSL, Ex.PW7/C, reveals that no alcohol/poison could be detected. Another report of FSL, Ex.PW14/D was received. Human blood was found on leaves and soil taken from the spot as well as on the clothes of Ratti Ram. Blood was not detected on clothes of accused Satish Kumar and Rajeev Kumar. Report of FSL, Ex.PW14/E reveals that fire arm (SBBL gun) was in working order and cartridge case, Ex.E/5 has been fired from the said gun.

4. On conclusion of investigations, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared and filed in the competent Court.

5. The accused were charged by the learned trial Court for theirs committing offences punishable under Section 302 read with Section 34 of the IPC and 25-27 of the Indian Arms Act. In proof of the prosecution case, the prosecution examined 18 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 trial Court, in which the accused claimed innocence and pleaded false implication. However, they did not lead any defence evidence.

6. On an appraisal of evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused/respondents herein.

7. The complainant/appellant herein aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned counsel appearing for the complainant/appellant 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.

8. On the other hand, the learned defence counsel has with considerable force and vigour, 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.

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. Deceased Ratti Ram suffered his end by a gun shot injury. The relevant incident of his standing allegedly inflicted with a fatal gun shot wound occurred in Balh Churani Forest. The accused/respondents herein are alleged to commit the murder of deceased Ratti Ram. The fatal gun shot injury is alleged to stand fired at the deceased by accused Rajeev Kumar from the licenced arm, Ex.P-27, of his father, accused Lekh Ram. The spent cartridge Ex.P-23 stood recovered from the house of accused Rajeev Kumar under recovery memo Ex.PW2/F. The FSL concerned in its opinion comprised in Ex.PW14/E has therein categorically echoed of cartridge Ex.E/5 standing fired from fire arm, Ex.E/4 (SBBL gun), a valid licence qua which stood issued by the competent Licencing Authority qua accused Lekh Ram. Furthermore, underscorings stand embodied therein qua traces of gun shot residue standing borne on the holes present on Exts. E/9a (a piece of cloth), E/9b (shirt), E/9c (pant), E/9d (Sweater), E/9e (T-shirt) and E/9g (underwear). Ex.PW7/B is the postmortem report prepared by PW-7, Dr. N.K. Sankhan, in sequel to his subjecting the body of deceased Ratti Ram to postmortem examination. PW-7 in his testification has proved Ex.PW7/B. He has voiced therein qua his during the course of his subjecting the body of deceased to postmortem examination noticing thereon multiple perforated wounds without charring, blackening, tattooing, singing of hair. He attributes the existence of the aforesaid features on the body of the deceased to firing of pellets thereon. He testifies qua the demise of deceased occurring due to cardio respiratory failure as a result of injuries to lungs and heart and hypovolumic shock in sequel to a gun shot injury.

11. Apparently, the case of the prosecution rests upon circumstantial evidence. For the prosecution to succeed in a case anvilled upon circumstantial evidence, it was enjoined to prove by efficacious unflinching evidence each of the links in the chain of circumstances. Motive which ultimately does not hold any force in a case hinged upon direct evidence yet assumes significance in a case rested upon circumstantial evidence. The motive which stands attributed by the prosecution to the accused for theirs murdering the deceased stands grooved in there being an on going land dispute inter se them. Even though no record personificatory of an on going land dispute inter se the accused and the deceased exists on record also thereupon the attribution of a motive to the accused by the prosecution for theirs murdering the deceased would founder. However, even if, the aforesaid ascription of motive by the prosecution to the accused

may not be nourished by any convincing evidence yet for want of evidence qua the facet aforesaid would not benumb the vigour of the prosecution case, if, other links in the chain of circumstances stand unflinchingly proven by the prosecution. Also if scientific ballistic evidence comprised in the report of the FSL concerned manifested in Ex.PW14/E squarely attracts the inculpation of the accused in the alleged offences, any lack of proof of link of motive would stand blunted. Also pronouncements occurring in the deposition of PW-7 qua the demise of the deceased ensuing from pellet injuries observed by him to be existing on the person of the deceased when cumulatively point qua accused Rajeev Kumar firing at the deceased the fatal gun shot from gun, Ex.P-27, concomitantly they assume paramount predominance dehors other links in the chain of circumstances remaining assumingly not cogently proven.

12. The learned trial Court had disimputed credence to the prosecution version qua recovery of body of the deceased under memo Ex.PW2/B at the instance of accused Satish Kumar and Rajeev Kumar in succession to their respective precedingly recorded disclosure statements comprised in Ex.PW2/A and Ex.PW15/C, given PW-15 testifying qua his receiving from accused Satish Kumar a telephonic intimation on 22.12.2009 whereupon he recorded rapat Ex.PW15/A, information whereof held a narrative qua a person suffering death in Balh Churani Forest, also with PW-2 testifying qua his standing purveyed an intimation qua the aforesaid facet by the police besides with PW-15 unveiling in his testification qua both Satish Kumar and Rajiv Thakur besides PW Kuldeep Kumar, Jaswant Singh and Neelam proceeding to the site of occurrence begetting therefrom an inevitable inference qua the investigating Officer holding knowledge qua the place of hiding, concealment or keeping of the body of deceased preceding vis-a-vis effectuation of recovery of body of the deceased at the instance of the accused. The aforesaid conclusion qua prior to, accused Statish Kumar and Rajeev Kumar getting its place of keeping or hiding identified in sequel whereto memo Ex.PW2/B stood prepared, the Investigating Officer holding knowledge qua the place of its keeping would stand firmly engendered also would hold entrenched vigour only when evidently PW-2 and PW-15 along with the Investigating Officer had prior to the identification of body of deceased by the accused, located it in Balh Churani Jungle. However, there is no evidence existing on record portraying the factum of PW-15, PW-2 and PW Kuldeep Kumar prior to the accused Rajeev Kumar and Satish Kumar making disclosure statements comprised in Ex.PW2/A and Ex.PW15/C, in pursuance whereof they under memo Ex.PW2/B identified the place of concealment or keeping of body of deceased, theirs along with the Investigating Officer visiting it, significantly it was inapt for the learned trial Court to conclude of the Investigating Officer detecting the body of the deceased in Balh Churani Forest prior to his recording the disclosure statements of accused Satish Kumar and accused Rajeev Kumar comprised in Ex.PW2/A and Ex.PW15/C. Even if, the Investigating Officer besides PW-1 and PW-2 held knowledge qua the occurrence of body of the deceased Ratti Ram in Balh Churani Jungle on information qua its location standing purportedly telephonically purveyed by accused Satish Kumar whereupon a rapat comprised in Ex.PW15/A stood registered yet the mere factum of information qua its occurrence in the forest would not be connotative of PW-15 (Investigating Officer) along with PW-1 and PW-2 visiting the relevant spot in the forest prior to the making of by co-accused Satish Kumar and Rajiv Kumar their respective disclosure statements comprised in Ex.PW2/A and Ex.PW15/C in sequel whereto the body of deceased stood identified by them under memo Ex.PW2/B, nor also any conclusion can stand fostered of the Investigating Officer dehors the accused identifying the place of its keeping and hiding preceding whereto they recorded their respective disclosure statements comprised in Ex.PW2/A and Ex.PW15/C, his previously locating the place whereat its location stood ultimately identified by accused Satish Kumar and accused Rajiv Kumar. Furthermore, no relevant unearthings upsurge in the cross-examination of PW-1, PW-2 and PW-15 qua dehors theirs holding knowledge qua the occurrence of body of deceased in Balh Churani, Jungle, theirs conjointly identifying its location prior to effectuation of its recovery at the instance of the accused under memo Ex.PW2/B. Also knowledge, if any, held by PW-1 and PW-2 qua occurrence of the body of the deceased in Balh Churani Jungle would ipso facto hold no connotation qua theirs purveying to the Investigating Officer with graphic specificity the exact place of its occurrence in the relevant jungle unless efficacious apposite unearthings upsurge in their testifications. However, for want of emergence

of apposite upsurgings in the relevant testifications qua the facet aforesaid enhances the inference of the Investigating Officer of PW-1 and PW-2 not sharing with the Investigating Officer the exact place of its location in the relevant jungle wherefrom also an inference stands erected of the accused alone holding knowledge qua the place of hiding or keeping of body of deceased by them wheretoat they led the Investigating Officer whereupon memo Ex.PW2/B stood prepared. For reiteration, lack of upsurgings in their cross-examination qua the facet aforesaid, an apt inference therefrom is of assumingly even if PW-1, and PW-2 had held prior knowledge qua the place of keeping and hiding of the body of deceased in Balh Churani Jungle, nonetheless, the aforesaid knowledge held by PW-1 and PW-2 qua the precise site of its location therein cannot ipso facto stand concluded to be conveyed by them to the Investigating Officer unless their relevant cross-examinations qua the trite factum aforesaid unearthed evidence in affirmation thereto, whereas, with the aforesaid evidence being amiss it would be grossly inapt to conclude of even if assumingly PW-1 and PW-2 held knowledge qua the place of hiding and keeping of the body of deceased in Balh Churani Jungle, of thereupon the Investigating Officer also holding knowledge qua its exact place of location therein. The sequitur thereto is of the Investigating Officer acquiring knowledge only from the accused qua the place of hiding and keeping of the body of the deceased by them in Balh Churani Jungle, rendering hence redundant the effect, if any, of PW1 and PW-2 holding knowledge qua the place of hiding and keeping of the body of deceased Ratti Ram in Balh Churani Jungle. Preeminently also when the Investigating Officer hence evidently held no confabulations with PW-1 and PW-2 qua the relevant fact aforesaid rather he stood led by the accused to the place of its keeping and hiding by them, in sequel, it was grossly inapt for the learned trial Court to conclude of with PW-15 also PW-1 and PW-2 holding prior knowledge qua the occurrence of demise of Ratti Ram in Balh Churani Jungle, knowledge whereof occurred prior to the making of disclosure statements by accused Satish Kumar and Rajeev Kumar, begetting a concomitant conclusion of theirs visiting it along with the Investigating Officer, also theirs along with the Investigating Officer locating the place of its keeping and hiding nor it was apt for the learned trial Court to conclude of the disclosure statements of Satish Kumar and Rajeev Kumar lacking in sanctifying vigour. Cumulatively, hence the accused are to be concluded to be holding exclusive knowledge qua the place of its location also qua the exact place of its hiding or camouflaging by them whereupto they accosted the police, whereupon they identified it under memo Ex.PW2/B, preceding whereto their respective disclosure statements comprised in Ex.PW2/A and Ex.PW15/C stood recorded. The apt sequitur of the aforesaid inference qua accused Satish Kumar and Rajeev Kumar alone holding exclusive knowledge qua the place of hiding and keeping of the body of deceased Ratti Ram is qua also their respective disclosure statements, holding vigorous probative force, vigour whereof imbuing them stands grooved in the factum of exhibits aforesaid holding the respective signatures of the accused, signatures thereon of both standing not disputed by them whereupon they stand interdicted by the mandate of Sections 91 and 92 of the Indian Evidence Act to resile from the recitals occurring therein also stand concomitantly estopped to adduce oral evidence in digression thereto. Also likewise the existence of uncontested signatures of the marginal witnesses on memos Ex.PW2/A, Ex.PW15/C, Ex.PW2/B, Ex.PW2/C, Ex.PW2/D, Ex.PW2/F, Ex.PW2/J, Ex.PW4/A, Ex.PW6/A, Ex.PW8/A, Ex.PW9/A, and Ex.PW15/G, also likewise attracts qua them the interdiction cast in Sections 91 and 92 of the Indian Evidence Act against theirs orally digressing from the recorded recitals occurring therewithin. Consequently, their oral testimonies in variation thereto hold no vigour. Furthermore, with efficacious proof emanating qua disclosure statements of accused Satish Kumar and Rajiv Thakur respectively comprised in Ex.PW2/A and Ex.PW15/C also when in sequel thereto the place of concealment and keeping of the body of deceased stood identified by them under memo Ex.PW2/B, the factum of the prosecution not adducing cogent evidence in display of cellular communications occurring inter se co-accused Satish Kumar and PW-15 holding therein a narrative qua the body of the deceased occurring in Balh Churani Jungle appears to be inconsequential. Even, if the testimony of PW-5, who had last seen co-accused Satish Kumar and Rajiv Kumar going to the jungle on 21.12.2009 at about 6.00 a.m., hence holds therewithin the link evidence of his last seeing them in the vicinity of the site of occurrence, factum whereof qua his last seeing them in the vicinity of the

site of occurrence stands testified by him to generate on his hearing sound of foot steps occurring outside his house whereupon he stood prodded to make an inquiry, inquiry whereof fetched/yielded to him an answer by accused Satish Kumar and accused Rajiv Thakur, identification whereof by him of the aforesaid stands testified by him to occur on his identifying their voices, may stand rendered discrepant, given PW-1 testifying qua her father departing from his house at about 8.00 a.m., whereas PW-5 deposing of his last seeing the accused in the vicinity of the site of occurrence at 6.00 a.m. yet it may not erode the efficacy of the disclosure statements of accused Satish Kumar and Rajiv Kumar manifested in Ex.PW2/A and Ex.PW15/C also would not benumb the vigour of identification in sequel thereto by the accused under memo Ex.PW2/B of the location of hiding or keeping of body of deceased Ratti Ram. The learned trial Court has meted the least deference to Ex.PW14/E with vivid articulations occurring therein of Ex.E/4 (Ex.P-27), A Single Barrel Breech Loading gun constituting the weapon wherefrom cartridge Ex.E/5 stood fired also it has belittled the significance of the expert concerned therewithin opining of traces of gun shot residue standing borne on the holes present on Exts. E/9a (a piece of cloth), E/9b (shirt), E/9c (pant), E/9d (Sweater), E/9e (T-shirt) and 3/9g (underwear). All the aforesaid pronouncements occurring in Ex.PW14/E graphically evince therefrom qua the relevant weapon of offence standing used by the accused for firing therefrom cartridge Ex.E/5 also with a loud articulation occurring therewithin qua the relevant clothes as sent to it for analysis holding gun shot residue within the holes existing thereon, does imminently cumulatively alongwith the factum of the relevant cartridge standing evidently fired from the relevant weapon of offence, portray qua its penetrating the portion of the body of deceased through clothes, Exts. E/9a (a piece of cloth), E/9b (shirt), E/9c (pant), E/9d (Sweater), E/9e (T-shirt) and 3/9g (underwear) whereon holes with gun shot residue stand opined to occur. With firm connectivity emanating qua hence the user of the relevant weapon of offence by the accused, it ought not to have entailed any inference as untenably drawn by the learned trial Court qua the recovery of empty cartridge P-23 under memo Ex.PW2/F holding no efficacy given its standing recovered from an open almirah wherefrom an inference stood untenably drawn by it qua its standing planted thereon by the Investigating Officer also its concluding qua the incriminatory role of accused Lekh Ram in the offences alleged qua whom Ex.P-27 stood issued and from whose house an empty cartridge Ex.P-23 stood recovered under recovery memo Ex.PW2/F being not cogently evincible obviously suffers from gross error of mis-appreciation by it of relevant germane evidence.

13. Be that as it may with absolute concurrence rather stark alignments occurring vis-a-vis the pronouncements made by PW-7 in Ex.PW7/B on his subjecting the body of deceased to postmortem examination qua his noticing occurrence thereon of pellet wounds vis-a-vis the report of the FSL comprised in Ex.PW14/E wherefrom for reasons aforesaid it stands concluded qua the user of the relevant weapon of offence standing connected with the fatal wounds occurring on the body of the deceased wherefrom the apt ensuing sequel is of with the accused not making any endeavour to while subjecting the prosecution witnesses to cross-examination put apposite suggestions to them qua the Investigating Officer removing the relevant weapon of offence from the premises of its licence holder, whereupon on affirmative responses thereto emanating from them wherewithin bespeakings stand encapsulated qua the Investigating Officer engineering the recovery of Ex.P27, contrarily evident absence of concert thereof by the defence nails a firm conclusion qua its licence holder also being amenable along with other co-accused for fastening an incriminatory role vis-a-vis its vicarious user by him.

14. The up shot of the above conclusion is of the postmortem report Ex.PW7/B and the report of the FSL Ex.PW 14/E constituting the best scientific evidence in emphatically sustaining the user of gun Ex.P-27 by the accused, also the exhibits aforesaid alone constituting the crucial pivotal link for sustaining the guilt of the accused. In sequel, with the aforesaid exhibits alone constituting formidable scientific evidence, they solitarily were enjoined to be meted deference by the learned trial Court. More so, when they vividly pronounce qua the incriminatory role of the accused, their respective credibility besides their vigour stands untenably undermined by the learned trial Court on mere purported inefficacy gripping the

disclosure statements of the accused comprised in Ex.PW2/A and Ex.PW15/C, in sequel whereof they identified the place of its concealment and keeping under Ex.PW2/B, infirmities whereof as delineated by it in its judgment to be embodying them do not withstand the test of incisive scanning of the respective testifications of the relevant witnesses to the apt memos also do not withstand the rigor of application thereon of the relevant principles engrafted in Section 27 of the Indian Evidence Act besides of Sections 91 and 92 of the Indian Evidence Act. Conspicuously, when the identification of the place of recovery of the body of deceased at the instance of the accused was exclusively within their knowledge besides when its recovery at their instance under memo Ex.PW2/B alone held efficacy whereas with the learned trial Court untenably holding of the Investigating Officer prior to the accused making the disclosure statements, whereafter they identified the body of the deceased, his holding knowledge qua the place of its keeping and hiding, has hence desanctified their solemnity whereby it has committed a gross mis-appreciation of their relevant import. Even if, some of the links in the chain of circumstances may assumingly remain unproven by clinching evidence thereto remaining unadduced by the prosecution, nonetheless, when the relevant links are merely incidental or fringe links vis-a-vis the predominant links constituted in Ex.PW7/B (postmortem report) and Ex.PW14/E (report of the FSL), exhibits whereof conclusively connect the guilt of the accused in the commission of offences alleged, the mere non proof of fringe links would not erode the sanctity of the aforesaid exhibits, significantly when they constitute best potent links besides when it is not a thumb rule of inflexible applicability of with fringe links remaining unproved it hence eroding the efficacy of proof by unflinching evidence of predominant potent links.

15. With accused Lekh Ram holding licence of the gun also with his incriminatory role standing unflinchingly proven besides with co-accused Satish and Rajiv identifying the location of body of the deceased whereat it stood concealed or kept by them whereupon the aforesaid evidently hold a vicarious incriminatory role intra se each other besides with co-accused Lekh Ram also preponderantly when both accused Rajiv and Satish Kumar do not in their defence propagate qua theirs not joining their intra se company at the relevant time when a fatal gun shot wound stood fired from the licenced arm of co-accused Lekh Ram imperatively hence it is to be reinforcingly concluded qua all the accused joining their intra se company at the site of occurrence wherefrom also an inference is marshable qua at the relevant site of occurrence each of the relevant accused standing infused with a conjointly premeditated mensrea with the relevant accused who fired fatal gun shot wound at deceased Ratti Ram. Even if assumingly, the apposite gun shot stood fired by only one of the accused, it would not exculpate the incriminatory role of other co-accused in the relevant occurrence, significantly, when the incriminatory role of all co-accused stand hinged upon theirs holding a vicarious premeditated mensrea vis-a-vis intra se each other respectively, factum whereof is evincible from theirs holding the company of the relevant accused while his standing armed with a fatal weapon also when no defence stands espoused by them qua theirs dissuading the relevant accused in his proceeding to fire the fatal gun shot wound at deceased Ratti Ram. Consequently, it is held that the prosecution has proven the guilt of the accused beyond all reasonable doubt.

16. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below 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 perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

17. Consequently, the instant appeal is allowed and the accused/respondents are convicted for the offence punishable under Section 302 read with Section 34 of the IPC and under Section 25-27 of the Indian Arms Act. Consequently, they be produced before this Court on 22nd September, 2016 for hearing them on quantum of sentence.

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

Smt. Reeta Gupta wd/o Sh. Ram Parshad and others ....Revisionists.

Versus

Sh. Lal Chand and others ....Non-revisionists

Civil Revision Petition No. 26/2016
Order Reserved on 14.09.2016
Date of order: 20.09.2016

H.P. Urban Rent Control Act, 1987- Section 24(5)- Landlord filed a petition for eviction of the tenant, which was allowed by Rent Controller- inadvertently name of S was omitted in the memo of the parties- aggrieved from the order, an appeal was filed before the Appellate Authority- an application was filed before Appellate Authority for correction of memo of parties- matter was remanded to Rent Controller for correction of memo of parties- held in revision, that appeal is continuation of judicial proceedings and the Appellate Court has same power as Court of original jurisdiction- he was impleaded as legal representative of the deceased/tenant by Rent Controller- it was for the Rent Controller to correct error – matter was rightly remanded to Rent Controller for disposal- revision dismissed. (Para-6 to 8)

Cases referred:

Shyam Sunder Lal Vs. Shagun Chand, AIR 1967 Allahabad 214
Damodar Mukherjee & Others Vs. Bonwarilal Agarwalla, AIR 1960 Calcutta 469
Shyamlal Vs. Takhatmal, AIR 1957 M.P. 98
Mahangu Parsad Vs. Pravag Sah & Others, AIR 1975 Gauhati 40
Kakhangai Kabui & Others Vs. Smt. Apanbi Kabuini and others, AIR 1968 Manipur 42

For revisionists	:	Mr. Neeraj Gupta, Advocate
For non-revisionist No.1	:	Mr. Ajay Sharma, Advocate.
For non-revisionists No. 2 to 15		None despite service

The following order of the Court was delivered:

P. S. Rana, J.

Present civil revision petition is filed under Section 24(5) of H. P. Urban Rent Control Act 1987 against the interim order dated 24.02.2016 whereby learned Appellate Authority (I) Kangra at Dharamshala (H.P.) remanded the rent petition to learned Rent Controller(I) Kangra at Dharamshala (H.P.) for limited purpose to correct clerical mistake in memo of parties only relating to rent petition No.08/07/2005 title Sh. Lal Chand Vs. Sh. Ram Parshad and others decided on 26.04.2013.

Brief facts of the case:

2. Sh. Lal Chand s/o Sh. Tulsi Ram landlord filed eviction petition against tenants under Section 14(3)(C) of H. P. Urban Rent Control Act 1987. During pendency of rent petition before learned Rent Controller(I) Kangra at Dharamshala (H.P.) Sh. Ram Chand Mehta co-respondent No.4 died and learned Rent Controller impleaded Smt. Vimla Devi, Sh. Rajesh Mehta, Smt. Chanchla Devi, Smt. Shanta Devi and Smt. Sudha Devi as co-party in rent petition being LRs of deceased Sh. Ram Chand Mehta. Due to clerical mistake in the final eviction order passed by learned Rent Controller on dated 26.04.2013 in the memo of parties name of Smt. Sudha Devi was omitted. Learned Rent Controller evicted tenants from premises on the ground of reconstruction which could not be carried out without eviction of tenants. Learned Rent Controller directed tenants to hand over vacant possession of premises to landlord within three months w.e.f. 26.04.2013. Thereafter against eviction order Smt. Reeta Gupta and other tenants

filed rent appeal No.78-D/XIV/13 title Smt. Reeta Gupta and others Vs. Sh. Lal Chand and others.

3. Thereafter during pendency of rent appeal No.78-D/XIV/13 landlord Sh. Lal Chand filed application before Appellate Authority (I) Kangra at Dharamshala (H.P.) under Section 152 CPC for correction of memo of parties in the eviction order and in memo of costs with plea that name of Smt. Sudha Devi be added as co-respondent No.4(v) in memo of parties. Learned Appellate Authority (I) on dated 24.02.2016 held that mistake committed by learned Rent Controller in memo of parties is liable to be corrected by learned Rent Controller. Thereafter learned Appellate Authority (I) Kangra at Dharamshala (H.P.) remanded the matter to learned Rent Controller(I) Kangra at Dharamshala (H.P.) for limited purpose to correct clerical mistake and add name of Smt. Sudha Devi as LR of deceased Sh.Ram Chand Mehta as co-party in eviction order and in memo of costs. Learned Appellate Authority (I) directed that after correction of clerical mistake in memo of parties and memo of costs learned Rent Controller would submit the record to learned Appellate Authority (I) on or before 16.03.2016. Aggrieved against interim order of learned Appellate Authority (I) dated 24.02.2016 revisionists filed present civil revision petition in H.P. High Court.

4. Court heard learned Advocate appearing on behalf of revisionists and learned Advocate appearing on behalf of non-revisionist No.1 and Court also perused the record of present civil revision petition carefully.

5. Following points arise for determination:

1) Whether civil revision petition filed under Section 24(5) of the H. P. Urban Rent Control Act 1987 is liable to be accepted as mentioned in memorandum of grounds of revision petition?

2) Final order.

Findings upon Point No.1 with reasons.

6. Submission of learned Advocate appearing on behalf of revisionists that learned Appellate Authority (I) has committed grave illegality by way of remitting the case file to learned Rent Controller(I) Kangra at Dharamshala (H.P.) for limited purpose for correcting clerical mistake in memorandum of parties is rejected being devoid of any force for reasons hereinafter mentioned. It is well settled law that section 152 Code of Civil Procedure 1908 is based upon concept of *actus curiae neminem gravabit.* (An act of Court should not prejudice anyone). It is well settled law that as per Section 152 Code of Civil Procedure 1908 Court is competent to correct clerical or arithmetical mistake at any stage of the case either on its own motion or on application of any party. It is also well settled law that an arithmetical mistake is a mistake of calculation and clerical mistake is a mistake of writing or typing. See AIR 2003 SC 4179 title **State of Punjab Vs. Darshan Singh**. See AIR 1966 SC 1047 title **Master Construction Co. (P) Ltd. Vs. State of Orissa.** See AIR 1977 Orissa 68 title **Bishnu Charan Vs. Dhani Biswal**. See AIR 1966 Orissa 225 title **Sagua Vs. Bichinta**.

7. Submission of learned Advocate appearing on behalf of revisionists that clerical mistake could be rectified by only Rent Controller and application for rectification of clerical mistake was not maintainable before Appellate Authority and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. It is proved on record that rent appeal No.78-D/XIV/13 title Smt. Reeta Gupta and others Vs. Sh. Lal Chand and others is pending before learned Appellate Authority (I) Kangra at Dharamshala (H.P.). It is well settled law that appeal is in continuation of judicial proceedings. See AIR 1967 Allahabad 214 title **Shyam Sunder Lal Vs. Shagun Chand**. See AIR 1960 Calcutta 469 title **Damodar Mukherjee & Others Vs. Bonwarilal Agarwalla**. See AIR 1957 M.P. 98 title **Shyamlal Vs. Takhatmal**. See AIR 1975 Gauhati 40 title **Mahangu Parsad Vs. Pravag Sah & Others.** See AIR 1968 Manipur 42 title **Kakhangai Kabui & Others** Vs. **Smt. Apanbi Kabuini and others**. It is held that Appellate Authority is legally competent to correct clerical mistake committed by learned Trial Court at any stage of the case. Power of Appellate Court is defined under Section

107 Code of Civil Procedure 1908. As per Section 107 Code of Civil Procedure 1908 Appellate Court has powers (1) To determine case finally (2) To remand the case (3) To frame issues and refer them for trial (4) To take additional evidence himself or direct that such additional evidence would be taken by Trial Court. As per Section 107(2) Code of Civil Procedure 1908 Appellate Court would have same powers and would perform same duty as conferred upon Courts of original jurisdiction.

8. In the present case it is proved on record that Sh.Ram Chand Mehta died during pendency of rent petition before learned Rent Controller. It is proved on record that learned Rent Controller by way of judicial order directed that following persons would be impleaded as LRs of deceased Sh. Ram Chand Mehta in rent eviction petition. (1) Smt. Vimla Devi (2) Sh. Rajesh Mehta (3) Smt. Chanchla Devi (4) Smt. Shanta Devi (5) Smt. Sudha Devi. It is proved on record that due to clerical mistake in memorandum of parties of final eviction order learned Rent Controller omitted name of Smt. Sudha Devi as co-party. It is held that mistake committed by learned Rent Controller in memo of parties is purely clerical in nature. It is held that it is expedient in the ends of justice to direct the learned Rent Controller to correct clerical mistake in memorandum of parties and incorporate name of Smt. Sudha Devi in memorandum of parties as one of LRs of deceased Sh.Ram Chand Mehta. In view of above stated facts it is held that there is no illegality in the interim order dated 24.02.2016 passed by learned Appellate Authority (I) Kangra at Dharamshala (H.P.). Point No.1 is answered in negative.

Point No.2 (Final order).

9. In view of findings upon point No.1 above present civil revision petition is dismissed. Interim order of learned Appellate Authority (I) Kangra at Dharamshala (H.P.) dated 24.02.2016 is affirmed. Parties are left to bear their own costs. Observations will not effect merits of case in any manner and will be strictly confined for disposal of present revision petition. Parties are directed to appear before learned Appellate Authority (I) Kangra at Dharamshala (H.P.) on **05.10.2016.** Certified copy of this order be sent back forthwith to learned Appellate Authority (I) Kangra at Dharamshala (H.P.) and learned Rent Controller(I) Kangra at Dharamshala (H.P.) for compliance forthwith. C.R. No.26/2016 is disposed of. Pending applications if any also disposed of.

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

Sher Bahadur Singh son of Shri Bhim Bahadur Singh ....Petitioner

Versus

State of H.P. ....Non-petitioner

Cr.MP(M) No. 1044 of 2016
Order Reserved on 15th September,2016
Date of Order 20th September, 2016

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offence punishable under Section 20 of N.D.P.S. Act- petitioner filed a petition seeking bail on the ground that he was falsely implicated- held, that question of guilt or innocence cannot be determined while considering the bail application but will be determined at the conclusion of trial- while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- quantity of contraband recovered from the accused is less than commercial quantity- refusal of bail will affect the personal liberty of individual – petition allowed- bail granted subject to furnishing personal bonds of Rs. 5 lacs with two sureties. (Para-5 to 9)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702 Apex Court DB 702

For the Petitioner: Ms. Leena Guleria, Advocate.
For the Non-petitioner: Mr. M.L. Chauhan Additional Advocates General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under section 37 Narcotic Drugs and Psychotropic Substances Act 1985 read with section 439 Code of Criminal Procedure 1973 for grant of bail to petitioner relating to FIR No. 83 of 2016 dated 15.4.2016 registered under Section 20 of ND&PS Act 1985 at P.S. Kullu District Kullu H.P.

Brief facts of the case

2. It is alleged that on 15.4.2016 police officials headed by HC Suraj Thakur were present at place known as Shangan bridge in connection with routine patrolling and traffic checking. It is alleged that police officials noticed accused sitting on parapet. It is also alleged that when accused saw the police officials he threw some object down the road. It is further alleged that in presence of independent witnesses object thrown lifted and in a bag 814 grams of cannabis (Charas) found. As per police report investigation completed and challan stood filed before learned Special Judge Kullu and is fixed for prosecution evidence on 29.9.2016.

3. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the non-petitioner and also perused the record.

4. Following points arise for determination in this bail application:-

1. Whether bail application filed by petitioner is liable to be accepted as mentioned in memorandum of grounds of bail application?
2. Final Order.

Findings upon Point No.1 with reasons

5. Submission of learned Advocate appearing on behalf of petitioner that petitioner is innocent and petitioner did not commit any criminal offence as alleged by investigating agency cannot be decided at this stage. Judicial findings relating to innocence of accused or not would be given by learned Trial Court after giving due opportunity to both the parties to lead evidence in support of their case.

6. Submission of learned Advocate appearing on behalf of the petitioner that investigation is completed and charge sheet already stood filed and recovered quantity is less than commercial quantity and on this ground petitioner is legally entitled to be released on bail is accepted for the reasons hereinafter mentioned. Bail in narcotic drugs and psychotropic substances cases is governed by Section 37 of ND&PS Act 1985. Bail relating to recovery of contraband less than commercial quantity is permissible under law. It is well settled law that accused is presumed to be innocent till convicted by competent Court of law. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) Character of evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It is well settled law that object of bail is to secure the appearance of the accused person at his trial. It is well settled law that grant of bail is rule and

committal to jail is exceptional. Refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. Accused should not be kept in jail for an indefinite period. ***See 2012 Cri. L.J. 702 Apex Court DB 702 titled Sanjay Chandra vs. Central Bureau of Investigation.***

7. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if bail is granted to petitioner then petitioner will induce and threat the prosecution witnesses and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that conditional bail will be granted to petitioner. Court is of the opinion that if petitioner will flout the terms and conditions of conditional bail order then non-petitioner will be at liberty to file application for cancellation of bail in accordance with law.

8. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that accused is resident of Nepal and if bail is granted to accused then trial of case would be hampered and petitioner would leave India and on this ground bail application be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. There is recital in bail petition that petitioner is residing at village Karol near Manikaran for the last so many years and there is recital in petition that petitioner would furnish local sureties for release and there is also recital in petition that petitioner would not leave District Kullu till the conclusion of trial by learned Trial Court. If petitioner will flout terms and conditions of bail order then prosecution will be at liberty to file appliction for cancellation of bail as per section 439(2) Code of Criminal Procedure 1973. In view of undertaking given by petitioner Court is of the opinion that it is expedient in the ends of justice to allow the bail application. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final order)

9. In view of findings upon point No.1 bail application filed by petitioner under Section 37 of NDPS Act 1985 read with section 439 Cr.P.C. is allowed subject to furnishing personal bond to the tune of Rs. 5 lac (Rupees five lacs only) with two local sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That petitioner will attend the proceedings of learned Trial Court regularly till conclusion of trial of case. (ii) That petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That petitioner will not leave District Kullu (Himachal Pradesh) without the prior permission of the Court. (iv) That petitioner will not commit similar offence qua which he is accused. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail application filed under section 37 of NDPS Act 1985 read with section 439 of Code of Criminal Procedure 1973. Bail petition filed under section 37 of NDPS Act 1985 read with section 439 of Code of Criminal Procedure stands disposed of. All pending application(s) if any also disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Shongtong Karcham Hydel Project Workers' Union ....Petitioner

Versus

State of Himachal Pradesh and others. ...Respondents

CWP No. 1186 of 2016
Judgment reserved on: 30.8.2016
Date of Decision: 20.9.2016.

Constitution of India, 1950- Article 226- Himachal Pradesh Power Corporation Limited (HPCL) is setting up a 450 MW Hydro Electric project and most of the construction activities have been

allotted to respondent No. 6 who had engaged various contractors to execute the work- there is violation of the various labour laws - workers are not even getting their salaries on which demand charters were presented- a meeting was arranged in which it was agreed that arrears of salary will be paid within two days- salary was not paid on which workers went on strike but prohibitory orders were imposed under Section 144 of Cr.P.C and to shield the contractors- respondents denied that there was violation of any labour law- a conciliation meeting was fixed but the workers went on strike- held, that members of the petitioner's Union are industrial workers - going on strike is recognized form of expression- however, strikers must obey civilized norms and not be vulgar or violent hoodlums- right to strike is not absolute- workmen cannot be permitted to take law into their own hands- demand charter was under consideration and a meeting was fixed- there was no occasion for the members of the petitioner Union to have illegally gone on strike- this only shows that they have no or scant respect for rule of law- hence, strike of petitioner is declared illegal- however, direction issued to comply with various labour laws and safety measures. (Para-7 to 31)

Cases referred:

Gujarat Steel Tubes Ltd. and others Vs. Gujarat Steel Tubes Mazdoor Sabha and others (1980) 2 SCC 593

B.R. Singh Vs. Union of India (1989) 4 SCC 710

Chandrana Brothers and others versus K.Venkata Rao and others (1976) 1 KLJ 245

Ajaib Singh versus Sirhind Cooperative Marketing-cum-Processing Service Society Limited and another (1999) 6 SCC 82

The Workmen of Bhurkunda Colliery of M/s Central Coalfields Ltd. v. The Management of Bhurkunda Colliery of M/s Central Coalfields Ltd., (2006) 3 SCC 297

For the Petitioner:	Mr. Sanjeev Bhushan, Senior Advocate, with Mr.Dalip Kaith, Advocate.
For the Respondents:	Mr.Anup Rattan,Mr.Romesh Verma, Mr.Varun Chandel, Additional Advocate Generals and Mr.Kush Sharma, Deputy Advocate General, for respondents No. 1, 4 and 7.
	Mr.Satyen Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate, for respondents No. 2 and 3.
	Mr.Rajiv Jiwan, Advocate, for respondent No. 5.
	Mr.R.K. Bawa, Senior Advocate with Mr.Amit Dhumal, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The Workers' Union of Shongtong Karcham Hydel Project is aggrieved by the action/inaction on the part of the respondents and has filed the instant writ petition claiming therein the following reliefs:-

"i) That the respondents may very kindly be directed that all the mandatory provision of the various Acts as mentioned in the body of the writ petition may very kindly be ordered to be implemented with further directions that benefits arising out of these Acts may very kindly be ordered to be paid to the members of the petitioner Union, with interest @ 9% p.a.

ii) That the respondents may very kindly be directed to get the decision of conciliation meeting held on 15.3.2015 annexure P-3 implemented with further directions to pay wages to the members of the petitioner union for the months of December 2015, January 2016, February 2016 and March, 2016 immediately.

iii) That the respondents may very kindly be directed to intervene and conduct conciliation meeting and resolve the problems by implementing all statutory norms, in the interest of justice and fair play.

iv) That the notification annexure P-4 imposing prohibitory orders under Section 144 Cr.P.C. dated 18.3.2016, may kindly be quashed and set aside."

2. It is averred that respondent No. 2, i.e. Himachal Pradesh Power Corporation Limited (for short HPCL) is setting up a 450 MW Hydro Electric project at Powari and most of the construction related activities have been allotted to respondent No. 6, i.e. Patel Engineering Limited, who in turn has further engaged various contractors to execute the work. However, the principal employer for all intends and purposes is still respondent No. 2. It is averred that there has been flagrant violation of the various labour laws, as a result whereof there is complete unrest amongst the workers, who are not even getting their dues and have not been paid the salary for the months of December, 2015, January, 2016 and February, 2016, which constrained them to submit a demand charter to the employer on 14.3.2016 with copies to the labour Officer-cum-Conciliation Officer, as also to respondent No. 5, i.e. Regional Provident Fund Commissioner. On submission of demand charter, Labour Officer cum-Conciliation Officer arranged a meeting of all concerned on 15.3.2016, in which it was agreed that the arrears of salary of the workmen will be paid within two days and for rest of the demands a meeting was to be held on 17.3.2016. The respondents did not pay the salary to the workers within the stipulated time nor was the further conciliation meeting convened, which constrained the workers to proceed on strike w.e.f. 17.3.2016. It is averred that such situation was forced and created because of the callous attitude of the respondents, who even thereafter instead of convening meeting for redressing the problem of the workers, resorted to oppressive methods, as is evident from the fact that respondent No. 7, i.e. Deputy Commissioner, Kinnaur immediately imposed prohibition orders under Section 144 Cr.P.C. and tried to shield the contractors and other respondents. The petitioner Union made various representations, but to no avail, constraining the Union to file the instant petition.

3. Respondent No. 1 i.e. Secretary MPP & P has not chosen to file reply. Respondents No. 2 and 3 have in their joint reply raised preliminary objections regarding the maintainability of this petition on the ground that the allegations contained therein are totally misplaced and wrong. It is averred that there is no violation of any of the labour laws and further averred that the wages and facilities as per the provisions of the relevant labour laws are required to be provided to the workers by respondent No. 6 at its own. Whereas, the replying respondents have only to release the payment to the contractor after the requisite milestone as laid down under the contract agreement is achieved by it. It is further averred that till 15.3.2016 payments in the sum of Rs.1,62,14,68,537/- has been made to respondent No. 6 and in addition to that a further payment of Rs.25 Crore has been made to respondent on 17.5.2016. It is also averred that the petitioner union has illegally sought support from outsiders, particularly some of the Trade Unions rather than reposing confidence in rule of law and have not only gone on illegal strike, but have resorted to violence. The illegal, wrongful and unruly acts on the part of the members of the petitioner Union have paralyzed the entire work and caused unnecessary delay in the execution of the project which is detrimental to larger public interest. It is averred that due to the delay the State exchequer is losing about approximately Rs.2 Crore per day and the entire project is being held to ransom. It is also averred that the acts on the part of the members of the petitioner union show that they have no respect for the rule of law. Instead of resorting to legal remedies, they have illegally resorted to strike.

4. The Labour Commissioner, who has been arrayed as respondent No. 4 filed his reply, wherein it has been stated that the replying respondent through its functionaries has been persistently taking necessary action against the contractor and its sub contractors for violation of labour laws and in this regard even prosecution cases have been filed before the learned Chief Judicial Magistrate, Kinnaur at Rekong Peo from time to time. It is on account of constant and

continued intervention that unpaid wages to some of the workers due up to February, 2016 have been paid during the months of March/April, 2016. It is then averred that the petitioner Union had submitted their demand charter on 14.3.2016 and vide letter dated 15.3.2016, respondents No. 2 and 6 were asked to submit their replies. Thereafter in order to settle the issue, respondent No. 4 had fixed a conciliation meeting on 17.3.2016 at 2:00 P.M. in his office however, the workers (approximately 450) went on strike w.e.f. 14.3.2016 itself at about 4:00 P.M. under the banner of CITU (Center of Indian Trade Union). That apart, a meeting was convened by the Deputy Commissioner, Kinnaur on 17.3.2016 and a settlement was arrived at. It is averred that the representatives of the petitioner Union were not present in this meeting and again went on strike on 17.3.2016. The strike continued from 17.3.2016 onwards and thereafter conciliation meeting vide notice dated 25.4.2016, was fixed on 27.4.2016, which was attended to by all the parties, but despite best efforts no settlement could be arrived at. Therefore, the Joint Labour Commissioner was specifically deputed to Rekong Peo to hold conciliation meeting, so as to resolve the matter. Such meeting was held in the office of Deputy Commissioner, Kinnaur on 29.4.2016, which was attended to by the representatives of respondent No. 2 and petitioner Union, but the same was not attended to by respondent No. 6 and therefore, no conciliation could be effected. It is thereafter averred that taking into consideration the report, all the issues raised in the demand notice and other issues, which have arisen thereafter have been referred for adjudication to the Labour Court cum Industrial Tribunal vide notification dated 6.5.2016.

5. Respondent No. 5, Regional Provident Fund Commissioner in its reply averred that despite repeated requests respondent No. 6 has failed to produce the records so as to enable it to verify the claims regarding payment of Provident Fund, constraining it to launch prosecution against the establishment of respondent No. 6 and others on 8.6.2016.

6. Respondent No. 6 in its reply averred that the wages to the workers for the period from December, 2015 to January, 2016 already stand paid. It is further averred that though a meeting was held with the representatives of the petitioner Union on 15.3.2016, but no conclusion was arrived at in the said meeting. However, the grievance of the petitioner thereafter has been resolved in the proceedings held with the Deputy Commissioner on 17.3.2016, but despite this the petitioner has illegally proceeded on strike on 17.3.2016. Not only this, the members of the petitioner Union have thereafter resorted to rampage causing damage worth crores of rupees to the machinery and equipments of the replying respondent, constraining it to lodge various FIRs (36 in number) against such workers. Not only this, the members of the petitioner Union, are indulging in illegal acts of instigating other workers to stop work and go on strike and even tried to compel the replying respondent to take back those workmen, who have resorted to rampage and large scale damage and destruction to public property, which in fact compelled the authorities to pass prohibitory orders under Section 144 Cr.P.C.

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

7. The demand charter submitted by the petitioner Union is with regard to the violation of the provisions of the various labour laws and in particular:

(i) The Contract Labour (Regulation and Abolition) Act, 1970 and Rules made there under;

(ii) Minimum Wages Act, 1948;

(iii) Payment of Wages Act;

(iv) Employees Provident Fund Act;

(v) Registration under Building and other Construction Workers (Registration of Employment and Condition of Service) Act, 1996.

In addition thereto relates to following safety measures.

(i) Employees compensation;

(ii) Leave;

(iii) Uniform;

(iv) Bonus; and

(v) Illegal retrenchment.

8. It appears that some of the issues had been agreed to be settled in the minutes of meeting held on 17th March, 2016, which reads thus:-

"THAT ON DATED 17TH MARCH, 2016 MEETING WAS HELD UNDER THE CHAIRMANSHIP OF DEPUTY COMMISSIONER, KINNAUR IN HIS OFFICE BETWEEN THE H.P. POWER CORPORATION, PATEL ENGINEERING, HEP WORKERS' UNION REGARDING TO SETTLE THE ISSUE UNDER THE PROVISIONS AND IMPLEMENTATION OF THE LABOUR LAWS.

1. On 10th March, 2016, a meeting was held between the ShonGthong Workers' Union and Sub Contractors of the Patel Engineering in which it was resolved that all sub contractors of the Patel Engineering HEP shall disburse the wages within the stipulated period as per provisions of the law be paid in the front of the Chief appointed subordinate official of HPPCL, and Patel Engineering. Payment will be started from 1st March, 2016 as per Minimum Wages Act.

The payment of those employees' who have not been disbursed by the sub-contractors, the payment of the previous month i.e. February, 2016 shall disburse the wages within a week and photocopy of the same is may be forwarded to the Labour Officer, Kinnaur at Reckong Peo.

2. That the payment of the wages will be paid all the workers under minimum Labour Act, 1948 and regularly will be paid the overtime.

3. That the identity card, salary receipt and attendance card will be given to all the workers.

4. That the provident funds of all the employees will be deducted under the Provident Funds Act, 1952 and receipt thereof will also be given to the workers.

5. That as per the agreement between the Patel Shongthong Karcham HEP and Worker's Union (INTUC) the bonus, leave encashment and daily wages to the tune of 15% shall be given to the workers. Beside those contract employees who resides in their own residences shall be given HRA and canteen allowances.

6. That the tunnel allowance shall be given as per rule to the employees working in the tunnel.

7. That the basic facilities i.e. rest room, sanitation, drinking water and safety equipment etc. shall be provided to all the workers in their working places.

8. That workers shall not be thrown out of job without any valid reasons and provisions of law.

9. All the skilled workers shall be registered in Building and other Construction Welfare Boards under the Building and other Constructions Act, 1996 and all the facilities given by Board shall be extended to the workers."

9. When the matter came up before this Court on 28.6.2016, a request was made on behalf of the petitioner that the Deputy Commissioner, Kinnaur be directed to have a dialogue with the petitioner and the respondents for an amicable settlement and accordingly a direction was issued to the Deputy Commissioner to try and resolve the issue.

10. In compliance to this direction, Deputy Commissioner has filed his affidavit/status report, wherein it is stated that a meeting of all the stake holders was convened on 8.7.2016 and as per the demands of the petitioner Union, all their demands, except Item No. 12, which relates to illegal retrenchment, have been accepted by the representatives of respondent No. 6. It is further averred that respondent No. 6 undertook to pay all the dues to the labourers including ones who had gone on strike and further undertook to give the benefits like

leave, uniform, employees' compensation as well as safety measures. As per the amicable settlement it had been pointed out by the representatives of respondent No. 6 that 283 labourers were working with it, out of which 108 labourers have been issued show cause notices on account of their having resorted to illegal strike and whereas criminal cases have been registered against 36 labourers. Respondent No. 6 was asked to reinstate the services of all the labourers, but it denied to reinstate the services of the labourers due to the matter being subjudice before this Court. It is lastly averred that though the Deputy Commissioner had made all sincere efforts and had given three more opportunities to settle the issue, but despite that the petitioner Union again and again reiterated that the strike would be continued until and unless the terminated labourers are not reinstated.

11. There can be no manner of doubt that the members of the petitioner Union are industrial workers covered by the provisions of Industrial Disputes Act, 1947, Industrial Employees Standing Orders, 1946, Trade Union Act, 1926 and host of other legislations. Going on strike is also one of the modes of recognized form of expression. However, the strikers must obey civilized norms in the battle and not be vulgar or violent hoodlums.

12. This was so held by the Hon'ble Supreme Court in ***Gujarat Steel Tubes Ltd. and others Vs. Gujarat Steel Tubes Mazdoor Sabha and others (1980) 2 SCC 593*** and the relevant observations reads thus:-

> *"129. A selective study of the case-law is proper at this place. Before we do this, a few words on the basis of the right to strike and progressive legal thinking led by constitutional guidelines is necessitous. The right to union, the right to strike as part of collective bargaining and, subject to the legality and humanity of the situation, the right of the weaker group, viz., labour, to pressure the stronger party viz., capital, to negotiate and render justice, are processes recognised by industrial jurisprudence and supported by Social Justice. While society itself, in its basic needs of existence, may not be held to ransom in the name of the right to bargain and strikers must obey civilized norms in the battle and not be vulgar or violent hoodlums, industry, represented by intransigent managements, may well be made to reel into reason by the strike weapon and cannot then sequeal or well and complain of loss of profits or other ill-effects but must negotiate or get a reference made. The broad basis is that workers are weaker although they are the producers and their struggle to better their lot has the sanction of the rule of law. Unions and strikers are no more conspiracies then professions and political parties are, and being for weaker, need succour. Part IV of the Constitution, read with Article 19 sows the need of this burgeoning jurisprudence. The Gandhian quote at the beginning of this judgment sets the tone of economic equity in industry. Of course, adventuriet, extremist, extraneously inspired and puerile strike, absurdly insan persistence and violent or scorched earth policies boomerang and are snathema for the law. Within the parameters to the right to strike is integral to collective bargaining."*

13. That apart, the right to strike is not absolute under the Industrial jurisprudence and restrictions have been placed on it, by virtue of Sections 10(3), 10-A(4-A), 22, 23 and 24 of the Act, as was observed by the Hon'ble Supreme Court in ***B.R. Singh Vs. Union of India (1989) 4 SCC 710*** in the following terms:-

> *"15. Counsel for TFAI also strongly contended that since the strike was illegal, the workers are not entitled to any relief. We see no merit in this submission. The right to form associations or unions is a fundamental right under Article 19(l)(c) of the Constitution. Section 8 of the Trade Unions Act provides for registration of a trade union if all the requirements of the said enactment are fulfilled. The right to form associations and unions and provide for their registration was recognized obviously for conferring certain rights on trade unions. The necessity to form unions is obviously for voicing the demands and grievances of labour. Trade unionists act*

as mouthpieces of labour. The strength of a trade union depends on its membership. Therefore, trade unions with sufficient membership strength are able to bargain more effectively with the managements. This bargaining power would be considerably reduced if it is not permitted to demonstrate. Strike in a given situation is only a form of demonstration. There are different modes of demonstrations, e.g., go-slow, sit-in, work-to-rule, absenteeism, etc., and strike is one such mode of demonstration by workers for their rights. The right to demonstrate and, therefore, the right to strike is an important weapon in the armoury of the workers. This right has been recognised by almost all democratic countries. Though not raised to the high pedestal of a fundamental right, it is recognised as a mode of redress for resolving the grievances of workers. But the right to strike is not absolute under our industrial jurisprudence and restrictions have been placed on it. These are to be found in Sections 10(3), 10-A(4-A), 22 and 23 of the Industrial Disputes Act, 1947 ("ID Act" for short). Section 10(3) empowers the appropriate government to prohibit the continuance of a strike if it is in connection with a dispute referred to one of the fora created under the said statute. Section 10-A(4-A) confers similar power on the appropriate government where the industrial dispute which is the cause of the strike is referred to arbitration and a notification in that behalf is issued under Section 10-A(3-A). These two provisions have no application to the present case since it is nobodys contention that the Unions demands have been referred to any forum under the statute." (Emphasis added)

14. Thus it is established that right of strike as part of collective bargaining is recognized in law only so long as it is peaceful. There is no scope for violence. Workmen cannot be permitted to take law into their own hands. The striking employees/workmen etc. must obey the civilized norms in the battle, desist from using vulgar and intimidating language; indulge in violent acts or acts which may subversive to the discipline of the industrial undertaking/company etc.

15. It is equally settled that the right to freedom of speech and expression is guaranteed under the Constitution of India, but the same is subject to reasonable restrictions as enshrined under Article 19 of the Constitution of India. The Trade Unions or their office bearers can resort to demonstration/dharna but that would be subject to the law of land. The same can be carried out only in a peaceful manner and not in a manner that would stop the working of the management. The management has every right to ensure that its working is not obstructed. Therefore, a balance necessarily has to be struck between the competing interests and to ensure that the work of the management is not disturbed and at the same time workmen can also continue with their activities in a peaceful manner.

16. The workmen may resort to peaceful picketing i.e. marching to and from before the premises of an establishment. This may be accompanied by carrying and display of sign boards, placards or banners bearing decent statements of the dispute or in connection with the dispute. They may also request politely the other non-striking employees not to assist in the running of the project/business and ask the customers not to patronize such establishment. Such acts would constitute peaceful picketing and are protected under Section 18 of the Trade Unions Act. These demonstrations may cause inconvenience and embarrassment to the employer/management and may be initiated to bring pressure on the management to concede to the workmen's demands.

17. However, as observed earlier, such demonstration is only protected so long as it is peaceful and does not turn violent. The striking employees/workmen cannot obstruct the ingress and egress of the employer/management to their business premises and the employer/management are also entitled to protection if there is imminent danger to their life and property. If picketing ceases to be peaceful or becomes a nuisance or endangers public peace etc., it ceases to be lawful.

18. In ***Chandrana Brothers and others versus K.Venkata Rao and others (1976) 1 KLJ 245,*** the Hon'ble Kerala High Court has expressed the law lucidly and incisively and it is apt to reproduce paras 18 and 19 of the judgment which read thus:-

> *"**18**. The principles which are relevant for the purpose of the present case as can be gathered from the above may be now summarised. A demonstration by the employees is protected under Article 19 of the Constitution of India provided it is peaceful and orderly. Such a demonstration is, therefore protected even apart from Section 18 of the Trade Unions Act, 1926. Section 18 does not afford immunity for an act of deliberate trespass. The members of a trade union may resort to a peaceful agitation by gathering together either outside the industrial establishment or inside within the working hour. provided it is peaceful and no violence, intimidation or molestation is involved and there is no violation of the provisions of law. An act in contemplation or in furtherance of a trade dispute which induces breach of contract on other employees or causes interference with trade, business or employment of some other to dispose of his capital or labour as he wills would not be actionable, but such inducement or interference must be by lawful means and not by means which would be illegal or wrongful. The display of posters within or outside the place of business is permissible. The workers are entitled to the protection of Section 18 of the Trade Unions Act even if the strike is illegal under Section 24(l) of the Industrial Disputes Act.*
>
> ***19**. The workers may resort to peaceful picketing i.e., the marching to and fro before the premises of an establishment. They may be accompanied by the carrying and display of sign boards, placards or banners bearing statements in connection with the dispute. They may also request politely the employees not to assist in the running of the business and ask the customers not to patronise that establishment. Such acts would constitute peaceful picketing and are protected under Section 18. The demonstration may cause inconvenience and embarrassment to the employer. It may be intended to bring pressure on the management to concede to the workers' demands. But such demonstration is protected so long as it is peaceful and does not turn violent. The employer can claim that the ingress and egress to their business premises should be protected from obstruction. He is also entitled to protection if there is imminent danger to life or property. If the picketing ceased to be peaceful or becomes a nuisance or endangers public peace, it ceases to be lawful. If the picketing is carried out in such principles or in such manner as is likely to intimidate or to obstruct or molest the employees or molest the employees or customers against their will, it would be unlawful. Any show or threat of violence or any other unlawful threat likely to create fear in the mind of a reasonable man will render picketing unlawful. Pickets are not entitled to compel people to listen to them or to obstruct deliberately standing in their way or catching hold of their arms, they are also not entitled to obstruct passage of vehicles by lying down in the high-way in front of them or otherwise blocking the high-way. They are not entitled to pester those persons who do not wish to listen to them, and who have requested them to desist. Right to picket is a very tangible one which is closely limited by the equal right of others to go about their lawful affairs free from objection, molestation or intimidation. The methods of persuasion are limited to oral and visual methods i.e., the use of the voice and the exhibition of placards and should not be extended to physical obstruction of a vehicle or a person which would be illegal. Each case must depend very largely upon its attendings facts and circumstances as to whether or not particular acts complained of are protected under Section 18 or not. When persons are combining and conspiring together and adopt means calculated to intimidate or to coerce the employees or those who wish to become employees from remaining in or entering his employ, or to prevent employers customers or others who wish to*

have dealings with him from so doing by means of force, threats, intimidation or violence resulting in serious injuries to plaintiff's business, then such acts would not be protected."

19. Adverting to the facts we notice that the members of petitioner Union had on a drop of hat called a strike on 15.3.2016. We observe so, because once the demand charter of the petitioner Union was under consideration and a meeting had already been fixed on 15.3.2016, then there was no occasion for the members of the petitioner Union to have illegally gone on strike. Not only this, there further action in continuing with the strike with illegal support from the outsiders, particularly some of the trade Unions and thereafter going on rampage, is not only illegal, but reprehensible. The illegal, wrong and unruly acts on the part of some of the members of petitioner Union cannot be countenanced, whereby they have paralyzed the entire work and held the entire project to ransom and caused unnecessary delay in the execution of the project of national importance, which is detrimental to the larger public interest. This only goes to show that they have no or scant respect for the rule of law or else they would have taken resort to legal remedy.

20. That apart, the aforesaid members of petitioner Union have indulged in illegal acts of instigating other workers to stop or desist from work and go on strike and have tried to compel the respondents by adopting hand twisting tactics to take back those workmen, who have resorted to rampage and large scale damage and destruction to public property.

21. In such circumstances, we have no hesitation to conclude that even if some of the demands of the petitioner Union were genuine, the mode and manner of protest adopted and resorted to by the members of the petitioner Union is totally illegal. They had no right to obstruct the ingress and egress of the respondents or indulge in large scale violence and destroy public property. The members of the petitioner Union cannot compel respondent No. 6 to take back the workers who are *persona-non-grata* and more particularly when their cases are subjudice before the competent Court/authority. Accordingly, the strike of the petitioner is declared illegal.

22. It is then vehemently argued by Mr.Sanjeev Bhushan, Senior Advocate, assisted by Mr.Dalip Kaith, Advocate that the respondents be directed to at least implement the various labour legislations, as mentioned in the body of the petition and also ensure that the respondents follow the safety measures.

23. We find substance in this submission, because the respondents are duty bound and obliged to follow the mandate of the labour laws, which are enacted for the benefits of the workmen.

24. In fact, the provisions of the labour laws, particularly Industrial Disputes Act was brought on the statute book with the object to ensure social justice to both the employers and employees arid advance the progress of industry by bringing about the existence of harmony and cordial relationship between the parties. This was so observed by the Hon'ble Supreme Court in ***Ajaib Singh versus Sirhind Cooperative Marketing-cum-Processing Service Society Limited and another (1999) 6 SCC 82,*** which read thus:-

"*5. Before appreciating the rival contentions urged on behalf of the parties, it has to be noticed as to under what circumstances the act was enacted and what was the objectives sought to be achieved by its legislation. If cannot be disputed that the act was brought on the statute book with the object to ensure social justice to both the employers and employees arid advance the progress of industry by bringing about the existence of harmony and cordial relationship between the patties. It is a piece of legislation providing and regulating the service conditions of the workers. The object of the Act is to improve the service conditions of industrial labour so as to provide for them the ordinary amenities of life and by the process, to bring about industrial peace which would in its turn accelerate productive activity of the country resulting in its prosperity. The prosperity of the country in its turn, helps to improve the conditions of labour (Hindustan Antibiotics Ltd v. The Workman, AIR*

(1967) SC 948). The Act is intended not only to make provision for investigation and settlement of industrial disputes but also to serve industrial peace so that it may result in more production and improve the national economy. In the present sociopolitical economic system, it is intended to achieve co-operation between the capital and labour which has been deemed to be essential for maintenance of increased production and industrial peace. The Act provides to ensure fair terms to workman and to prevent disputes between the employer and the employees so that the large interests of the public may not suffer. The provisions of the Act have to be interpreted in a manner which advances the object of the Legislature contemplated in the statement of objects and reasons. While interpreting different provisions of the Act attempt should be made to avoid industrial un-rest, secure industrial peace and to provide machinery to secure the end. Conciliation is most important and desirable way to secure that end. In dealing with industrial disputes, the courts have always, emphasized doctrine of social justice, which is founded on basic ideal of socio-economic equality as enshrined in the Preamble of bur Constitution. While construing the provisions of the Act, the Courts have to give them a construction which should help in achieving the object of the Act."

25. The Hon'ble Supreme Court in ***The Workmen of Bhurkunda Colliery of M/s Central Coalfields Ltd. v. The Management of Bhurkunda Colliery of M/s Central Coalfields Ltd., (2006) 3 SCC 297*** held as under:-

"*The main object of enacting Industrial and Labour laws is to ensure peace and harmony between the employers and the employees in the larger interest of the society."*

"The industrial growth leading to economic prosperity largely depends on happy and healthy relationship between employers and employees."

"It is also our bounded duty to give expression to the legislative intention for creating a healthy environment leading to proper understanding and cooperation and in true sense a partnership between the employers and the employees in cases of industrial disputes."

"The interests of the employees which have received constitutional guarantees under the Directive Principles, the interests of the employers which have received a guarantee under Article 19 and other Articles of Part III, and the interests of the community at large which are so important in a Welfare State. It is on these lines that industrial jurisprudence has developed during the last few decades in our country."

"Both employers and employees have their respective obligations. They must have the appreciation of each other's responsibilities, duties and obligations. The Trade Union and Labour Union should understand and appreciate the fact that Labour is not a commodity nor is it a mere supply of Labour force at the management's disposal. Essentially, Labour is the real basis that underlines the production of goods and services. Through the work should the human personality and its sense of responsibility be able to unfold, management should appreciate this and always attribute its success to the trained and effective labour force. It must be understood by all concerns that both the employees and employers are vital for any industry and unless there is proper coordination, a smooth functioning of any industry would be difficult."

26. Adverting to the facts, we may notice that, as regards, the prayer made for payment of wages to the members for the period December, 2015 to March, 2015, the same already stands paid.

27. It has also come on record that even earlier the members of the petitioner Union were constrained to proceed on strike only because respondent No. 6 and respondents No. 2 and

3 had not been scrupulously following the various provisions of the labour legislations meant for the benefit of workmen. In addition to that even the safety measures were not in place. No doubt, this could not have been an excuse for the workmen to have proceeded on a strike and resorted to vandalism, but at the same time, this incident in itself does not in any manner give respondents an upper hand, so as to disobey and violate the mandate of law.

28. Apart from the above, we are also of the considered view that only because of misdemeanor on part of some of the members/representatives of the petitioner Union, the same cannot be used as a hand twisting tactics by the respondents for denying the benefits of various labour laws legislations enacted for their benefits. The entire body of the workmen cannot be driven against the wall and compelled to enter into litigation, which obviously to the knowledge of the respondents is a highly time consuming process. The respondents in this way cannot surmount illegal pressure upon the workmen to accept their dictates and terms by creating compelling circumstances.

29. However, at the same time, it does not mean that respondent No. 6 can be compelled to take back in service even those workmen, who according to it are *persona-non-grata* and those workmen who according to it have actively indulged in disrupting the smooth functioning of the project and destroyed its properties.

30. Now coming to the question of prohibitory orders issued under Section 144 Cr.P.C., we may notice that the initial prohibitory order was issued by the District Magistrate on 18.3.2016 and on completion of statutory period of two months, fresh notifications have been issued by the State Government from time to time and the maximum period of six months is going to expire on 18.9.2016 and therefore, this question need not to be gone into, as it has with efflux of time been rendered academic.

31. In view of the aforesaid discussion, we are of the considered view that the following directions shall subserve the interest of justice.

(i) The petitioner Union shall forthwith call of their strike.

(ii) Respondents No. 2, 3 and 6 would ensure that the benefits of various labour law legislations and safety measures detailed in para 7 (supra) including payment of P.F. are extended and made available within a period of three months from today.

The petition is disposed of in the aforesaid terms, leaving the parties to bear their costs.

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

State of Himachal Pradesh .....Appellant.

Vs.

Raj Kumar .....Respondent.

Cr. Appeal No.: 509 of 2011
Reserved on : 05.09.2016
Date of Decision: 20.09.2016

Indian Penal Code, 1860- Section 304- Husband of the informant had gone to bazaar- his mobile was switched off- a missing report was lodged- his dead body was found in the khad- it was found on investigation that deceased had gone with the accused and had consumed liquor- a quarrel took place and the accused pushed the deceased into a nallah- accused were tried and acquitted by the trial Court- held, in appeal that there was no eye witness to the incident- prosecution has relied upon the fact that accused and the deceased were last seen together, motive for the commission of crime and the details of the mobile calls- however, it was not proved

that accused was last seen with the accused- motive was also not established- recovery of mobile phone of the deceased from PW-4 does not prove that accused had pushed the deceased into the nallah- informant had improved upon her earlier version- trial Court had taken a reasonable view – appeal dismissed. (Para-8 to 28)

Cases referred:

Vijay Thakur Vs. State of Himachal Pradesh, (2014) 14 Supreme Court Cases 609

Sangili alias Sanganathan Vs. State of Tamil Nadu, (2014) 10 Supreme Court Cases 264

For the appellant: Mr. V.S. Chauhan, Addl. A.G., Mr. Vikram Thakur and Mr. Puneet Rajta, Dy. A.Gs.

For the respondent: Ms. Anjali Soni Verma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. :

By way of the present appeal, State has challenged the judgment passed by the Court of learned Additional Sessions Judge (II), Kangra at Dharamshala in Sessions Trial No. 29/2011 dated 24.09.2011 vide which, learned trial Court has acquitted the accused for commission of offence punishable under Section 304 read with Section 34 of the Indian Penal Code.

2. The case of the prosecution, in brief, was that on 19.10.2009, husband of the complainant had gone to Palampur Bazaar at around 10:00 a.m., but he did not return back in the evening. Complainant Poonam tried to contact her husband Rajinder on his mobile, but the phone of Rajinder was switched off. In these circumstances, she apprised her mother-in-law of the said facts and her mother-in-law lodged missing report of Rajinder at Police Station, Palampur on 20.10.2009. Further as per the prosecution, on 22.10.2009, one Santosh Kumar found the dead body of Rajinder near Neugal Khad bridge. The dead body was identified by the brother of the deceased. At the instance of Poonam, wife of the deceased, FIR was registered wherein she alleged that on 19.10.2009 in the evening, her husband had gone with accused Raj Kumar and Sadhu Ram towards Bundla in the vehicle of Ramjan Mohammad and near Kandi bridge, her husband had consumed liquor with Raj Kumr and Sadhu and at that moment, quarrel took place between deceased Rajinder and the accused regarding payment of some money and accused pushed the deceased in the *Nallah*, as a result of which Rajinder expired. The body of the deceased was sent for post mortem and on the basis of the FIR so lodged, investigation was carried out by the police. Investigation revealed that on 19.10.2009, during day time, accused Raju, Sadhu as well as deceased had gone to the shop of Raj Kumar, son of Rattan Chand, who had seen all of them together at Palampur Bazaar in the afternoon of 19.10.2009. Police visited the spot and prepared the spot map also and from the spot, *chappal* of the deceased alongwith five glasses, empty packet of *namkeen* were also recovered. Statement of Ramjan Mohammad was recorded before learned Judicial Magistrate 1st Class, Palampur under Section 164 of the Code of Criminal Procedure. The print out of the telephone calls of the deceased was obtained. After completion of the investigation, challan was filed in the Court and as a prima facie case was found against the accused, accordingly they were charged for commission of offence punishable under Section 304 read with Section 34 of the Indian Penal Code, to which they pleaded not guilty and claimed trial.

3. On the basis of material produced on record both ocular as well as documentary by the prosecution, learned trial Court concluded that the evidence produced on record by the prosecution was not specific to connect the accused with the commission of offence. It further held that the testimony of the complainant was not free from reasonable doubts and there were material improvements in her statement. It was further held by learned trial Court that there was no direct or circumstantial evidence against the accused and accordingly, accused could not be

held liable for commission of offence on the basis of last seen theory. On these basis, learned trial Court acquitted the accused for commission of offence punishable under Section 304 read with Section 34 of the Indian Penal Code.

4. Mr. V.S. Chauhan, learned Additional Advocate General vehemently argued that the judgment of acquittal passed by learned trial Court was not sustainable in law as learned trial Court while acquitting the accused erred in not appreciating that the prosecution had placed sufficient material on record to prove the guilt of the accused beyond reasonable doubt. Mr. Chauhan further argued that learned trial Court had erred in not believing the cogent and reliable testimony of the prosecution witnesses on material points. According to Mr. Chauhan, the testimony of the prosecution witnesses was disbelieved by learned trial Court on whimsical grounds without appreciating that the testimony of the said witnesses besides being cogent and reliable was also truthful. Mr. Chauhan further argued that learned trial Court failed to appreciate the prosecution evidence in right perspective and mislead itself by placing reliance on irrelevant material and by ignoring the testimony of Dr. Harjeet Pal Singh, who entered the witness box as PW-9. Accordingly, on these basis, it was urged by Mr. Chauhan that the judgment of acquittal passed by learned Court below was not sustainable and the same be set aside and accused be punished for the commission of offence punishable under Section 304 read with Section 34 of the Indian Penal Code.

5. Ms. Anjali Soni Verma, learned counsel for the respondent, on the other hand, argued that the judgment of acquittal passed by learned trial Court did not want any interference because the conclusions arrived at by learned trial Court were duly borne out from the records of the case. Ms. Verma further argued that the prosecution had miserably failed to link the accused with the commission of offence and accordingly, no perversity or illegality was committed by the learned trial Court in acquitting the accused for commission of offence for which they were charged. Ms. Verma further argued that neither the guilt of the accused was proved beyond reasonable doubt by the prosecution nor it stood established on the basis of material on record that the accused had committed any offence for which they were charged. According to Ms. Verma, the accused were falsely implicated in the matter and learned trial Court had rightly acquitted them. Thus, Ms. Verma prayed that as there was no merit in the appeal, the same be dismissed.

6. We have heard the learned counsel for the parties and also gone through the records of the case as well as the judgment passed by learned trial Court.

7. Before we proceed further, it is relevant to take note of the fact that in the present case, there is no eye witness. No one has actually seen the commission of the offence with which the accused were charged. This is a case of circumstantial evidence. During the course of arguments, learned Additional Advocate General has culled out the following circumstances connecting the accused with the commission of the offence:

"1. Last seen together

2. Recovery of dead body

3. Motive

4. Mobile calls

8. The Hon'ble Supreme Court in **Vijay Thakur** Vs. **State of Himachal Pradesh**, (2014) 14 Supreme Court Cases 609 has held on circumstantial evidence:

"18. It is to be emphasized at this stage that except the so-called recoveries, there is no other circumstances worth the name which has been proved against these two appellants. It is a case of blind murder. There are no eyewitnesses. Conviction is based on the circumstantial evidence. In such a case, complete chain of events has to be established pointing out the culpability of the accused person. The chain should be such that no other conclusion, except the guilt of the accused person, is discernible without any doubt. Insofar as these two appellants are concerned, there is no circumstance attributed except that they were with Rajinder

Thakur till Sainj and the alleged disclosure leading to recoveries, which appears to be doubtful. When we look into all these facts in entirety in the aforesaid context, we find that not only the chain of events is incomplete, it becomes somewhat difficult to convict the appellant only on the basis of the aforesaid recoveries.

19. In Mani v. State of Tamil Nadu, (2008) 1 SCR 228, this Court made following pertinent observation on this very aspect:

> *"26. The discovery is a weak kind of evidence and cannot be wholly relied upon on and conviction in such a serious matter cannot be based upon the discovery. Once the discovery fails, there would be literally nothing which would support the prosecution case...."*

20. There is a reiteration of the same sentiment in Manthuri Laxmi Narsaiah v. State of Andhra Pradesh, (2011) 14 SCC 117 in the following manner:

> *"6. It is by now well settled that in a case relating to circumstantial evidence the chain of circumstances has to be spelt out by the prosecution and if even one link in the chain is broken the accused must get the benefit thereof. We are of the opinion that the present is in fact a case of no evidence."*

21. Likewise, in Mustkeem alias Sirajudeen v. State of Rajasthan, (2011) 11 SCC 724, this Court observed as under:

> *"24. In a most celebrated case of this Court, Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116, in para 153, some cardinal principles regarding the appreciation of circumstantial evidence have been postulated. Whenever the case is based on circumstantial evidence the following features are required to be complied with. It would be beneficial to repeat the same salient features once again which are as under: (SCC p.185) "(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."

> *25. With regard to Section 27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material object and its use in the commission of the offence. What is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution."*

It is settled position of law that suspicion, however strong, cannot take the character of proof.

22. We, therefore, have no hesitation in allowing these appeals and setting aside the conviction and sentence of the two appellants under Section 302

read with Section 34 of the Penal Code. We order accordingly. The appellants are directed to be released from jail forthwith, if not required in any other case."

9. Thus, the salient points which have been carved out by the Hon'ble Supreme Court in a case of circumstantial evidence, on the basis of which the guilt of the accused can be brought home are as under:

"(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) Thee 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."

10. Further, Hon'ble Supreme Court in **Sangili alias Sanganathan** Vs. **State of Tamil Nadu**, (2014) 10 Supreme Court Cases 264 has held:

"15. To sum up what is discussed above, it is a case of blind murder. There are no eyewitnesses. Conviction is based on the circumstantial evidence. In such a case, complete chain of events has to be established pointing out the culpability of the accused person. The chain should be such that no other conclusion, except the guilt of the accused person, is discernible without any doubt. In the present case, we find, in the first instance, that the appellant was roped in with suspicion that it was a case of triangular love and since he also loved PW-3, he eliminated the deceased when he found that the deceased and PW-3 are in love with each other. However, we are of the view that this motive has not been proved. The evidence of last seen is also not established. Father of the deceased only said that the deceased had received a call and after receiving that call he left the house. In his deposition, he admitted that he had not seen the appellant before and he did not recognize his voice either. Therefore, he was unable to say as to whether the phone call received was that of the appellant. Proceeding further, we find that the deceased was not seen by anybody after he left the house. When we look into all these facts in entirety in the aforesaid context, we find that not only the chain of events is incomplete, it becomes somewhat difficult to convict the appellant only on the basis of the aforesaid recoveries.

16. In Mani v. State of Tamil Nadu, (2009) 17 SCC 273, this Court made following pertinent observation on this very aspect:

"26. The discovery is a weak kind of evidence and cannot be wholly relied upon and conviction in such a serious matter cannot be based upon the discovery. Once the discovery fails, there would be literally nothing which would support the prosecution case...."

There is a reiteration of the same sentiment in Manthuri Laxmi Narsaiah v. State of Andhra Pradesh, (2011) 14 SCC 117 in the following manner:

"6. It is by now well settled that in a case relating to circumstantial evidence the chain of circumstances has to be spelt out by the prosecution and if even one link in the chain is broken the accused must get the benefit thereof. We are of the opinion that the present is in fact a case of no evidence."

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"24. In a most celebrated case of this Court, Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116, in para 153, some cardinal principles regarding the appreciation of circumstantial evidence have been postulated. Whenever the case is based on circumstantial evidence the following features are required to be complied with. It would be beneficial to repeat the same salient features once again which are as under: (SCC p.185) "(i) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established;

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(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."

25. With regard to Section 27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material object and its use in the commission of the offence. What is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution."

(emphasis supplied)

18. It is settled position of law that suspicion however strong cannot be a substitute for proof. In a case resting completely on the circumstantial evidence the chain of circumstances must be so complete that they lead only to one conclusion, that is, the guilt of the accused. In our opinion, it is not safe to record a finding of guilt of the appellant and the appellant is entitled to get the benefit of doubt. We, therefore, allow the appeal and set-aside the conviction and sentence of the appellant. The appellant be set at liberty unless required in any other case."

11. In these circumstances because it is a case of circumstantial evidence, this Court has to satisfy its judicial conscience as to whether by way of circumstantial evidence produced on record by the prosecution, it has been able to link the commission of the offence with the accused or not.

12. We will deal with each of the circumstance independently in order to satisfy ourselves as to whether the chain of circumstances as culled out by learned Additional Advocate General linked the accused with the commission of offence or not in view of the law laid down by the Hon'ble Supreme Court.

1. <u>Last seen together:</u>

13. According to Mr. Chauhan, the factum of the deceased having been last seen together with the accused was substantiated by the testimonies of PW-5 Raj Kumar and PW-6 Ramjan Mohammad. PW-5 Raj Kumar has stated that he runs a photography shop in Palampur Bazaar and on 19.10.2009 as it was Monday, the market was closed. This witness further deposed that his house is behind his shop and on the relevant day, he was carrying out repairs of his house, therefore, half of the shutter of his shop was open. He further deposed that at around 11 a.m., Rajinder came to him and as he had kept a chair outside his shop, Rajinder sat on the

same. After about 10 minutes, accused Raj Kumar also came there and thereafter, both Raj Kumar and Rajinder went away. This witness further deposed that on the same day in between 3:30 and 3:45 p.m., he again saw Raj Kumar, Rajinder and one third person, whose name was Happy standing by the side of Red Light Pole, which was about 10 meters away from his shop. Thereafter, all of them went away and at about 8:00 p.m, accused Raj Kumar came to him and asked about Rajinder. On the next morning, wife of Rajinder came to him and on her inquiry, he told her that Rajinder had not come to him during the previous night. He further deposed that after 3-4 days, he came to know that Rajinder had expired and his body was recovered from the Neugal Khad. In his cross-examination, he denied that he had told the police that dead body of Rajinder was recovered from Neugal Khad on 22.10.2009. He was confronted with his statement recorded under Section 161 of the Code of Criminal Procedure, wherein it was so recorded. He further deposed that he had disclosed to the police that on 19.10.2009 at around 11:00 a.m. both Rajinder and accused Raj Kumar had gone away together from his shop. He was again confronted with his statement recorded under Section 161 of the Code of Criminal Procedure, wherein it was not so recorded.

14. PW-6 Ramjan Mohammad deposed that on 19.10.2009, deceased and the accused came to him at around 5/5:15 p.m. and they hired his taxi up to Bundla. He also stated that before Bundla, some *namkeen* and glasses were purchased. He further deposed that thereafter deceased and the accused sat about 150 yards ahead of Kandi bridge. This witness further stated that thereafter, he received a phone call from the house of Shankar Bag at Palampur, who required his taxi. Thereafter, he came back by asking the deceased and the accused that they were free to contact him on his telephone. He further deposed that thereafter said persons did not call him on telephone and he came to know that deceased was missing and then he informed the police of the above facts. He further stated that he was taken to Kandi bridge by the police and in his presence, police took into possession glasses and empty packet of *namkeen*. He also stated that police also recovered one *chappal* and at that relevant time, Manohar was with them. In his cross-examination, this witness stated that it was correct to suggest that he came to know about the death of Rajinder on 22.10.2009. He also stated that he did not give any statement to the police on 22nd and 23rd October, 2009. He further mentioned that he did not notice accused consuming liquor with the deceased. He further admitted it to be correct that after he dropped the said persons ahead of Kandi bridge and came back, thereafter he was not aware as to who had gone to the spot and met the aforesaid persons.

15. In our considered view, on the basis of the testimony of the said two witnesses, the prosecution was able to establish that on 19.10.2009, the deceased was last seen with the accused ahead of Kandi bridge, where they were left by PW-6 Ramjan Mohammad in his taxi.

2. <u>Recovery of dead body</u>:

16. The factum of recovery of dead body has been proved on record by PW-7 Manohar Lal brother of the deceased as well as by PW-10 Smt. Poonam wife of the deceased. PW-7 Manohar Lal has deposed that on 20th October, 2009, report was lodged with police by his mother regarding the factum of deceased being missing. He further stated that on 22nd October, 2009, they recovered the dead body of his brother ahead of Kandi bridge near Neugal Khad and he identified the dead body. He further deposed that one taxi driver Ramjan Mohammad had told him that on 19.10.2009, deceased and the accused had gone to Kandi bridge in a vehicle of PW-6.

17. PW-10 Poonam deposed that on 19.10.2009, she was informed by the police that dead body of her husband was found in the bushes near Kandi bridge and thereafter she got the FIR registered in the Police Station. She further stated that during the course of investigation, police came to their house and she had gone to the house of accused Raju, who on her asking had told her that he was also searching for Rajinder as mobile phone of Rajinder was found switched off. This witness further deposed that before that on 19.10.2009 in the evening, accused Raju had come to her house to inquire whether her husband had come back or not. This witness further deposed that accused Raju had told her that he alongwith Happy and the deceased had gone to Bundla and consumed liquor and a quarrel had taken place between them

and her husband regarding payment of some money and the accused had also told her that he had pushed Rajinder, as a result of which, Rajinder had fallen down and died. In her cross-examination, this witness stated that when her mother went to lodge the missing report, she did not express any suspicion over anybody. This witness further deposed that at that relevant time, they did not name Raju as accused because they were not having any knowledge. She further stated that she had not seen the accused going with her husband, however, her mother-in-law had seen so. She further stated that she visited the house of accused Raju on 20.10.2009. She admitted it to be correct that she did not disclose this fact to the police on 20.10.2009. She denied that accused had not told any of the facts to her as were narrated by her in her cross-examination.

18. It is apparent from the testimony of PW-7 and PW-10 that body of the deceased was in fact recovered from behind the bushes on 22.10.2009, but the important and relevant aspect of the matter is as to whether the prosecution was able to link the accused with the death of the deceased so as to convict them for commission of offence punishable under Section 304 read with Section 34 of the Indian Penal Code or not. This aspect of the matter shall be dealt with by us in the subsequent part of the judgment.

3. Motive:

19. According to learned Additional Advocate General, accused were having a motive to do away with the deceased and the said motive was that there was some dispute with regard to money between accused and the deceased and in fact the accused had thrown the deceased in the Khad after quarrel broke between the accused and the deceased on the fateful day with regard to money when all of them were under the influence of liquor.

20. In our considered view, the element of there being any motive with the accused to do away with the deceased has not been substantiated at all by the prosecution. There is not even an iota of evidence on record to prove and substantiate that on account of any enmity, animosity or dispute over monetary transaction, there was disharmony between the accused and the deceased and, therefore, the accused were having some motive to do away with the deceased. Accordingly, in our considered view, this circumstance has not been proved by the prosecution against the accused.

21. It has been held by the Hon'ble Supreme Court in **Pankaj** Vs. **State of Rajasthan** in Criminal Appeal No. 2135 of 2009 decided on 9th September, 2016 that it is a well settled principle of law that when the genesis and manner of the incident is doubtful, the accused cannot be convicted. The Hon'ble Supreme Court has further held that when the evidence produced by the prosecution has neither quality nor credibility, it would be unsafe to rest conviction upon such evidence and in such circumstances, the appellant is entitled to the benefit of doubt. It has further been held by the Hon'ble Supreme Court that motive is not sine qua non for the conviction of the accused, however, the effect of not proving motive raises a suspicion in the mind of the Court.

22. In our considered view also, keeping in view the fact that the prosecution has miserably failed to prove that the accused had any motive to do away with the deceased, it seriously raises question mark over the credibility of the case of the prosecution.

4. Mobile calls:

23. As per learned Additional Advocate General, this circumstance stood proved by the testimony of PW-2 Vinod Kumar, PW-3 Parestha Devi, PW-4 Darshan Devi, PW-7 Manohar Lal and PW-15 Inspector Jagdish. Vinod Kumar entered the witness box as PW-2 and stated that he runs a electronic shop in main Bazaar, Palampur. This witness further stated that on 25.10.2009, he alongwith police and one lady Parestha had gone to Neugal Khad, from where one mobile phone Ex. P-12 was recovered. PW-3 Parestha Devi stated that she remained associated with police during the investigation of the case and in fact while she was collecting fuel wood in the bushes below the LIC building Palampur, she recovered one mobile phone in the bushes which she handed over to her brother Darshan. She also identified the said mobile to be Ex. P-12.

PW-4 Darshan Ram stated that on 25th police had come and taken the mobile phone and 2-3 days prior to this, his sister Parestha had given him the said mobile phone. This witness further deposed that she told him that she had recovered the mobile phone from the bushes and thereafter he had inserted his SIM in mobile and made the same functional. PW-7 Manohar Lal, brother of the deceased deposed to the effect that possession of mobile phone Ex. P-12 was taken in his presence vide recovery memo Ex. PW2/B. PW-15 Inspector Jagdish deposed that on 25.10.2009, he took into possession the mobile phone of the deceased from Parestha Devi vide recovery Memo Ex. PW2/B

24. A careful perusal of the testimony of these five witnesses though points towards the factum of the mobile phone of the deceased having been recovered from the possession of PW-4 by the prosecution, however, we fail to understand as to how on the basis of the testimony of the abovementioned witnesses any inference can be drawn that the recovery of the mobile phone of the deceased from PW-4 is a pointer that the accused had in fact pushed the deceased in the *Nallah,* as a result of which, he died. Therefore, in our considered view, the prosecution has not been able to prove this circumstance against the accused.

25. Therefore, according to us, the chain of circumstances enumerated above by learned Additional Advocate General does not in any manner forms a complete chain linking the accused with the commission of the alleged offence.

26. Besides this, one more very important aspect of the matter is that the testimony of the wife of the deceased, i.e. the complainant does not inspire confidence as the same neither appears to be cogent nor the same appears to be reliable. As per the case of the prosecution, deceased went missing on 19.10.2009 and report to this effect was initially lodged at Police Station, Palampur on 20.10.2009 by the mother of the deceased. FIR was lodged subsequently on 23.10.2009 on the complaint of wife of the deceased PW-10 Smt. Poonam. Smt. Poonam deposed in the Court as PW-10 that in the evening of 19.10.2009, accused Raju had come to her house and inquired about her husband. She further deposed that accused Raju had told her that he, other accused had gone to Bundla alongwith the deceased and had consumed liquor there and a quarrel took place between them with regard to payment of some money and he had pushed Rajinder, as a result of which Rajinder had fallen down and died. Incidentally, none of these facts find mentioned in the FIR Ex. PW10/A, which was registered at the behest of the complainant. As per the prosecution, earlier to that a missing person report was also lodged by the mother of the deceased which is Ex. PW7/A on 20.10.2009 at 13:35 hours. It has come on record that this missing person report was lodged by the mother of the deceased after the factum of the deceased being missing was brought to her notice by the complainant. Even in this missing person report, there is no averment to the effect that accused Raju had come to the house of the deceased on 19.10.2009 and admitted/disclosed that a quarrel had taken place between the accused and the deceased after consuming liquor and deceased had died as a result of his being pushed by accused Raju. Even otherwise, it is not understood that if the factum of accused Raju having pushed deceased Rajinder had been brought to the notice of the complainant in the evening on 19.10.2009 itself, then why neither she disclosed these facts either to her relatives or to the police and why these facts were subsequently also not disclosed by her to anyone including to police. The only inference which can be drawn in the absence of any cogent explanation coming forth from the prosecution as to why these facts were not earlier revealed by the complainant, is that the statement to this effect by PW-10 is nothing but an afterthought and a concocted version. Further, no material has been produced on record by the prosecution to corroborate this version of the complainant. In this background, the testimony of PW-10 becomes highly doubtful and the conviction of the accused cannot be based on the testimony of such witnesses. Further, a perusal of the judgment passed by learned trial Court also demonstrates that after taking into consideration the entire material produced on record by the prosecution and after discussing the same in detail, learned trial Court held that the prosecution was not able to complete chain of circumstantial evidence against the accused nor the testimony of the complainant was free from reasonable doubts and the prosecution had not been able to prove its case against the accused beyond reasonable doubts.

27. In our considered view, the findings so returned by learned trial Court are neither perverse nor it can be said that the finding of acquittal returned by learned trial Court in favour of the accused is not borne out from the records of the case. According to us also, the prosecution has not been able to establish beyond reasonable doubt that the accused were guilty of commission of offence punishable under Section 304 read with Section 34 of the Indian Penal Code.

28. In view of above discussion, we do not find any infirmity with the judgment which has been passed by the learned trial Court acquitting the accused of the charges levelled against him. It cannot be said that the judgment passed by the learned trial Court is either perverse or that the prosecution had proved its case beyond reasonable doubt against the accused, but learned trial Court erred in acquitting him. According to us, the prosecution has not been able to prove its case beyond reasonable doubt. Therefore, the judgment passed by the learned trial Court is up-held and the present appeal is accordingly dismissed being devoid of any merit.

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

State of Himachal Pradesh .....Appellant.
Versus
Umesh Singh .....Respondent.

Cr.Appeal No.207 of 2010.
Reserved on: 16.09.2016.
Date of Decision : September 20, 2016.

Indian Penal Code, 1860- Section 302 and 34- A dead body was found by the police – dead body was identified to be that of H- accused U was tried and acquitted by the trial Court- accused O absconded – held, in appeal that case of the prosecution is based upon circumstantial evidence- prosecution version that accused was last seen with the deceased had not been proved- Medical Officer admitted that injuries sustained by accused could have been possible by way of fall on an unsmooth surface- extra judicial confession stated to have been made by the accused was also not proved- trial Court had rightly acquitted the accused- appeal dismissed. (Para-9 to 13)

For the Appellant: Mr.M.A.Khan, Additional Advocate General.
For the Respondent: Mr.Ashok Tyagi, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed against the judgment of the learned Sessions Judge, Solan, Himachal Pradesh, rendered on 1.9.2009, in Sessions Trial No.20-NL/7 of 2008, whereby the learned trial Court acquitted the respondent/accused for committing offences punishable under Sections 302 read with Section 34 IPC of the Indian Penal Code.

2. The facts, relevant to adjudicate the instant appeal, are that on 13.8.2008, Inspector Madan Kant Sharma, the then SHO Police Station, Baddi after receipt of an information recorded in Daily Diary register as report No. 54 along with ASI Kalyan Singh, HC Tejender Singh, Constables Sher Singh and Desh Raj proceeded to the spot. On reaching there, they found a dead body lying in bushes in a lonely place near Truck Union Baddi. The said Inspector after getting the dead body photographed, inspected the dead body of the deceased and found the person having been killed by strangulation with cloth used as Parna. He also found the blood having been oozed out of the nose of the deceased and also found injury marks on the backside of

right ear and on the private part appearing to have been caused with pointed object. The vest and pants worn by the deceased were found torn. From the dead body an identity card issued by Election Commission was recovered on the basis of which the deceased was identified to be Harish Chander son of Satya Bhan resident of House No. 152 Aipura, Tehsil Bisauli, District Badayun. Thereafter, the dead body was identified by the co-villagers of the deceased, namely, Ram Bahadur and Naresh Kumar. Rukka was sent to the police Station concerned on the basis of which, FIR stood registered.

3. On conclusion of investigations into the offences allegedly committed by the accused a report under Section 173 of the Code of Criminal Procedure stood prepared and presented in the competent Court. The inspector aforesaid also initiated proceedings under Section 82 and 83 Cr.P.C against co-accused Ominder who had absconded.

4. Accused/respondent stood charged by the learned trial Court for committing offences punishable under Sections 302 read with Section 34 of Indian Penal Code to which he pleaded not guilty and claimed trial.

5. In proof of the prosecution case, the prosecution examined 15 witnesses. On closure of the prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded, in which he pleaded innocence. On closure of proceedings under Section 313 Cr.P.C. the accused was given an opportunity to adduce evidence in defence yet he chose not to lead any evidence in defence.

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

7. The appellant/State stands aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Additional Advocate General has concerted to vigorously contend 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.

8. On the other hand, the learned counsel for the respondent/accused has with considerable force and vigour, 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.

9. The prosecution case in its entirety stands hinged upon circumstantial evidence. Consequently, it was incumbent upon the prosecution to by adducing cogent evidence emphatically prove each of the links in the chain of circumstances. However, in the event of the prosecution failing to adduce conclusive evidence in proof of any of the links in the chain of circumstances, the entire chain would get severed whereupon the relevant benefit of doubt would stand afforded to the accused. The initial link in the chain of circumstances for connecting the accused in the commission of offence alleged stands comprised in PW-3, PW-11 and PW-12 testifiying qua theirs last seeing the deceased in the company of the accused.

10. PW-3 (Smt. Sunita) has voiced qua on 12.8.2008 at about 9.30 p.m. Umesh, Ominder and Harish Chander @ Sudhir visiting their Jhugi along with a bottle of liquor. She continues to testify of the bottle of liquor standing consumed by Umesh, Ominder, Harish Chander @ Sudhir, Riyasat and her husband. Also she proceeds to testify qua Ominder requesting her husband for money for bringing more liquor, request whereof stood refused by her husband besides she testifies qua her husband thereafter proceeding to his Jhuggi for sleeping. Further more, she deposes of Riyasat departing from the Jhuggi whereafter Umesh, Ominder and Harish Chander also departed from her Jhuggi. However, she has omitted to bespeak in her testification qua her and PW-12 (Sitara) being also present at the relevant time when liquor was being consumed by the deceased, Ominder, Riyasat, Ram Bahadur and Umesh. The effect of her

omission to testify qua her and PW-12 being present at the relevant time when the aforesaid were consuming liquor underscores an inference of both her and PW-12 standing disabled to unequivocally voice qua Ominder asking for money from her husband also both standing disabled to voice qua the confabulations which occurred inter-se them besides obviously qua what transpired thereat whereupon hence any testification by them qua the aforesaid factum holds no veracity.

11. Even PW-11 (Riyasat) who was sitting along with the deceased besides Umesh and Ominder at the relevant time they were consuming liquor at the relevant place, has testified qua accused Umesh requesting him on the bottle of liquor standing consumed by them to fetch another bottle of liquor, request whereof stood refused by him on score of his having no money whereafter there occurs an echoing in his testification qua him and the husband of PW-3 departing to their respective Jhuggi(s). Also he omits to underscore in his testification qua the presence of PW-3 and PW-12 at the relevant place whereupon with amplifying vigor an obvious inference upsurges qua hence PW-3 and PW-12 standing disabled to depose qua the confabulations which occurred inter-se the persons who were consuming liquor besides PW-3 and PW-12 also concomitantly stand disabled to testify qua what transpired at the relevant site. With the witnesses aforesaid standing disabled to depose qua what transpired inter-se the persons who were consuming liquor fosters an inference of the prosecution wanting in adducing clinching evidence in portrayal of the relevant motive which stood nursed by the accused for murdering the deceased. In sequel, with motive assuming significance in a case resting upon circumstantial evidence also it constituting an important link in the chain of circumstances whereas its standing not clinched by emphatic proof takes a toll upon the ascription of an incriminatory role by the prosecution to accused wanting in vigor. Significantly, unless the accused had nursed a motive to murder the deceased he would not proceed to commit the relevant incriminatory act ascribed to him by the prosecution. Furthermore, on an incisive reading of the testimonies of PW-3 and PW-12, a visible unveiling stands unfolded qua their respective testifications qua the accused and deceased departing together from the relevant place whereupon the prosecution erects an espousal of both standing last seen together, standing harboured upon hearsay, inference whereof galvanizes strength from PW-11 (Riyasat) testifying qua after theirs consuming a bottle of liquor at the relevant place, he and the husband of PW-3 departing to their respective Jhugis yet he has omitted to disclose qua his sighting only the accused alongwith the deceased departing therefrom contrarily he deposes qua both accused Umesh and Ominder along with the deceased proceeding towards Truck Union to fetch liquor. Since this Court has concluded of PW-3 and PW-12 not remaining present at the relevant place whereat the aforesaid were consuming a bottle of liquor whereupon this Court has concluded of both standing disabled to disclose the happenings which occurred thereat conclusion whereof when stands conjointly construed with the afore-referred testimony of PW-11, unveils a concomitant inference qua theirs surmisingly testifying qua theirs last seeing the accused and the deceased significantly when PW-11 contrarily testifies qua apart from accused herein, absconding accused Ominder also accompanying the former along with the deceased towards the Truck Union for fetching liquor. Ominder, who, alongwith deceased and accused Umesh, was hence also purportedly last seen together with the latter, was the best person to depose qua the significant crucial moment when he alienated himself from their company wherefrom it could be invincibly concluded of after absconding accused Ominder alienating himself from the company of the accused herein and the deceased both the latter holding their intra se company wherefrom also it could be concluded of with the body of the deceased standing recovered on 13.8.2008 qua hence with visible proximity occurring inter-se both the accused and the deceased standing last seen together vis-à-vis the recovery of the body of deceased, the relevant incriminatory role ascribed by the prosecution to the accused standing conclusively proven. However, the aforesaid Ominder up to date has remained under absconsion whereupon the Investigating Officer concerned stood disabled to make apposite elicitations from him qua the relevant occurrence. Also his remaining under absconsion empowers this Court to conclude of after accused/respondent alienating himself from the company of Ominder and deceased, both the latter thereafter holding their intra se company. Also obviously a conclusion

stands rested qua hence absconding accused Ominder being hence the person who was last seen with the deceased whereupon a concomitant inference is erectable qua hence his being the likely person who committed the offence alleged. The efficacy of recovery of screw driver Ext.P-18 recovered under memo Ext.PW-5/C is to be tested in the light of manifestations occurring in Ext.PW-14/B qua the demise of the deceased standing sequelled by strangulation leading to asphyxia. While proceeding to hence construe the efficacy of effectuation of recovery of screw driver Ext.P-18 even if assumingly it holds efficacy, nonetheless its tenacity gets eroded when construed in conjunction with the post mortem report comprised in Ex.PW-14/B wherewithin recitals stand encapsulated qua ligature marks occurring in the middle of the neck tapering towards its end and its holding dimensions 6x3 cms. The factum aforesaid pronounces qua absence of exertion of pressure on the sides of the neck by the purported user thereon of the relevant strangulatory material also hence dispels the purported user thereon of the relevant strangulatory material necessarily also it enhances an inference of the demise of the deceased occurring not by strangulation. Consequently, the occurrence of ligature marks in the middle of the neck of the deceased besides absence of ligature marks on posterior aspect of the neck is magnificatory qua the strangulation of the deceased occurring not by tying of cloth around the neck. The erection of the aforesaid inference dispels the factum of user thereon of screw driver Ex.P-18 by the accused also dispels the factum of his purportedly by tying a Parna around the neck of the deceased strangulating him. Reiteratedly, hence when the user thereon of Screw Driver Ex.P-18 by the accused stands belied, it concomitantly wanes the factum of its recovery by the Investigating Officer under Memo Ext.PW-5/C at the instance of the accused preceding whereof his disclosure statement comprised in Ext.PW-5/A stood recorded predominantly when its recovery for reasons afore-stated holds no connectivity vis-à-vis accused qua its user begetting the demise of the deceased. Furthermore, also the lacerated wounds noticed by PW-14 (Dr.Amarjeet Singh) to be occurring on the relevant portion of the body of the deceased when stand testified by him in his cross-examination to stand suffered by the victim by fall on an unsmooth surface forcefully dispels their occurrence thereon standing seqeulled by user thereon of screw driver by the accused. Consequently, with the cause of demise of the deceased abysmally remaining unconnected with user thereon by a cloth by the accused or user thereon of screw driver by the accused, its recovery under memo Ext.PW-5/C by the Investigating Officer even if assumingly it holds efficacy does not constitute any efficacious link in the chain of the circumstances. Predominantly also the efficacy, if any, of recovery of screw driver Ext.P-18 at the instance of the accused gets subsumed in the trite factum of the pivotal link of the deceased standing last seen with the accused getting dismembered.

12. Also the prosecution has anvilled an espousal upon the purported extra judicial confession made by the accused to PW-3 for contending of hence the guilt of the accused standing clinchingly proven. However, the efficacy of the purported extra judicial confession besides its constituting a potent link in the chain of circumstances stands blunted, in the trite factum of PW-3 unveiling in her testification qua the purported extra judicial confession standing made by the accused to her on 13.8.2008 whereas hers making an inordinate delay up to 17.8.2008, to in tandem thereof record a statement before the Investigating Officer, in sequel thereof the aforesaid link in the chain of circumstances gets dismembered.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

14. In view of the above, we find no merit in this appeal which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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

Amit Sood ...Petitioner
Versus
State of H.P. & Ors ...Respondents

CWP No. 1157 of 2005.
Judgment reserved on : 31.08.2016.
Date of decision: September,21st , 2016.

Constitution of India, 1950- Article 226- Petitioner was running a Banquet Hall and Restaurant - one room is attached to the Banquet Hall which is primarily meant for the parties booking the hall for changing their clothes or keeping their belongings, but the same was never offered for rental - 4-5 ladies accompanied by two or three men came to the restaurant and placed an order- police party reached the restaurant and made inquiry from men and ladies- FIR was registered against the petitioner under Immoral Traffic (Prevention) Act - petitioner was taken in custody- he was asked to sign blank papers and on refusing to do so, he was abused and mercilessly beaten up by SHO- petitioner filed a writ petition seeking compensation and registration of FIR against the SHO- State filed a reply stating that injuries were noticed in the medical examination of the petitioner- petitioner was found to have sustained two bodily injuries- grievous injuries were noticed in the right ear of the petitioner- SHO was suspended to ensure free inquiry- FIR was lodged rightly- held, that custodial torture is not permissible in a civilized society- injuries were not noticed at the time of the arrest, thus, injuries were sustained during the custody- inquiry was not conducted fairly and is an attempt to shield the SHO- direction issued to register criminal case against the SHO and to proceed against him departmentally. (Para- 11 to 41)

Cases referred:
Kishore Singh Ravinder Dev etc. versus State of Rajasthan AIR 1981 SC 625
Gyanesh Rai and another versus State of UP and Ors 2015 (6) All LJ 499
Dr. Rini Johar and another versus State of M.P. and others AIR 2016 SC 2679
State of Himachal Pradesh and another versus Sakshi Sharma etc. and others 2014 (Supp) Shim. LC 563

For the Petitioner: Mr. R.L. Sood, Senior Advocate, with Mr. Arjun Lall, Advocate.
For the Respondents: Ms. Meenakshi Sharma, Addl. A.G., with Mr.J.S. Guleria, Asstt. A.G., for respondents No. 1 to 4.
Mr. B.C. Negi, Senior Advocate, with Mr. Vijay Verma, Advocate, for respondent No.5.
ASI Tilak Raj, I/O, Police Station, Dharamshala and Mr.Vakil Singh, Reader, SDM Office, Dharmashala present alongwith records.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan Judge.

"Nothing is more cowardly and unconscionable than a person in police custody being beaten up and nothing inflicts a deeper wound on our constitutional culture than a State official running berserk regardless of human rights". (***Kishore Singh Ravinder Dev etc.*** *versus* ***State of Rajasthan AIR 1981 SC 625*****).**

2. The petitioner claims himself to be a victim of custodial torture and has filed this writ petition claiming therein the following reliefs:-

"i) Direct that a case be registered against respondent No.5, for having illegally arrested, detained and physically tortured the petitioner in custody; in the most inhuman manner.

ii) Award adequate compensation to the petitioner for the custodial torture of the petitioner.

iii) Quash the inquiry conducted by the SDM and the consequent reinstatement of respondent No.5.

iv) Direct that the investigation in the case be conducted by an independent high-ranking official of police/ the crime branch.

v) Direct that a copy of the medical report of the petitioner be given to him.

vi) Direct that a copy of the inquiry report conducted by the SDM be given to him.

vii) The respondent No.5 may be directed to be transferred from P.S. Dharamshala to any other place so that he may not influence with course of the investigation.

viii) Proceedings for contempt of Court be initiated against respondent No.5 for having willfully and knowingly violated the directions of the Hon'ble Supreme Court in the case of "D.K.Basu versus State of West Bengal".

ix) Issue any other order, writ or direction that this Hon'ble Court may deem fit and proper in the peculiar facts and circumstances of the present case."

3. It is averred that the petitioner is a Commerce Graduate and belongs to a respectable family and his father is a very senior and well-known Chartered Accountant. At the relevant time, the petitioner was running a Banquet Hall and Restaurant by the name of 'Kashish'. There was only one room attached to the Banquet Hall which was primarily meant for the parties booking the hall for changing their clothes or keeping their belongings, but the same was never offered for rental.

4. On 24.08.2005 while petitioner was away, then at about 4.40 p.m., 4-5 ladies accompanied by two or three men came to the restaurant and after being served water, ordered cold drinks and later placed order for chilly chicken. The waiter called the cook, who was on rest, for preparation of the food, however, in the meantime, (within 5 to 7 minutes) of the men and ladies having entered the place, a police party led by SHO, Dharamshala, R.P.Jaswal, accompanied by video camera operator of the local cable channel reached the restaurant and made enquiries from the men and ladies and the restaurant staff. The long and short of the story is that an FIR No.216/2005 (for short 'FIR') came to be registered against the petitioner under Sections 3, 4 and 5 of the Immoral Traffic (Prevention) Act (for short the 'Act') on the allegations that there was a sex racket being carried out in these premises.

5. The petitioner claimed to have arrived at the Banquet Hall at about 6.10/6.20 p.m. in response to a telephonic call made by his father at about 5.30 p.m. It is thereafter claimed that while in the lock up, the petitioner at about 11.00 p.m. was asked to sign blank papers and on refusing to do so, he was abused and mercilessly beaten up by respondent No.5 SHO. The beating was so severe and relentless that the same caused grievous injury in the ear of the petitioner. On these allegations, the petitioner has filed the instant petition for the reliefs as already set out hereinabove.

6. The State of Himachal Pradesh through Secretary (Home), District Magistrate-cum-Deputy Commissioner, Kangra at Dharamshala and Sub Divisional Magistrate, Kangra, who have been arrayed as respondents No.1, 2 and 4, respectively, have filed their joint reply wherein it is admitted that the petitioner is running the restaurant and letting the same for marriage functions, however, it is denied that the rooms of the hotel are not rented out to anyone. It has been averred that the local police of Police Station, Dharamshala, had searched the hotel and FIR had been registered. Regarding arrest etc., it has been stated that in the subsequent inquiry conducted by respondent No.4, it has been established that the hotel of the petitioner had been raided by the SHO (respondent No.5) alongwith police officials pursuant to which aforesaid FIR

came to be registered. It is admitted that local cable operators had videographed the entire incident and was also with the raiding party. As regards the allegations of beating, it has been averred that during inquiry contradictory statements have been made by the petitioner. On 24.08.2005, the petitioner told respondent No.3 that he was beaten up by respondent No.5 and other police officials, whereas, in his later statement dated 31.08.2005, the petitioner clearly denied beating having been given by other police officials except respondent No.5.

7. Respondent No.3 has filed its separate reply wherein it has been averred that the petitioner was taken in custody from the spot in the presence of his father at 9.40 p.m. on 24.08.2005 from the spot and the said fact finds mention in the Zimini No.1 dated 24.08.2005. The petitioner was lodged in the police station lock up at 10.30 p.m. and an entry to this effect was made in the station diary vide DD No.32 dated 24.08.2005. It is averred that the police had associated their videographer which speaks volume of the fairness on the part of the police. The respondent admitted that the medical report indicated two bodily injuries (simple in nature) sustained by the petitioner within the past six hours when he was examined at 12.14 a.m. on 25.08.2005. Respondent No.3 then placed respondent No.5 under suspension and ordered Additional S.P.,Kangra to conduct departmental inquiry in the incident. However, the next day the ENT Specialist reported grievous injury to the right ear of the petitioner. Thus, as per the Punjab Police Rule 16.38 as applicable to the Himachal Pradesh before proceeding further departmentally, the matter was referred to D.M., Kangra. The SHO i.e. respondent No.5 was suspended by respondent No.3 only to ensure that he did not influence any inquiry into the incident by misusing his position, status or posting. The suspension was ordered to ensure free and impartial inquiry.

8. Respondent No.5 has filed his separate reply raising therein various preliminary objections by alleging that the petition is nothing more than a counter-blast to the FIR registered against the petitioner. It is averred that though the petitioner had got himself medically examined, but he has not chosen to place on record such medical examination report and, therefore, adverse inference ought to be drawn against him. Even otherwise, the petitioner at best, had suffered injury which was purely temporary and had not got the audiometry test conducted so as to establish any permanent loss of hearing. It is also averred that the present petition depicts no enforceable cause of action and concocted ipse-dixit of the petitioner cannot withstand the presumption of truth attached to the official records as prepared during the course of the duty.

9. On merits, it is averred that as per the investigation conducted in the FIR it had come to light that the premises of the petitioner where the raid was conducted was being used for carrying on a prostitution racket and the same was being carried out with the active support of the petitioner. The raid had been conducted pursuant to a complaint made by one Sarabjeet, who had informed the police that he had met one Veena Devi, who had agreed to arrange 4-5 girls. The amount to be paid to these girls had been fixed and Sarabjeet was required to pay the advance amount. The girls were provided at the premises of the petitioner at about 7 in the evening on 24.08.2005, as according to Veena Devi, these premises were very safe. According to her, the writ petitioner was related to some police official, hence no one dared to raid the premises of the writ petitioner and even on earlier occasions, she had used these premises in collusion with the writ petitioner.

10. After preparing decoy customers, the raid was carried out which was witnessed by independent witnesses like Pradhan, Gram Panchayat, Dari and other witnesses and the incident was also video filmed. The raid was started at about 7.00 p.m. and concluded at about 10.15 p.m. It is specifically stated that when the raid was being conducted, the writ petitioner had run away from the spot and was chased by the police and later over-powered. In this process, there was a major scuffle as the writ petitioner very strongly tried to resist being captured and in this process may have sustained some injury. It is specifically denied that the petitioner was asked to sign blank papers and it is further categorically denied that the petitioner was abused

and mercilessly beaten up by the replying respondent and, therefore, there was no question of the petitioner having sustained any ENT related injury.

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

11. Before dealing with the contentions on merits, it needs to be observed that no civilized law postulates custodial cruelty, an inhuman trait that springs out of a perverse desire to cause suffering when there is no possibility of any retaliation; a senseless exhibition of superiority and physical power over the one who is overpowered or a collective wrath of hypocritic thinking. It is one of the worst crime in the civilized society. Torture in custody flouts the basic rights of the citizen and is affront to him and his dignity. Custodial torture is a collective assault on human dignity and nothing can be more dehumanizing as the conduct of the police in practicing torture of any kind on a person in custody.

12. At the outset, it may be noticed that the criminal case filed against the petitioner pursuant to FIR No.216/05 dated 24.08.2005 has been dismissed and all the accused therein including the petitioner have been acquitted of the offences for which they had been charged.

13. It is also not in dispute that the petitioner while in police custody was got medically examined by the police i.e. on 25.08.2005 at about 12.20 a.m. at Dr. Rajendra Prasad Government Medical College and Hospital, Dharamshala, the said report is annexed as Annexure R3/A with the supplementary affidavit filed by Superintendent of Police pursuant to directions passed by this Court on 22.11.2006. In addition to this, respondent No.3 has also placed on record the letter dated 27.08.2005 whereby on the request of respondent No.5, respondent No.3 had asked for constitution of a Medical Board and the said report is annexed as Annexure R3/G. The necessity of Medical Board arose because respondent No.5 had made an allegation that he did not find the opinion of the ENT Expert to be fair as the Expert was personally known to the petitioner, who was levelling false allegations of having been beaten up in police custody only because he had been booked for a serious offence.

14. Notably, there was a perforation of the size of approximately 2 x 2 mm on the center of the tympanic membrane which was noticed in the right ear of the petitioner and the Medical Board had clearly found the injury to be grievous and had been caused within duration of 2-5 days earlier.

15. Now the moot question arises as to how the petitioner came to sustain such injury. Was it self-inflicted? Was it caused during the process when petitioner tried to flee as per the version of respondent No.5 or was it on account of the beating given by respondent No.5?

16. Insofar as the first probability is concerned, the same is otherwise ruled out as it is not even the case of the respondent that the petitioner had self-inflicted the injury.

17. Therefore, the question now only hinges around to two other probabilities. As already observed, the specific stand of respondent No.5 in his reply to the writ petition is that the petitioner may have sustained injury while he was fleeing from the spot and had been over-powered by the crowd and the police and the said allegation is reproduced in verbatim and reads thus:-

> *"6. That the contents of paras 6 to 8 are categorically denied. It is submitted that the raid which started at about 7.00 on the premises of the petitioner concluded at about 10.15. At this juncture, it would be appropriate to mention that when the raid was conducted the writ petitioner had run away from the spot. The Writ petitioner had been chased by the police. On seeing this the public which had collected there had overpowered the writ petitioner. In the process there was a major scuffle as the writ petitioner had tried to very seriously resist being captured. Therefore in the process the Writ petitioner may have sustained some injury....."*

18. The version put forth in the FIR against the petitioner with regard to an attempt being made by the petitioner to flee reads thus:-

> *"At this time I, Inspr./SHO alongwith raiding party reach out side Hotel Kashish Civil Station and Video Film maker Pardeep Dogra has also reached at this time, he is also associated with the raiding party and the party raids the Hotel after surrounding it from all sides. When the party entered the main gate the person standing at the counter/reception on seeing the party ran towards the stairs out side the restaurant leading to the rooms upstairs. In his hurry he fell on the stairs and I Inspr./SHO with the help of raiding party over powered him....."*

19. There appears to be again yet another version in the challan/final report which does not even mention anything about the petitioner trying to flee from the spot or his being apprehended by the mob or by anybody else and rather suggests that the petitioner has been arrested from the spot itself. The relevant portion of the challan reads thus:-

> *".....Thereafter during the raid at Kashish Hotel and Restaurant/Banquet Hall Dharamshala in the presence of witnesses, Amit Sood; who was present near the counter; produced five currency notes of denomination of Rs.500/- before the police; which were given to him for prostitution. The numbers of the currency notes are (1) 3AH 599963 (2) 3CK 153499 (3) 4CT 749149 (4) 7AA 42096 (5) 9AL 976672 which bear the signatures of Inspector/S.H.O. and have been seen by the witnesses. The aforesaid currency notes amounting to Rs.2500/- was packed in a cloth and was sealed by Stamp "K" 4 times and the sample of stamp was taken on a separate cloth and were taken into custody of the police. The stamp after use was handed over to witness Savita Karki. The copy of memo was supplied to witnesses and accused free of cost. The memo signed by Amit Sood and the witnesses by putting there signatures and thereafter Sh. Pradeep Dogra produced a video cassette which was recorded on 24.8.2005 in Kashish Rastaurant and Banquet Hall Dharamshala before me (Inspector/SHO) which was sealed in a cloth packet by stamping with Stamp "J" three times and the sample of the stamp was taken on separate cloth and stamp was handed over to witness Balbir Singh after use. Cloth Packet was taken into custody by way of recovery memo as evidence and the memo was signed by witness Balbir Singh and Pradeep Singh by putting their signatures. The spot was examined and spot map was also prepared. The statements of witnesses namely S/Sh. Sarvjeet Singh, Nirpail Singh, Niraj Kumar, Baldev Singh, Surjeet Singh, Deep Chand Ward Panch, Smt. Savita Karki, Balbir Singh, Pradeep Dogra were recorded as per their version and were penned down. Veena Devi, Meena Devi, Kaushalya Devi, Usha Devi, Suman Devi and Amit Sood were arrested for the offence under Section 3, 4, 5 of Immoral Traffic Act, 1956 and who have been released on Bail Bonds and Surety Bonds by the orders of Hon'ble Court. After investigation, the offences under Section 3, 4, 5 of the Immoral Traffic Act, 1956 in the Challan against the accused mentioned above is proved. The challan was prepared and is submitted before the Hon'ble Court. The accuseds be prosecuted."*

20. When the petitioner was made to stand trial, the Ward Panch of Gram Panchayat, Dari, PW-2 Kuldeep Chand has clearly stated that the petitioner was not even present at the spot during the raid.

21. It is evidently clear from the aforesaid that it is not even the case of respondent No.5 or the other respondents that the petitioner had already sustained injury at the time of his arrest or else he would have straightaway been taken to the hospital. Even as per the respondents, the raid was conducted at 7.00 p.m. and concluded at 10.15 p.m. and the petitioner and the independent witnesses came to the police station at 10.30 p.m. The petitioner admittedly was examined after his arrest at 12.20 a.m. on 25.08.2005 and it was found that the petitioner had suffered perforation of the right ear. This was thereafter confirmed by the Medical Board so constituted on the asking of respondent No.5.

22. It is vehemently argued by learned counsel for respondent No.5 that in absence of there being any bleeding and injury to the external ear of the petitioner, the injury, if any, could only be an old one, out of which much capital cannot be made by the petitioner to claim that he was given beatings by respondent No.5 which resulted in the aforesaid injury. He has referred to Modi's Medical Jurisprudence and Toxicology, 23rd Edition, Chapter 7 which deals with the torture and as regards ear torture, it reads thus:-

> *"(viii)* ***Ear Torture***
>
> *Ear torture includes beating both the ears with the palms. This is known as 'telefona', which causes rupture of the tympanic membrane causing pain, bleeding and hearing loss."*

23. He would thereafter rely upon page 230 of the book wherein it has been mentioned that in case of beatings with the palms on both ears simultaneously ('*el telefone*') the physical findings would be that of ruptured or scarred tympanic membranes. Injuries to the external ear which would be detected in the post mortem detection of torture. He would further canvass that in case blow is given over the ear, the same may produce a rupture of the tympanum leading to temporary or permanent deafness and would rely on the following abstract found at page 813 of the book which reads thus:-

> " ***Ears***
>
> *A blow over the ear may produce a rupture of the tympanum leading to temporary or permanent deafness. Such injuries should be examined as soon as possible to differentiate whether the damage to the tympanum if due to disease or injury.*
>
> *A police constable complained that he was slapped over his left ear by a station master. On examination of his ear on the next day, the tympanic membrane was found ruptured and the surrounding surface was congested."*
>
> *If a blow over the external ear is very severe, it may also injure the labyrinth. During a quarrel, the ears may be bitten off or cut off, and their lobes may be torn by pulling out the earrings either with the intention of causing hurt or committing theft. The injuries are grievous, if they produce permanent disfiguration.*

24. The aforesaid contention cannot simply be accepted for the reason that in case it had been an old injury, the same would have been so mentioned in the Medico-Legal-Certificate. That apart, it has been specifically opined by the Medical Board in para-1 of its report that *"X-ray of the mastoid region (RT & LT) does not show any sclerotic changes ruling out old perforation".* Once, there is overwhelming evidence available on the record by way of opinion rendered by a team of doctors of the Medical Board that too based on the physical examination of the petitioner, it is not safe to rely upon any text which only refers to things in abstract.

25. Thus, on the basis of the aforesaid discussion, I am prima facie of the considered opinion that the injury sustained by the petitioner was at the time when he was in custody of respondent No.5 as earlier to this he was hale and hearty and, therefore, the onus was upon respondent No.5 to prove that the petitioner while in custody could not have and had not sustained injuries.

26. Dr. Martin Luther King had observed that "*injustice anywhere is a threat to justice everywhere"* and these golden words were thereafter reiterated by the Hon'ble Supreme Court in ***Kishore Singh Ravinder Dev's case*** (supra).

27. Justice R.K.Abichandani in his Article relating to custodial violence while referring to 'Custody' had observed as under:-

> ***"Custody***
>
> *The very idea of a human being in custody save for protection and nurturing is an anathema to human existence. The word custody implies guardianship and protective care. Even when applied to indicate arrest or*

incarceration, it does not carry any sinister symptoms of violence during custody. No civilized law postulates custodial cruelty – an inhuman trait that springs out of a perverse desire to cause suffering when there is no possibility of any retaliation; a senseless exhibition of superiority and physical power over the one who is overpowered or a collective wrath of hypocritic thinking."

28. In the same Article, he has referred to 'The Universal and Constitutional Concern' which reads thus:-

"***The Universal Concern***

(1) *The Universal Declaration of Human Rights 1948, adopted and proclaimed by the General Assembly Resolution 217A(III) of 10th December, 1948 declared in the preamble that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Article 1 proclaimed that all human beings are born free and equal, in dignity and rights. In Article 3 it proclaimed that everyone has the right to life, liberty and security of person, and in Article 5 that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The presumption of innocence of a person charged with a penal offence until proved guilty as contained in Article 11(a) is meant to insulate him against any high-handed treatment by the authorities dealing with him in the matter.*

(2) *Article 7 of the International Covenant on civil and Political Rights, 1966 adopted by the General Assembly resolution dated 16th December, 1966 covenanted that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Under Article 10 of the said Covenant all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and the accused persons shall , save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. The minimum guarantees to which everyone charged with a criminal offence, is entitled in full equality covenanted in Art. 14(3), inter-alia, provide that no shall be compelled to testify against himself or to confess guilt, which obviously will rule out use of force of any kind on a person accused of any crime.*

(3) *The American Convention of Human Rights 1969 which came into force in July, 1978, declares under Article 4(1) that every person has the right to have his life respected and this right shall be protected by law. Under Article 5, the right of every person to have his physical, mental, and moral integrity respected is recognized and it is covenanted between the States who are parties to this convention that no one shall be subject to torture or to cruel, inhuman, or degrading punishment or treatment and that all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. Right to human treatment recognized by Article 5 cannot be suspended even in time of war, public danger, or other emergency situation, as declared in Article 27 of this Convention.*

VI. The Constitutional Concern

Respect for human dignity is thus not a matter for any deep study in axiology for an estimate of comparative values in ethical, social or an aesthetic problem but a matter of acknowledging a simple truth already recognized by our national document when its opening chant exudes the cultural nobility of a fraternity that assures the dignity of the individual. The Constitution recognizes it to be fundamental in the governance of the country that the State shall direct its policy to secure conditions of freedom and dignity and insulates against all forms of tyranny against mind and body and their freedom to grow fearlessly. All custodial safeguards in the constitutional and other laws are meant to protect human dignity and shun barbaric approaches. This is why no person accused of any offence shall be compelled

to be a witness against himself [Art.20(3), a person is entitled to know why he is arrested for being detained in custody and to consult a legal practitioner of his choice [Art. 22(1), there is prohibition of traffic in human beings and forced labour (Art. 23), and, above all, that mother of all rights, the right to protection of life and personal liberty (Art. 21). The right to live with human dignity enshrined in Art. 21 derives its life and breath from the directive principles of State policy particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 as held by the Supreme Court in Bandhua Mukti Morcha case. [see (1984)3 SCC 161 & (1991) 4 SCC 417]."

29. In ***Gyanesh Rai and another versus State of UP and Ors 2015 (6) All LJ 499*** the learned Division Bench of the Allahabad High Court has made extremely lucid enunciation of law on the subject and I can do no better than to extract some of the observations made therein which read as follow:-

"*8. Mahatma Gandhi in one of his quotes has said as follows:*

"I object to violence because when it appears to do good, the good is only temporary, the evil it does is permanent."

9. By resorting to custodial torture, for the time being, police with a view to secure evidence or confession may achieve their goal but in long run, police will have to substantiate and will have to face the scrutiny of Court, as to whether evidence secured or confession made was voluntary or same has been sheer outcome of custodial violence inflicted upon. Evidences and Confessions that come through the route of custodial violence, in long run, do no good and prosecution has to pay heavy price for the same, on such facts being substantiated, otherwise police would be accomplishing behind their closed doors precisely what the demands of our legal order forbid.

10. Time and again custodial torture has been at the radar of the Apex Court and Apex Court, at all point of time, has viewed custodial torture with all seriousness. Apex Court in the case of Raghbir Singh vs. State of Haryana 1980 (3) SCC 70 proceeded to mention that State at the highest administrative and political levels would organize special strategies to prevent and punish brutality by police methodology, otherwise, the credibility of the rule of law in our Republic vis-a-vis the people of the country will deteriorate. Relevant extract of said judgement is as follows:

"We are deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scarce in the minds of common citizens that their lives and liberty are under a new peril when the guardians of the law gore human rights to death. The vulnerability of human rights assumes a traumatic, torture some poignancy when violent violation is perpetrated by the police arm of the State whose function is to protect the citizen and not to commit gruesome offences against them as has happened in this case, Police lock-up if reports in newspapers have a streak of credence, are becoming more and more awesome cells. This development is disastrous to our human rights awareness and humanist constitutional order.

The State, at the highest administrative and political levels, we hope, will organise special strategies to prevent and punish brutality by police methodology. Otherwise, the credibility of the rule of law in our Republic vis-a-vis the people of the country will deteriorate.

We conclude with the disconcerting note sounded by Abraham Lincoln:

'If you once forfeit the confidence of your fellow citizens you can never regain their respect and esteem. It is true that you can fool all the people some of the time, and some of the people all the time, but you cannot fool all the people all the time.'

These observations have become necessary to impress upon' the State police echelons the urgency of stamping out the vice of 'third degree' from the investigative armoury of the police."

11. Apex Court in the case of State of Uttar Pradesh vs. Ram Sagar Yadav and others 1985 (1) SCC 552 has proceeded to took a note of the fact that at the point of time when a person is in custody and he is subjected to any atrocity, then, at the said point of time, police officials alone and none else, can give evidence as regards the circumstances in which a person in their custody comes to receive injuries while in their custody. Relevant extract of said judgement is as follows:

"Police Officers alone, and none else, can give evidence as regards the circumstances in which a person in their custody comes to receive injuries while in their custody. Bound by ties of a kind of brotherhood, they often prefer to remain silent in such situations and when they choose to speak, they put their own gloss upon facts and pervert the truth. The result is that persons, on whom atrocities are perpetrated by the police in the sanctum sanctorum of the police station, are left without any evidence to prove who the offenders are."

12. Apex Court, in the case of Nilabati Behera @ Lalit Behera vs. State of Orissa and others, 1993 (2) SCC 746 proceeded to take view that even convicts, prisoners and undertrials have right under Article 21 and once an incumbent is taken into custody and there are injuries on his body, then State will have to explain, as to how he sustained the injuries, and compensation can be awarded under public law remedy.

13. Apex Court in the case of D.K. Basu vs. State of West Bengal 1997 (1) SCC 416, has dealt with the issue of custodial violence, and has clearly ruled, interrogation through essential must be on scientific principles, third degree methods are impermissible, balanced approach should be there so that criminals don't go scot free. Various guidelines have been issued and same are holding the field, even as on date, in addition to constitutional and statutory safeguards. Relevant extract of said judgment is as follows:

"The importance of affirmed rights of every human being need no emphasis and, therefore, to deter breaches thereof becomes a sacred duty of the Court, as the custodian and protector of the fundamental and the basic human rights of the citizens. Custodial violence, including torture and death in the lock ups, strikes a blow at the Rule of Law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law enforcing officers is a matter of deep concern in a free society. These petitions raise important issues concerning police powers, including whether monetary compensation should be awarded for established infringement of the Fundamental Rights guaranteed by Articles 21 and 22 of the Constitution of India. The issues are fundamental.

14. "Torture" has not been defined in Constitution or in other penal laws. 'Torture' of a human being by another human being is essentially an instrument to impose the will of the 'strong' over the 'weak' by suffering. The word torture today has become synonymous wit the darker side of human civilisation.

> *"Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also so intangible that there is not way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone paralyzing as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself."*

-Adriana P. Bartow

> *No violation of any one of the human rights has been the subject of so many Conventions and Declarations as 'torture'- all aiming at total banning of it in all forms, but inspite of the commitments made to eliminate torture, the fact remains that torture is more widespread not that ever before, "Custodial torture" is a naked violation of human dignity and degradation with destroys, to a very large extent, the individual personality.*

15. It is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backward-flag of humanity must on each such occasion fly half-mast.

16. In all custodial crimes that is of real concern is not only infliction of body pain but the mental agony which a person undergoes within the four walls of police station or lock-up. Whether it is physical assault or rape in police custody, the extent of trauma a person experiences is beyond the purview of law.

> *"Custodial violence" and abuse of police power is not only peculiar to this country, but it is widespread. It has been the concern of international community because the problem is universal and the challenge is almost global. The Universal Declaration of Human Rights in 1984, which market the emergency of worldwide trend of protection and guarantee of certain basic human rights, stipulates in Article 5 that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Despite the pious declaration, the crime continues unabated, though every civilised nation shows its concern and takes steps for its eradication."*

17. Fundamental rights occupy a place of pride in the India Constitution. Article 21 provides "no person shall be deprived of his life or personal liberty expect according to procedure established by law". Personal liberty, thus, is a sacred and cherished right under the Constitution. The expression "life of personal liberty" has been held to include the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries. Article 22 guarantees protection against arrest and detention in certain cases and declares that no person who is arrested shall be detained in custody without being informed of the grounds of such arrest and the shall not be denied the right to consult and defend himself by a legal practitioner of his choice. Clause (2) of Article 22 directs that the person arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the Magistrate. Article 20(3) of the Constitution lays down that a person accused of an offence shall not be compelled to be a witness against himself. These are some of the constitutional safeguard provided to a person with a view to protect his personal liberty against and unjustified assault by the State, In tune with the constitutional guarantee a number statutory provisions also seek to project personal liberty, dignity and basic human rights of the citizens. Chapter V. of Criminal Procedure Code, 1973 deals with the powers of arrest of a person and the safeguard which are required to be followed by the police to protect the interest of the arrested person. Section 41, Cr. P.C. confers powers on any police officer to arrest a person under the circumstances specified therein without any order or a warrant of arrest from a Magistrate. Section 46 provides the method and manner of

arrest. Under this Section no formality is necessary while arresting a person. Under Section 49, the police is not permitted to use more restraint than is necessary to permitted to use more restraint than is necessary to prevent the escape of the person. Section 50 enjoins every police officer arresting any person without warrant to communicate to him the full particulars of the offence for which he is arrested and the grounds for such arrest. The police officer is further enjoined to inform the person arrested that he is entitled to be released on bail and he may arrange for sureties in the event of his arrest for a non-bailable offence. Section 56 contains a mandatory provision requiring the police officer making an arrest without warrant to produce the arrested person before a Magistrate without unnecessary delay and Section 57 echoes Clause (2) of Article 22 of the Constitution of India. There are some other provisions also like Section 53, 54 and 167 which are aimed at affording procedural safeguards to a person arrested by the police. Whenever a person dies in custody of the police, Section 176 requires the Magistrate to hold and enquiry into the cause of death.

18. However, inspite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidence of torture and deaths in police custody has been a disturbing factor. Experience shows that worst violations of human rights take place during the course of investigation, when the police with a view to secure evidence or confession often resorts to third degree methods including torture and adopts techniques of screening arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation. A reading of the morning newspapers almost everyday carrying reports of dehumanising torture, assault, rape and death in custody of police or other governmental agencies is indeed depressing. The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the creditibility of the Rule of Law and the administration of criminal justice system.

19. The community rightly feels perturbed. Society's cry for justice becomes louder.

20. Custodial death is perhaps one of the worst crimes in a civilised society governed by the Rule of Law. The rights inherent in Articles 21 and 22(1) of the Constitution required to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture of cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchanism. No civilised nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal court of human rights jurisprudence. The answer, indeed, has to be an emphatic 'No'. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicted undertrials, detenues and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

21. Instances have come to out notice were the police has arrested a person without warrant in connection with the investigation of an offence, without recording the arrest, and the arrest person has been subjected to torture to extract information from him for the purpose of further investigation or for recovery of case property or for extracting confession etc. The torture and injury caused on the body of the arrestee has sometime resulted into his death. Death in custody is not generally shown in the records of the lock-up and every effort is made by the police

to dispose of the body or to make out a case that the arrested person died after he was released from custody. Any complaint against such torture or death is generally not given any attention by the police officers because of ties of brotherhood.

22. No first information report at the instance of the victim or his kith and kin is generally entertained and even the higher police officers turn a blind eye to such complaints. Even where a formal prosecution is launched by the victim or his kith and kin, no direct evidence is available to substantiate the charge of torture or causing hurt resulting into death as the police lock-up where generally torture or injury is caused is away from the public gaze and the witnesses are either police men or co- prisoners who are highly reluctant to appear as prosecution witness due to fear of retaliation by the superior officers of the police. It is often seen that when a complaint is made against torture, death or injury, in police custody, it is difficult to secure evidence against the policemen responsible for resorting to third degree methods since they are incharge of police station records which they do not find difficult to manipulate.

23. Consequently, prosecution against the delinquent officers generally results in acquittal. State of Madhya Pradesh Vs. Shyamsunder Trivedi & Ors. [1995 (3) Scale, 343] is an apt case illustrative of the observations made by us above. In that case, Nathu Bnjara was tortured at police station, Rampura during the interrogation. As a result of extensive injuries caused to him he died in police custody at the police station. The defence set up by the respondent police officials at the trial was that Nathu Banjara had been released from police custody at about 10.30 p.m. after interrogation 13.10.1986 itself vide entry EX. P/22A in the Roznamcha and that at about 7.00 a.m. on 14.10.1981, a death report Ex. P/9 was recorded at the police station, Rampura, at the instance of Ramesh respondent No. 6, to the effect that he had found "one unknown person" near a tree by the side of the tank riggling with pain in his chest and that as a soon as respondent No. 6 reached near him, the said person died. The further case set up by SI Trivedi, respondent No. 1, incharge of the police station was that after making a Roznamcha entry at 7.00 a.m. about his departure from the police station he (respondent No. 1- Shyamsunder Trivedi) and Constable Rajaram respondent proceeded to the spot where the dead body was stated to be lying for conducting investigation under Section 174 Cr.P.C. He summoned Ramesh Chandra and Goverdhan respondents to the spot and in their presence prepared a panchnama EX. P/27 of the dead body recording the opinion therein to the effect that no definite cause of death was known.

24. Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of a an offence but it must be remembered that the law does not permit use of third degree methods or torture of accused in custody during interrogation and investigation with that view to solve the crime. End cannot justify the means.

25. The interrogation and investigation into a crime should be in true sense purpose full to make the investigation effective. By torturing a person and using their degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No society can permit it.

34. Apex Court in the case of Shakila Abdul Gafar Khan vs. Vasant Raghunath Dhoble and another 2003 (7) SCC 749 has proceeded to make a mention that who are at the helm of affairs who proclaim from rooftops to be the defenders of democracy and protectors of people's rights and do not hesitate to condescend behind the screen to let loose their men in uniform to settle personal scores, reigning ignorance of what happens and pretending to be peace-loving puritans and saviours of citizens' rights. Relevant extract of said judgement is as follows:

"If it is assuming alarming proportions, now a days, all around it is merely on account of the devilish devices adopted by those at the helm of affairs who proclaim from roof tops to be the defenders of democracy and protectors of peoples' rights and yet do not hesitate to condescend behind the screen to let loose their men in uniform to settle personal scores, feigning ignorance of what happens and pretending to be peace loving puritans and saviours of citizens' rights.

Article 21 which is one of the luminary provisions in the Constitution of India, 1950 (in short the 'Constitution') and is a part of the scheme for fundamental rights occupies a place of pride in the Constitution. The Article mandates that no person shall be deprived of his life and personal liberty except according to the procedure established by law. This sacred and cherished right i.e. personal liberty has an important role to play in the life of every citizen. Life or personal liberty includes a right to live with human dignity. There is an inbuilt guarantee against torture or assault by the State or its functionaries. Chapter V of the Code of Criminal Procedure, 1973 (for short the 'Code') deals with the powers of arrest of persons and the safeguards required to be followed by the police to protect the interest of the arrested person. Articles 20(3) and 22 of the Constitution further manifest the constitutional protection extended to every citizen and the guarantees held out for making life meaningful and not a mere animal existence. It is therefore difficult to comprehend how torture and custodial violence can be permitted to defy the rights flowing from the Constitution. The dehumanizing torture, assault and death in custody which have assumed alarming proportions raise serious questions about the credibility of rule of law and administration of criminal justice system. The community rightly gets disturbed. The cry for justice becomes louder and warrants immediate remedial measures. This Court has in a large number of cases expressed concern at the atrocities perpetuated by the protectors of law. Justice Brandies's observation which have become classic are in following immortal words:

> *"Government as the omnipotent and omnipresent teacher teaches the whole people by its example, if the Government becomes a law breaker, it breeds contempt for law, it invites every man to become a law into himself". (in (1928) 277 U.S. 438, quoted in (1961) 367 U.S. 643 at 659)."*

The diabolic recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new and unwarranted peril because guardians of law destroy the human rights by custodial violence and torture and invariably resulting in death. The vulnerability of human rights assumes a traumatic torture when functionaries of the State whose paramount duty is to protect the citizens and not to commit gruesome offences against them, in reality perpetrate them. The concern which was shown in Raghubir Singh's case (supra) more than two decades back seems to have fallen to leaf ears and the situation does not seem to be showing any noticeable change. The anguish expressed in Gauri Shanker Sharma v. State of U.P. (AIR 1990 SC 709), Bhagwan Singh and Anr. v. State of Punjab (1992 (3) SCC 249), Smt. Nilabati Behera @Lalita Behera v. State of Orissa and Ors. (AIR 1993 SC 1960), Pratul Kumar Sinha v. State of Bihar and Anr. (1994 Supp. (3) SCC 100), Kewal Pati (Smt.) v. State of U.P. and Ors. (1995 (3) SCC 600), Inder Singh v. State of Punjab and Ors. (1995(3) SCC 702), State of M.P. v. Shyamsunder Trivedi and Ors. (1995 (4) SCC 262) and by now celebrated

decision in Shri D.K. Basu v. State of West Bengal (JT 1997 (1) SC 1) seems to have caused not even any softening attitude to the inhuman approach in dealing with persons in custody.

Rarely in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel alone who can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues - and the present case is an apt illustration - as to how one after the other police witnesses feigned ignorance about the whole matter."

35. Apex Court in the case of Sube Singh vs. State of Haryana and others 2006 (3) SCC 178 has taken note of custodial violence to be torture and third degree methods used by police during interrogation and has discussed in detail the reasons behind such practice and has also given preventive measures as to how such violence can be tackled. Relevant extract of said judgement is as follows:

"Unfortunately, police in the country have given room for an impression in the minds of public, that whenever there is a crime, investigation usually means rounding up all persons concerned (say all servants in the event of a theft in the employer's house, or all acquaintances of the deceased, in the event of a murder) and subjecting them to third-degree interrogation in the hope that someone will spill the beans. This impression may not be correct, but instances are not wanting where police have resorted to such a practice. Lack of training in scientific investigative methods, lack of modern equipment, lack of adequate personnel, and lack of a mindset respecting human rights, are generally the reasons for such illegal action. One other main reason is that the public (and men in power) expect results from police in too short a span of time, forgetting that methodical and scientific investigation is a time consuming and lengthy process. Police are branded as inefficient even when there is a short delay in catching the culprits in serious crimes.

The expectation of quick results in high-profile or heinous crimes builds enormous pressure on the police to somehow 'catch' the 'offender'. The need to have quick results tempts them to resort to third degree methods. They also tend to arrest "someone" in a hurry on the basis of incomplete investigation, just to ease the pressure. Time has come for an attitudinal change not only in the minds of the police, but also on the part of the public. Difficulties in criminal investigation and the time required for such investigation should be recognized, and police should be allowed to function methodically without interferences or unnecessary pressures. If police are to perform better, the public should support them, government should strengthen and equip them, and men in power should not interfere or belittle them. The three wings of the Government should encourage, insist and ensure thorough scientific investigation under proper legal procedures, followed by prompt and efficient prosecution. Be that as it may.

Custodial violence requires to be tackled from two ends, that is, by taking measures that are remedial and preventive. Award of compensation is one of the remedial measures after the event. Effort should be made to remove the very causes, which lead to custodial violence, so as to prevent such occurances. Following steps, if taken, may prove to be effective preventive measures:

a) Police training should be re-oriented, to bring in a change in the mindset and attitude of the Police personnel in regard to investigations, so that they will recognize and respect human rights, and adopt thorough and scientific investigation methods.

b) The functioning of lower level Police Officers should be continuously monitored and supervised by their superiors to prevent custodial violence and adherence to lawful standard methods of investigation.

c) Compliance with the eleven requirements enumerated in D.K. Basu (supra) should be ensured in all cases of arrest and detention.

d) Simple and fool-proof procedures should be introduced for prompt registration of first information reports relating to all crimes.

e) Computerization, video-recording, and modern methods of records maintenance should be introduced to avoid manipulations, insertions, substitutions and ante-dating in regard to FIRs, Mahazars, inquest proceedings, Port-mortem Reports and Statements of witnesses etc. and to bring in transparency in action.

f) An independent investigating agency (preferably the respective Human Rights Commissions or CBI) may be entrusted with adequate power, to investigate complaints of custodial violence against Police personnel and take stern and speedy action followed by prosecution, wherever necessary.

The endeavour should be to achieve a balanced level of functioning, where police respect human rights, adhere to law, and take confidence building measures (CBMs), and at the same time, firmly deal with organized crime, terrorism, white-collared crime, deteriorating law and order situation etc."

36. Apex Court in the case of Prithipal Singh and others vs. State of Punjab and another 2012 (1) SCC 10 has considered that the State has to protect the victim of torture and State cannot be permitted to negate such a right. Relevant extract of said judgement is as follows:

"Police atrocities in India had always been a subject matter of controversy and debate. In view of the provisions of Article 21 of the Constitution, any form of torture or cruel, inhuman or degrading treatment is inhibited. Torture is not permissible whether it occurs during investigation, interrogation or otherwise. The wrong-doer is accountable and the State is responsible if a person in custody of the police is deprived of his life except in accordance with the procedure established by law.

However, when the matter comes to the court, it has to balance the protection of fundamental rights of an individual and duties of the police. It cannot be gainsaid that freedom of an individual must yield to the security of the State. Latin maxim salus populi est suprema lex - the safety of the people is supreme law; and salus reipublicae suprema lex - safety of the State is supreme law, 14 co-exist. However, the doctrine of the welfare of an individual must yield to that of the community.

The right to life has rightly been characterised as "`supreme' and `basic'; it includes both so-called negative and positive obligations for the State". The negative obligation means the overall prohibition on arbitrary deprivation

of life. In this context, positive obligation requires that State has an overriding obligation to protect the right to life of every person within its territorial jurisdiction. The obligation requires the State to take administrative and all other measures in order to protect life and investigate all suspicious deaths.

The State must protect victims of torture, ill-treatment as well as the human rights defender fighting for the interest of the victims, giving the issue serious consideration for the reason that victims of torture suffer enormous consequences psychologically. The problems of acute stress as well as a post-traumatic stress disorder and many other psychological consequences must be understood in correct perspective. Therefore, the State must ensure prohibition of torture, cruel, inhuman and degrading treatment to any person, particularly at the hands of any State agency/police force.

In addition to the protection provided under the Constitution, the Protection of Human Rights Act, 1993, also provide for protection of all rights to every individual. It inhibits illegal detention. Torture and custodial death have always been condemned by the courts in this country. In its 113th report, the Law Commission of India recommended the amendment to the Indian Evidence Act, 1872 (hereinafter called "Evidence Act"), to provide that in case of custodial injuries, if there is evidence, the court may presume that injury was caused by the police having the custody of that person during that period. Onus to prove contrary is on the police authorities. Law requires for adoption of a realistic approach rather than narrow technical approach in cases of custodial crimes."

38. Apex Court in the case of People's Union for Civil Liberties and another vs. State of Maharashtra and others 2014 (10) SCC 635 has clearly mentioned that Article 21 of Constitution of India guarantees "right to live with human dignity" and any violation of human rights is viewed seriously. Relevant extract of said judgement is as follows:

"Article 21 of the Constitution of India guarantees "right to live with human dignity". Any violation of human rights is viewed seriously by this Court as right to life is the most precious right guaranteed by Article 21 of the Constitution. The guarantee by Article 21 is available to every person and even the State has no authority to violate that right.

In some of the countries when a police firearms officer is involved in a shooting, there are strict guidelines and procedures in place to ensure that what has happened is thoroughly investigated. In India, unfortunately, such structured guidelines and procedures are not in place where police is involved in shooting and death of the subject occurs in such shooting. We are of the opinion that it is the constitutional duty of this Court to put in place certain guidelines adherence to which would help in bringing to justice the perpetrators of the crime who take law in their own hands.

Article 21 of the Constitution provides "no person shall be deprived of his life or personal liberty except according to procedure established by law". This Court has stated time and again that Article 21 confers sacred and cherished right under the Constitution which cannot be violated, except according to procedure established by law. Article 21 guarantees personal liberty to every single person in the country which includes the right to live with human dignity.

In line with the guarantee provided by Article 21 and other provisions in the Constitution of India, a number of statutory provisions also seek to

protect personal liberty, dignity and basic human rights. In spite of Constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, the cases of death in police encounters continue to occur. This Court has been confronted with encounter cases from time to time. In Chaitanya Kalbagh3, this Court was concerned with a writ petition filed under Article 32 of the Constitution wherein the impartial investigation was sought for the alleged killing of 299 persons in the police encounters. The Court observed that in the facts and circumstances presented before it, there was an imperative need of ensuring that the guardians of law and order do in fact observe the code of discipline expected of them and that they function strictly as the protectors of innocent citizens.

We are not oblivious of the fact that police in India has to perform a difficult and delicate task, particularly, when many hardcore criminals, like, extremists, terrorists, drug peddlers, smugglers who have organized gangs, have taken strong roots in the society but then such criminals must be dealt with by the police in an efficient and effective manner so as to bring them to justice by following rule of law. We are of the view that it would be useful and effective to structure appropriate guidelines to restore faith of the people in police force. In a society governed by rule of law, it is imperative that extra-judicial killings are properly and independently investigated so that justice may be done."

30. The issue of custodial violence was the subject-matter of a recent decision of the Hon'ble Supreme Court in ***Dr. Rini Johar and another versus State of M.P. and others AIR 2016 SC 2679*** wherein the Hon'ble Supreme Court recapitulated the earlier law laid down by it in the following manner:-

"18. In D.K. Basu v. State of W.B.(1997) 1 SCC 416, after referring to the authorities in Joginder Kumar (supra), Nilabati Behera v. State of Orissa (1993) 2 SCC 746 and State of M.P. v. Shyamsunder Trivedi (1995) 4 SCC 262 the Court laid down certain guidelines to be followed in cases of arrest and detention till legal provisions are made in that behalf as preventive measures. The said guidelines read as follows:-

"(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives

outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."

31. Late Mr.Justice V.R.Krishna Iyer in 'Random Reflections' had said:-

"*Policing, like justicing, has therefore to be at the service of the people commanding the credibility of the community at large without fear or favour, affection or ill-will. Independence and accountability with commitment to the Rule of law, are as much the non-negotiable qualities of the invigilating, investigating police force of the 'robed brethern' on the bench. If the investigative process fails, if the police presence to guard Law and Order is not functionally successful, the adjudicatory apparatus collapses and our adversarial system of justice becomes dysfunctional. The safety of society, sans police integrity, accountability, transparency and efficiency, suffers illusion and unreality."*

32. Adverting to the facts of the case, not only is the conduct of respondent No.5 not above board, but even the then SDM, who conducted the inquiry has not at all been fair to the record and has rather acted as an expert over the medical evidence simply in order to exonerate respondent No.5. This is clearly evident from the report submitted by the SDM wherein he observed as under:-

"From the above stated findings, I am of the opinion that the any perforation in the ear, as opined by the doctor can not be conclusively decided to be caused by a grievous hurt until and unless the condition laid out in section 320 of the IPC are met with. The complainant Sh.Amit Sood has not suffered a permanent impairment of right ear as given as third condition nor has he suffered destruction of permanent impairment of ear. The dislocation which has been opined by Dr.Manish Saroch has not been observed by the Medical Board. As far as the hurt which

endangers life is concerned, it is such a wide term that if not interpreted properly will not leave any hurt out of the scope of grievous hurt. For the reasons above since there is some difference of opinion between Dr. Manish Saroch ENT Specialist and Medical Board with regard to the handle of melleus, tuning fork test for assessment of hearing loss and as it has been advised by the medical board to approach the higher institution for audiometry so as to ascertain the exact loss, I am of the opinion that it can not be convincingly established that the nature of injury suffered is grievous in nature in the absence of unimpeachable medical testimony which can only be arrived after conducting audiometry test on the complainant. Hence the point No-1 is decided in negative."

33. The only apparent reason given by the SDM for disbelieving the version of the petitioner that he had suffered injury on account of beatings given by respondent No.5 reads thus:-

"------The Rapat No-35 dated 24-08-2005 which has been written by SP Kangra clearly reveals that the complainant told SP Kangra that he has been beaten up by Inspector Jaswal and some other police official. But where as in his statement dated 31-08-2005 the complainant has categorically denied any beating by other police officials. He has specifically mentioned that SHO Jaswal has beaten him up not the other police official where as in the police station before SP Kangra (Rapat No-35) he has alleged to have been beaten up by SHO Jaswal and other police officials also which contradicts his statements before the inquiry officer. This contradiction in the statement of the complainant before the SP Kangra & before the inquiry officer, throws a ring of suspicion about the complaint of the complainant and no irresistible conclusion can be drawn regarding the guilt of Inspector RP Jaswal.

-----Moreover the complainant has deposed that Inspector RP Jaswal has beaten him up on the ear with slaps, kicks and leather belt but there is no trace of external injury on the ear or associated areas as per the medical opinion of ENT expert and the Medical Board (Annexure A40 question no.2) and (Annexure A41 question no.5). The complainant alleges that the injury in the ear has been caused by beating in the ear by Inspector Jaswal with slaps, kicks & leather belt but the experts opine no external injury on the right ear. There is remotest possibility that if a person has been beaten up with slaps, kicks and leather belt on the ear, he will have no injury mark on the ear and in the absence of such medical testimony, no confidence can be inspired and the guilt of Inspector Jaswal can not be conclusively established. Under such circumstance it can not be proved that the injury which caused perforation in the right ear of complainant Amit Sood has been caused by beating by Inspector Jaswal in the PS."

34. The aforesaid reasonings are clearly two far-fetched and contrary to the records. The SDM was not an expert in the medical field and as already observed above, once the petitioner was hale and hearty and there was no record to prove that he had an old wound perforation of the ear, then the presumption was that the petitioner had suffered injury while in custody between 10.30 p.m. on 24.08.2005 to 12.20 a.m. on 25.08.2005 and heavy onus lay upon respondent No.5 to rebut this presumption which unfortunately he has failed to rebut. Rather, respondent No.5 continued to give different versions regarding the injuries sustained by the petitioner.

35. The inquiry report submitted by the SDM, to say the least, is clearly one sided and is an apparent attempt to shield respondent No. 5 with a biased mind. It would have been more appropriate if the concerned SDM had atleast called the petitioner and his father and thereafter made sincere efforts to find the truth, rather than straightaway come to the conclusion that the petitioner had come up with false allegations and that there was no act of torture, harassment from the side of respondent No.5. To say the least, the SDM, who conducted the

inquiry has not acted with high probity and expected candour and has failed to meet the requisites of fairness while conducting inquiry.

36. What amazes this Court is the fact that it is the specific case of respondent No.5 that the whole incident relating to the arrest of the petitioner had been videographed. However, strangely enough, the said record of videography which could have been the best evidence to support the plea of respondent No.5 has been conveniently withheld from this Court constraining this Court to draw an adverse inference against the respondents, particularly, respondent No.5.

37. However, even having prima facie concluded that the petitioner had suffered injury while he was in custody of respondent No.5, such findings can only be said tentative for want of conclusive proof. A firm finding of fact in such like cases by a constitutional Court can be returned only in exceptional cases and even while these observations are founded upon material on record, nonetheless they remain only tentative for want of conclusive proof. No doubt, in the case in hand, the allegations are serious, even the circumstances somewhat seem to support them, even the consequences are quite apparent, yet the material on record is not within the decree of conclusive proof on the basis of which firm findings of fact can be returned. These, at best, may give rise to a strong suspicion, yet cannot be held to be conclusive. The truth must surface in the interest of those, who are accusing and/or are being accused, therefore, to reach a definite conclusion, the investigation and disciplinary proceedings are inevitable whereafter alone the guilt, if any, of respondent No.5 can be established. If such a course is not followed, then in teeth of such firm findings regarding the guilt of respondent No.5 are returned, then no subordinate Court or even the disciplinary authority would dare to go beyond these findings.

38. Identical issue came up for consideration before a learned Division Bench of this Court in ***State of Himachal Pradesh and another*** *versus* ***Sakshi Sharma etc. and others 2014 (Supp) Shim. LC 563*** wherein it was held as under:-

> *"11. It has to be remembered that while exercising the powers of a Constitutional Court a firm finding of fact in such like case can be returned only in exceptional cases. The observations made by the learned Single Judge may though be founded upon the material on record, nonetheless they remain only tentative for want of conclusive proof and at best can be termed to be prima facie views only. No doubt, in the case in hand, the allegations are serious, even the circumstances somewhat seem to support them, even the consequences are quite apparent, yet the material on record is not within the degree of conclusive proof on the basis of which firm findings of fact could have been returned. These at best may have given rise to a strong suspicion, but yet could not have been held to be conclusive. The truth must surface in the interest of those who are accusing and/or are being accused, therefore, to reach a definite conclusion, the investigation and disciplinary proceedings are inevitable whereafter alone the guilt, if any, of the police officials can be established.*
>
> *12.This Court otherwise cannot be oblivious to the fact that in teeth of such firm findings as recorded by the learned Single Judge, no subordinate court or even the disciplinary authority would dare to go beyond these findings. More so when the order passed by the learned Single Judge does not even state that the findings as recorded are only tentative or prima-facie. Obviously, therefore, the findings so recorded in our considered view amounts to pre-judging the issues because the matter is pending investigation/disciplinary proceedings and it is possible that on its conclusion the Court /disciplinary authority may have sufficient material with it on the basis of which whatever has been said in the judgment could be sustained. However, it is equally possible that the material which the Court/ disciplinary authority may collect may not be enough to substantiate those allegations. When both the possibilities are there, the learned Single Judge should not have returned firm findings at this pre-mature stage."*

39. Nonetheless, it has to be remembered that whenever human dignity is wounded, civilization takes a step backward. It is a collective assault on human dignity which cannot be tolerated and, in such circumstances, I have no option but to direct respondents No.1 to 3 to register a criminal case against respondent No.5 and, at the same time, direct departmental proceedings against respondent No.5. Needless to observe that since respondent No.5 is admittedly an Inspector rank police official, these proceedings/inquiry shall be conducted by a high ranking Officer of the Police, not below the rank of Superintendent of Police.

40. Coming to the question of compensation, the same can only be awarded if the guilt of respondent No.5 is established in the aforesaid criminal and departmental proceedings.

41. In view of the aforesaid discussion, the petition is partly allowed and respondents No.1 to 3 are directed to register a criminal case as also initiate disciplinary proceedings against respondent No.5 to be conducted by an Officer not below the rank of Superintendent of Police and conclude the same as expeditiously as possible and in no event later than **31st March, 2017.** Respondents No.1 to 3 are directed to initiate criminal proceedings against respondent No.5 by lodging FIR and thereafter take the same to its logical end within the aforesaid period i.e. 31.03.2017.

42. The petition is disposed of in the aforesaid terms, so also the pending applications, if any.

****

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

Chander Dev ...Appellant/Defendant.
Versus
Roshan Lal & others ... Plaintiffs/respondents.

RSA No. 357 of 2007.
Reserved on 1.9.2016.
Decided on: 21.9.2016.

Indian Succession Act, 1925- Section 63- Suit land was earlier owned by K who died intestate- defendants No. 1 and 2 got attested mutation of inheritance on the basis of bogus Will stated to have been executed by K- suit was opposed by the defendants by filing written statement pleading that K had executed a Will in favour of the defendants No. 1 and 2- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that propounder of the Will had played an active role in the execution of the Will- PW-4 stated that Will was already written prior to his arrival and the testator had not put his signatures in his presence- it was upon the propounder to remove the suspicious circumstances surrounding the execution of the Will- original Will was not produced and the reason for withholding it was also not satisfactory- no presumption can be drawn by the registration of the Will- Courts had rightly held that execution of the Will was not proved- appeal dismissed. (Para-13 to 27)

Cases referred:

H. Venkatachala Iyengar Vs. B.N. Thimmajamma, AIR 1959 SC 443
S.R. Srinivasa and others Vs. S. Padmavathamma, (2010) 5 Supreme Court Cases 274
Bharpur Singh and others Vs. Shamsher Singh, (2009) 3 Supreme Court Cases 687
Kashibai and another Vs. Parwatibai and others, 1996 (1) S.L.J. 315

For the appellant. : Mr. Sanjeev Kuthiala, Advocate.
For respondents No.1 to 4. : Mr. G.R. Palsra, Advocate.
For remaining respondents : None.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

This appeal has been filed by appellants/defendants against the judgment and decree passed by the Court of learned District Judge, Kullu in Civil Appeal No. 93 of 2005 dated 29.6.2007 vide which, learned appellate court while upholding the judgment and decree passed by the Court of learned Civil Judge (Jr. Division), Manali in Civil Suit No. 38 of 2004/148 of 2000 dated 18.10.2005, dismissed the appeal filed against the same by the appellants.

2. This appeal was admitted on 5.12.2008, on the following substantial questions of law:-

> "Whether on proper construction and interpretation of the registered Will Ext. DW1/A, it could be held that it was the last Will of the testator and valid presumption of a valid execution and disposition by the testator in favour of the beneficiary was to be raised?
>
> Whether on the basis of an application being allowed under Section 65 of the Indian Evidence Act to lead secondary evidence, the certified copy of the registered Will was sufficient to have proved that the Will was validly executed and registered, the certified copy being compared with the copy of the Sub Registrar and duly proved by the Sub Registrar regarding the attestation of the same and whether such mode of proof was not sufficient as observed the courts below?
>
> Whether the endorsement by the Sub Registrar that the executant had acknowledged the execution before him amounts to attestation and whether such attestation holding the signatures and thumb impression of the identifying witness, testator and the attesting witness is sufficient to discharge the onus of proof?
>
> Whether, on the collusion of the attesting witness with the other party, the Sub Registrar can be taken to be an attesting witness and treated as such for the purpose of proving the execution of the Will, and the onus on the propounder stands discharged?"

3. Brief facts necessary for adjudication of the present case are that a suit was filed by respondents/plaintiffs (hereinafter to be referred as "the plaintiffs") to the effect that suit land measuring 17-8-5 bighas which was owned and possessed by Smt. Kamla was inherited after her death by plaintiffs No.1 to 4 and defendants No.1 and 4 in equal shares as absolute owners thereof. Smt. Kamla was widow of Sh. Narain Dass who was real brother of the father of plaintiffs and defendants No.1 and 4. As per plaintiffs, they along with defendants No.1 and 4 and their father Lal Dass and Narain Dass and Kamla Devi lived jointly and constituted a joint family. As per plaintiffs, Kamla Devi lived with them and defendants No.1 and 4 and it was only the plaintiffs who rendered their services and maintained her and also cultivated the suit land. Kamla Devi died intestate on 14.11.1997 and her last rites were performed by defendant No.4. Thereafter the suit property was inherited by plaintiffs and defendants No.1 and 4 in equal shares being heirs of the deceased and thereafter they became owners in possession of the suit land. As per plaintiffs, defendant No.1 was a clever person and with his ulterior motive to grab the shares of plaintiffs in connivance with revenue officials and defendant No.2, he managed the mutation of deceased Kamla Devi behind the back of the plaintiff in his favour and in favour of defendant No.2 which was wrong and illegal. Further as per plaintiffs, since the last week of July, 2000, defendant No.1 started proclaiming himself that he was the sole heir of deceased Kamla Devi where-after plaintiffs made inquiries which revealed that said defendant behind their back and without any notice to them had managed the attestation of mutation of the suit land in his own name and in the name of defendant No.2 on the basis of one bogus Will. According to plaintiffs, Kamla Devi died intestate and she had not executed any Will nor there was any occasion for her

to execute the same. According to plaintiffs, Will dated 24.1.1994 was bogus and fictitious and the same had been set up and forged by defendants No.1 and 2 with an ulterior motive to grab the share of plaintiffs in connivance with the scribe and marginal witnesses after the death of Kamla Devi. It was further the case of plaintiffs that Mutation No. 1294 was illegal, void and inoperative and plaintiffs were not bound by the same. On these bases that the suit was filed by plaintiffs.

4. The claim as put-forth in the plaint was denied by defendants No.1 and 2. It was denied by said defendants in the written statement that Kamla Devi had died intestate. As per defendants deceased Kamla Devi had executed registered Will dated 24.1.1994 in favour of defendants No.1 and 2 and her last rites were performed by defendants No.1 and 2. It was denied by defendants that after the death of Kamla Devi, suit land was inherited by plaintiffs and defendant No.1 and 4 in equal shares. Defendants also justified the mutation which was attested in their favour based on the Will which was executed in their favour by Kamla Devi. It was denied by defendants that Will which was executed in their favour by Kamla Devi was a bogus Will. According to said defendants, after the death of Narain Dass, Kamla Devi brought defendant No.2 to her house who at the relevant time was studying in 4th Class and firstly they were brought up, educated and maintained by Kamla Devi and her husband and when he became major along with defendant No.1, both of them rendered services to Kamla Devi and also managed her household and agricultural affairs. According to defendants, plaintiffs had never rendered any services to Kamla Devi and Will dated 24.1.1994 had been executed by her in favour of defendants No.1 and 2 out of love and affection and in lieu of services rendered by them to her.

5. On the basis of pleadings of the parties and material placed on record, the learned Trial Court framed the following issues:-

> "1.Whether the parties are joint owners in possession of the suit land, as alleged ? OPP.
>
> 2. Whether the plaintiffs have got no locus standi and cause of action to file the present suit? OPD 1 and 2.
>
> 3. Whether suit is bad for non joinder of necessary parties? OPD 1 and 2.
>
> 4. Whether suit has not been properly valued for the purpose of Court fee and jurisdiction? OPD 1 and 2.
>
> 5. Whether Smt. Kamla Devi-deceased executed a valid and last Will dated 24.1.1994 in favour of defendants No.1 and 2? OPD 1 and 2.
>
> 6. Relief"

6. The learned Trial Court returned the following findings on the said issues:-

> "Issue No.1 : Yes.
>
> Issue No.2 : No.
>
> Issue No.3 : No.
>
> Issue No.4 : No.
>
> Issue No.5 : No.
>
> Relief : The suit is decree, per operative part of the judgment."

7. Accordingly, learned trial court vide its judgment dated 18.10.2005 decreed the suit of the plaintiffs by holding that the plaintiffs and defendants No.1 and 4 were jointly owners in possession of land measuring 17-8-5 bighas subject matter of the suit being legal heirs of deceased Kamla Devi. It was further held by learned trial court that mutation No. 1294 was wrong, illegal and void and mutations No. 1338 and 1339 were also wrong, illegal and void.

8. Feeling aggrieved by the said judgment and decree passed by learned trial court, defendants therein filed an appeal. Learned appellate court vide its judgment and decree dated

29.6.2007 while upholding the judgment and decree passed by learned trial court dismissed the appeal so filed by the defendants. It is pertinent to mention that plaintiffs had also filed cross-objections against the judgment and decree passed by learned trial court and the said cross-objections were also dismissed by learned appellate court.

9. The judgment and decree so passed by learned trial court in favour of the plaintiffs and upheld in appeal by learned appellate court is challenged by the appellants/defendants by way of this appeal.

10. According to Mr. Sanjeev Kuthiala, learned counsel for the appellant, the finding so returned by both the learned courts below are erroneous and not sustainable. According to Mr. Kuthiala the execution of the Will in issue stood duly proved in consonance with the provisions of Section 63 of the Indian Succession Act and this very important aspect of the matter had been ignored by both the learned courts below. He further argued that both the learned courts below had erred in not appreciating that application filed under Section 65 of the Indian Evidence Act was allowed by the learned trial court vide order dated 21.5.2004.

11. On the other hand it was submitted by Mr. G.R. Palsra learned counsel for respondents No.1 to 4 that the factum of there not being any valid Will executed by late Smt. Kamla in favour of defendants No.1 and 2 stood concurrently decided in favour of the present appellant and the said finding returned by both the learned courts below did not warrant any interference in the second appeal. Mr. Palsra further argued that even otherwise, there is no infirmity with the findings returned in this regard by both the learned courts below because the execution of the Will in issue could not be proved by the defendants as was rightly held by both the learned courts below. Mr. Palsra further submitted that there was no question of presumption of valid execution and disposition of the testator in favour of beneficiary when the suspicion surrounding the execution of the Will could not be explained satisfactorily by the propounder of the Will. Accordingly, he argued that there was no merit in the appeal and the same be dismissed.

12. I have heard learned counsel for the parties and also gone through the records of the case as well as judgments and decrees passed by both the courts below.

13. In the present case there is a concurrent finding recorded by both the learned courts below to the effect that Kamla Devi never executed any Will dated 24.1.1994 in favour of defendants No.1 and 2. The Will in issue is on record as Ext. DW1/A. The Will bears the signatures of the testator Kamla Devi. The scribe of the Will was Mansukh and Dhayan Singh was the marginal witness of the execution of the said Will.

14. Mansukh has entered the witness box as DW3 and he has stated that he has seen the second copy of Will and this Will was scribed by him on the asking of Kamla Devi. He has further deposed that the Will was read over to Kamla Devi and after accepting the contents thereof to be correct, she had appended her signatures on the original Will as well as the second copy of the same. He further stated that witness had also appended signatures in the presence of Kamla Devi. He further stated that at the relevant time Kamla Devi was in sound and disposing state of mind and she was in a position to understand what was good and bad for her. In his cross-examination he admitted it to be correct that in the second copy he had not written that the same was true copy of the original. He further stated that he cannot say that second copy was the true copy of the original or not.

15. Dhayan Singh entered the witness box as DW4 and this witness deposed that Kamla Devi had got one Will scribed through Mansukh and that he had seen the second copy of the same. This witness further stated that the Will was read over and after understanding the contents thereof, Kamla Devi had appended her signatures on the same and thereafter he had also signed the same. He stated that he appended his signatures in the presence of Kamla Devi and she was in a sound and disposing state of mind. In his cross-examination this witness deposed that he came after some time of the scribing of the Will. He further stated that he reached the Tehsil on that day between 1:30 and 2:00 p.m. He further stated that he had come there because of his own work. He further admitted in his cross-examination that Kamla Devi did

not append her signatures Mark Y, Mark Z and Mark Z1 on Ext. DW1/A in his presence. This witness further stated in his cross-examination that he was asked to be a witness to the execution of the Will by Keshav and he had become a witness to the same on the asking of Keshav and he did not know Kamla Devi. He further stated that Keshav met him in the Tehsil. Another important thing which is stated in his cross-examination was that the Will in fact already stood scribed before he reached there and after his arrival only his name and address was written.

16. Section 63 of the Indian Succession Act clearly lays down that every testator shall execute his/her Will according to the following rules:-

> *(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.*
>
> *(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.*
>
> *(c) The will shall he attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."*

17. Coming to the facts of the present case, it has clearly and categorically come in the testimony of DW4 that the Will in issue was already scribed when he reached and after his arrival only his name and address were scribed on the Will. He further stated in his cross-examination that the testator of the Will did not append her signatures on the same in his presence. In the present case it is apparent that the propounder of the Will Keshav had played an active role in the execution of purported Will Ext. DW1/A.

18. It has been held by the Hon'ble Supreme Court in ***H. Venkatachala Iyengar*** *Vs.* ***B.N. Thimmajamma***, ***AIR 1959 SC 443***, that in the cases in which execution of the Will is surrounded by suspicious circumstances, it may raise a doubt as to whether the testator was acting of her own free will. The Hon'ble Supreme Court has further held that in such circumstances, the initial onus is on the propounder to remove all reasonable doubts in the matter. The presence of suspicious circumstances makes initial onus heavier. Such suspicion cannot be removed by the mere assertion of the propounder that the Will bears signature of the testator or that the testator was in a sound and disposing state of mind at the time when the Will was made.

19. In the present case, the propounder of the Will has failed to discharge this initial onus as she has not been able to remove all reasonable doubts in the matter. Though the purpose of the Will is to deprive the natural heirs from the devolution of the property as per natural succession, however, if the Will is suspicious, then the onus is upon the propounder of the Will to remove that suspicion and if the propounder succeeds in removing the suspicious circumstances, then the Court has to give effect to the Will, even if it has cut off whole or in part near relations.

20. It is a matter of record that in the present case the original Will was not produced by the defendants and in fact they led secondary evidence in order to prove the execution of Will, Ext. DW4/A, by stating that the original Will was lost. In this regard, it is relevant to refer to the averments which were made by the defendants in the application which was filed under Section 65 of the Indian Evidence Act for permitting them to lead secondary evidence.

21. Para 3 and 4 of the said application read as under:-

> *"3. That after the execution and registration of the aforesaid Will dated 24.1.1994, the same was kept in safe custody by the defendants No.1 and 2 and after the death of*

Smt. Kamla Devi, the estate left by her has been inherited by the defendants No.1 and 2 on the basis of the aforesaid Will and the mutation to this effect has also been attested and sanctioned in favour of the defendants No.1 and 2.

4. That the original Will dated 24.1.1994 executed by said Kamla Devi during her life time, is now lost and the defendants tried their level best to trace out the same but the same is not traceable as such the defendants No.1 and 2 are not in a position to produce the aforesaid original Will dated 24.1.1994."

22. However, Keshav Ram who entered the witness box as DW2 stated in his cross-examination that the original Will was with him and thereafter he stated that he had handed it over to the Advocate. Application for permission to lead additional evidence is dated 21.4.2004. DW2 Keshav Ram entered the witness box on 17.8.2004. Learned trial Court allowed the application filed by the defendants to lead additional evidence vide order dated 21.5.2004. The only conclusion which can be drawn from what has been discussed above is that either the averments which were made in the application filed by defendants for permitting them to lead secondary evidence were incorrect and wrong or the statement made by DW2 in the Court was incorrect and wrong. However, keeping in view the fact that DW2 had entered the witness box subsequently then the filing of application by the defendants to lead secondary evidence, it is apparent that the application which was filed by the defendants for permitting them to lead secondary evidence were based on incorrect facts.

23. Be that as it may, it remains a matter of fact that the original Will was not produced by defendants on the pretext that the same was lost but Keshav Ram in his cross examination categorically stated that the Will was in his possession and thereafter he stated that the same was handed over to him by his Lawyer. The only conclusion which can only be drawn from the said conduct of the defendants is that the original Will was purposely withheld by them from the Court and this itself becomes a suspicious circumstance regarding the execution of the Will which in my considered view defendants miserably failed to dispel.

24. Further coming to Will, Ext. DW1/A, in his cross examination Mansukh who entered the witness box as DW3 has deposed that he cannot say that the second copy of the Will was true copy of the original Will, therefore, in this view of the matter also in my considered view defendants were not able to remove the suspicion circumstances surrounding the Will. Perusal of judgments passed by both the learned courts below will demonstrate that both the learned courts below have taken into consideration the evidence on record and after discussing the same in detail they have come to the conclusion that defendants could not prove that Will Ext. DW1/A was a valid Will executed by Kamla Devi in their favour. It cannot be said that the findings so arrived at by the learned courts below are either perverse or not borne out from the records. The contention of the learned counsel for the appellant that because the Will in issue is a registered Will, therefore, presumption is in favour of the said Will that it is a validly executed Will also deserves rejection because the document in issue was registered in itself is not sufficient to dispel all the other related suspicious circumstances regarding the validity of the Will. In my considered view had the defendants been able to dispel the suspicious circumstances surrounding the execution of the Will then the factum of the said Will being a registered document would they had come to their rescue in the absence of the original Will being on record. However in the present case the appellant/defendants have miserably failed to prove that Ext. DW1/A was a validly executed Will by Kamla Devi in their favour.

25. The Hon'ble Supreme Court in **S.R. Srinivasa and others** Vs. **S. Padmavathamma,** (2010) 5 Supreme Court Cases 274 held as under:-

*"This Court in **Iyengar** case had clearly held that cases in which the execution of the will is surrounded by suspicious circumstances, it may raise a doubt as to whether the testator was acting of his own free will. In such circumstances it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter. The presence of suspicious circumstances makes initial onus heavier. Such suspicion cannot be removed by the mere assertion of the propounder that the will bears*

signature of the testator or that the testator was in a sound and disposing state of mind at the time when the will was made"

26. The Hon'ble Supreme Court in ***Bharpur Singh and others*** *Vs.* ***Shamsher Singh***, (2009) 3 Supreme Court Cases 687 has held as under:-

"14. The legal principles in regard to proof of a will are no longer res integra. A will must be proved having regard to the provisions contained in clause (c) of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872, in terms whereof the propounder of a will must prove its execution by examining one or more attesting witnesses. Where, however, the validity of the Will is challenged on the ground of fraud, coercion or undue influence, the burden of proof would be on the caveator. In a case where the Will is surrounded by suspicious circumstances, it would not be treated as the last testamentary disposition of the testator.

15. This Court in H. Venkatachala Iyengar vs. B.N. Thimmajamma opined that the fact that the propounder took interest in execution of the Will is one of the factors which should be taken into consideration for determination of due execution of the Will. It was also held that: (AIR p. 451, para 19)

> *one of the important features which distinguishes Will from other documents is that the Will speaks from the date of death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator.*

16. In H. Venkatachala case, it was also held that the propounder of will must prove:

> *(i) that the Will was signed by the testator in a sound and disposing state of mind duly understanding the nature and effect of disposition and he put his signature on the document of his own free will, and*
>
> *(ii) when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of propounder, and*
>
> *(iii) If a Will is challenged as surrounded by suspicious circumstances, all such legitimate doubts have to be removed by cogent, satisfactory and sufficient evidence to dispel suspicion. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts indicated therein.*

It was moreover held: (H. Venkatachala case, AIR p. 452, para 20)

> *"20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as*

the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter."

17. This Court in Niranjan Umeshchandra Joshi vs. Mrudula Jyoti Rao held: (SCC pp. 447-48, paras 33-34)

"33. The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. [See Madhukar D. Shende v. Tarabai Aba Shedage and Sridevi v. Jayaraja Shetty.) Subject to above, proof of a Will does not ordinarily differ from that of proving any other document.

34. There are several circumstances which would have been held to be described (sic) by this Court as suspicious circumstances:

(i) When a doubt is created in regard to the condition of mind of the testator despite his signature on the Will;

(ii) When the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;

(iii) Where propounder himself takes prominent part in the execution of Will which confers on him substantial benefit.

[See H. Venkatachala Iyengar v. B.N. Thimmajamma and T.K. Ghosh's Academy v. T.C. Palit.]"

27. The Hon'ble Supreme Court in **Kashibai and another** Vs. **Parwatibai and others**, 1996 (1) S.L.J. 315 has held as under:-

11. Here we may also take note of the definition of the expression "attested" as contained in Section 3 of the Transfer of Property Act which reads as under:-

"3. attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

Having regard to the afore-mentioned definition an attesting witness is a person who in the presence of an executant of a document puts his signature or mark after he has either seen the executant himself or someone on direction of the executant has put his signature or affixed his mark on the document so required to be attested or after he has received from the executant a personal acknowledgement of his signature or mark or the signature or mark of such other person. In the present case the trial Court after a

close scrutiny and analysis of the evidence of the defendant No. 1, Smt. Parvati Bai, Vir Bhadra. Sheikh Nabi. Shivraj and Gyanoba Patil who are witnesses to the will recorded the finding that none of them deposed that Lachiram had signed the said will before them and they had attested it. None of them except Sheikh Nabi even deposed as to when the talk about the execution of will was held. The witness Sheikh Nabi, however, deposed that the talk about the will also took place at the time of the talk about the adoption. But this witness too did not depose that deceased Lachiram had signed the alleged will in his presence. In the absence of such evidence it is difficult to accept that the execution of the alleged will was proved in accordance with law as required by Section 68 of the Evidence Act read with Section 63 of the Indian Succession Act and Section 3 of the Transfer of Property Act. It may be true as observed by the High Court that law does not emphasis that the witness must use the language of the Section to prove the requisite merits thereof but it is also not permissible to assume something which is required by law to be specifically proved. The High Court simply assumed that Lachiram must have put his signature on the will Deed in the presence of the attesting witness Sheikh Nabi simply because the Deed of Adoption is admitted by the witness to have been executed on the same day. The High Court committed a serious error in making the observations that broad parameters of Nabi's evidence would show that Lachiram executed the will in his presence, that he signed the will being part of the execution of the testament and this evidence in its correct background would go to show that what was required under Section 63 has been carried out in the execution of the will. With respect to the High Court we may say that these findings of the High Court are clearly based on assumption and surmises and, totally against the weight of the evidence on record. The trial Court on a close and thorough analysis of the entire evidence came to a proper conclusion that the will has not been proved in accordance with law which finding has been further affirmed by the lower appellate Court after an independent reappraisal of entire evidence with which we find ourselves in agreement as there was hardly any scope or a valid reason for the High Court to interfere with."

Therefore, in view of the discussion held above as well as the law laid down by the Hon'ble Supreme Court it cannot be said that the findings returned by both the learned courts below to the effect that defendants were not able to prove valid execution of Will Ext. DW2/A in their favour. Both the learned courts below have correctly come to the conclusion that the defendants were not able to prove the valid execution of Will Ext. DW4/A in accordance with law. The substantial question of law is answered accordingly and as a result thereof, the appeal is dismissed with costs.

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

CWPIL No. 15 of 2014
a/w CWP No. 3428 of 2015
Date of order: 21.09.2016

CWPIL No. 15 of 2014

Court on its own motion ...Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

CWP No. 3428 of 2015

S.K. Shad ...Petitioner.

Versus

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

Constitution of India, 1950- Article 225- Status reports have been filed by the various respondents - Amicus Curiae requested to file response to the status reports and fresh suggestion- concerned authority directed to furnish copy of complete report including the application, which was moved for grant of permission, along with all the NOCs obtained by respondent No. 16 – respondent directed to comply with the direction issued by the Court from time to time and to ensure that no encroachment is made or no construction is made in violation of the sanction- direction issued to file status report regarding the encroachment made on Shimla - Dharamshala National Highway- steps taken for the removal of the encroachment and its maintenance. (Para-5)

CWPIL No. 15 of 2014

Present: Mr. J.L. Bhardwaj, Advocate, as Amicus Curiae.

Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondent-State.

Mr. Hamender Chandel, Advocate, for respondent No. 8.

Ms. Jyotsna Rewal Dua, Senior Advocate, with Ms. Charu Bhatnagar, Advocate, for respondent No. 9.

Mr. Ashok Sharma, Assistant Solicitor General of India, with Mr. Nipun Sharma, Advocate, for respondents No. 13 and 14.

Mr. Anand Sharma, Advocate, for respondent No. 16.

CWP No. 3428 of 2015

Mr. Anil Kumar, Advocate, vice Mr. S.D. Gill, Advocate, for the petitioner.

Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for the respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Respondents No. 1 to 11 have filed fresh status reports. Deputy Commissioner and Superintendent of Police, Solan, have also filed affidavits. Respondent No. 16 has filed the reply. Respondents No. 12 to 15 have not filed the status report.

2. At the oral request of learned Amicus Curiae, we deem it proper to array Chief Engineer, National Highways, Shimla; Deputy Commissioners, Solan, Bilaspur, Mandi, Hamirpur and Kangra, as party-respondents, shall figure as respondents No. 17 to 22 in the array of respondents. Registry to carry out necessary entry in the cause title.

3. Issue notice to newly added respondents No. 17 to 22. Mr. Anup Rattan, learned Additional Advocate General, waives notice on behalf of the said respondents. He has also made available two sets of Rules occupying the field across the Board, made part of the file.

4. Respondent No. 9 has moved CMP No. 7870 of 2016 for modification of order, dated 8th August, 2016.

5. We have heard learned Advocate General for a while. We deem it proper to pass the following directions:

(i) Learned Amicus Curiae is requested to file response to the status reports filed by respondents No. 1 to 11 and rejoinder/counter to the reply filed by respondent No. 16. He is also requested to file fresh suggestions in view of the subsequent developments;

(ii) The concerned authority is directed to furnish copy of complete record including the application, which was moved for grant of permission,

alongwith all the NOCs obtained by respondent No. 16 for grant of permission, on the basis of which permission was granted to respondent No. 16 for raising the construction of the complex enabling the learned Amicus Curiae to assist this Court as to from which point the plinth point was to be raised;

(iii) All the respondents are directed to comply with the directions issued by this Court from time to time and to ensure that no encroachment is made or no construction is made in violation of the sanction(s) granted;

(iv) State-respondents to file objections to CMP No. 7870 of 2016, so that the concerned authority(ies), which is/are, in fact, responsible for maintaining the roads, National Highways and to remove encroachments, may be commanded to do the needful;

(v) Respondents are also directed to file status reports viz-a-viz Shimla-Dharamshala National Highway in terms of the previous orders made by this Court;

(vi) Respondents No. 3 and 17 to 22 are also directed to file status regarding the encroachments made on Shimla-Dharamshala National Highway, the steps taken for removal of the encroachments and its maintenance; and

(vii) Respondent No. 9 also to file affidavit indicating therein progress of the work undertaken.

6. Respondents No. 12 to 15 are directed to remain present before this Court on the next date of hearing. List on **20th October, 2016.**

7. Registry is directed to furnish **dasti** copy of this order to the learned Advocate General enabling him to convey the order to the concerned authorities.

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

Lekh Ram deceased, through his LRs. & others. ...Appellants

Versus

Sh. Vidya Sagar and Another. ...Respondents

RSA No. 414 of 2005
Judgment Reserved on: 7.9.2016
Date of decision: 21.9.2016

Specific Relief Act, 1963- Section 34- Plaintiffs filed a suit for declaration that they are owners of the property left behind by late H- they came to know that mutation was attested in favour of the defendants- defendants pleaded that deceased had made a specific statement that plaintiff no. 1 was not his son and he had no claim over him before the Court- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that H was married to M but he had disputed the paternity of plaintiff No. 1- however, there is irrebuttable presumption regarding the legitimacy of the child born during the continuance of a valid marriage- plaintiff No. 1 was not party to the matrimonial proceedings- decree of divorce was passed on the basis of statements of the parties but there was no proof of recognized custom of divorce - decree is contrary to law and will not operate as res judicata- plaintiffs came to know about the wrong revenue entries in the year 1994- suit was also filed in the year 1994 and is within limitation- appeal dismissed. (Para-7 to 21)

Cases referred:

Yool Vs. Ewing (1904 1 L.R. 434)

Russell Vs. Russell (1924) AC 687
Yamanaji H. Jadhav Vs. Nirmala (2002) 2 SCC 637
Shakuntla Devi Vs. Kamla and others (2005) 5 SCC 390

For the Appellants: Mr. G.D. Verma, Senior Advocate with Mr.B.C. Verma, Advocate.
For the Respondents: Mr. J.R. Poswal, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

This Regular Second Appeal under Section 100 of the Code of Civil Procedure is directed against the judgment and decree dated 16.7.2005, passed by learned District Judge, Shimla H.P. in Civil Appeal No. 109/S/13 of 2002, whereby the judgment and decree dated 12.9.2002, passed by learned Sub Judge, Court No. 4, Shimla in Civil Suit No. 413/1 of 1996/94 was affirmed.

2. The brief facts leading to filing of the present appeal are that the plaintiffs (herein after referred to as the respondents) filed a suit for declaration against the defendants (herein after referred to as the appellants) to the effect that they are owners of the properties left behind by late Sh. Hira Lal alias Har Lal, son of Sh. Dharam Dass, Residents of Village Okhru in equal shares, being his son and widow, respectively. It was averred that at the time of death deceased had share in Khata Khatuni No. 2/3, 3/3, 4/4, 5 of village Okhru and Khata Khatuni No. 3/4, 4/5 to 6, 7/9, 8/10 of village Jania, as per jamabandi for the year 1984-85. In the alternative it was submitted that if respondent No. 2 is not found entitled to the share left behind by deceased (Hira Lal), then respondent No. 1 was the exclusive owner of the property left behind by deceased Hira Lal, who died in the year 1987. At the time of death, respondent No. 1 was alleged to be minor. It was averred that the respondents all the time remained under the impression that the property left by deceased was safe in the hands of the appellants. However, in the month of January, 1994, the respondents came to know that the appellants have got the mutation of immoveable property of the deceased attested in their favour, concealing the fact that respondents are the legal heirs of the deceased.

3. The suit was contested by appellants by filing written statement, wherein number of preliminary objections were raised viz maintainability, locus standi, limitation, estoppal, valuation for the purpose of court fee and jurisdiction, jurisdiction of the court to try and determine the suit, bad for failure to join all the necessary parties, as well as, not maintainable in view of the decision in H.M.A. Case No. 69-S/3 of 1976, dated 14.6.1976, titled as Hari Lal Vs. Maina Devi, decided by learned District Judge, Shimla. It was alleged that the parties are bound by the decision dated 14.6.1976. The main ground for opposing the claim of the respondents was that the deceased made a specific statement that respondent No. 1 was not his son and he had no claim over him. This statement was made in the Court in the above case and was admitted to be correct by respondent No. 2. The entirety of the pleadings reveals that the property had not been succeeded by the appellants by any testamatory document, but as per succession, excluding the respondents.

4. Respondents/plaintiffs filed replication, wherein it was specifically alleged that the order passed in H.M.A. Case does not bind the parties. A stand was taken that no divorce was possible except by a decree of divorce passed by the competent Court under the Hindu Marriage Act. It was alleged that there was no custom applicable to the parties, whereby any divorce was permissible outside the Court. It was further alleged that the right of respondent No. 1 could not have been taken away by the statement of respondent No. 2. Respondent No. 2 was alleged to be an illiterate woman. An attempt was made in the replication to show that the said signatures on this statement were obtained by coercive means.

5. On 16.10.2000, learned trial Court framed the following issues:-

"1. Whether the plaintiffs are entitled to the declaration that they are the only legal heirs of Hira Lal and entitled to the suti property, as prayed for? OPP

2. If the issue No. 1 is answered in affirmative, whether the mutation attested in favour of the defendants is illegal and void, as prayed for? OPP

3. Whether the plaintiffs in alternative are entitled for the relief of joint possession, as prayed for? OPP

4. Whether the present suit is not maintainable, as alleged? OPD

5. Whether the plaintiffs have no locus standi to file the present suit, as alleged? OPD

6. Whether the plaintiffs are estopped to file the present suit, as alleged? OPD

7. Whether the present suit is not properly valued for the purpose of court fee and jurisdiction, as alleged? OPD

8. Whether the plaintiffs' suit was barred by limitation, as alleged? OPD

9. Relief."

6. The learned trial Court after recording the evidence and evaluating the same decreed the suit. However, the appeal preferred against the same was dismissed. Aggrieved by the judgment and decree passed by the learned first appellate Court, the defendants have filed the instant appeal, which came to be admitted on the following substantial questions of law:-

"1. Whether the learned first Appellate Court erred in law and fact in holding that respondent No. 1 Vidya Sagar is the son of the deceased Hari Lal?

2. Whether the suit of the respondents-plaintiffs was beyond the period of limitation?

Question No. 1

7. At the outset, it may be observed that the question as framed is erroneous, as it was not the appellate Court alone but even the learned trial Court who concurrently held that respondent No. 1, Vidya Sagar to be the son of deceased Hari Lal. Be that as it may. Evidently, one of the parties to the marriage, i.e. Hari Lal is no more and the dispute has arisen only after his death. There is no dispute that Hari Lal was married to respondent No. 2, Maina Devi, but he disputed respondent No. 1 to be his son and this is clearly evident from the order passed by the then District Judge in matrimonial proceedings on 4.3.1977, which reads thus:-

"Parties with their counsel are present.

This petition has been preferred u/s 13/10 of H.M.A. Act on various grounds. Statements of petitioner and respondent recorded. The petitioner has stated that he has divorced the respondent outside the court according to the custom, that there is custom of divorce in his family and Illaqua, that son born to the respondent named Vidya Sagar is not from his loins and he has no claim over him and the respondent can bring up the said child and he has no objection and he will have no claim over the said child. The respondent has stated that she has heard the statement of the petitioner, which was explained to her in Hindustani and that it was correct and that they have divorced each other outside the court.

In view of the statements of the parties, this petition under Section 13/10 of Hindu Marriage Act has become infructuous, and is hereby dismissed. There is no order as to costs. The file after completion, according to procedure be considered to record room. Order announced in the open court."

8. Section 112 of the Evidence Act reads thus:-

"112. Birth during marriage, conclusive proof of legitimacy.—The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son

of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

9. It is evidently clear from the aforesaid Section that law presumes strongly in favour of the legitimacy of the offspring. A child born during the continuance of valid marriage is legitimate, unless non access is proved by the husband. The proof of non access must be strong, distinct, clear, satisfactory and conclusive and unless such absence of access is established, presumption of legitimacy cannot be displaced. Once there is no dispute that respondent No. 2 was legally wedded wife of deceased Hari Lal, then the legal presumption of paternity raised by Section 112 is fully applicable to the child of a married couple. No doubt, in this case, even respondent No. 2 had in her statement before the Court in the proceedings (supra) admitted the statement of late Sh. Hari Lal to be correct when he stated that respondent No. 1 was not born from his loins and he had no claim over him, but the said statement of either Hira Lal or respondent No. 2 cannot have any binding effect on respondent No. 1, who as stated above, was born during the continuance of a valid marriage between respondent No. 2 and deceased Hari Lal. Moreover, respondent No. 2's solemn admission of respondent No. 1's legitimacy (if any) will not overcome the presumption provided for in the aforesaid Section.

10. The Courts in Ireland have consistently held that a strong presumption of legitimacy arises where a child is born during the marriage. In ***Yool Vs. Ewing (1904 1 L.R. 434)*** Sir Andrew Porter M.R. stated:

"Now, the presumption of legitimacy in the case of a child born during wedlock is not own juris et de jurie …. The question is one of fact. But the presumption is of enormous strength, and will not be rebutted in an ordinary case, where husband and wife live together, by mere evidence, or even proof, that a person or persons other than the husband had improper relations with the wife. In such a case the law, on the clearest grounds of public policy and decency, will not allow any enquiry as to who is the father. But it might be otherwise (where) ….the husband and wife were not living under the same roof, though…there was clearly possibility of access."

The Court further held that even the wife's solemn admission of the child legitimacy will not overcome the presumption envisaged and contemplated under Section 112 of the Act.

11. The House of Lords in ***Russell Vs. Russell (1924) AC 687*** held that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to basterdize the child born from the wedlock. The question of law is accordingly answered against the appellants.

12. Apart from the above, it would be noticed that even the judgment passed in matrimonial proceedings will not have binding effect nor operate as resjudicata qua respondent No. 1. Admittedly, respondent No. 1 was not a party to the proceedings and secondly, the decree so passed was contrary to the existing law. There can be no dispute that on the date of passing of the decree i.e. 4.3.1977, the provisions of Hindu Marriage Act had come into force, which as per provision contained in Section 29 did protect the customary divorce, but then it was incumbent upon the party setting up such customs to plead and prove such custom.

13. It is well established by a long chain of decision that prevailing of customary divorce in a community to which the parties belonging contrary to general law of divorce must be specifically pleaded and established by the person performing such custom. Here it is apt to refer to the judgment of Hon'ble Supreme Court in ***Yamanaji H. Jadhav Vs. Nirmala (2002) 2 SCC 637***, wherein it was held as under:-

"7. In the view that we are inclined to take in this appeal, we do not think it is necessary for us to go into the contentions advanced by the learned counsel for the parties in this case, because we find that the courts below have erroneously proceeded on the basis that the divorce deed relied upon by the parties in question was a document which is acceptable in law. It is to be noted that the deed in

question is purported to be a document which is claimed to be in conformity with the customs applicable for divorce in the community to which the parties to this litigation belong to. As per the Hindu Law administered by courts in India divorce was not recognised as a means to put an end to marriage, which was always considered to be a sacrament, with only exception where it is recognized by custom. Public policy, good morals and the interests of society were considered to require and ensure that, if at all, severance should be allowed only in the manner and for the reason or cause specified in law. Thus such a custom being an exception to the general law of divorce ought to have been specially pleaded and established by the party propounding such custom since said custom of divorce is contrary to the law of the land and which, if not proved, will be a practice opposed to public policy. Therefore, there was an obligation on the trial court to have framed an issue whether there was proper pleadings by the party contending the existence of a customary divorce in the community to which the parties belonged and whether such customary divorce and compliance with the manner or formalities attendant thereto was in fact established in the case on hand to the satisfaction of the court. In the instant case, we have perused the pleadings of the parties before the trial court and we do not find any material to show that prevalence of any such customary divorce in the community, based on which the document of divorce was brought into existence was ever pleaded by the defendant as required by law or any evidence was led in this case to substantiate the same. It is true in the courts below that the parties did not specifically join issue in regard to this question and the lawyers appearing for the parties did orally agree that the document in question was in fact in accordance with the customary divorce prevailing in the community to which the parties belonged but this consensus on the part of the counsel or lack of sufficient pleading in the plaint or in the written statement would not, in our opinion, permit the court to countenance the plea of customary divorce unless and until such customary divorce is properly established in a court of law. In our opinion, even though the plaintiff might not have questioned the validity of the customary divorce, the court ought to have appreciated the consequences of their not being a customary divorce based on which the document of divorce has come into existence bearing in mind that a divorce by consent is also not recognisable by a court unless specifically permitted by law. Therefore, we are of the opinion to do complete justice in this case. It is necessary that the trial court be directed to frame a specific issue in regard to customary divorce based on which the divorce deed dated 26th of June, 1982 has come into existence and which is the subject matter of the suit in question. In this regard, we permit the parties to amend the pleadings, if they so desire and also to lead evidence to the limited extent of proving the existence of a provision for customary divorce (otherwise through the process of or outside court) in their community and then test the validity of the divorce deed dated 26.6.1982 based on the finding arrived at in deciding the new issue."

14. Evidently, the pleadings in the earlier suit have not been placed on record. A bare perusal of the order passed by the learned Court below would reveal that a decree of divorce has been passed only on the basis of statement of parties that they had divorced each other outside the Court. To say the least, this statement in itself was not sufficient to pass a decree, as observed by the Hon'ble Supreme Court in *Yamanaji case* (supra), the Hindu Law did not recognize divorce as a means to put an end the marriage, which was eventually considered sacrament, with only exception where it is recognized by custom. Public policy, good morals and the interests of society were considered to require and ensure that, if at all, severance should be allowed only in the manner and for the reason or cause specified in law. Thus such a custom being an exception to the general law of divorce ought to have been specially pleaded and established by the party propounding such custom since said custom of divorce is contrary to the law of the land and which, if not proved, will be a practice opposed to public policy.

15. That apart, once it is concluded that the decree was erroneous on the point of law, the same would not operate as resjudicate, as held by the Hon'ble three Judges Bench of Hon'ble Supreme Court in ***Shakuntla Devi Vs. Kamla and others (2005) 5 SCC 390***, wherein it was categorically held that where the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land. The question of law is accordingly answered against the appellants.

Question No. 2.

16. It is vehemently contended by learned counsel for the appellants that the suit was hopelessly time barred and therefore, deserves to be dismissed. According to him, as per the admitted case Hari Lal died in the year 1987 and the suit was instituted only on 26.4.1994, after 6 years of death of Hari Lal. He would further contend that as per the admitted case of the parties, respondent No. 1 was born on 22.11.1972 and at the time of death of his father in the year 1987 was minor and attained majority in February, 1990 and therefore, the suit for declaration at best could have been brought within three years of attaining majority as per the provisions of Section 6 of the Limitation Act, 1963.

17. On the other hand, learned counsel for the respondents would contend that as the suit property was joint between the parties and therefore, all co-owners including the respondents were deemed to be in possession of every inch of the property. He would further argue that no cause of action had arisen to the respondents prior to year 1994, when they came to know about the non sanction of mutation of landed property of late Sh.Hari Lal in their favour.

18. While answering substantial question No. 1, this Court has already held respondent No. 1 to be the son of late Sh.Hari Lal and once it is so, then obviously he was co-owner of the property.

19. Now the further question is as to whether the respondents in fact acquired knowledge regarding the sanction of mutation in the year 1994, as alleged by him. For answering this question one will have to fall back to the statement of PW-5, Vidya Sagar, plaintiff No. 1, who in his examination-in-chief has categorically stated that he for the first time in the year 1994 came to know regarding the sanction of mutation of inheritance of his father, whereby he and his mother had been excluded and earlier to that he was under the impression that their share is intact. This version on behalf of respondent No. 1 was accepted to be correct by the appellants, as they did not elect to challenge the same by subjecting respondent No. 1 to cross-examination and would, therefore, be considered to have been admitted by them.

20. In addition to the aforesaid, even when PW-3 Maina Devi (plaintiff No. 2) appeared in the witness box, she too had stated that she had acquired knowledge regarding the wrong revenue entries qua the property of late Hari Lal only in January, 1994 and prior to it she was not aware about the entries and was under the impression that their share is intact. Though in her cross-examination she has stated that she had visited the office of Patwari in the year 1987, but by that time mutation was not attested, which admittedly was attested later on 22.1.1988.

21 Therefore, it stands established that it was in the year 1994 when the respondents came to know about the wrong revenue entries qua the suit land, which furnished them cause of action to file the suit, which admittedly was filed on 26.4.1994 and is therefore, within limitation after accrual of cause of action in their favour. The question if answered accordingly.

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

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

M.Alexander .....Petitioner.
Versus
State of H.P .....Respondents

Cr.MMO No.272 of 2016
Reserved on:9.9.2016
Date of decision: 21.9.2016.

Contempt of Courts Act, 1971- Section 2, 10, 11 and 12- An application was filed by the petitioner under the contempt of Courts Act, which was dismissed by the trial Court- a fine of Rs. 5,000/- was imposed on the ground that petitioner had misled the Court by filing false petition- held, that petitioner had made scandalous allegations against the judge and had also attributed motive to him- petitioner had made deliberate attempt to interfere with the due course of judicial proceedings and such action could be construed to be obstructive or attempting to obstruct the administration of justice- any allegation which has the tendency of interfering with due course of judicial proceedings or which scandalizes or has the tendency to scandalize, or lower or has the tendency to lower the authority of the court cannot be justified- litigant cannot be permitted to browbeat the court or terrorize or intimidate the Judges- Judges cannot be intimidated to seek favourable orders - judges shall not be able to perform their duties freely and fairly, if such activities are permitted or tolerated and justice would become a casualty- any action on the part of a litigant which has the tendency to interfere with or obstruct the due course of justice has to be dealt with sternly and firmly to uphold the majesty of law- hence, suo moto notice issued for initiating the criminal proceedings against the petitioner. (Para-2 to 27)

Cases referred:
Ajay Kumar Pandey, Advocate, (1998) 7 SCC 248
Chetak Construction Ltd. v. Om Prakash (1998) 4 SCC 577
Radha Mohan Lal v. Rajasthan High Court (2003) 3 SCC 427
Jaswant Singh Vs. Virender Singh (1995 (supp.1) SCC 384
D.C.Saxena vs. Hon'ble the Chief Justice of India (1996) 5 SCC 216
S.K.Sundaram: IN RE (2001) 2 SCC 171
Arundhati Roy, IN RE (2002) 3 SCC 343)
M.B. Sanghi Vs. High Court of Punjab & Haryana (91) 3 SCC 600
Asharam M.Jain Vs. A.t. Gupta, (1983) 4 SCC 125
Jennison v. Baker [1972] 1 All E.R. 997, 1006, it was observed (QB p.66 H)
Vishram Singh Raghubanshi Vs. State of Uttar Pradesh (2011) 7 SCC 776

For the Petitioner : In person.
For the Respondent : Mr. J. S. Guleria, Assistant Advocate General, for respondent No.1.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The instant petition was initially filed under the provisions of Sections 2,10,11 and 12 of the Contempt of Courts Act, 1971 (hereinafter referred to as the 'Act') and under Section 482 of the Code of Criminal Procedure (hereinafter referred to as 'Code'). When the same came up for consideration before this court on 9.9.2016, the petitioner was asked to justify the maintainability of the petition and was also repeatedly informed that in case he is not prepared, the matter could be adjourned and he could also be provided free legal-aid. However, the petitioner insisted that he was fully prepared and would argue the petition himself and gave

statement on oath to the effect that he does not seek to invoke the provision of the Act and the petition be treated as one having been filed only under section 482 of the Code and be treated as an appeal.

I have heard the petitioner.

2. Even after his statement had been recorded, the petitioner was again asked to justify the maintainability and yet again offered legal assistance, which he refused to accept and while addressing on the question of maintainability of the petition would argue that clerks of the Registry of this court had guided him to file this petition in the manner he did.

3. He would further argue that even at earlier occasion, he had filed a similar petition which was registered as Cr MMO No.282/2014 and, therefore, the petition on the basis of past precedents was very much maintainable.

4. Evidently, the order assailed in this petition emanates from the proceedings conducted by learned Special Judge, Kangra on 1.9.2016 in an application instituted by the petitioner under Sections 2 and 12 of the Contempt of Courts Act.

5. It would be noticed that while instituting the aforesaid application and even while adjudicating upon the same, no provisions of the 'Code' have been invoked and same was decided only under the provisions of the 'Act' and, therefore, on the face of it, the instant petition under Section 482 of the 'Code' is misconceived and liable to be dismissed. Advice given by the Registry (if at all given), to say the least, cannot be a ground to canvass and claim that the petition is maintainable.

6. As regards the reliance placed on above Cr.MMO, it would be noticed that the precise prayer made in the said petition was for registration of FIR which obviously could be granted by this court in exercise of its jurisdiction under Section 482 Cr.PC. There is no parity whatsoever in both the petitions, therefore, the said petition can hardly be cited as a precedent for invoking the jurisdiction of this court under Section 482 Cr.P.C.

7. Having answered the question in issue, I may now advert to a very disturbing feature of the case. Petitioner while assailing the impugned order has not only used intemperate and contemptuous language, but has even levelled allegations which are not only scandalous but tactically attribute motive to the learned Judge below as would be evident from paragraphs 2,3,4,7 and 8 of the petition and the same read thus:-

> *"2.That while the contempt petition in question, as set forth hereinabove, ought to have been referenced in short order to this Honourable Court as the sole authority empowered to adjudicate the matter at hand under the law, with the voice of the aforementioned subordinate court of lower instance necessarily added to the voice of petitioner as either assenting to or dissenting from the allegations made, the aid lower court of Sh. Rajeev Bali, very learned Special Judge, Kangra Division at Dharamshala, HP, illegally entertained and adjudicated the contempt petition at issue on merits on its own and of its own accord, thereby (a) causing obstruction in the administration of justice amounting to unnecessary delay of eight months and nine days; (b) illicitly benefiting the accused in the case while directly harming the interest of justice; (c) illegally compounding, in effect, the criminally illegal, unnecessary delays in police investigations prohibited by statute; (d) illegally condoning criminal contempt of the High Court of HP as the author of decisional law in this case.*
>
> *3.That petitioner complained of the unlawful state of affairs obtaining here, as set forth in para 2 hereinabove, to the Worthy Registrar General of the High Court of HP on 12 August, 2016. Following remedial actions taken by the Worthy Registrar General as a result of petitioner's complaint, the aforementioned very learned Special Judge, as set forth in paras 1 and 2 dismissed the contempt petition in question on 1st September, 2016 after 253 days of litigation. At the same time, the*

same very learned Special Judge levied a fine in the amount of five thousand rupees (Rs.5000) against petitioner for 'frivolous litigation'.

4.That the aforementioned very learned Special Judge, as set forth in paras 1 and 2, additionally accused petitioner deliberately concealing material facts from the court, an action which-if corroborated by evidence-ought to have resulted in criminal counteraction against petitioner for perjury, given that full disclosure had been averred by petitioner in the sworn affidavit supporting the petition in question, and given that material concealments would have been a serious matter not amounting to frivolity but patently amounting to criminality, and thus meriting a much sterner punishment than a mere fine. There is, however, no evidence to support such an allegation against petitioner, while the documentation cited in the impugned order does not support the conclusions reached there from, which prima facie seem therefore, to have been framed mala fide. The same may be said of the implicit answer given tacitly by the said very learned Special Judge loco citato to the further and separate question as to whether or not the point at issue, allegedly concealed by petitioner, is material to the cause in the first place, and in such a way as could substantively affect the legal outcome as concerns the determination of respondent State's non-compliance in question here. While nothing at all is said in the impugned order on the question of material relevance of the point in issue, the unspoken presumption of the impugned order is nevertheless that the said point is unquestionably material; whereas the truth is that it is not and that it does not affect the factum and the pleading in the instant cause. We are thus dealing here with a case of double judicial misconduct-false evidence against petitioner in a matter that is ipso facto immaterial- a judicial fraud of Chaucerian proportions, intended to exculpate respondent's offences at al cost and by any means, fair or foul. Even the Pardoner might blush here: there has never been any pleading here from respondent alleging the uncorroborated facts relied on by the impugned order.

7. That the impugned order of 1st September, 2016, as set forth on the title page and paras 3 and 4 hereinabove is illegal, unjust, and unreasonable as having been entered in violation of the dictates of such common sense as might be espoused by any rational mind with regard to its factum of the instant cause, the latter having been established fraudulently without supporting evidence. Moreover, petitioner has not filed any other competent petition pertaining to this case in any other court of law, except as disclosed herein.

8. That in view of the facts, circumstances and points of law as set forth in paras 1-7 hereinabove, petitioner prays your Lordships to quash and set aside the impugned order entered on 1st September, 2016 by the immensely learned Sh. Rajeev Bali, Special Judge, Kangra Division at Dharamshala, as illegal, unconscionable, and indeed scandalous, and to revive and reactivate the dismissed contempt petition, this to be pursed within this Honourable High Court of Himachal Pradesh in accordance with the provisions of law, so as to punish respondent for its contempt of court and obstruction of administration of justice in an exemplary fashion, by meting out thereto the maximum prison sentence allowed by the Contempt of Courts Act, given the gravity insidiousness, multiplicity, persistence and massive nature of the offences constituting the contempt in question, as considered in the light of their undermining not just the administration of justice in this one single case but tending to tear to shreds the very fabric of the Union of India's democracy given the extremely high degree of insidiousness and shamelessness of the illegalities involved on the part of a law-enforcement agent, including in its submissions to the lower court in the instant case. Petitioner additionally prays your Lordships to assign the investigation of the instant case to the Central Bureau of Investigation in the hope of finding therein a more

professional, honest, impartial and law abiding investigative agency to carry out the same."

8. Though as observed above, the instant petition is not maintainable, but it is suggestive that it was the Special Judge who illegally entertained and adjudicated the contempt at issue on merits and of its own accord. This contention is not only preposterous, but is contrary to the record after all it is the petitioner who himself had filed this petition and cannot now turn round and impute motive to the learned Judge by alleging that (a) he caused obstruction in the administration of justice amounting to unnecessary delay of eight months and nine days; (b) illicitly benefiting the accused in the case while directly harming the interest of justice; (c) illegally compounding, in effect, the criminally illegal, unnecessary delays in police investigations prohibited by statute; (d) illegally condoning criminal contempt of the High Court of HP as the author of decisional law in this case.

9. That apart, it would be noticed that the learned court below had imposed a find of Rs.5000/- on the ground that the petitioner had misled the court by filing frivolous petition despite knowing that the time frame for completion of investigation had been extended by this court.

10. It is not in dispute that initially this court vide order dated 24.4.2015, had directed the respondents to re-investigate the case within two months. However, thereafter, respondents moved an application seeking extension of time for completion of the investigation and this court vide order dated 29.7.2015 granted further time of three months to them to complete the investigation and this order was duly communicated to the petitioner by the learned Deputy Advocate General vide letter dated 24.9.2015. The fact that the learned court below had been considerate enough in only imposing a nominal fine of Rs. 5000/- and not initiating any other proceedings like perjury against the petitioner, cannot be a ground to impute motive and assail the order that too by using intemperate language and casting unwarranted aspersions on the Judicial officer and attributing motive to him while he was discharging his judicial functions.

11. Evidently, the language used by the petitioner is intemperate and contemptuous and above all, this petition is loaded with sarcasm and innuendos and, therefore, this court has no hesitation to conclude that the petitioner has made deliberate attempt to interfere with the due course of judicial proceedings and such action could be construed to be obstructive or attending to obstruct the administration of justice.

12. It has to be remembered that the subordinate judiciary forms the very backbone of the administration of justice and the higher court would come down with a heavy hand for preventing the judges of the subordinate judiciary from being subjected to scurrilous and indecent attacks, which scandalize or have the tendency to scandalize, or lower or have the tendency to lower the authority of any court as also all such actions which interfere or tend to interfere with the due course of any judicial proceedings or obstruct or tend to obstruct the administration of justice in any other manner.

13. No affront to the majesty of law can be permitted. The fountain of justice cannot be allowed to be polluted by disgruntled litigants. The protection is necessary for the courts to enable them to discharge their judicial functions without fear. (***Ajay Kumar Pandey, Advocate, (1998) 7 SCC 248).***

14. It is well settled that litigant cannot be permitted to browbeat the court or terrorize or intimidate the Judges as held by the Hon'ble Supreme Court in ***Chetak Construction Ltd. v. Om Prakash (1998) 4 SCC 577:***

"16. Indeed, no lawyer or litigant can be permitted to browbeat the court or malign the presiding officer with a view to get a favourable order. Judges shall not be able to perform their duties freely and fairly if such activities were permitted and in the result administration of justice would become a casualty and the rule of law would receive a setback. The Judges are obliged to decide cases impartially and without

any fear or favour. Lawyers and litigants cannot be permitted to 'terrorise' or 'intimidate' Judges with a view to 'secure' orders which they want. This is basic and fundamental and no civilized system of administration of justice can permit it."

15. These observations were subsequently, reiterated in ***Radha Mohan Lal v. Rajasthan High Court (2003) 3 SCC 427.***

16. It would be evident from the pleadings extracted above that the petitioner has made scurrilous and indecent attacks against the learned Presiding Judge which are not only indecent and distasteful, but on the face of it, are contemptuous. It is most Unbefitting for a litigant to make imputations against the Judge only because he does not get the expected result, which according to him is the fair and reasonable result available to him. Judges cannot be intimidated to seek favourable orders. Only because the party has appeared in person he does not get a licence thereby to commit contempt of the court by using intemperate language and casting unwarranted aspersions on the Judicial Officers and attributing motive to him while he was discharging his judicial functions. He cannot use language, either in pleadings or during arguments which is either intemperate or unparliamentarily. The safeguards are not for the protection of any Judge individually but are essential for maintaining the dignity and decorum of the courts. No doubt, fair comments, even if, outspoken, but made without any malice or attempting to impair the administration of justice and made in good faith, in proper language, do not attract any punishment for contempt of court. However, when from the criticism deliberate, motivated and calculated attempt is discernible to bring down the image of judiciary in the estimation of the public or to impair the administration of justice or tend to bring the administration of justice into disrepute, the courts must bestir themselves to uphold their dignity and the majesty of law. No system of justice can tolerate such unbridled licence on the part of a person to permit himself the liberty or scandalizing a court by casting unwarranted, uncalled for an unjustified aspersions on the integrity, ability, impartiality or fairness of a Judge in the discharge of his judicial functions as it amounts to an interference with the due course of administration of justice. (***Jaswant Singh*** Vs**. *Virender Singh (1995 (supp.1) SCC 384)***.

17. Indeed, no litigant can be permitted to brow beat the court or malign the Presiding Officer with a view to get a favourable order. Judges shall not be able to perform their duties freely and fairly if such activities are permitted or tolerated and justice would become a casualty and Rule of Law would receive a set back. The Judges are obliged to decide cases impartially and without any fear or favour. Litigants cannot, be allowed to 'terrorize' or 'intimidate' judges with a view to 'secure' orders which they want. This is basic and fundamental and no civilized system of administration of justice can permit it. Not only are the aspersions cast by the petitioner derogatory, scandalous and uncalled for, but also tend to bring the authority and administration of justice into disrespect.

18. This all has been done calculatedly by the petitioner in order to undermine the authority of the Courts and public confidence in the administration of justice. Contempt of Court is to keep a blaze the glory around the judiciary and to deter the people from attempting to render justice contemptible in the eyes of public. A libel upon the Court is a reflection upon the sovereign people themselves. The petitioner has tried to convey to the people that the administration of justice is weak or in corrupt hands and that the fountain of justice is tainted. Therefore, it is necessary to regulate the judicial process free from fouling the fountain of justice to ward off the people from undermining the confidence of the public in the purity of fountain of justice and due administration. Justice thereby remains pure, untainted and unimpeded. If the people's allegiance to the law is so fundamentally shaken, it is the most vital and most dangerous obstruction of justice calling for urgent action.

19. The petitioner has indulged in scandalizing the Court, which means hostile criticism of Judges as Judges or judiciary. The gravamen of the offence is lowering the dignity or authority or an affront to majesty of justice. The petitioner has challenged the authority of the Court and has, therefore, interfered with the performance of duties of Judge's office or judicial process or administration of justice that has the tendency of bringing the Judges or judiciary into contempt.

If the attempts of the petitioner are encouraged the judicial independence would vanish eroding the very edifice on which the institution of justice stands. Any action on the part of a litigant which has the tendency to interfere with or obstruct the due course of justice has to be dealt with sternly and firmly to uphold the majesty of law. None can be permitted to intimidate or terrorize Judges by making scandalous unwarranted and baseless imputations against them in the discharge of their judicial functions so as to secure orders which the litigant "wants".

20. The rule of law is the foundation of a democratic society and the judiciary is the guardian of the rule of law. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted, the dignity and authority of the Courts has to be respected and protected at all costs. It is for this reason that the Courts are entrusted with the extraordinary power of punishing those for contempt of court who indulge in acts whether inside or outside the Courts, which tend to undermine the authority of the Courts and bring them in disrepute and disrespect thereby obstructing them to discharge their official duties without fear or favour. This power is exercised by the Courts not to vindicate the dignity and honour of any individual Judge who is personally attacked or scandalized but with a view to uphold the majesty of law and the administration of justice. The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver fearless and impartial justice and as such no action can be permitted to shake the very foundation itself. Thus, it is now settled that abuses, attribution of motives, vituperative terrorism and scurrilous and indecent attacks on the impartiality of the Judges in the pleadings, applications or other documents filed in the Court or otherwise published which have the tendency to scandalize and undermine the dignity of the Court and the majesty of law amounts to criminal contempt of court.

21. No doubt, the litigant has the freedom of expression and liberty to project his case forcefully, but it has to be remembered that while exercising this liberty he is required to maintain dignity, decorum and order in the Court proceedings. Liberty of free expression cannot be permitted to be treated as a licence to make reckless imputations against the impartiality of the Judges deciding the cases. Even criticism of the judgment has to be in a dignified and temperate language and without any malice. (See: ***D.C.Saxena vs. Hon'ble the Chief Justice of India (1996) 5 SCC 216, In Re: Ajay Kumar Pandey (1996) 6 SCC 510, Ajay Kumar Pandey, Advocate, in RE: (1998) 7 SCC 248, S.K.Sundaram: IN RE (2001) 2 SCC 171 and Arundhati Roy, IN RE (2002) 3 SCC 343).***

22. The Hon'ble Supreme Court in ***M.B. Sanghi Vs. High Court of Punjab & Haryana (91) 3 SCC 600,*** while examining the similar case has observed as under (SCC p.602, para 2).

> *"2.....The foundation of judicial system which is based on the independence and impartiality of those who man it will be shaken if disparaging and derogatory remarks are made against the presiding judicial officers with impunity. It is high time that we realise that the much cherished judicial independence has to be protected not only from the executive or the legislature but also from those who are an integral part of the system. An independent judiciary is of vital importance to any free society".*

23. **In Asharam M.Jain Vs. A.t. Gupta, (1983) 4 SCC 125,** while dealing with the issue, this Court observed as under: (SCC p.127, para 3)

> *"3.....The strains and mortification of litigation cannot be allowed to lead litigants to tarnish, terrorise and destroy the system of administration of justice by vilification of judges. It is not that judges need be protected; judges may well take care of themselves. It is the right and interest of the public in the due administration of justice that has to be protected."*

24. In ***Jennison v. Baker [1972] 1 All E.R. 997, 1006*****, it was observed (QB p.66 H)**

".....'The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope.' "

25. *In* ***Vishram Singh Raghubanshi Vs. State of Uttar Pradesh (2011) 7 SCC 776,*** the Hon'ble Supreme Court noted the dangerous trend of making false allegations against judicial officers and observed as under:

"18. *The dangerous trend of making false allegations against judicial officers and humiliating them requires to be curbed with heavy hands, otherwise the judicial system itself would collapse. The Bench and the Bar have to avoid unwarranted situations on trivial issues that hamper the cause of justice and are in the interest of none. "Liberty of free expression is not to be confounded or confused with license to make unfounded allegations against any institution, much less the Judiciary". A lawyer cannot be a mere mouthpiece of his client and cannot associate himself with his client maligning the reputation of judicial officers merely because his client failed to secure the desired order from the said officer. A deliberate attempt to scandalise the court which would shake the confidence of the litigating public in the system, would cause a very serious damage to the Institution of judiciary. An Advocate in a profession should be diligent and his conduct should also be diligent and conform to the requirements of the law by which an Advocate plays a vital role in the preservation of society and justice system. Any violation of the principles of professional ethics by an Advocate is unfortunate and unacceptable. (Vide: O.P. Sharma & Ors. v. High Court of Punjab & Haryana, (2011) 5 SCALE 518).*

26. The matter cannot therefore be permitted to rest here or else, this would amount to compromising with the majesty of the Court and undermining the authority of the Court and the public confidence in the administration of justice. The petitioner has indulged in scandalizing the Court and his act amounts to interference with the administration of justice. This action tends to lower the authority of the Court and at the same time prejudice and interfere with due course of judicial proceedings apart from scandalizing and lowering the dignity of the Court.

27. Therefore, taking suo motu notice for initiation of criminal contempt proceedings against the acts of the petitioner, let criminal contempt proceedings be separately registered against

the petitioner and the matter be placed before Hon'ble the Chief Justice for obtaining orders regarding listing of the same before the Hon'ble Division Bench in accordance with rules.

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

Rameshwar Dass (deceased) through his LRs: Subhash Jain and others ...Appellants/Plaintiff.

Versus

Dayawanti (deceased) through her LRs: Manoj Bansal and others .Respondents/Defendants.

R.S.A. No. 246 of 2001
Judgment reserved on: 08.09.2016.
Date of decision: 21st September, 2016

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration, permanent prohibitory injunction and mandatory injunction pleading that his grandfather M had migrated from District Ambala- he started business which was carried by his son and thereafter by his grandson – partition had taken place between grandsons, in which suit land had fallen to the share of S, father of the plaintiff- S disappeared in 1979 and was presumed to be dead- plaintiff became owner in possession of the suit land- suit land could not have been alienated except for legal necessity- defendants no. 1 and 2 started interfering with the suit land and it was found on inquiry that suit land was alienated to P through registered sale deed- suit was dismissed by the

trial Court- an appeal was filed, which was also dismissed- held, in second appeal that particulars of fraud and misrepresentation have to be given specifically - it is not enough to allege fraud without stating particulars- pleadings of the plaintiff are deficient and the facts constituting fraud or misrepresentation were not pleaded- suit was filed after 25 years of the registration of the sale deed- mere mutation will not extend the period of limitation- partition had taken place and the suit land was allotted to the S - appeal dismissed. (Para-7 to 29)

Cases referred:

Sukhdei (Smt.) (dead) by LRs vs. Bairo (dead) and others (1999) 4 SCC 262
Sankalchan Jaychandbhai Patel and others vs. Vithal Bhai Jaychandbhai Patel (1996) 6 SCC 433
Sawarni (Smt.) vs. Inder Kaur (Smt.) and others, (1996) 6 SCC 223
Baleshwar Tewari (dead) by LRs. and others vs. Sheo Jatan Tiwary and others (1997) 5 SCC 112
Ningawwa vs. Byrappa Shiddappa Hireknrabar AIR 1968, SC 956
Prem Singh vs. Birbal (2006) 5 SCC 353

For the Appellants:	Mr. K.D. Sood, Senior Advocate, with Ms. Ranjana Chauhan, Advocate.
For the Respondents	Mr. R.K.Bawa, Senior Advocate, with Mr. Ajay Sharma, Advocate, for respondents No. 2 and 3. Ms. Kiran Aggarwal, respondent No.4 in person.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This Regular Second Appeal under Section 100 of the Code of Civil Procedure has been filed by the appellants/plaintiff against the judgment and decree dated 31.3.2001 passed by learned District Judge, Kinnaur Civil Division at Rampur Bushahr, in Civil Appeal No. 29 of 1999 whereby he affirmed the judgment and decree dated 20.9.1999 passed by learned Sub Judge, 1st Class, Rampur Bushahr, District Shimla in Case No. 25-1 of 99/87.

For convenience, the parties are referred to as plaintiff and defendants.

2. The facts as are necessary for determination of this appeal are that the plaintiff filed a suit for decree of declaration, permanent prohibitory and mandatory injunction on the allegations that his great grand father Meeri Mal had migrated from Raipur Rani, District Ambala to the then princely State of Rampur Bushahr in 1936. Meeri Mal had started business at Rampur Bushahr under the name and style of M/s Meeri Mal Lachhman Dass. Lachhman Dass was son of Meeri Mal. After the death of Meeri Mal, Lachhman Dass had carried on the family business. Out of the income of the business, Marri Mal had acquired moveable and immoveable property in the township of Rampur Bushahr. Lachhman Dass had inherited the moveable and immoveable property of his father Meeri Mal. Lachhman Dass had died sometimes in 1950 leaving behind three sons namely Krishan Chand, Keshav Ram and Sadhu Ram. After the death of Lachhman Dass, his three sons had carried on with the family business. The joint Hindu family comprised three sons of Lachhman Dass. Marri Mal had purchased a vacant piece of land described in Khata Khatauni No. 52/162 Khasra No. 240, measuring 64 square yards, (hereinafter referred to as the suit land), in Kasba Bazar within the limits of the township of Rampur Bushahr. There had been partition between three sons of Lachhman Dass on 19.9.1960. As per partition, the suit land had fallen to the share of Sadhu Ram, who was the father of the plaintiff. As per partition, Sadhu Ram had acquired ownership and possession of the suit land. Sadhu Ram was stated to have disappeared sometimes in 1979 and was presumed to be dead under the Presumptive Evidence Law. After the death of Sadhu Ram, the plaintiff had become owner in possession of the suit land. The plaintiff and his father had stacked stones in the suit land. The suit land was ancestral property in the hands of Sadhu Ram, as such, Sadhu Ram could not have alienated the suit land except for legal necessity. The plaintiff had acquired ½

share in the suit land by birth. The plaintiff and Sadhu Ram constituted a joint Hindu family and were governed by Mitakshara School of Hindu Law. After the presumptive death of Sadhu Ram, the proforma defendant No.8 Jai Bhagwan (brother of the plaintiff) and the plaintiff had been joint owners in possession in equal share of the suit land. The proforma defendant No.8 Jai Bhagwan and his father had been putting up at Kalka. Sadhu Ram was literate businessman and had been aware of implications of giving Special Power of Attorney. It had been alleged that sometimes in 1987, Brij Bhushan (father of defendants No.1 and 2) had started interfering with the ownership and possession of the plaintiff and proforma defendant No.8 of the suit land. At such time, the plaintiff had looked into the books of the Collector. It was found that Sadhu Ram through his special power of attorney Keshav Ram (father of Brij Bhushan had alienated the suit land in favour of Brij Bhushan through registered sale deed No. 10/62 of 20.6.1962 for alleged sale consideration of Rs.500/-. On the basis of the sale deed No.10/62 dated 20.6.1962, registered on 22.6.1962, mutation of the suit land had been initially entered in favour of Brij Bhushan but had been rejected. Afterwards, Brij Bhushan and defendants No.1 to 3 had manipulated the attestation of mutation No.1349 of the suit land in favour of Brij Bhushan on 6.6.1970. The defendants No.2 and 3 had been members of Himachal Pradesh Judicial Service and had been exercising undue influence over local revenue officials. The defendants No. 1 to 3 had also manipulated attestation of mutation No. 1758 on 20.2.1987 of the suit land in favour of Brij Bhushan. The plaintiff was not bound by false and fictitious sale deed No. 10/62, dated 20.6.1962, purported to have been executed by his father Sadhu Ram in favour of Brij Bhushan. The sale deed No.10/62, dated 20.6.1962 of the suit land was stated to be the result of fraud and misrepresentation and was liable to be set-aside. The plaintiff was also not bound by wrong and illegal entries of the books of the Collector and various mutations manipulated by defendants No. 1 to 4. Brij Bhushan and defendants No. 1 to 4 had started raising construction in the suit land in February, 1987. The defendants No. 1 to 4 were sought to be restrained from interfering with the ownership and possession of the plaintiff of the suit land by issuance of a decree of perpetual injunction against them. The construction done by defendants No. 1 to 4 in the suit land was sought to be pulled down by issuance of a decree of mandatory injunction. The defendants No. 1 to 4 were also sought to be restrained from using the sale deed No. 10/62 by issuance of a decree of perpetual injunction against them. With these allegations the suit had been instituted in the trial court on 17.3.1987.

3. The defendants No. 1 to 4 and their predecessors-in-interest Brij Bhushan and Keshav Ram had resisted the suit by raising preliminary objections of limitation, non-joinder and maintainability of the suit. The defendants No.1 to 4 had admitted their relationship with Meeri Mal and Lachhman Dass. Meeri Mal had migrated from Raipur Rani Ambala to the then princely State of Rampur Bushahr in 1936. Meeri Mal and his son Lachhman Dass had started business under the name and style of M/s Meeri Mal Lachhman Dass at Rampur Bushahr. The joint Hindu Family had acquired moveable and immoveable property at Rampur Bushahr. The suit land after the death of Lachhman Dass had been owned and possessed by Krishan Chand, Keshav Ram and Sadhu Ram. The defendants No. 1 to 4 had admitted private partition of the suit land on 19.9.1960. In such private partition, the suit land had fallen to the share of Sadhu Ram. The defendants No. 1 to 4 had stated that Sadhu Ram through his special power of attorney Keshav Ram, had sold the suit land in favour of Brij Bhushan on 20.6.1962 through registered sale deed No. 10/62. The sale deed No. 10/62 had been duly registered by the Sub Registrar on 22.6.1962. After 20.6.1962 Brij Bhushan had been owner in possession of the suit land and had been rightly entered so vide mutation no. 1349 dated 6.6.1970. The plaintiff in collusion with defendants No.5 and 6, had manipulated attestation of mutation No.1730 on 15.7.1986. As such, mutation No. 1758 of the suit land had been rightly sanctioned in favour of Brij Bhushan on 20.2.1987. The defendants No. 2 and 3 were members of Himachal Pradesh Judicial Service/Higher Judicial Service, but had not exercised any influence much less undue influence over the local revenue officials of Rampur Bushahr for attestation of mutation of the suit land in favour of Brij Bhushan. It had also been pleaded that in case Brij Bhushan, predecessor-in-interest of defendants No. 1 to 4 was not treated owner of the suit land on the strength of sale deed No. 10/62, dated 20.6.1962, he had acquired right of ownership of the suit land by adverse

possession. Brij Bhushan had been in continuous, open, uninterrupted and hostile possession of the suit land w.e.f. 20.6.1962. The possession of Brij Bhushan had ripened into ownership. The plaintiff had not properly valued the suit for the purpose of court fee and jurisdiction. The plaintiff could not be treated either owner or in possession of the suit land. The plaintiff was bound by the registered sale deed No. 10/62, dated 20.6.1962 and the same deed could not be treated wrong, illegal and void on the ground of fraud and misrepresentation. The plaintiff was also bound by mutation No. 1349 dated 6.6.1970 and mutation No. 1758 dated 20.2.1987. The defendants No. 1 to 4 and their predecessors-in-interest had constructed three storeyed RCC building in the suit land after their building plans stood approved by the local body. The plaintiff was not entitled to any relief much less to the discretionary relief of permanent prohibitory and mandatory injunction. The proforma defendant No.8 Jai Bhagwan had filed written statement supporting the defence of defendants No. 1 to 4 and their predecessors-in-interest. Defendants No. 5 and 6 had admitted the suit of the plaintiff. Defendant No.7 despite notice, did not contest the suit.

4. On 29.7.1995, the learned trial Court framed the following issues:

1. *Whether the suit land was coparcenary property, if so, its effect? OPP*
2. *Whether plaintiff is entitled for the declaratory decree to the effect that vide family arrangement/partition dated 19.9.1960, plaintiff and defendant No.8 are absolutely woner in possession of the land comprised in Khata/Khatauni No. 52/162, Khasra No. 240 to the extent of half share each after their father, as alleged? OPP*
3. *Whether the sale deed dated 20.6.1962 No.10/62 registered on 22.6.1962 in respect of the land comprised in Khasra No. 240 to the extent of 1/3rd share in favour of defendant No.1 (since deceased) is illegal one and in-operative and the result of fraud and misrepresentation and liable to be cancelled alongwith mutation No.1349, dated 6.6.1970 and mutation No. 1758 attested on 20.2.1987 are also liable to be cancelled? OPP*
4. *Whether plaintiff is entitled to the consequential relief of permanent injunction against defendants No.1 to 4 from using the said alleged sale deed No.10/62, as alleged? OPP*
5. *Whether plaintiff and proforma defendant No.8 are entitled for decree of permanent prohibitory injunction against defendants No. 1 to 4 as alleged? OPP*
6. *Whether the plaintiff is entitled for the relief of mandatory injunction directing defendants No. 1 to 4 to pull down the entire RCC structure over land comprised in Khasra No. 240 to the extent of 64 square yards, as alleged? OPP*
7. *Whether the suit is within time? OPP*
8. *Whether the suit of the plaintiff is bad for non-joinder of necessary parties? OPD*
9. *Whether the suit of the plaintiff is not value dproperly for the purpose of court fee and jurisdiction? OPD*
10. *Whether the suit of the plaintiff is not maintainable in the present form? OPD*
11. *Whether the suit land was in exclusive possession of defendant No.1 Brij Bhushan (since deceased), if so, its effect? OPD*
12. *Whether defendant No.1, Brij Bhushan (since deceased) was in lawful possession of the suit land by virtue of registered sale deed No.10/62, dated 22.6.1962? OPD*
13. *Whether the defendant No.1, Brij Bhushan (since deceased) in the alternative had acquired title to the suit land by way of adverse possession? OPD*
14. *Relief.*

5. After recording the evidence led by the parties and evaluating the same, the learned trial Court dismissed the suit of the plaintiff on 20.9.1999, constraining him to file the

appeal before the learned lower Appellate Court, who vide judgment and decree dated 31.3.2001 dismissed the same.

6. Aggrieved by the judgment and decree passed by both the learned Courts below, appellants/plaintiffs have filed this Regular Second Appeal, which was admitted by this Court vide order dated 06.10.2003 on the following substantial questions of law No.1, 2, 4 and 5:

1. *When the plaintiff-appellant assailed the deed of sale Ext. PG, to be illegal, null and void, on account of having been procured by exercise of fraud and misrepresentation by the alleged attorney executed by late Sh. Sadhu Ram, in favour of Shri Keshav Ram, was not the defendant-respondents obliged to produce and prove on record such documents? Have not both the Courts below acted in excess of their jurisdiction in not drawing adverse inference on account of withholding the original documents despite issuance of notice under Order 12 Rule 8 of the Code of Civil Procedure by the plaintiff-appellant?*
2. *Whether both the Courts below have put under reliance on inadmissible evidence particularly Exhibit PG which was a certified copy without seeking permission to lead secondary evidence?*
3. *Whether both the Courts below have failed to consider the true import of the provisions of Section 107 and 108 of the Indian Evidence Act regarding the civil presumptive death of late Shri Sadhu Ram? What was the date when such factum was to be presumed? Whether both the Courts below have gravely erred in dismissing the suit of the plaintiff-appellant being barred by limitation? Are not such findings absolutely wrong and illegal and perverse when the suit from the date of knowledge of the fraud played was within the period of limitation, seeking declaration for setting aside the same?*
4. *Whether both the Courts below have exceeded their jurisdiction in denying the relief of mandatory injunction to the plaintiff-appellant particularly when it was established that the offending structure was constructed by the defendant-respondents during the pendency of the litigation despite the order of injunction operative against them.*
5. *Whether vendor Sh. Sadhu Ram through special attorney had executed the sale deed on dated 20.6.1962 registered on dated 22.6.1962 in the office of Sub Registrar, Rampur District Shimla, H.P. in favour of vendee namely Sh. Brij Bhushan in the capacity of exclusive owner of Khasra No. 240 on the basis of family partition or in the capacity of co-sharer?*

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

Substantial Question of Law No.1.

7. The answer to this question lies in the fact as to whether there are sufficient pleadings so as to constitute fraud or misrepresentation as alleged by the appellants/plaintiffs. For deciding this question, one will have to fall back on the contents of the plaint wherein the allegations of fraud and misrepresentation have been set out more particularly para-9 thereof where the allegations have been pleaded in the following manner:

> *"That the alleged sale deed alleged to have been executed by defendant No.2 in the capacity of his being Special Power of Attorney of late Sadhu Ram pertaining to Khasra No. 240 measuring 64 sqr. Yards in Kasba Bazar Rampur, is altogether void, illegal, inoperative and same deserves to be set-aside and cancelled, as Sadhu Ram never gave any Special Power of Attorney to execute the same in favour of defendant No.2. The alleged sale deed which is alleged to have been executed on 20.6.1962 and registered on 22.6.1962 with Sub Registrar, Rampur under registration No. 10/62 by defendant No.2. Late Sadhu Ram never appeared*

either before Sub Registrar nor before Assistant Collector 2nd Grade, Rampur. The alleged sale deed is the result of fraud and mis-representation and the same is forged one. The Assistant Collector 2nd Grade, Rampur in mutation No. 1223 dated 30.3.1963 rejected the alleged sale deed and the mutation entered on the basis of this alleged sale deed of No. 10/62 was rejected by him."

8. Evidently, the aforesaid allegations do not meet and fall short of the requirement of Rule 4 of Order 6, which reads thus:

> *"**4. Particulars to be given where necessary**.- In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."*

9. It is clearly evident from the aforesaid provision that as per Rule 4 particulars with dates and items are clearly required to be stated in the pleading inter alia in cases of misrepresentation, fraud, breach of trust, wilful default or undue influence. The object of insisting on these particulars is two fold:

(i) It enables the opposite party to know the case he has to meet with; and

(ii) It prevents the issue being enlarged and enables the court to determine the controversy at the earliest.

'Fraud' is obtaining of an advantage by unfair or wrongful means.

10. Under this rule, where fraud is alleged, necessary particulars have to be set out and stated in the pleadings which must be clear, definite, express and specific. It is not enough to allege fraud without stating particulars with dates and items as to such fraud. General allegations, however strong, if unaccompanied by sufficient particulars, are not enough and the Court will not take notice.

11. In ***Sukhdei (Smt.) (dead) by LRs vs. Bairo (dead) and others (1999) 4 SCC 262*** the Hon'ble Supreme Court held that while pleading fraud, particulars necessary for establishing the same should be specifically stated in the plaint and it was further held that findings on a question of fraud concurrently arrived at by the Courts below should not be interfered with by the High Court while exercising power under Section 100 of CPC. The aforesaid Rule is mandatory and no departure from the Rule is permissible while leading evidence.

As regards the plea of misrepresentation, the same means wrong, false or misleading representation.

12. Here again, when misrepresentation is alleged, the party alleging it must state necessary facts of such misrepresentation. Though, it is often observed that fraud and misrepresentation may overlap sometimes, however, particulars of each must be given. It must also be stated whether such representation was verbal or written. When it was alleged that diverse persons were induced by the defendant, names and necessary particulars also should be mentioned in the plaint by the plaintiff. Obviously, the onus is on the party setting up a plea of misrepresentation to prove it.

13. Adverting to the plea as extracted above, it may be noted that the pleadings of the plaintiff are wholly deficient and barring use of the word fraud or misrepresentation, nothing is stated which may even remotely establish the facts which constitute fraud or misrepresentation.

14. As regards, the drawing of adverse possession because of non-production of the document inspite of notice under Order 12 Rule 8 CPC, suffice it to say that before such presumption can be drawn against a party called upon to produce a document, it has to be proved that the document is in fact in the possession and custody of the party concerned. That apart, even otherwise such inference is no more than presumptive evidence which by its very

nature is weak evidence and would at best entitle the party issuing the notice to lead secondary evidence of document under the Evidence Act.

Substantial question of law No.2:

15. It is not in dispute that Ext. PG was not only produced by the plaintiff but relied upon by the plaintiff in his examination-in-chief while appearing as PW-1. Having produced the document, the plaintiff is estopped from assailing either its mode and manner of production or even the contents thereof.

Substantial question of law No.3:

16. It is not in dispute that as per the allegations of the plaintiff, the partition amongst the party took place in 1960 and the sale deed in question was executed and registered in the year 1962, whereas the suit came to be filed only on 17.3.1987 i.e. after 25 years of the registration of the sale deed. Though, the learned counsel for the appellants would harp

upon on the various mutations attested from time to time, but these mutations are hardly of any value as it is the sale deed which is the document of title that was required to be assailed and the mutations attested either ways could not furnish a cause of action.

17. The Hon'ble Supreme Court in ***Sankalchan Jaychandbhai Patel and others vs. Vithal Bhai Jaychandbhai Patel (1996) 6 SCC 433*** has held that the mutation entries are only to enable the State to collect revenues from the persons in possession and enjoyment of the property and the right, title and interest as to the property should be established dehors the entries. Entries are only one of the modes of proof of the enjoyment of the property. However, mutation entries in themselves do not create any title or interest therein.

18. Similar reiteration of law can be found in the judgment rendered by the Hon'ble Supreme Court in ***Sawarni (Smt.) vs. Inder Kaur (Smt.) and others, (1996) 6 SCC 223***, wherein in paragraph -7 it was observed as under:

> *"7. .....Mutation of a property in the revenue record does not create or extinguish title nor has it any presumptive value on title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question....."*

19. Furthermore, it is not always safe to rely upon the revenue records in cases like the instant one where one of the parties is possessed of a registered document of title. Entries in revenue records have often been held to be paradise of the Patwari and here it shall be apt to refer to the observations of the Hon'ble Supreme Court in ***Baleshwar Tewari (dead) by LRs. and others*** vs. ***Sheo Jatan Tiwary and others (1997) 5 SCC 112*** which read thus:-

> *"16. Under these circumstances, even if any enquiry was conducted unless the appellant is given notice and an opportunity to adduce the evidence to establish his right in the enquiry made, the finding generally does not bind him. Entries in revenue records are the paradise of the patwari and the tiller of the soil is rarely concerned with the same. So long as his possession and enjoyment is not interdicted by due process and course of law, he is least concerned with entries. It is common knowledge in rural India that a raiyat always regards the lands he ploughs, as his dominion and generally obeys, with moral fiber the command of the intermediary so long as his possession is not disturbed. Therefore, creation of records is a camouflage to defeat just and legal right or claim and interest of the raiyat, the tiller of the soil on whom the Act confers title to the land he tills."*

20. Even otherwise, admittedly the respondents are in possession of a registered document of title which is correct and complete proof of ownership and revenue entries including mutation entries have nothing to do with the ownership and cannot be treated as evidence of ownership of the property. There is a presumption in regard to the correctness of registered document.

21. In ***Ningawwa*** vs. ***Byrappa Shiddappa Hireknrabar AIR 1968, SC 956,*** the Hon'ble Supreme Court held as under:

> *"27. There is a presumption that a registered document is validly executed. A registered document, therefore, prima-facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, Respondent 1 has not been able to rebut the said presumption."*

22. In ***Prem Singh*** vs**. *Birbal (2006) 5 SCC 353***, it was held as under:

> *"27. There is a presumption that a registered document is validly executed. A registered document, therefore, prima-facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, respondent No.1 has not been able to rebut the said presumption."*

23. In view of the aforesaid exposition of law, the time spent in the mutation proceedings cannot be set off while computing the period of limitation. The suit filed by the plaintiff is clearly time barred and moreover the timing of the suit is such when the plaintiff knew fully well that most of the evidence with the passage of time may have got destroyed.

24. As already observed, there is no valid plea of fraud and misrepresentation and as regards, the knowledge thereof, it is too late in the day for the plaintiff to canvass that he only acquired knowledge in the year 1987 and filed the suit immediately. Rather it is established that the plaintiff had been contesting the mutation proceedings which in turn were admittedly based upon the sale deed in question, and still he would have this Court believe that he had no knowledge qua the sale deed. What then was the plaintiff really contesting is anybody's guess?

25. Therefore, in absence of the case of the plaintiff falling within any of the exemptions as contemplated under Rule 6 of Order 7 of the case, no fault can be found with the concurrent findings rendered by the learned Courts below regarding the suit of the plaintiff being highly time barred.

Substantial question of law No.4:

26. The appellants have failed to point out as to how both the Courts below exceeded the jurisdiction in deciding the relief of mandatory injunction particularly when the plaintiff has failed to establish the fact that offending structures were constructed by the defendants/respondents during the pendency of the litigation. This question is based on a pure findings of fact, and, therefore, is not open to challenge in these proceedings. That apart, in absence of proof of fraud or misrepresentation and more particularly when this question has not been agitated before the learned lower Appellate Court, the same is not open to challenge in this appeal.

Substantial question of law No.5:

27. It is vehemently argued by the appellants that there is a recital in the sale deed that vendor by way of family partition became owner of Khasra No. 240 measuring 64 Sqr. Yards and there is also further a recital that the sale deed was executed by vendor in the capacity of co-sharer. It is further argued that Sadhu Ram could not have been exclusive owner and at the same time the co-sharer of the property and this casts a serious doubt on the deed itself.

28. I find this contention to be not only devoid of any merit but to say the least preposterous. It is pleaded case of the plaintiff that immoveable properties possessed by their ancestors were divided amongst S/Sh. Krishan Chand, Keshav Ram and Lala Sadhu Ram on 19.9.1960 and the suit land fell to the share of Sadhu Ram as is evident from para-5 of the plaint which reads thus:

> *"5. That the aforesaid immoveable properties were divided amongst themselves by S/Sh. Krishan Chand, Keshav Ram and Lala Sadhu Ram on 19 Sept. 1960 by way of family arrangement and the following properties came in the share of each:*

Krishan Chand : (i) One residential house single storey first floor Is raised.

(ii) One small shop in Main Bazar, Raipur Rani.

Keshav Ram : (i) One two stories shop in Main Bazar, Raipur Rani.

(ii) One Kholla (Khandar).

Sadhu Ram : Total land situated in Khasra No.240 measuring 64 Sqr. Yards in Kasba Bazar Rampur.

The aforesaid family arrangement by way of partition was fully being acted upon by all the three persons and the possession of the aforesaid properties so allotted to them in that family arrangement remained that of the person to whom it was allotted according to aforesaid arrangement. Since this family arrangement by way of partition was affected each one of allotted to them in that partition. In this way late Sh. Sadhu Ram the father of the plaintiff became the full and exclusive owner in possession of the land comprising in Khasra No. 240 measuring 64 sqr. Yards in Kasba Bazar Rampur by aforesaid partition. The said land on the spot was Khandar since the time of Great-Grand Father of the plaintiff."

29. Notably, even the defendants/respondents have not denied these facts and, therefore, both the parties were alive to the factual situation that not only was there a partition inter se the co-owners but this property in fact fell to the share of Sadhu Ram in such partition. Thus, there was no question of Sadhu Ram being co-owner of the property in the year 1962 when partition had already been affected in 1960 and therefore, even if any such word is found to have been mentioned in any document, the same would only be superfluous and compulsory termed to be an accidental slip having virtually no bearing on the issue on hand. The appellants cannot convert a mountain out of a mole and thereby perpetuate the litigation which is already pending for the last more than thirty years.

Substantial questions of law are answered accordingly.

In view of aforesaid discussion, I find no merit in this appeal and the same is accordingly dismissed with costs throughout. Pending application(s), if any, also stands disposed of.

****

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

Miss Shefali Kumari .....Petitioner.

Vs.

Indian Oil Corporation Limited and others .....Respondents.

CWP No.: 6889 of 2011
Reserved on: 09.09.2016
Date of Decision: 21.09.2016

Constitution of India, 1950- Article 226- Indian Oil Corporation Limited issued an advertisement for the purpose of award of Rajiv Gandhi Gramin LPG Vitrak (RGGVL) under Scheduled Caste category - petitioner applied for the same- she was selected in draw of lots - she was called upon to be present along with photo identity card – however, no letter of intent was issued – a fresh draw was held- respondent pleaded that mere qualification in the draw is not final selection- plot was found to be in the name of grandfather of the petitioner who was not family member and the petitioner was not eligible- held, that family has been defined to mean spouse and their unmarried children- In case of unmarried applicant family means parents and unmarried brother(s) and sister(s)- grandparents are not included in the definition of family unit-

parents will include only father and mother and not grandparents- case of the petitioner was rightly rejected- petition dismissed. (Para-11 to 22)

Case referred:
K.V. Muthu Vs. Angamuthu Ammal (1997) 2 Supreme Court Cases 53

For the petitioner:	Mr. B.C. Negi, Senior Advocate, with Mr. Vineet Vashisht, Advocate.
For the respondents:	Mr. K.D. Sood, Senior Advocate, with Mr. Sanjeev Sood, Advocate, for respondent No. 1. Respondent No. 2 *ex parte.* Ms. Nishi Goel, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. :

Issue involved in the present writ petition is as to whether the term "Family Unit" as it finds mention in Clause 4(e) of the brochure issued by respondent No. 1/Indian Oil Corporation Limited, i.e. Brochure on Selection of Rajiv Gandhi Gramin LPG Vitrak (RGGLV) includes the "grand parents" of the applicant or the term "parent" includes only "mother" and "father" of the applicant?

2. Brief facts necessary for the adjudication of the present case are that Indian Oil Corporation Limited issued an advertisement on 11.10.2010 for the purpose of award for Rajiv Gandhi Gramin LPG Vitrak (RGGVL) at Sarol in District Chamba under Scheduled Caste category. For the purpose of setting up of LPG Vitraks, respondent/Indian Oil Corporation Limited has issued a brochure, i.e. '*Brochure on Selection of Rajiv Gandhi Gramin LPG Vitrak (RGGLV)*'. As per the said brochure, common eligibility criteria for all categories who intend to apply for allotment of Rajiv Gandhi Gramin LPG Vitrak location (hereinafter referred to as 'the RGGLV location') is contemplated in Clause 4 of the said brochure, which provides as under:

> *"4. Common Eligibility Criteria for all Categories:*
>
> *Applicant applying for RGGLV should*
>
> *(a) be an Indian citizen*
>
> *(b) be a resident of the town /village(s) of the advertised RGGLV location*
>
> *(c) have passed minimum Xth Standard examination or equivalent from recognized Board*
>
> *(d) be not less than 21 years and not more than 45 years in age as on the date of application*
>
> *(e) fulfil Multiple dealership/distributorship norm*
>
> *Multiple Dealership/Distributorship norms means that the applicant or any other member of 'family unit' should not hold a dealership/ distributorship/ RGGLV or Letter of Intent (LOI) for a dealership/distributorship/ RGGLV of a PSU Oil Company i.e only one Retail Outlet/SKO-LDO dealership/LPG distributorship/RGGLV of PSU Oil Company will be allowed to a 'Family Unit'.*
>
> *'Family Unit' in case of married person/ applicant, shall consist of individual concerned, his/her Spouse and their unmarried son(s)/daughter(s). In case of unmarried person/ applicant, 'Family Unit' shall consist of individual concerned, his/her parents and his/her unmarried brother(s) and unmarried sister(s). In case of divorcee, 'Family Unit' shall consist of individual concerned, unmarried son(s)/unmarried daughter(s) whose custody is given to him/her. In case of widow/widower, 'Family Unit' shall consist of individual concerned, unmarried son(s)/unmarried daughter(s).*

(f) have minimum total amount of Rs 2 lakhs put together from Saving accounts in Bank (as on date of application), free and un-encumbered fixed deposits in scheduled banks, Kisan Vikas Patra, NSC, bonds, any other investment, etc in the name of self or family members of the 'Family Unit' as defined above. (In case of RGGLV locations reserved under 'SC/ST' category, applicants with less than Rs 2 lakhs are also eligible also apply). For evaluation purpose, marks will be awarded to applicants of all categories based on the amount mentioned in the application.

(g) own a suitable land (plot) of minimum 20 metre X 24 metre in dimension at the advertised RGGLV location for construction of LPG cylinder Storage Godown.

Own means having clear ownership title of the property in the name of applicant/ family member of the 'Family Unit' as defined in multiple dealershi/distributorship norm. In case of ownership/co-ownership by family member, consent letter from the family member will be required.

Land for construction of Godown will be considered suitable, if it is freely accessible through all weather motorable approach road (public road or private road of the applicant connecting to the public road) and should be plain, in one contiguous plot, free from live overhead power transmission or telephone lines. Pipelines / Canals / Drainage / Nallahs should not be passing through the plot.

(h) be physically and mentally sound to be able to run the business

(i) neither have been convicted nor charges been framed by any Court of Law for any criminal offence involving moral turpitude/ economic offences.

(j) not be a signatory to distributorship/ dealerships agreement, terminated on account of proven cases of malpractice/adulteration of any Oil Company."

3. The case of the petitioner is that pursuant to the issuance of advertisement dated 11.10.2010, the petitioner being eligible to apply for RGGLV location at Sarol in District Chamba, she applied for the same. Vide communication dated 16.02.2011 (Annexure P-2) on the subject *"Application for award of Rajiv Gandhi LPG Vitrak (RGGLV) at Sarol, District Chamba under SC Category advertised on 11.10.2010*", the petitioner was intimated by respondent No.1/Corporation that she had qualified for draw of selection of RGGLV and she was called upon to be present alongwith photo identity card issued by any Government department for draw at 10:00 a.m. on 11.03.2011. It is further the case of the petitioner that at the draw which was held on 11.03.2011 for Sarol location, the petitioner was declared as selected candidate. As per the petitioner, in consonance with the provisions of Clause 12.9 and 12.10 of the brochure after draw, field verification was to be carried out with regard to the selected candidate and in case the information provided by the applicant was found to be correct, then letter of intent was to be issued to the selected candidate and in case of rejection of selected candidate on account of findings in field investigation, the selection of the candidate so selected was required to be cancelled and this was to be followed by fresh draw from amongst remaining qualified eligible candidates. As per the petitioner, despite the fact that she had been selected for Sarol location in the draw which was held on 11.03.2011, no letter of intent was received by her, neither it was even communicated to her that the selection was cancelled. As per the petitioner, it was vide letter dated 01.08.2011 (Annexure P-3) that she came to know that respondent-Corporation had in fact invited the private respondents for fresh draw for Sarol Location, which was scheduled on 26.08.2011. As per the petitioner, this implied that her selection stood cancelled. According to the petitioner, she came to know all these facts on 16.08.2011 when she incidentally happened to come across the said communication. Accordingly, feeling aggrieved by the issuance of communication dated 01.08.2011 (Annexure P-3) vide which the private respondents were invited for draw of lots for allocation of Sarol location in District Chamba under Scheduled Caste category for award of Rajiv Gandhi LPG Vitrak (RGGLV), she filed the present writ petition praying for quashing of letter dated 01.08.2011 and for direction to the respondent/Corporation not to implement letter dated 01.08.2011 and to issue letter of intent in her favour.

4. In its reply filed by the respondent/Corporation, the factum of Sarol location having been advertised on 11.03.2011 and the factum of communication dated 16.02.2011 having been issued to the petitioner and her subsequently participating in the draw of lots on 11.03.2011 is not in dispute. However, as per the said respondent, merely qualifying in the draw was not to be construed as final selection and the final selection in fact depended upon field verification which was to be carried out with regard to the selected candidates. According to the respondent/ Corporation, if during field verification, the information given by the applicant in the application was found to be correct, only then letter of intent was to be issued to the selected candidate. As per the respondent/ Corporation, vide communication dated 17.08.2011, the petitioner was informed that as during field verifications involving physical verification of the information provided by the petitioner, it was found that plot offered by her for construction of godown at Khasra No. 756/312 was found to be in the name of Shri Guro Ram (grandfather of the present petitioner), who was not a member of her 'Family Unit' as defined under multi distributorship norms in the application/advertisement, and as she was also not a co-sharer qua the above land, the said land could not be considered to be owned by her as per multi distributorship norms as given in the application/advertisement. Vide this communication, the petitioner had also been informed that as she did not met the eligibility criteria of owning the suitable plot of minimum 20 meters X 24 meters in dimension in the advertised location for LPG storage godown, she stood disqualified for being issued the letter of intent for RGGLV at Sarol, District Chamba. It was the stand of the respondent/Corporation that the candidature of the petitioner was not found eligible as she did not had land in the name of self or within "Family Unit" as defined in the advertisement. On these basis, it was submitted on behalf of the respondent/Corporation that there was no arbitrariness or illegality in the issuance of communication dated 01.08.2011 quashing of which was sought by way of the present writ petition. It was further urged on behalf of the respondent/Corporation that as there was no merit in the petition, the same be dismissed.

5. Respondent No. 2 stood proceeded against *ex parte* and respondent No. 3 adopted the reply filed by respondent No. 1.

6. No rejoinder was intended to be filed by the petitioner to the reply filed by respondent No. 1.

7. Mr. B.C. Negi, learned Senior Counsel appearing for the petitioner has argued that the rejection of the candidature of the petitioner on the ground that the land offered by her under Sub-clause (g) of Clause 4 of the brochure cannot be construed to be land either owned by the applicant or family member of the 'Family Unit' is arbitrary and erroneous. Mr. Negi has argued that it is an admitted fact that in the present case, the land which was offered by the petitioner as contemplated in Sub-clause (g) of Clause 4 of the brochure for construction of LPG storage godown belonged to the grand father of the petitioner. According to Mr. Negi, not construing grand father to be a family member of the "Family Unit" was totally erroneous because by no stretch of imagination grand father of an applicant can be said to be outside the purview of family member as envisaged by the term of "Family Unit". According to Mr. Negi, a "Family Unit" as defined in the brochure of the respondent/Corporation in case of unmarried applicant was to consist of individual concerned, his/her parents and his/her unmarried brothers and unmarried sisters. According to Mr. Negi, the term "his/her parents" also includes grand parents. On this analogy, it was argued by Mr. Negi that the rejection of the candidature of the petitioner on the ground that plot offered by her belonged to her grand father was not sustainable in law. To fortify his arguments, Mr. Negi has relied upon judgment of the Hon'ble Supreme Court in **K.V. Muthu** Vs. **Angamuthu Ammal** (1997) 2 Supreme Court Cases 53.

8. On the other hand, Mr. K.D. Sood, learned Senior Counsel appearing for respondent/Corporation argued that the term "Family Unit" as defined in Clause 4 of the brochure issued by the respondent/Corporation was unambiguous and very clear as to who all were included in the term "Family Unit". Mr. Sood argued that in the present case, the petitioner was an unmarried lady and as per Clause 4, "Faimly Unit" in the case of an unmarried lady was

to include her parents which means her mother and father and her unmarried brothers and unmarried sisters. According to Mr. Sood, grand parents were not included in the term parents and were not expressly included in the term "Family Unit" and could not be allowed to be introduced by giving the words "Parents" a wider meaning than what was intended in the brochure published by the respondent/Corporation. Mr. Sood further argued that the judgment being relied upon by the petitioner was having no applicability in the facts of the present case. It was further urged by Mr. Sood that incidentally the definition of "Family Unit" as it finds mention the brochure published by the respondent/Corporation had not been challenged by the petitioner. On these basis, it was submitted by Mr. Sood that there was no force in the arguments of Mr. Negi.

9. Ms. Nishi Goel, learned counsel appearing for respondent No. 3 adopted the arguments of Mr. K. D. Sood, learned Senior Counsel representing respondent/Corporation.

10. I have heard the learned counsel for the parties and also gone through the documents which have been placed on record by the respective parties.

11. Clause 4 of the brochure issued by the respondent/Corporation on Selection of Rajiv Gandhi Gramin LPG Vitrak (RGGLV) for all categories defines "Family Unit" as under:

> *'Family Unit' in case of married person/ applicant, shall consist of individual concerned, his/her Spouse and their unmarried son(s)/daughter(s). In case of unmarried person/ applicant, 'Family Unit' shall consist of individual concerned, his/her parents and his/her unmarried brother(s) and unmarried sister(s). In case of divorcee, 'Family Unit' shall consist of individual concerned, unmarried son(s)/unmarried daughter(s) whose custody is given to him/her. In case of widow/widower, 'Family Unit' shall consist of individual concerned, unmarried son(s)/unmarried daughter(s).*

12. Sub-clause (g) of Clause 4 of the said brochure provides as under:

> *(g) own a suitable land (plot) of minimum 20 metre X 24 metre in dimension at the advertised RGGLV location for construction of LPG cylinder Storage Godown.*
>
> *Own means having clear ownership title of the property in the name of applicant/ family member of the 'Family Unit' as defined in multiple dealership/distributorship norm. In case of ownership/co-ownership by family member, consent letter from the family member will be required.*
>
> *Land for construction of Godown will be considered suitable, if it is freely accessible through all weather motorable approach road (public road or private road of the applicant connecting to the public road) and should be plain, in one contiguous plot, free from live overhead power transmission or telephone lines. Pipelines / Canals / Drainage / Nallahs should not be passing through the plot.*

13. As per the term "Family Unit" which finds mention in Clause 4 of the above mentioned brochure, the said term in case of married person consists of individual concerned, his/her spouse and their unmarried sons and daughters. In other words, if married person applies for allotment of location under this brochure, then "Family Unit" in case of such like person consists of the said applicant, spouse and un-married children. Neither married children nor their wards, i.e. grand children of the applicant are included in the definition of the term "Family Unit" in case of a married person. Similarly, in case of unmarried person, "Family Unit" is stated to be consisting of individual concerned, his/her parents and his/her unmarried brothers and unmarried sisters.

14. A harmonious reading of the term "Family Unit" as has been defined for a married person and an unmarried person makes it clear that the respondent/Corporation has confined the term "Family Unit" in case of a married applicant to his/her spouse and unmarried children and in case of unmarried applicant to his/her parents and unmarried brothers and sisters.

15. In my considered view, bare reading of the term "Family Unit" as has been provided for in the brochure makes it clear that grand parents are not included in the scheme of things as far as "Family Unit" is concerned. Therefore, I do not find any force in the contention of learned Senior Counsel for the petitioner that the term "Family Unit" in general and the term "Parent" in particular as it finds mention in Clause 4 of the brochure *ipso facto* includes grand parents also.

16. In Black's Law Dictionary Seventh Edition term "Parent" has been defined as:

> *"**Parent:** The lawful father or mother of some one. In ordinary usage, the term denotes more than responsibility for conception and birth. The term commonly includes (1) either the natural father or the natural mother of a child, (2) the adoptive father or adoptive mother of a child, (3) a child's putative blood parent who has expressly acknowledged paternity, and (4) an individual or agency whose status as guardian has been established by judicial decree. In law, parental status based on any criterion may be terminated by judicial decree."*

17. Similarly, in Corpus Juris Secundum, the term "Parent" has been defined as:

> *"A "parent" is one who has generated a child; is a father or a mother.*
>
> *A "parent" is one who begets or brings forth off-spring; a father or a mother.*
>
> *A "parent" is one who generates a child, a father or mother by blood.*
>
> *"Parent" in its common and accepted meaning refers to the natural father or mother.*
>
> *The word "parent" means father or mother."*

18. Therefore also, in my considered view, the word "parent" obviously means father and mother and it cannot be said to include "grand parents" within its ambit.

19. As far as the judgment relied upon by learned Senior Counsel for the petitioner is concerned, in the said case, the Hon'ble Supreme Court was seized with the issue as to whether a "foster son" would be a "member of family" in relation to a landlord within the meaning of Section 2(6-A) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. It is evident from para-9 of the said judgment that Section 2(6-A) of the Act in issue provided as under:

> *"2.(6-A) 'member of his family' in relation to a landlord means his spouse, son, daughter, grandchild or dependant parent."*

20. While interpreting the said statutory provision, the Hon'ble Supreme Court was pleased to hold that it appears that the definition is conclusive as the word "means" has been used to specify the members, namely, spouse, son, daughter, grandchild or dependent parent, who would constitute the family.

21. In my considered view, the judgment being relied upon by the petitioner has no bearing in this case because therein the Statute itself envisaged "member of his family" to mean a grandchild, which naturally took into its compass "grand parents" when dealt with from the perspective of the grandchild. It was in this background that the Hon'ble Supreme Court held that in its ordinary and primary sense, the term "family" signifies the collective body of persons living in one house or under one head or manager or one domestic government and in its restricted sense, "family" would include only parents and their children and it may include even grandchildren and all the persons of the same blood living together. In my considered view, the Hon'ble Supreme Court has not been pleased to hold that the term "parent" inherently includes not only father and mother, but also grand father and grand mother.

22. In view of the discussion held above, I do not find any merit in the present writ petition and the same is accordingly dismissed, so also the Miscellaneous application(s), if any. No order as to costs.

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

State of Himachal Pradesh ....Appellant.
Versus
Krishan Lal ... Accused/respondent.

Cr. Appeal No. 325 of 2011.
Reserved on 5.9.2016.
Decided on: 21.9.2016.

Indian Penal Code, 1860- Section 302- Deceased had left home in connection with his work- he heard cries of the deceased - when he came out of the house, he found the accused giving beating to the deceased with a danda- when the informant made inquiry as to why the accused was beating the deceased, he pushed the deceased due to which deceased fell down – deceased had sustained injuries- he was taken to hospital and died there- accused was tried and acquitted by the trial Court- held, in appeal that deceased had disclosed in the hospital that he had suffered injuries by way of fall- Medical Officer stated that injuries are possible if a person falls down after a push by another person or falls down under the influence of liquor- no injuries by stick were found in the post mortem- testimonies of prosecution witnesses are contradicting each other- no independent witness was examined to prove the incident - the deceased was heavily drunk and possibility of his fall in a state of intoxication cannot be ruled out- prosecution version that accused had given beatings to the deceased by the danda was not proved beyond reasonable doubt- accused was rightly acquitted by the trial Court- appeal dismissed. (Para-18 to 25)

For the appellant. Mr. V.S. Chauhan, Addl. Advocate General with Mr. Vikram Thakur & Mr. Puneet Rajta, Dy. Advocate Generals.
For the respondent. None.
Mr. K.S.Banyal, Sr. Advocate, Amicus Curiae.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of this appeal, the State has challenged the judgment passed by the Court of learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr in Sessions Trial Court No. 12 of 2010 dated 12.5.2011 vide which, learned trial court has acquitted the accused for commission of offence punishable under Section 302 of the Indian Penal Code (in short 'IPC').

2. The case of the prosecution was that complainant Palas Ram and his brother Hari Singh were residing separately for the last 15 years and their parents were residing with the complainant. On 19.11.2009 Hari Singh (hereinafter to be referred as 'deceased') had gone to Kholighat in connection with his work. At about 7:00 p.m. complainant heard cries of the deceased and he along with his mother Smt. Shyam Dassi came out of the house and saw accused, Krishan Lal, who had his house nearby giving beatings to the deceased with 'Danda'. Further as per prosecution, at that time, bulb of the verandah of the house of accused was on. Beatings were given to the deceased on the passage which passed through the house of the accused. When complainant asked the accused as to why he was beating the deceased, accused gave a push to the deceased, as a result of which, deceased was thrown on the down side of the passage in a field and thereafter accused ran away. On this complainant ran and reached the spot and found the deceased in an injured condition. Both the legs of the deceased were not functioning. In the meanwhile his mother also reached the spot. Deceased was unable to move and his arms were also not working. He was taken to the house by the complainant on his back. Further as per prosecution, thereafter deceased told complainant that when he was returning

from Kholighat and when he reached near the house of accused, accused started giving him beating with a danda and thereafter he pushed him down the field. Deceased was having lot of pain on the back of neck as well as his arms and legs were also not working properly. Since it was night time, therefore no vehicle could be arranged. On 20.11.2009, at around 9:30 a.m. deceased was taken to IGMC, Shimla in the vehicle of Ram Singh. Wife of the deceased also accompanied them. On the asking of doctors at IGMC, Shimla complainant told them that deceased had suffered injuries due to fall. This version was given by the complainant to the doctors, as he was confused. On 21.11.2009 deceased died while he was admitted in the hospital. Thereafter complainant telephonically reported the matter to police at Police Station, Rampur. This led to entry of Rapat in the daily diary. One police official was sent from police post Nankhari to inquire the Rapat. Thereafter statement of the complainant was recorded under Section 154 Cr.P.C. and on the basis of said statement, FIR was registered. The dead body of the deceased was also subjected to post-mortem. The accused was taken into custody and while in custody accused allegedly made a disclosure statement which led to the discovery of the weapon of offence, i.e. Danda.

3. After completion of investigation, challan was filed and as a prima facie case was found against the accused, he was charged for commission of offence punishable under Section 302 IPC, to which he pleaded not guilty and claimed trial.

4. On the basis of material produced on record by the prosecution, learned trial court held that the version of prosecution that the deceased was given beatings by the accused with danda was highly doubtful. Learned trial court further held that testimony of PW7, Dr. Piyush Kapila, who conducted the postmortem of the dead body, revealed that he had nowhere stated that injuries found on the person of deceased could have been caused by danda. On the contrary he had stated that injuries which were found on the body of deceased could have been caused if a person was pushed by another person and as a result of the said push the said person fell down. Learned trial court further held that the defence suggestion that injuries sustained by the deceased could have been caused to a person due to fall under the influence of liquor were also admitted by PW7. Learned trial court also took note of the fact that danda Ext. P4 was never produced before PW7 to seek his opinion as to whether injuries which were found on the person of deceased could have been caused with the said weapon of offence or not. Learned trial court also took note of the fact that it had come on record that in the testimony of PW10 that deceased had consumed liquor firstly in the Dera of Bablu Nepali on 19.11.2009 at about 4:00 p.m. and thereafter in the house of Man Singh and he was found to be heavily drunk. Learned trial court further held that since the deceased was heavily drunk and was not in a position to move properly as stated by the Investigating Officer, there was every possibility of his having fallen down. On these basis, learned trial court came to the conclusion that prosecution was not able to prove its case beyond all reasonable doubt and accordingly it acquitted the accused for commission of offence punishable under Section 302 IPC.

5. Mr. V.S. Chauhan, learned Additional Advocate General argued that the judgment of acquittal passed by learned trial court was not sustainable in the eyes of law as the conclusions arrived at by learned trial court while acquitting the accused were based on hypothetical reasoning, surmises and conjectures. According to Mr. Chauhan, learned trial court failed to appreciate the evidence on record in its correct perspective and it also discarded the testimony of prosecution witnesses for untenable reasons ignoring the fact that the prosecution witnesses had proved the guilt of accused beyond reasonable doubt. It was further argued by Mr. Chauhan that the conclusion arrived at by learned trial court that there were material discrepancies and contradictions in the testimony of prosecution witnesses was also not borne out from the record especially in view of the fact that the complainant had very clearly and emphatically proved the occurrence of the incident which corroborated with the testimony of the doctor nailed the guilt of the accused. Mr. Chauhan further argued that adverse inference drawn by learned trial court against the prosecution with regard to recovery of Danda was also totally unsustainable, as it stood proved on record that after the assault Danda remained in the possession of accused and prosecution could not have been held liable for non-cooperation of the

accused during the course of investigation. On these basis it was argued by Mr. Chauhan that the judgment passed by learned trial court was not sustainable in law and the same be set aside and the accused be convicted for commission of offence for which he was charged.

6. Mr. K.S. Banyal, learned Senior Counsel appearing as Amicus Curiae submitted that the findings of acquittal returned in favour of the accused by learned trial court were neither perverse nor it could be said that the findings so returned by learned trial court were not borne out from the records of the case. According to Mr. Banyal the evidence placed on record by the prosecution did not prove beyond reasonable doubt the guilt of the accused and in these circumstances learned trial court had rightly given the benefit of doubt to the accused Mr. Banyal further pointed out that the findings returned by learned trial court to the effect that the version of prosecution could not be believed because there were too many contradictions and inconsistencies in the story of the prosecution as well as in the testimonies of prosecution witnesses could also not be faulted with because the conclusion so arrived at by learned trial court was evident from the perusal of prosecution evidence. Further according to Mr. Banyal, there was possibility of accused having been falsely implicated in the case because of enmity which the complainant had towards him. Mr. Banyal urged that it was on these basis that there was no merit in the appeal, hence the same be dismissed.

7. We have heard Mr. V.S. Chauhan, learned Additional Advocate General as well as Mr. K.S. Banyal, learned Senior Counsel as Amicus Curiae.

8. In order to substantiate its case, the prosecution in all examined ten witnesses.

9. Before proceeding further we would take note of the testimonies of material witnesses of the prosecution in order to ascertain as to whether on the basis of statements so recorded by prosecution witnesses the case of prosecution stood proved against the accused beyond reasonable doubt or whether learned trial court correctly came to the conclusion that the prosecution had failed to prove its case against the accused beyond reasonable doubt.

10. Complainant-Palas Ram entered the witness box as PW1 and deposed that Hari Singh (deceased) was his elder brother. On 19.11.2009 his brother had gone to Kholighat in connection with his personal work and when he (complainant) was at his house at around 7:00 p.m. he heard cries of his brother where after he along with his mother came out of the house and saw that the accused was giving beatings to the deceased with danda blows. This witness further deposed that when he asked the accused as to why he was beating his brother, accused did not say anything and he pushed down the deceased in the field and fled/went away. This witness further deposed that thereafter he along with his mother went to the spot and found that the lower portion of deceased was not working and his neck had also turned to one side. They brought the deceased to their house and thereafter it was decided to take him to Shimla for treatment. However, no vehicle could be arranged on 19.11.2009, therefore deceased was taken to Shimla on 20.11.2009. He further deposed that since his brother (deceased) had told him that doctor was not to be told regarding the alleged incident, for this reason when initially deceased was taken to the doctor it was disclosed to the doctor that deceased had sustained injuries on account of fall. He further stated that deceased died on 21.11.2009 and thereafter he (complainant) rang Police Station, Rampur and police came to IGMC Shimla where his statement, Ext. PW1/A was recorded . In his cross-examination this witness stated that deceased, Hari Singh had gone all alone in the morning to Kholighat which was at a distance of 400 meters from his house. He further stated that on 21.11.2009 he had telephonically informed the police the fact of deceased having been beaten by Danda by the accused. He stated that he had also told the police telephonically that deceased had been pushed by the accused. He also stated that he had telephonically told the police that on account of said push his brother had sustained injuries on his neck, back and arms etc. He also stated that police was also informed by him that his mother had also seen the accused pushing the deceased. It was further stated in his cross examination that when deceased was admitted in IGMC, Shimla at around 3:00 p.m. on 20.11.2009 deceased was accompanied by him, his wife and driver of the vehicle. He stated that witness Sunder Singh had met them at Shimla. He admitted it to be correct that when deceased

was initially admitted in the causality department, at that time it was told that deceased sustained injuries on account of fall from height. He further stated that immediately after the death of deceased he informed the doctor that the deceased had in fact been pushed by the accused. He further stated that on 19.11.2009 between 6:45 to 7:00 p.m. he was present in his room which had been allotted to him in a family partition and his daughter was also with him and she was watching television. He further stated that in the next room his wife and father were present. He further stated that he saw accused giving danda blows with right hand and from the distance he could recognize the accused giving danda blows. He further stated that accused gave two danda blows on the arm and leg of the deceased. He denied the suggestion that when he reached the spot he found his brother heavily drunk. He admitted it to be correct that there were vehicles which are being plied as taxis. He denied that there was a police post nearby. He stated that wife of deceased had died due to hanging. He expressed his ignorance that deceased along with Man Singh and Jai Singh had consumed liquor in the Dera of Bablu Nepali. He admitted it to be correct that in Kholighat there was PHC where two doctors were posted. He admitted it to be correct that there were houses of Padam Singh, Madan Lal, Puran Chand and Joginder near the house of the accused. He also admitted it to be correct that if someone cries, the voice would be heard in the houses of the above mentioned persons.

11. Shyam Dassi entered the witness box as PW2 and stated that deceased was her son. This witness further deposed that on the fateful day at around 7:00 p.m. she was boiling milk in her kitchen when she heard noise. She further stated that accused was hurling abuses and on hearing noise she came out from the kitchen and saw accused giving danda blows to her son and also pushing him, as a result of which deceased fell down. She further stated that her son Palas Ram also saw the incident. This witness further deposed that thereafter accused went to the verandah of his house and when they went on the spot they found Hari Singh in an injured condition and his lower portion was not working. She further deposed that they brought the deceased to the house and because it was night time, no vehicle could be arranged. It was on the next day they brought the deceased to Shimla hospital where he was admitted. She stated that on the third day, from the date of incident, she was informed telephonically that Hari Singh died. In her cross-examination she stated that while she was in the kitchen boiling milk firstly she heard abuses being hurled by accused and upon this, she called her son Palas Ram who came out along with other members of the family. She further deposed that from her house she saw accused giving danda blows and also pushing the deceased. She further stated that she could not say as to what was the length of danda because she saw the incident from some distance and her eyesight was week. She denied the suggestion that on the date of alleged occurrence deceased had consumed liquor along with Man Singh and Jai Singh in the Dera of Bablu Nepali.

12. Karam Chand entered the witness box as PW3 and deposed that he was associated in the investigation and SHO Des Raj Chandrotia had seized the danda in his presence. As this witness did not support the case of the prosecution, he was declared as a hostile witness. In his cross-examination by the Public Prosecutor this witness denied that while in police custody accused had disclosed about the danda to the effect that the same was kept out of the kitchen of his house. He also denied that thereafter accused led the police to the place where he had kept the danda and got the same recovered. In his cross examination by the defence counsel this witness stated that police met him at Kholighat and accused was with them.

13. PW4, Sub Inspector Brij Lal, PW5, HC Laiq Ram and PW6 Shankar Dass are formal witnesses.

14. Dr. Piyush Kapila entered the witness box as PW7 and stated that he had conducted the postmortem of the deceased and in his opinion the deceased had died as a result of gross spinal shock and due to oedema of cervical spinal cord leading to death. He also deposed that injuries stated by him were possible in case a person falls down after being pushed by another person. In his cross-examination by defence, PW7 admitted it to be correct that such like injuries could be sustained by a person if he falls under the influence of liquor.

15. Smt. Sheela wife of deceased entered the witness box as PW8 and deposed that on 19.11.2009 she was at her house and at around 5:45 p.m. her mother-in-law told her that deceased was beaten by accused, Krishan Lal. This witness further deposed that upon this she along with Palas Ram, her mother-in-law and Sanit went to the spot and when they reached the spot, her husband was crying and lying downside and his legs, hands and neck were not working. This witness further deposed that when she asked her husband as to what had happened, he told her that when he was walking on the passage without hurling abuses to anyone accused gave danda blows on his legs, arms and neck and then gave him a push. This witness further deposed that during night time they did not take him for providing medical care under the belief that he had not suffered any serious injury and in the morning they took him to IGMC, Shimla. In her cross examination this witness deposed that when her mother-in-law called her, she was in the kitchen which was outside the residential house and her son, daughter and another girl were with her. She further stated that initially Palas Ram came to know about the incident and he told her mother-in-law about the same who further told her about the said incident. This witness further deposed that her mother-in-law, after she came to know about the incident, came running to her and informed her about the same. She admitted it to be correct that any incident taking place near the house of accused Krishan Lal would have come in the notice of persons residing in the neighbourhood. She also stated that her husband was related to accused as a brother. She also admitted it to be correct that her husband used to work with the accused and accused had no enmity with her husband. Thereafter she self stated that accused had earlier also given beatings to her husband.

16. ASI Devi Singh entered the witness box as PW9 and deposed that on 21.11.2009 he had come to Police Station, Rampur and Desh Raj the then SHO sent him to IGMC Shimla in order to verify Rapat No. 23A, Ext. PW5/A. He further deposed that upon this he came to Shimla along with Constable Narender Kumar and recorded statement of Palas Ram, on the basis of which FIR was recorded.

17. Inspector Desh Raj entered the witness box as PW10 and deposed that on 21.11.2009 complainant had telephonically informed Police Station, Rampur that his brother had been taken to IGMC Shimla in an injured condition and he died in the hospital. Upon this Rapat No. 23A dated 21.11.2009 was registered and ASI Devi Singh was deputed to Shimla to verify the report. This witness further deposed that on 22.11.2009 he visited the spot in village Banoga at the instance of the wife of deceased, his mother and father. He also deposed that site plan was prepared. This witness further deposed that on 23.11.2009 he arrested the accused and on 26.11.2009 while in police custody, accused made a disclosure statement to the effect that he in fact had kept the danda with which deceased was beaten by him in his house and he could get demarcated that place. On the basis of disclosure statement which was made in the presence of witnesses Ram Singh and Karam Chand, recovery of danda was made by the side of the kitchen where the same had been kept along with stacked fire wood. This witness also stated that he recorded the statement of witnesses correctly as per their versions. In his cross examination this witness stated that as per investigation it was found that deceased had been taken to IGMC on 22.11.2009. He admitted it to be correct that as per case summary of the patient, Ext. DA, it was mentioned by Registrar, Department of Orthopedics, Shimla that patient was present on 20.11.2009 in casualty with history of “fall from height”. He further stated that he did not found any blood stains on the spot. He also deposed that complainant Palas Ram had told that there was no blood on the clothes which were worn by deceased and he had not seen the other clothes of the deceased. He also stated that nearby the house of accused there were houses of Padam Singh etc. He further stated that as per his investigation the alleged incident took place between 7/7:30 p.m on 19.11.2009. He further admitted it to be correct that in the month of November it is pitch dark by 7/7:30 p.m. He also stated that in site plan, Ext. PW10/A as well as in the marginal notes he had not shown/mentioned any source of light at the spot. However, he self stated that there was a bulb in the verandah of the house of accused from where light was coming. This witness further deposed that in his investigation it had come that on 19.11.2009 at about 4:00 p.m. deceased had consumed liquor in the Dera of Bablu Nepali. He also stated that it

had come in the investigation that thereafter deceased also took liquor along with Jai Singh in the house of Man Singh. He further stated that it had come in the investigation that under the influence of liquor deceased was unable to move properly. This witness stated that accused was related to the deceased and it had come in his investigation that they had strained relations. **He further stated that he did not obtain medical opinion from the doctor regarding the cause of death of the deceased by Danda, Ext. P4**.

18. The so-called disclosure statement of accused is on record as Ext. PW3/A. Witnesses to this disclosure statement are Ram Singh and Karam Chand. It is mentioned in this disclosure statement that accused had hidden one danda on the night of 19.11.2009 outside the kitchen of his house which he can get demarcated. The recovery of danda on the basis of disclosure statement has been made vide recovery memo Ext. PW3/C. As already mentioned above, the so-called disclosure statement was made by accused on 26.11.2009 in the presence of Ram Singh and Karam Chand. Incidentally Karam Chand who entered the witness box as PW3 has not supported the case of the prosecution and he has denied that any such disclosure statement was made by accused in his presence in the police station. He has also denied that accused led the police to the place from where he got the danda recovered. The other witness to the said disclosure statement, namely, Ram Singh has not been examined by the prosecution. In fact this witness was given up by the prosecution on 18.1.2011.

19. It is a matter of record that when deceased was initially brought to and admitted in the causality department at IGMC Shimla on 20.11.2009, the reason as to how deceased had suffered said injuries disclosed to the doctors by complainant was that deceased in fact had fell down. It was only after the death of deceased that complainant introduced the story of deceased having been beaten with a danda by the accused in the evening hours of 19.11.2009. As per PW1 the reason as to why it was not initially disclosed to the doctors that the deceased was beaten by the accused was that deceased had restrained the complainant to disclose this fact to the doctors. However, it has come in the case of the prosecution that the complainant initially told the doctors that the injuries were suffered by deceased on account of fall because the complainant was perplexed when he made this statement to doctors. The postmortem report of the deceased is exhibited on record as Ext. PW7/D. A perusal of the postmortem report demonstrates that the cause of death which has been given in the said postmortem report is that the deceased died as a result of gross spinal shock and due to oedema of cervical spinal cord leading to death. Post mortem of the deceased was conducted by Dr. Piyush Kapila who entered the witness box as PW7. In his examination-in-chief this witness deposed that "**the injuries stated above are possible in case a person is being pushed by another and he falls down**." In his cross-examination this witness has stated that "**it is correct to suggest that if a person under the influence of liquor falls and then sustains such injuries.**" There is no mention either in his statement as PW7 or in the postmortem report that either there were danda blow injuries on the body of the deceased or that the deceased had died as a result of danda blows. On the other hand this witness is very categorical when he states that the injuries found on the person of deceased can be sustained if a person falls down.

20. Therefore, now it is to be seen as to whether the prosecution has been able to prove on record that the death of the deceased took place on account of his being pushed down by the accused or not and whether it is borne out from the records of the case that the accused gave danda blows to the deceased resulting in his death. Prosecution has relied upon the testimony of complainant PW1 Palas Ram, PW2 Shyam Dassi and PW8 Sheela Devi, to substantiate and corroborate the factum of deceased having been beaten by a danda by the accused and thereafter accused pushing the deceased down side towards the fields.

21. As per PW1-Palas Ram on the fateful day he heard the cries of his brother at around 7:00 p.m. and thereafter he along with his mother came out of the house and saw the accused gave beating to the deceased with danda blows and when he asked the accused as to why he was beating his brother, accused pushed the deceased in the field and fled/went away. This witness further stated that thereafter he along with his mother went to the spot and found

the deceased lying in an injured condition at the spot. PW2 Shyam Dassi stated that on the fateful day at around 7:00 p.m, she was boiling milk in the kitchen when she heard noise and heard accused hurling abuses to deceased. She further stated that on hearing the noise, she came out of the kitchen and saw the accused giving danda blows to her son. She further deposed that accused gave danda blows to her son and also pushed him as a result of which he fell down and thereafter she and her son Palas Ram went to the verandah of the house of accused and found the deceased lying in an injured condition. In her cross-examination this witness states that she first heard the abuses hurled by accused and on this she called her son Palas Ram and other family members. However, Palas Ram has nowhere stated that either he heard the accused hurling abuses on the deceased or he was called by her mother as she heard accused hurling abuses upon the deceased. According to Palas Ram upon hearing the cries of his brother he along with his mother came out of the house and saw the accused giving beatings to the deceased with danda. However, according to PW2, Palas Ram was called by her after she heard abuses being hurled by the accused upon the deceased. This witness also stated that Palas Ram came out of the house along with other family members whereas Palas Ram does not say so. PW8 Sheela Devi wife of deceased has deposed that on the fateful day at 5:45 p.m. her mother-in-law told her that accused was beating the deceased and thereafter she along with Palas Ram her mother-in-law and Sanit went to the spot and found her husband lying there who was crying. The statement of this witness is totally contradictory to the testimony of PW1 and PW2. As per PW1 and PW2 the incident took place at around 7:00 p.m. whereas as per PW8 the incident took place at around 5:45 p.m. Further as per PW1 it was he who heard the cries of deceased and thereafter he and his mother rushed to the spot whereas as per PW8 she along with Palas Ram, her mother-in-law and Sanit went to the spot.

22. In our considered view these are major contradictions in the statements of these three witnesses who are otherwise interested witnesses being close relatives of the deceased. These contradictions in the statements of these witnesses raise serious doubt about the trustworthiness and reliability of the testimonies of these witnesses. Another important aspect of the matter is that it has not come in the deposition of PW8 that she saw accused beating her husband. As per PW8 she was informed of this fact by her mother-in-law. The factum of accused giving danda blows to the deceased has come in the testimonies of PW1 and PW2. Incidentally in her cross-examination PW2 has stated that she could not say as to what was the length of the danda with which accused gave beatings to the deceased as she saw the occurrence from some distance as her eyesight was week. Further it has come in the testimonies of PW1 as well as in the testimony of PW2 that there were houses of other persons adjacent to the house of accused where the alleged incident took place. It has also come in the statement of these witnesses that the houses of other persons were within audible distance from the spot where the alleged incident took place. Surprisingly, no independent witness was examined by the prosecution to substantiate its case that on the fateful day that accused first gave danda blow to the deceased and thereafter he pushed the deceased.

23. It has come on record that on 19.11.2009 deceased was heavily drunk as he had consumed liquor firstly in the Dera of Bablu Nepali and thereafter in the house of Man Singh. It has also come on record especially in the statement of Investigating Officer that on account of being under the influence of liquor deceased was unable to move properly. In these circumstances keeping in view the fact that as per post mortem report death of deceased was not caused by danda blows, this possibility cannot be ruled out that the deceased died on account of his having fallen down under the influence of liquor. As we have already mentioned above, the recovery of the weapon of offence is highly doubtful as the witness in whose presence allegedly the disclosure statement was made and the danda was recovered has not supported the case of the prosecution. Not only this the version of PW1 as to why when the deceased was initially admitted at IGMC Shimla on 20.11.2009 it was not disclosed to the doctors that deceased had sustained injuries because he was given danda blows by the accused and thereafter he was pushed by accused also does not inspire confidence. It has also come on record that deceased was related to accused and he was not having any motive to do away with the deceased. It has

come in the cross-examination of PW1 that the place of occurrence was about 100 feet from where he was standing. It has come in the testimony of Investigating Officer, PW10 that in the month of November it is pitch dark by 7/7:30 p.m. It has also come in the testimony of PW1 that the path where the alleged incident took place was about 2 to 2 ½ feet wide. According to PW1 and PW2 they identified accused giving danda blows to the deceased in the light of one bulb which was in the verandah of the accused. Cross-examination of Investigating Officer PW10 demonstrates that while he denied the fact that there was no source of light and he self stated that in the house of accused light was found in the verandah, however, he was confronted with the site plan Ext. PW10/A in which neither the source of light was shown nor was the same mentioned/reflected in the marginal notes. He admitted the suggestion that the verandah of the house of accused was glazed and there were windowpanes on the windows. He admitted the suggestion that outside the house no bulb or light was found.

24. In our considered view taking into consideration the inconsistencies and contradictions in the statements of prosecution witnesses, their testimonies neither seem cogent nor reliable nor trustworthy. The defence was able to impinge their credibility during the course of cross-examination. In our considered view the testimonies of prosecution witnesses do not prove beyond reasonable doubt that either accused gave danda blows to the deceased on the fateful evening or he pushed down the deceased as a result of which, Hari Singh later on died. At the most the material produced on record by the prosecution raises suspicion that accused might have hit the deceased with a danda or that he might have pushed the deceased down fields, however, in the absence of their being any cogent evidence on record to corroborate the said case of the prosecution, in our considered view this suspicion, no matter how so strong it is, cannot be made a substitute for proof.

25. We have also gone through the judgment passed by the learned trial court and a perusal of the same demonstrates that learned trial court after taking into consideration the entire evidence which was produced on record by the prosecution both ocular as well as documentary has come to the conclusion that on the basis of material produced on record by the prosecution it could not be said that the prosecution was able to prove its case against the accused beyond reasonable doubt. We concur with the findings so returned by the learned trial court. In our considered view also the material produced on record by the prosecution does not prove beyond reasonable doubt the guilt of the accused. Accordingly while upholding the judgment passed by the learned trial court we dismiss the present appeal being devoid of merit.

We place on record our appreciation for the assistance rendered by the learned Amicus Curiae in the adjudication of the appeal.

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

Tota Ram s/o Sh. Balak Ram .....Petitioner

Versus

Smt. Kanchan Lata d/o Sh. Balak Ram .....Non-petitioner

Cr.MMO No.115 of 2014
Reserved on: 8th August, 2016
Date of Order: 21st September, 2016

Code of Criminal Procedure, 1973- Section 125- Wife filed a petition seeking maintenance pleading that marriage between the parties was solemnized as per Hindu Rites and Custom- her husband and his family members started maltreating and abusing her for bringing insufficient dowry- matter was reported to police- a compromise was effected between the parties, but the maltreatment continued - wife has no source of income while husband was earning Rs. 15,000/- per month- maintenance of Rs. 7,000/- per month was sought- husband pleaded that wife had left the home voluntarily without any reason – she has independent source of income- it was

prayed that petition be dismissed- petition was allowed and the maintenance of Rs. 3,500/- per month was awarded from the date of the order- a revision was filed, which was dismissed- held, that District Judge had dissolved the marriage on the ground of cruelty and desertion on the part of wife- hence, she is not entitled to maintenance- it was duly proved that wife had resided in her matrimonial home for 3-4 days and had left the same without any reason- petition allowed and maintenance granted to the wife ordered to be cancelled. (Para-14 to 16)

Cases referred:

Teja Singh Vs. Chhoto, 1981 Criminal Law Journal 1467 title
Baldev Singh Vs. Pushpa Ram, AIR 1970 P&H 515 title
Ravindra Kaur vs. Achant Swarup, AIR 1966 All 133 title
Datiyalal Vs. Bai Kanta, AIR 1965 Gujarat 247
Rabindra Nath Rao, 1995 Criminal Law Journal 1187

For petitioner : Mr. Peeyush Verma, Advocate
For Non-petitioner : Ex-parte vide order dated 08.08.2016

The following order of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Article 227 of Constitution of India read with section 482 Code of Criminal Procedure 1973 against the order dated 25.02.2014 passed by learned Sessions Judge (Forest) Shimla (H.P.) in criminal revision No. 10-S/10 of 13/12 title Tota Ram vs. Kanchan Lata whereby learned Sessions Judge (Forest) Shimla affirmed order dated 31.03.2012 passed by learned Judicial Magistrate Ist Class Court No.(1) Shimla in criminal petition No.31-4 of 2011/08 filed under section 125 Cr.PC.

Brief facts of the case:

2. Smt. Kanchan Lata filed petition under section 125 Code of Criminal Procedure 1973 for grant of maintenance allowance. It is pleaded that Smt. Kanchan Lata is legally wedded wife of Sh. Tota Ram and marriage between parties was solemnized on 07.02.2007 at Shimla as per Hindu rites and customs. It is further pleaded that Sh. Tota Ram and his family members started maltreating Smt. Kanchan Lata and also abused her for bringing insufficient dowry in marriage. It is further pleaded that Sh. Tota Ram is a government employee and is working in Govt. Sen. Sec. School Manthal at Karsog as teacher and is drawing handsome salary and has sufficient source of income to maintain Smt. Kanchan Lata. It is further pleaded that Smt. Kanchan Lata started living in her matrimonial house after her marriage and stayed in her matrimonial house for 3-4 months. It is further pleaded that Sh. Tota Ram and his family members caused mental harassment to Smt. Kanchan Lata in her matrimonial house. It is further pleaded that police complaint was also filed by Smt. Kanchan Lata against Sh. Tota Ram and his family members. It is further pleaded that compromise executed inter se parties on the intervention of the relatives and villagers but Sh. Tota Ram and his family members did not change their behaviour. It is further pleaded that Smt. Kanchan Lata has no independent source of income to maintain herself. It is further pleaded that income of Sh. Tota Ram is more than Rs.15,000/- per month from salary and agricultural income. It is further pleaded that Sh. Tota Ram is under legal obligation to maintain Smt. Kanchan Lata being his legally wedded wife. It is further pleaded that Sh. Tota Ram failed to maintain Smt. Kanchan Lata. Maintenance allowance of Rs.7,000/- per month sought.

3. Per contra response filed on behalf of Sh. Tota Ram pleaded therein that Smt. Kanchan Lata has left her matrimonial house voluntarily without any reasonable cause. It is admitted that Smt. Kanchan Lata is legally wedded wife of Sh. Tota Ram. It is further pleaded that Sh. Tota Ram and his family members did not demand dowry from Smt. Kanchan Lata at

any point of time and did not mentally torture Smt. Kanchan Lata in her matrimonial house. It is pleaded that when Smt. Kanchan Lata came to her matrimonial house she refused to reside in her matrimonial house on the ground that matrimonial house is in dilapidated condition. It is pleaded that Smt. Kanchan Lata also disrespected the parents of Sh. Tota Ram. It is further pleaded that Smt. Kanchan Lata left her matrimonial house after 3-4 days of marriage and started residing at her parents village. It is further pleaded that Smt. Kanchan Lata opened a training centre for sewing etc. in her parents village and did not come to her matrimonial house. It is further pleaded that Sh. Tota Ram is getting Rs.7500/- as consolidated salary per month. It is further pleaded that Sh. Tota Ram has no agricultural income. It is further pleaded that parents of Sh. Tota Ram are suffering from various diseases. It is further pleaded that Smt. Kanchan Lata is President of SC and ST Women's Association and has independent source of income. It is further pleaded that Smt. Kanchan Lata has refused to reside in her matrimonial house without any fault on the part of Sh. Tota Ram. Prayer for dismissal of petition sought. 4. Smt. Kanchan Lata also filed rejoinder and reasserted the allegations maintained in the petition. Smt. Kanchan Lata examined two oral witnesses in support of her case. Sh. Tota Ram examined four oral witnesses in support of his case. Documentaries evidence also tendered. Learned Trial Court granted maintenance allowance in favour of Smt. Kanchan Lata to the tune of Rs.3,500/- per month from the date of order.

4. Aggrieved against the maintenance allowance order Sh. Tota Ram filed criminal revision petition before learned Sessions Judge (Forest) Shimla (H.P.) and learned Sessions Judge (Forest) Shimla on dated 25.02.2014 affirmed the maintenance allowance order passed by learned Trial Court and dismissed the revision petition. Thereafter Sh. Tota Ram filed present petition before H.P. High Court.

5. Court heard learned Advocate appearing on behalf of petitioner Tota Ram and Court also perused the entire records carefully.

6. Following points arise for determination:

1) Whether petition filed under Article 227 of Constitution of India read with section 482 Code of Criminal Procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of petition?

2) Final order.

Findings upon point No.1 with reasons:

7. PW-1 Smt. Kanchan Lata has stated that she was married with Sh. Tota Ram in the month of February 2007 according to Hindu rites and customs. She has stated that she resided in her matrimonial house after the marriage. She has stated that after some days Sh. Tota Ram and his family members started quarrelling with her and harassed her for bringing dowry. She has stated that she also filed criminal complaint against Sh. Tota Ram and his family members and same was compromised. She has stated that Sh. Tota Ram is posted as teacher in Govt. school. She has stated that Sh. Tota Ram did not provide her maintenance allowance. She has stated that Sh. Tota Ram also has agricultural income in addition to his salary. She has stated that income of Sh. Tota Ram is to the tune of Rs.15,000/- to Rs.20,000/- per month. She has stated that maintenance allowance to the tune of Rs.5,000/- to Rs.6,000/- per month be awarded to her. She has stated that Sh. Tota Ram and his family members started beating her in her matrimonial house after one week of marriage. She has denied suggestion that she forced Sh. Tota Ram to reside in separate house. She has denied suggestion that she resided in her matrimonial house only for four days. She has denied suggestion that monthly salary of Sh. Tota Ram is Rs.7500/- per month. She has denied suggestion that Sh. Tota Ram is not owner of 10 bighas of agricultural land. She has admitted that she remained President of SC and ST Women's Association.

8. PW-2 Sh. Balak Ram Dogra has stated that Smt. Kanchan Lata is his daughter and she was married with Sh. Tota Ram in the month of February 2007 according to Hindu rites and customs. He has stated that his daughter resided in her matrimonial house after marriage.

He has stated that after marriage Sh. Tota Ram did not properly behave with his daughter. He has stated that matter was also reported in Gram Panchayat. He has stated that income of Sh. Tota Ram is Rs.10,000/- to Rs.12,000/- per month. He has stated that Smt. Kanchan Lata is house wife. He has stated that Smt. Kanchan Lata is residing in her parental house. He has stated that Sh. Tota Ram did not maintain his legally wedded wife and harassed her. He has stated that Smt. Kanchan Lata is graduate and she also remained President of SC and ST Women's Association. He has denied suggestion that Smt. Kanchan Lata started quarrelling with her husband and his family members after 3-4 days of marriage. He has denied suggestion that Smt. Kanchan Lata demanded separate house. He has denied suggestion that Smt. Kanchan Lata is running a sewing centre. He has denied suggestion that income of Sh. Tota Ram is Rs.7500/- per month.

9. RW-1 Sh. Tota Ram has stated that he is posted in education department on contract basis. He has stated that Smt. Kanchan Lata is his wife. He has stated that marriage was performed on 07.02.2007. He has stated that his mother is also residing with him. He has stated that his father had died three years ago. He has stated that his monthly salary is Rs.13,000/- as of today. He has stated that Smt. Kanchan Lata resided in her matrimonial house for 2-3 days and thereafter started residing in her parental house. He has stated that dowry was not demanded from Smt. Kanchan Lata at any point of time. He has stated that he tried his best level to bring Smt. Kanchan Lata to her matrimonial house but she refused to reside in her matrimonial house. He has stated that Smt. Kanchan Lata is posted in IGMC Shimla and is drawing Rs.5500/- per month. He has stated that Smt. Kanchan Lata could maintain herself. He has denied suggestion that his salary is Rs.20,000/-. He has denied suggestion that he is earning Rs.10,000/- from agriculture.

10. RW-2 Sh. Bhim Singh has stated that he remained Pradhan Gram Pamchyat w.e.f. 2006 to 2011. He has stated that Sh. Tota Ram is known to him. He has stated that Sh. Tota Ram has filed application Ext.RW-1/A for registration of marriage. He has stated that marriage could not be registered because both parties did not appear before panchayat. He has stated that Smt. Kanchan Lata did not reside in her matrimonial house. He has stated that he pursuaded Smt. Kanchan Lata to reside in her matrimonial house but she did not reside in her matrimonial house. He has denied suggestion that he is deposing in favour of Sh. Tota Ram because Sh. Tota Ram is his panchayat voter and supporter.

11. RW-3 Sh. Bhoop Singh has stated that Sh. Tota Ram is his younger brother and he is residing with his mother. He has stated that Smt. Kanchan Lata resided in her matrimonial house for 2-3 days after marriage and thereafter she resided in her parental house. He has stated that Smt. Kanchan Lata came to her matrimonial house after one and half year and thereafter resided for 5-6 days and thereafter she resided in her parental house. He has stated that Smt. Kanchan Lata was not harassed in her matrimonial house. He has stated that Smt. Kanchan Lata has voluntarily left her matrimonial house. He has stated that he is residing separately from Sh. Tota Ram. He has denied suggestion that Sh. Tota Ram and his parents used to beat Smt. Kanchan Lata in her matrimonial house. He has admitted that after marriage Smt. Kanchan Lata has no sufficient income and she resided as house wife. He has admitted that Smt. Kanchan Lata has no source of income to maintain herself.

12. RW-4 Sh. Gian Chand has stated that he attended the marriage of parties. He has stated that Smt. Kanchan Lata resided in her matrimonial house for 2-3 days and thereafter he alongwith S/Sh. Tota Ram, Bhoop Singh and Parkash went to the parental house of Smt. Kanchan Lata. He has stated that Smt. Kanchan Lata came to her matrimonial house after one and half year and resided for 2-3 days and thereafter she went to her parental house. He has denied suggestion that he did not visit parental house of Smt. Kanchan Lata.

13. Following documentaries evidence filed by parties. (1) Ext.PW1/A is marriage card. (2) Ext.PW1/B is certificate of marriage issued by Secretary Gram Panchayat Shakorl. (3) Ext.PW2/A is affidavit given by Sh. Raju. (4) Ext.RW1/A is application. (5) Mark PA is criminal complaint filed by Smt. Kanchan Lata against Sh. Tota Ram and his family members. (6) Mark PB

is application filed by Smt. Kanchan Lata to SHO Police Station Karsog against Sh. Tota Ram and his family members.

14. Submission of learned Advocate appearing on behalf of petitioner that learned Addl. District Judge Mandi (H.P.) (Camp at Karsog) granted divorce to Sh. Tota Ram against Smt. Kanchan Lata in HMA No.42 of 2010 decided on 09.10.2012 on the ground of cruelty and desertion and on this ground maintenance allowance granted to Smt. Kanchan Lata is liable to be cancelled under section 125(5) Code of Criminal Procedure 1973 is accepted for reasons hereinafter mentioned. It is proved on record that learned Addl. District Judge Mandi (H.P.) (Camp at Karsog) on 09.10.2012 dissolved marriage inter se parties on the ground of cruelty and desertion. It is proved on record that learned Addl. District Judge Mandi (H.P.) (Camp at Karsog) has held in HMA No.42 of 2010 that Smt. Kanchan Lata has committed cruelty and desertion upon Sh. Tota Ram. Findings of cruelty and desertion against Smt. Kanchan Lata by civil Court has attained stage of finality. Smt. Kanchan Lata has not challenged decree of cruelty and desertion passed by learned Addl. District Judge Mandi (H.P.) before any competent Court of law. It is well settled law that parties cannot be allowed to take advantage of their own wrong. It is held that in view of the fact that cruelty and desertion is proved in HMA No.42 of 2010 title Tota Ram Vs. Kanchan Lata on the part of Smt. Kanchan Lata it is expedient in the ends of justice to cancel maintenance allowance granted under section 125 Cr.PC. Court take judicial notice of cruelty and desertion on the part of Smt. Kanchan Lata as held in HMA No.42 of 2010 decided on 09.10.2012. Judgment and decree passed in HMA No.42 of 2010 against Smt. Kanchan Lata relating to cruelty and desertion are relevant facts under section 41 of Indian Evidence Act 1872. Maintenance allowance granted to Smt. Kanchan Lata is liable to be cancelled under section 125(5) Code of Criminal Procedure 1973. See 1981 Criminal Law Journal 1467 title **Teja Singh Vs. Chhoto**. See AIR 1970 P&H 515 title **Baldev Singh Vs. Pushpa Ram**. See AIR 1966 All 133 title **Ravindra Kaur vs. Achant Swarup**. See AIR 1965 Gujarat 247 title **Datiyalal Vs. Bai Kanta**. See 1995 Criminal Law Journal 1187 in the matter of **Rabindra Nath Rao**.

15. Even as per testimonies of RW-1 Tota Ram, RW-2 Bhim Singh, RW-3 Bhup Singh and RW-4 Gian Chand it is proved on record beyond reasonable doubt that Smt. Kanchan Lata has resided in her matrimonial house only for 3-4 days and thereafter without any sufficient reason Smt. Kanchan Lata refused to live with Sh. Tota Ram as mentioned under section 125(5) Code of Criminal Procedure 1973. In view of above stated facts point No.1 is answered partly in affirmative.

Point No.2 (Final Order).

16. In view of findings upon point No.1 above present petition filed under Article 227 of Constitution of India read with section 482 Code of Criminal Procedure 1973 is partly allowed. Maintenance allowance granted to Smt. Kanchan Lata is cancelled under section 125(5) Code of Criminal Procedure 1973 w.e.f. 21.09.2016. Order of learned Trial Court and learned Sessions Judge (Forest) Shimla are modified accordingly. Record of learned Trial Court and learned Sessions Judge (Forest) Shimla (H.P.) be sent back forthwith alongwith certified copy of order for compliance. Cr.MMO No. 115/2014 is disposed of. Pending application(s) if any also disposed of.

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

Council of Scientific and Industrial Research (CSIR) and another .....Petitioners.

Vs.

State of Himachal Pradesh and others .....Respondents.

CWP No.: 85 of 2008, a/w CWPs. No. 83, 86, 87, 88, 89, 90, 91 & 94 of 2008 & CWP No. 9214 of 2011
Reserved on: 16.09.2016
Date of Decision: 22.09.2016

Constitution of India, 1950- Article 226- Notification was issued by the Government of Punjab for acquisition of 12,396 Kanals and 1 Marla of land for setting up of a National Biological Research Institute at Palampur- award was passed for acquiring the land- a sum of Rs. 21 lac was deposited as compensation amount, which was disbursed to various land owners- land was subsequently transferred to the State of Himachal Pradesh - scheme for establishing National Biological Research Institute was dropped and part of the property was handed over to Regional Research Laboratory, Jammu - CSIR Complex was established, which was subsequently remained as Institute of Himalayan Bio-resource Technology (IHBT), Palampur- owner was asked to vacate the land- a civil suit was filed but the plaint was ordered to be returned by the Court as Civil Court had no jurisdiction- applications were filed for delivery of the possession before Collector, Palampur, which were dismissed- aggrieved from the order, present writ petition has been filed- held, land will vest absolutely in the Government free from all encumbrances after the taking of possession by the Collector- title of the owner is not disturbed till the possession is taken over- compensation was deposited and compensation was received by the predecessor-in-interest of the present owner- application for delivery of possession was dismissed on the ground that no credible evidence of possession of the owners was produced- it was contended that possession cannot be taken after the commencement of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013- if the possession remains with the land owners, possession cannot be taken and the State has to initiate fresh proceedings for the acquisition of the land- orders passed by the Land Acquisition Collector are cryptic but no fruitful purpose will be served by setting these aside as possession cannot be delivered after the commencement of Right to Fair Compensation Act- petition dismissed.

(Para-14to 32)

Cases referred:

Velaxan Kumar Vs. Union of India and others (2015) 4 Supreme Court Cases 325

The Working Friends Cooperative House Building Society Ltd. Vs. The State of Punjab & Ors. JT 2015(9) SC 357

Pawan Kumar Aggarwal Vs. State of Punjab & Ors. JT 2016(4) SC178

Shashi Gupta & Anr. Vs. State of Haryana & Ors. JT 2016(5) SC 196

Delhi Development Authority Vs. Reena Suri and Ors. JT 2016(5) SC 291

For the petitioner(s):	Mr. K.D. Sood, Senior Advocate, with Mr. Sanjeev Sood, Advocate.
For the respondents:	Mr. Varun Chandel, Additional Advocate General, with Mr. Vikram Thakur and Ms. Parul Negi, Deputy Advocate Generals, for respondent-State. M/s. G.D. Verma, N.K. Sood, N.K. Thakur, Senior Advocates, with M/s. B.C. Verma, Aman Sood, Jamuna Pathik and Mr. Virender Singh Rathour, Advocates, for the respondents.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

All these writ petitions are being disposed of by common judgment as the issue involved in them is the same and the relief prayed for also is same and similar.

2. By way of these writ petitions, petitioners have prayed for quashing of orders passed by Collector, Palampur, District Kangra dated 28.05.2007, 18.06.2007 & 16.11.2010 vide which, Collector Palampur dismissed the applications filed by the petitioners under Section 16 of the Land Acquisition Act for possession of land by dispossessing the private respondents from the same. As prayed for by learned counsel for the parties jointly, CWP No. 85 of 2008 has been treated as the lead case. For convenience, case property and details of land qua possession of which applications were filed before learned Collector under Section 16 of the Land Acquisition Act, 1894, out of which these petitions have arisen, are given hereinbelow:

Case No.	Date of Institution	Date of decision	Details of property
CWP No. 85 of 2008	19.04.1999	28.05.2007	Khata No. 7 min, Khatoni No. 15, Khasra Nos. 222, measuring 0-00-54 hectares, situated at Mohal Holta, Mouja Holta, Tehsil Palampur, District Kangra, H.P.
CWP No. 83 of 2008	27.02.1999	28.05.2007	Khata No. 7 min, Khatoni No. 21, Khasra Nos. 255, 256 and 258, Kita 3, land measuring 0-07-13 hectares, situated at Mohal Holta, Mouja Holta, Tehsil Palampur, District Kangra, H.P.
CWP No. 86 of 2008	27.02.1999	28.05.2007	Khata No. 7 min, Khatoni No. 17, Khasra Nos. 221,226,227,229 & 231, Kita 5, measuring 0-27-28 hectares, situated at Mohal Holta, Mouja Holta, Tehsil Palampur, District Kangra, H.P.
CWP No. 87 of 2008	06.04.1999	28.05.2007	Khata No. 8 min, Kita 5, measuring 0-25-62 hectares, situated at Mohal Holta, Mouja Holta, Tehsil Palampur, District Kangra, H.P.
CWP No. 88 of 2008	27.02.1999	28.05.2007	Khata No. 7 min, Khatoni No. 14, Khasra Nos. 261, 262 & 264, Kita-3, measuring 0-27-27 hectares, situated at Mohal Holta, Mouja Holta, Tehsil Palampur, District Kangra, H.P.
CWP No. 89 of 2008	27.02.1999	28.05.2007	Khata No. 7 min, Khatoni No. 22, Khasra Nos. 254, 257, 259, 260 and 263, Kita 5, land measuring 0-11-23 hectares, situated at Mohal Holta, Mouja Holta, Tehsil Palampur, District Kangra, H.P.
CWP No. 90 of 2008	27.02.1999	28.05.2007	Khata No. 7 min, Khatoni No. 19, Khasra Nos. 247, measuring 0-04-16 hectares, situated at Mohal Holta, Mouja Holta, Tehsil Palampur, District Kangra, H.P.
CWP No. 91 of 2008	15.03.1999	28.05.2007	Khata No. 7 min, Khatoni No. 20, Khasra Nos. 245, 249 & 252, Kita 3, measuring 0-76-37 hectares, situated at Mohal Holta, Mouja Holta, Tehsil Palampur, District Kangra, H.P.
CWP No. 94 of 2008		18.06.2007	Khata No. 8 min, Khatoni No. 21, Khasra No. 379 & 380, measuring 0-12-36 hectares, situated in Mohal HOlta, Mouza Holta, Tehsil Palampur, Distriat Kangra, H.P.
CWP No. 9214 of 2011	23.06.2003	16.11.2010	Khata/Khatoni No. 8 min/12 min, Khasra No. 244 and 248, Kita 2 measuring 0-47-47 hectares, situated in Mohal and Mouza Holta, Tehsil Palampur, District Kangra, H.P.

3. In addition to the prayer made in the writ petitions for quashing of orders passed by Collector, Palampur in the applications filed by the petitioners under Section 16 of the Land Acquisition Act, the petitioners have also prayed for a direction to the respondents to deliver actual possession of the property subject matter of the petitions by dispossessing the private respondents from the same.

4. Brief facts necessary for the adjudication of the present cases are as under:

5. A notification was issued by the Government of Punjab under Section 4 of the Land Acquisition Act for acquisition of 12,396 Kanals and 1 Marla of land in Tika and Mauza

Mahal Banuri, Tika and Mauza Mahal Holta, Tika Bharmat Upperli and Jhalred, Mouza Banuri, Tehsil Palampur on 04.01.1966 for public purposes for setting up of a National Biological Research Institute at Palampur. This notification culminated into an award dated 8th July, 1966, which award was made by Shri Dalip Singh, I.C.S. Revenue Assistant Kangra at Dharmshala exercising the powers of Collector for Kangra District under the Land Acquisition Act, 1894, acquiring land for setting up of National Biological Research Institute at Palampur, District Kangra. According to the petitioners, predecessors-in-interest of the private respondents had submitted their respective claims under Section 9 of the Land Acquisition Act and pursuant to the Notification of award dated 08.07.1966, a sum of Rs.21 lac was deposited as compensation amount with the Land Acquisition Collector, Kangra vide cheque No. 986659/009867 dated 08.07.1966 by the Sub Divisional Engineer, Palampur for the purpose of setting up of a National Biological Research Institute, Palampur. Land presently in occupation of the private respondents situated at Mohal Holta, Tehsil Palampur, District Kangra was part of Holta Tea Estate, which was acquired by means of the above mentioned award, compensation qua which was duly deposited by the petitioners. After re-organization of the State of Punjab, Kangra District was added to the State of Himachal Pradesh and compensation awarded to the owners and occupants of the part of land acquired by Revenue Assistant, Land Acquisition Collector, Kangra was duly deposited in treasury and all the owners and occupants received payments of their respective shares, where after all rights, title and interest which they were having in the Holta Tea Estate regarding the land in issue stood extinguished. As per the petitioners, payments were received by all the predecessors-in interest of the private respondents. As scheme for establishing National Biological Research Institute was later on dropped and thereafter in per the petitioners, the year 1978, part of the property was temporarily handed over to Regional Research Laboratory, Jammu, another constituent unit of CSIR for its research work etc. and the Laboratory was using only a part of the property acquired vide award dated 08.07.1966. As the petitioners wanted to establish a Laboratory with wider objectives and research programmes, accordingly in place of National Biological Research Institute, it established CSIR Complex at Palampur in the year 1983, which was subsequently renamed as Institute of Himalayan Bioresource Technology (IHBT), Palampur. According to the petitioners, private respondents were verbally instructed to vacate the land, actual physical possession of which had not been taken from the said private respondents in respect of houses, though actual possession of entire agricultural land both from the owners and occupants stood delivered to CSIR to the extent of 186.2 acres. Further, as per the petitioners, portions of acquired land were given by State of Himachal Pradesh to different bodies including Himachal Pradesh Krishi Vishwavidyalaya. As per the petitioners, as the private respondents did not vacate the land which was in their actual possession despite their having assured the petitioners to do so, petitioners instituted Civil Suits against them in the Court of Sub Judge 1st Class, Palampur. The suits so filed by the petitioners were ordered to be returned to the petitioners/plaintiffs under Order 7 Rule 10 of the Code of Civil Procedure by the Court of learned Sub Judge 1st Class, Palampur as, the Court of learned Sub Judge concluded that the said Court had no jurisdiction to try the case. Thereafter, petitioners filed applications under Section 16 of the Land Acquisition Act before Sub Divisional Collector, Palampur exercising the powers of Collector under the Land Acquisition Act for possession of land which was occupied by the private respondents by demolition of structures, if any, on the same. The applications so filed by the petitioners were rejected vide impugned orders including order dated 28.05.2007 passed by the Court of Collector, Palampur, District Kangra by holding as under:

> *"From the above discussion, and perusal of the arguments put forth by the Counsel for the parties and record so placed on the file, the Court has come to the conclusion that the application has been moved by the party/applicant for taking over the possession after a long time of more than 30 years. The applicant was asked to produce evidence with regard to the actual possession by the defendant at the time of handing over the said possession of the ground as per letter and spirit of Section 16 of Land Acquisition Act, but in spite of giving of many opportunities to do so, the applicant failed to do so. No credible evidence whatsoever oral or written has been placed on record which can support their*

claim. It is therefore, clear that until and unless the defendants takes possession of the land after the acquisition, no title possess to it. In such a case, the person in possession can validly claim possessor title as against the title.

It was for the applicant to take over the actual possession at the time of handing over of possession by the acquiring authority and in case had their been some resistance to do, it would have been appropriate for the applicant party to move under Section 16 of Land Acquisition Act to obtain the actual possession on the ground at that point of time. Since that remedy has not been availed by the party at that point of time, therefore, this application is not maintainable under Section 16 of Land Acquisition Act, now and hence dismissed. File be consigned to the general Record room after the completion."

6. Feeling aggrieved by the said orders passed by Collector, Palampur, District Kangra vide which, the said authority has dismissed the applications filed by the petitioners under Section 16 of the Land Acquisition Act, the petitioners have filed these writ petitions.

7. Reply to the petition has been filed by the State and the replies filed by private respondents have been adopted by those private respondents who have not filed their independent replies to the petition.

8. Mr. K.D. Sood, learned Senior Counsel appearing for the petitioners has argued that the impugned orders passed by Collector, Palampur were not sustainable in law because while passing the impugned orders, Collector, Palampur failed to exercise jurisdiction vested in him and he erred in holding that the property in issue was not vested in the petitioners and the application for possession was not maintainable after a lapse of more than 30 years. According to Mr. Sood, the record of the land acquisition proceedings demonstrated that actual physical possession of substantial portion of the property had been taken over by the petitioners and they had also set up Institute of Himalayan Bioresource Technology, Palampur on the said property and had further developed the land for research and development purposes as well as for socio-economic development of regional community through sustainable utilization of natural resources with special emphasis on tea, floriculture, bamboo, medicinal plants and aromatic crops. On these basis, it was argued by Mr. Sood that the inference drawn by the Collector to the effect that the possession of the acquired land had not been taken by the petitioners was totally unjustifiable. According to Mr. Sood, because actual possession of part of the property was not taken, the same was totally immaterial and the structures being occupied by the private respondents were liable to be demolished and actual possession of the property was liable to be delivered to the petitioners. According to Mr. Sood, the impugned orders besides being non-speaking and cryptic were otherwise also liable to be set aside because while passing the said orders, not only the Collector lost sight of the fact that it was his statutory duty to carry out the responsibilities enshrined upon him under Section 16 of the Land Acquisition Act, 1894, but even otherwise whatever little reasoning that could be made out from the said order demonstrated that the orders were perverse and erroneous. Mr. Sood argued that the Collector below dismissed the applications filed by the petitioners without appreciating that it was not the case of the petitioners that they were not occupying the land. Mr. Sood further contended that the findings returned by Collector to the effect that "until and unless the defendant takes possession of the land after acquisition, no title passes to it" was totally out of context because this was neither the issue involved in the case nor it was clear from the impugned order as to what the authority intended to convey by returning the said findings. On these basis, it was urged by Mr. Sood that the impugned orders be set aside and the petitioners be granted reliefs as prayed for.

9. Mr. Varun Chandel, learned Additional Advocate General, supported the orders passed by Collector and argued that the Collector rightly dismissed the applications filed by the petitioners under Section 16 of the Land Acquisition Act for want of evidence on the factum of taking over of the possession of the land referred to in the applications. It was further submitted by learned Additional Advocate General that it was for the petitioners to take over the actual possession of the land in issue at the time of handing over of the possession by the acquiring

authority and because in the present case petitioners had failed to take the actual possession of the land at that point of time, the applications filed in this regard under Section 16 of the Land Acquisition Act were not maintainable and were rightly dismissed.

10. Mr. G.D. Verma, learned Senior Counsel appearing for the private respondents alongwith Mr. N.K. Sood and Mr. N.K. Thakur, learned Senior Counsel argued that neither there was any infirmity with the orders passed by Collector dismissing the applications of the petitioners filed under Section 16 of the Land Acquisition Act nor was there any merit in the present petitions and the same also deserved dismissal. It was argued by Mr. G.D. Verma, learned Senior Counsel that as far as the factual matrix of the case was concerned, there was no dispute. The factum of issuance of Notification under Section 4 of the Land Acquisition Act and the factum of the award having been announced on 08.07.1966 was not disputed by learned Senior Counsel. Mr. Verma submitted that the payment of compensation to the predecessors-in-interest of the private respondents out of the award money as well as the private respondents being in occupation of the land subject matter of acquisition award dated 08.07.1966 was an admitted position. According to Mr. Verma, the award which was passed as far back as in the year 1966 had in fact become un-executable and keeping in view the fact that despite the land having been acquired vide award dated 08.07.1966, the actual possession of the same remained initially with the predecessors-in-interest of the private respondents and thereafter with them, the petitioners had now no legal right to claim possession of the said land from the private respondents. It was further argued by Mr. Verma that the judgments passed by the Court of learned Sub Judge 1st Class, Palampur dismissing the suit for possession filed by the petitioners and returning their plaint under Order 7 Rule 10 of the Code of Civil Procedure had attained finality. According to Mr. Verma, the remedy available to the petitioners at that stage was to have had challenged the said judgments passed by the Court of learned Sub Judge 1st Class, Palampur rather than filing applications under Section 16 of the Land Acquisition Act before the Collector at a belated stage. It was further argued by Mr. Verma that there was neither any infirmity nor any perversity with the order that was passed by the Collector dismissing the applications filed by the petitioners under Section 16 of the Land Acquisition Act. Mr. Verma argued that neither the said orders were non speaking nor were they cryptic. According to Mr. Verma, learned Collector rightly dismissed the said applications by holding that the petitioners had no right to move such application at such a belated stage. It was further argued by Mr. Verma that keeping in view the fact that award passed by the Land Acquisition Officer had the force of decree and there was no specific provision for execution of the award passed by Land Acquisition Officer, then it was incumbent for the petitioners to have had got the said award executed within a period of three years. Mr. Verma further submitted that since the possession of the land in issue was never actually taken over by the petitioners, ownership rights never vested in them.

11. Mr. N.K. Sood, learned Senior Counsel while adopting the arguments of Mr. G.D. Verma, learned Senior Counsel, supplemented Mr. Verma by arguing that even otherwise in view of subsequent events, the petitions had been rendered infructuous. Mr. N.K. Sood submitted that it was an admitted case of the parties that despite the fact that the land subject matter of the present writ petitions was acquired by way of an award which was passed as far back as in the year 1966, the actual possession of the property which is being occupied by the private respondents was never taken by the petitioners from them. In this factual matrix, it was submitted by Mr. N.K. Sood that in view of the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as "the 2013 Act") which had come in force w.e.f. 01.01.2014, the petitions had been rendered infructuous. Mr. Sood placed reliance upon Sub-section(2) of Section 24 of the 2013 Act and argued that the said statutory provision explicitly provided by way of non-obstante clause that in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894, where an award under Section 11 has been made five years or more prior to the commencement of 2013 Act but physical possession of the land had not been taken or the compensation had not been paid, the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the

provisions of 2013 Act. On these basis, it was submitted by Mr. Sood that the present petitions had in fact been rendered infructuous and in case the petitioners were interested in the possession of the land which was in the occupation of the private respondents, then they will have to resort to the procedure prescribed in 2013 Act, which contemplated that the appropriate Government shall have to initiate proceedings afresh in accordance with the provisions of 2013 Act for acquisition of the land in issue.

12. Mr. N.K. Thakur, learned Senior Counsel while adopting the arguments of Mr. G.D. Verma and Mr. N.K. Sood, learned Senior counsel also argued that neither there was any infirmity with the orders passed by Collector, Palampur nor in view of subsequent development petitions in fact survived. Accordingly, it was submitted on behalf of the private respondents that the petitions be dismissed.

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

14. The grievance which has been raised by the petitioners by way of present writ petitions *inter alia* is the rejection of the applications filed by them under Section 16 of the Land Acquisition Act, 1894 by Collector, Palampur. Applications were filed by the petitioners before Collector, Palampur praying therein that the land which stood acquired as far back as in the year 1966 and which was still in the occupation of the private respondents be got vacated from the said private respondents and be handed over to the petitioners. The applications so filed by the petitioners have been dismissed by Collector, Palampur vide orders dated 28.05.2007, 18.06.2007 & 16.11.2010, which orders have been assailed in all these petitions by the petitioners.

15. Section 16 of the Land Acquisition Act, 1894 provided as under:

> *"16. Power to take possession. When the Collector has made an award under Section 11, he may take possession of the land, which shall thereupon vest absolutely in the Government, free from all encumbrances.*

16. Under the Land Acquisition Act, 1894, once the Collector made an award under Section 11 thereof, then he could take possession of the land and two consequences follow from this taking of possession, namely:

(i) Vesting of the land absolutely in the Government.

(ii) Such vesting is free from all encumbrances.

17. It is not disputed that until possession is taken by the Collector, the owner's title is not disturbed and there is no vesting of title in the Government notwithstanding that there has been an award. Where the property is in actual possession of a trespasser but in the legal possession of the true owner and the latter delivers possession, then such delivery will obviously be symbolic delivery of possession. Symbolic delivery of possession will be as effective as actual delivery for the purpose of Section 16 of the Act. Once the Land Acquisition Officer has taken symbolic delivery of possession, the State acquires along with it the right to evict the trespassers. It is settled law that taking of possession under Section 16 becomes complete as soon as the possession which the owner was capable of delivering was taken. It is not the spirit of Section 16 that Collector personally has to go to the land to proclaim that he has taken possession. It is enough that he authorizes someone in this regard.

18. A perusal of the averments made in the application which was filed by the petitioners under Section 16 of the Land Acquisition Act demonstrate that it was pleaded therein that after acquisition of land in issue by way of issuance of award, the compensation stood deposited by the petitioners and the same was given to the predecessors-in-interest of all the private respondents. It was mentioned therein that since the land in issue stood acquired and compensation stood paid, private respondents had no right to occupy the same and possession of the said land be taken from the said respondents by the Collector and the same be handed over to the applicant.

19. In the reply filed to the said application, the stand of the private respondents was that the factum of the land in issue having been acquired by way of an award was denied for want of knowledge and the factum of the predecessors-in-interest of the private respondents having received compensation in lieu of said acquisition was also denied for want of knowledge. The application was resisted on the grounds of limitation and mis-joinder of necessary parties etc.

20. A perusal of the orders passed by Collector demonstrates that the applications filed by the petitioners under Section 16 of the Land Acquisition Act were dismissed primarily on the ground that besides being belated the petitioners were asked to produce evidence with regard to actual possession of the defendant, but in spite of many opportunities having been granted to the petitioners in this regard, no credible evidence was placed on record by the petitioners in support of their claim.

21. Be that as it may, it is evident from the facts of the present petitions that the award under Section 11 of the Land Acquisition Act, 1894 was in fact passed on 08.07.1966 in respect of the land which is in possession of the private respondents and thus it is an undisputed fact that the award in issue was passed five years prior to the commencement of 2013 Act and possession of the land/houses/structures which are in occupation of the private respondents has not been taken over by the respondents. In fact, this factual position cannot be agitated by the petitioners whose edifice of filing the applications under Section 16 of the Land Acquisition Act before the Collector was that despite their being an award passed in their favour by the Collector and the compensation having been received by the predecessors-in-interest of the private respondents, possession thereof had not been vacated by the private respondents. Eight of these writ petitions were filed in the year 2008 and one writ petition was filed in the year 2011.

22. During the pendency of these writ petitions, the Parliament enacted Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, which has come into force w.e.f. 01.01.2014. Section 24 of the said Act provides as under:

> *"**24. Land Acquisition process under Act No. 1 of 1894 shall be deemed to have lapsed in certain cases**-(1) Notwithstanding anything contained in this Act, in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894)-*
>
> *(a) where no award under Section 11 of the said Land Acquisition Act has been made, then, all provisions of this act relating to the determination of compensation shall apply; or*
>
> *(b) where an award under said Section 11 has been made, then such proceedings shall continue under the provisions of the said Land Acquisition Act, as if the said Act has not been repealed.*
>
> *(2) Notwithstanding anything contained in sub-section (1), in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894), where an award under the said section 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act:*
>
> *Provided that where an award has been made and compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries, then, all beneficiaries specified in the notification for acquisition under Section 4 of the said Land Acquisition Act, shall be entitled to compensation in accordance with the provisions of this Act."*

23. On the basis of the provisions in Sub-section (2) of Section 24, it was argued on behalf of the private respondents that the proceedings initiated under the Land Acquisition Act, 1894 culminating into award dated 08.07.1966 as far as they pertain to the land presently in

possession of the private respondents are deemed to have lapsed and if the appropriate Government so chooses, it may initiate proceedings of such land acquisition afresh in accordance with the provisions of 2013 Act.

24. Undoubtedly, Sub-section (2) of Section 24 expressly provides with a non-obstante clause that where an award under Section 11 of the Land Acquisition Act, 1894 has been made five years or more prior to the commencement of 2013 Act but physical possession of the land has not been taken, then the land acquisition proceedings initiated under the old Act shall be deemed to have lapsed and appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of 2013 Act. The factum of the award in issue having been made more than five years prior to coming into force of 2013 Act is not in dispute. Therefore, in my considered view, by virtue of Sub-section(2) of Section 24, the land acquisition proceedings initiated under the Land Acquisition Act, 1894 culminating in award dated 08.07.1966 as far as the said award relates to the land which is still in physical possession of the present private respondents have lapsed by application of law, as one of the conditions in the said provisions is fulfilled in the present case.

25. In fact, this legal position is no more *res integra* and it has been settled in many pronouncements by the Hon'ble Supreme Court of India in cases where factual position was akin to the facts of the present cases, i.e. where award had been passed under Section 11 of the Land Acquisition Act, 1894 more than 5 years prior to the coming into force of 2013 Act and possession of the land acquired had not been taken over.

26. The Hon'ble Supreme Court in **Velaxan Kumar** Vs. **Union of India and others** (2015) 4 Supreme Court Cases 325 has held :

> "14. We have carefully examined the application *filed by the appellant seeking for the beneficial provision of Section 24(2) of the Act of 2013 and the objections filed by the respondents to the same. After examining the facts and circumstances of the case, we are of the considered view that the award passed under Section 11 was passed on 03.04.2002 in respect of the disputed land of village-pansali, therefore, it is an undisputed fact that it was passed 5 years prior to the commencement of the Act of 2013 and the compensation for the acquisition of the appellant's land has not been paid to the appellant. Further, with respect to taking over of possession of the land by the respondents, it is clear from the facts and circumstances of the case that actual physical possession of the land in question has not been taken by the respondents. Even if, for the sake of argument it is accepted that possession of the land was taken by the respondents, it is clear that due procedure has not been followed by the Acquisition Authority by way of preparing proper 'Panchnama' in the presence of independent witnesses and the land-holders, and therefore it is contrary to the principles law laid down by this Court in the case of Sita Ram Bhandar Society, New Delhi v. Lt. Governor Govt. Of N.C.T. Delhi & Ors.8 , wherein, this Court held that when possession of a large tract of land is to be taken then it is permissible in law to take possession by a properly executed 'panchnama' attested by independent witnesses. This was further reiterated by this Court in its decisions in the case of Bhanda Development Authority, Raghubir Singh Sehrawat, Patasi Devi 8 (2009) 10 SCC 501referred to supra.*
>
> *15. Further, in the case on hand it is clear from the photographs produced along with the affidavit in support of additional documents produced before us that the appellant is still in physical possession of his acquired land. Undisputedly, actual physical possession of the acquired land has not been taken over by the respondents as pleaded by them by following due process of law. Therefore, the acquisition proceedings of the land of the appellant are lapsed in view of Section 24(2) of the Act of 2013 as both the conditions under the said provision are fulfilled in the present case. This Court has rightly interpreted the said provision in its three*

Judge Bench decision in the case of Pune Municipal Corporation referred to supra and the legal principle laid down with respect to the same in the above mentioned case was reiterated by this Court in the cases of Bharat Kumar (supra), Bimla Devi & Others v. State of Haryana & Others9 and Union of India & others v. Shiv Raj & Others10.

16. The relevant paras of the Pune Municipal Corporation (supra) are extracted hereunder:-

> *"20…….it is clear that the award pertaining to the subject land has been made by the Special Land Acquisition Officer more than five years prior to the commencement of the 2013 Act. It is also admitted position that compensation so awarded has neither been paid to the landowners/persons interested nor deposited in the court. The deposit of compensation amount in the Governmenttreasury is of no avail and cannot be held to be equivalent to compensation paid to the landowners/persons interested. We have, therefore, no hesitation in holding that the subject land acquisition proceedings shall be deemed to have lapsed under Section 24(2) of the 2013 Act.*
>
> *21. The argument on behalf of the Corporation that the subject land acquisition proceedings have been concluded in all respects under the 1894 Act and that they are not affected at all in view of Section 114(2) of the 2013 Act, has no merit at all, and is noted to be rejected. Section 114(1) of the 2013 Act repeals the 1894 Act. Sub-section (2) of Section 114, however, makes Section 6 of the General Clauses Act, 1897 applicable with regard to the effect of repeal but this is subject to the provisions in the 2013 Act. Under Section 24(2) land acquisition proceedings initiated under the 1894 Act, by legal fiction, are deemed to have lapsed where award has been made five years or more prior to the commencement of the 2013 Act and possession of the land is not taken or compensation has not been paid. The legal fiction under Section 24 (2) comes into operation as soon as conditions stated therein are satisfied. The applicability of Section 6 of the General Clauses Act being subject to Section 24(2), there is no merit in the contention of the Corporation."*

17. On considering the facts and circumstances of the present case in the light of the legal principles laid down by this Court in the cases referred to supra, we are of the view that neither compensation has been paid by the respondents to the appellant for the said acquisition even though more than five years have elapsed from the date of Award when the Act of 2013 came into force w.e.f. 01.01.2014 nor physical possession of the land belonging to the appellant has been taken by the respondents. Therefore, the acquisition proceedings in respect of the appellant's land have lapsed in terms of Section 24(2) of the Act of 2013. In view of the law laid down by this Court in Pune Municipal Corporation's case and other cases referred to supra, we are of the opinion that the same are applicable to the fact situation on hand in respect of the land covered in this appeal for granting the relief as prayed by the appellant in the application.

18. In view of the above findings and reasons recorded by us with reference to the facts of the case and placing reliance upon the decisions of this Court referred to supra, the acquisition proceedings in respect of the appellant's land have lapsed. The aforesaid application is allowed in the above terms and consequently, the appeal is also allowed by quashing the acquisition proceeding notification in so far as the land of the appellant is concerned."

27. In **The Working Friends Cooperative House Building Society Ltd.** Vs. **The State of Punjab & Ors.** JT 2015(9) SC 357, the Hon'ble Supreme Court has held:

"2. The question for consideration is whether the compulsory acquisition of the appellant's land under the Land Acquisition Act, 1894 lapses in view of the provisions of Section 24(2) of The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short 'the Act'). In our opinion, the question must be answered in the affirmative and it must be held that the compulsory acquisition of the appellant's land has lapsed.

13. The law on the subject is now no longer res integra. The leading judgment in respect of Section 24(2) of the Act was delivered in Pune Municipal Corporation. It was concluded in paragraph 20 of the aforesaid decision, that the Award had been made by the Land Acquisition Collector more than five years prior to the commencement of the Act and compensation had not been paid to the landowners/persons interested nor deposited in the Court. It was held that the deposit of compensation in the Government Treasury is of no avail. Consequently, there was no option but to hold that the land acquisition proceedings were deemed to have lapsed under Section 24(2) of the Act. Paragraph 20 reads as follows:- "From the above, it is clear that the award pertaining to the subject land has been made by the Special Land Acquisition Officer more than five years prior to the commencement of the 2013 Act. It is also admitted position that compensation so awarded has neither been paid to the landowners/persons interested nor deposited in the court. The deposit of compensation amount in the Government treasury is of no avail and cannot be held to be equivalent to compensation paid to the landowners/persons interested. We have, therefore, no hesitation in holding that the subject land acquisition proceedings shall be deemed to have lapsed under Section 24(2) of the 2013 Act."

14. Subsequently, this decision was followed in Union of India v. Shiv Raj.[2] It was held, after examining the Objects and Reasons for the Act that since the possession of the acquired land had not been taken and compensation had been deposited with the Revenue Department, it could not be termed as "deemed payment" of the compensation as held in Pune Municipal Corporation. Accordingly, the appeals filed by the Union of India were liable to be dismissed. In this context, it may be noted that reference was also made to two other decisions of this Court namely Bharat Kumar v. State of Haryana[3] and Bimla Devi v. State of Haryana[4] which were to the same effect.

15. The issue again came up for consideration in Sree Balaji Nagar Residential Association v. State of Tamil Nadu[5] and the decision rendered in Pune Municipal Corporation and Shiv Raj were followed. In that case, it was noted that there is a lack of clarity on the issue whether compensation has been paid for majority of the land holding under acquisition, but there was no dispute that possession of the land under consideration had not been taken by the State or any other authority. It was also noted that more than five years had elapsed since the making of the Award. On this basis, it was held that Section 24(2) of the Act was applicable and the land acquisition proceedings must be deemed to have lapsed.

16. Finally, in Karnail Kaur v. State of Punjab[6] the issue was once again examined, this time a little more elaborately but there was no deviation from any of the decisions rendered by this Court. The additional submission made in this case on behalf of the State of Punjab and negatived by this Court, related to The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Ordinance, 2014, whereby a second proviso was inserted in Section 24(2) of the Act. The Ordinance came into force with effect from 1st January, 2015 and it was held by this Court that the Ordinance had only prospective effect and was not retrospective. Therefore, the period of the grant of stay or injunction by any Court from taking possession of the acquired land would not be excluded retrospectively for computing the period of five years referred to

in Section 24(2) of the Act. This issue does not arise in so far as the present appeal is concerned since no argument based on the Ordinance was raised and in any case the Ordinance has since lapsed. However, we are mentioning this only to highlight the fact that the interpretation of Section 24(2) of the Act has been considered by this Court from all possible angles.

17. The issue of retrospectivity of the Ordinance has also been considered in Radiance Fincap (P) Ltd. v. Union of India,[7] Arvind Bansal v. State of Haryana[8] and Rajiv Choudhrie HUF v. Union of India.

18. On the issue of retrospectivity, we may only mention the view taken by a Constitution Bench of this Court in Commissioner of Income Tax v. Vatika Township Pvt. Ltd.[10] It was held in paragraph 29 or the Report as follows:-

"The obvious basis of the principle against retrospectivity is the principle of "fairness" which must be the basis of every legal rule as was observed in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties."

19. Applying the law laid down by the Constitution Bench, it must be held that the appellant had an accrued right which must be recognized by Section 24(2) of the Act. The Ordinance which purported to take away such an accrued right would have to be treated as prospective unless the legislative intent was clearly to give it retrospective effect. As mentioned above, this issue does not arise in the present case but is being mentioned only to buttress the conclusion arrived at by this Court in Karnail Kaur and subsequent decisions."

28. In **Pawan Kumar Aggarwal** Vs. **State of Punjab & Ors.** JT 2016(4) SC178, the Hon'ble Supreme Court has held:

"1. Leave granted.

2. It is not in dispute that though an award was passed in respect of the land belonging to the appellant, the appellant has not been dispossessed and hence the appellant is entitled for the protection under Section 24(2) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. In fact, we find that in respect of the same very acquisition Notification in a situation where the possession is still retained by the owner, this Court by Judgment dated 22.01.2015 in C.A.No.7424 of 2013 titled Karnail Kaur & Ors. Vs. State of Punjab & Ors. reported in 2015 (3) SCC 206 has quashed the Notification, therefore, this appeal is allowed. Proceedings for acquisition in respect of the land belonging to the appellant covered by this appeal stand quashed."

29. In **D.D.A** Vs. **Raman Grover and Ors.** JT 2016(5) SC 196, the Hon'ble Supreme Court has held:

"1. Leave granted.

2. The appellant is before this Court, aggrieved by the Judgment of the High Court, whereby the High Court gave a declaration that the entire land acquisition proceedings have lapsed in view of the operation of Section 24 (2) of The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

3. Sh. Amrendra Sharan, learned senior counsel appearing for Delhi Development Authority (DDA), on instruction, faily concedes that as far as 1100 sq. yards of land belonging to Respondent No. 1 is concerned, the possession has not been taken by DDA, though the award had been passed as far back as in 1986. In that view of the matter, Section 24(2) of the 2013 Act squarely applies in the case and the land acquisition proceedings in respect of the said extent of 1100 sq. yards belonging to Respondent No. 1 shall be deemed to have lapsed.

4. In that view of the matter, the appeal is dismissed."

30. In **Shashi Gupta & Anr.** Vs. **State of Haryana & Ors.** JT 2016(5) SC 196, the Hon'ble Supreme Court has held:

"3. It was brought to the notice of the Court that in view of the operation of Section 24(2) of The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (in short, "the 2013 Act"), the proceedings have lapsed and, therefore, on 05.05.2016, this Court passed the following order:-

"In answer to RTI application, the petitioners have been informed that though the Award has been passed on 16.07.2007, the petitioner has not received the compensation. It is also stated in the RTI reply that the possession could not be taken on account of stay of dispossession in CWP No. 18579 of 2006.

There will be a direction to respondent No. 1 to file affidavit on the following aspects:

i) When was the amount of compensation deposited with the Land Acquisition Collector?

ii) When was the stay of dispossession granted in CWP No. 18579/2006 and when was it vacated?

The Competent Officer of the State of Haryana shall file the reply on these two aspects on or before 11.05.2016. We make it clear that if reply as mentioned above is not filed, it will be taken that they have nothing to reply and that the special leave petitions are only to be allowed

Post for Judgment/Order on 12.05.2016".

5. We are afraid, we cannot appreciate the above submission of the learned counsel for the State. On the admitted facts, the land acquisition proceedings have lapsed since there is no stay on any count operating in the matter of possession or acquisition of the lands of the appellants after 12.08.2008. The 2013 Act came into force on 01.01.2014. Therefore, five years prior to the coming into force of the 2013 Act, the appellats have not been dispossessed. It is also a fact that there is no payment of compensation in accordance with law as declared by this Court in Pune Municipal Corporation & Anr. V. Harakchand Misirimal Solanki & Ors. reported in (JT 2014(3) SC 283).

6. In view of the above admitted position, it is not necessary to remit the matters to the High Court. The land acquisition proceedings have lapsed in the facts of the present cases in view of the operation of Section 24(2) of the 2013 Act. It is declared so and the appeals are allowed. No costs."

31. In **Delhi Development Authority** Vs. **Reena Suri and Ors.** JT 2016(5) SC 291, the Hon'ble Supreme Court has held:

"1. Leave granted.

2. All these appeals have been filed by the Delhi Development Authority, aggrieved by the Judgment of the High Court of Delhi. In the impugned Judgment, the High Court has taken the stand that the land acquisition initiated under the Land Acquisition Act, 1894, and culminating in passing of awards on different

dates, has lapsed in view of Section 24 of The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (in short, "2013 Act") in respect of the land covered by these appeals. Section 24 of the Act reads as follows :- "24. Land acquisition process under Act No. 1 of 1894 shall be deemed to have lapsed in certain cases - (1) Notwithstanding anything contained in this Act, in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894,(a) where no award under section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act relating to the determination of compensation shall apply; or(b) where an award under said section 11 has been made, then such proceedings shall continue under the provisions of the said Land Acquisition Act, as if the said Act has not been repealed.(2) Notwithstanding anything contained in sub-section (1), in case of land acquisition proceedings initiated under the Land Acquisition Act. 1894, where an award under the said section 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act: Provided that where an award has been made and compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries, then, all beneficiaries specified in the notification for acquisition under section 4 of the said Land Acquisition Act, shall be entitled to compensation in accordance with the provisions of this Act"

3. It may be seen that under Section 24(2) of the Act, the proceedings initiated under the Land Acquisition Act, 1894 and culminating in award under Section 11 of the said Act would lapse in case the possession after passing of the award has not been taken within five years or more prior to the commencement of the 2013 Act (9 of 2014). This Act came into force on 01.01.2014. UnderSection 24 (2) of the 2013 Act, the proceedings would also lapse in case the compensation has not been paid to the owners of the land before 01.01.2014. However, it is made clear under Section 24(2) of the 2013 Act that despite such lapse, it will be open to the appropriate Government to initiate fresh proceedings for acquisition in accordance with the provisions of the 2013 Act.

4. Sh. Vishnu Saharya, learned counsel appearing for the appellant-Delhi Development Authority, has submitted that once an award has been passed, the property vests in the Government and, therefore, there is no lapse. We are afraid, the contentions raised by him cannot be appreciated.

5. Section 16 of the Land Acquisition Act, 1894 reads as follows :-"Power to take possession - When the Collector has made an award under Section 11, he may take possession of the land, which shall thereupon [vest absolutely in the [Government]], free from all encumbrances."

6. Under the above provision, once an award has been made by the Collector under Section 11 of the Act, 1894, the Collector has to take possession of the land and only thereupon, the land will vest in the Government free from all encumbrances. Therefore, passing of the award by itself will not enable the appellant to take a contention that the land has automatically vested with the Government on passing of the award.

7. It is not in dispute that in all these cases, the land has not been taken possession of by the Collector within five years or more prior to 01.01.2014 when the 2013 Act came into force.

8. In that view of the matter, there is no merit in these appeals. The appeals are, accordingly, dismissed. No costs."

32. In view of the law laid down by the Hon'ble Supreme Court in the abovementioned judgments, no second view is possible in the facts and circumstances of the present cases save and except that keeping in view that during the pendency of the present petitions, Parliament has repealed the Land Acquisition Act, 1894 and in its place enacted the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, which has come in force w.e.f. 01.01.2014, the provisions of Section 24(2) of the said Act comes to the rescue of private respondents. Though there appears to be merit in the contention of Mr. K.D. Sood, learned Senior Counsel appearing for the petitioners that the orders passed by the Collector vide which the applications filed by the present petitioners under Section 16 of the Land Acquisition Act, 1894 were dismissed are cryptic, but in my considered view, no fruitful purpose will be served by interfering with the said orders passed by Collector in view of coming into force of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 w.e.f. 01.1.2014 during the pendency of these writ petitions and the law laid down by the Hon'ble Supreme Court in interpretation of Section 24(2) of the said Act in the abovementioned judgments.

33. In view of the discussion held above, I do not find any merit in the present writ petitions and the same are accordingly dismissed, so also the Miscellaneous application(s), if any. No order as to costs.

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

Dharamveer Sharma ...Petitioner.

Versus

State of H.P. & others ...Respondents.

CWP No. 2463 of 2016
Date of Order: 22.09.2016

Constitution of India, 1950- Article 226- Son of the petitioner fainted due to electrocution- he was taken to hospital, where he succumbed to the injuries- interim compensation of Rs. 2 lacs awarded in favour of the petitioner. (Para-4 to 9)

Case referred:
Chief Engineer and others vs. Mst. Zeba, II (2005) ACC 705

Present:Ms. Rachna Sharma, Advocate, for the petitioner.

Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondent No. 1.

Mr. Satyen Vaidya, Senior Advocate, with Mr. Vivek Sharma, Advocate, for respondents No. 2 to 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

CMP No. 7979/2016.

Leave granted. The application is disposed of.

CWP No. 2463/2016.

2. Issue notice. Mr. J.K. Verma, learned Deputy Advocate General, and Mr. Vivek Sharma, Advocate, waive notice on behalf of respondent No. 1 and respondents No. 2 to 5, respectively. Reply be filed within six weeks. List on **17th November, 2016.**

CMP No. 7980/2016.

3. By the medium of this application, the applicant/petitioner has sought interim compensation.

4. The moot question is – whether interim compensation can be granted in writ proceedings, while exercising power under Article 226 of the Constitution of India?. The answer is in the affirmative for the following reasons.

5. To determine the issue, it is necessary to have a glance of brief facts of the case, which have been made the foundation for claiming the compensation in the main writ petition. It is averred in the writ petition that the son of the petitioner Akhil Sharma got fainted due to electrocution as the current suddenly pulled him and he sustained injuries on his body , was taken to Civil Hospital Indora and succumbed to the injury in the Hospital. The incident was stated to have been reported to the police and FIR No. 108 of 2016 came to be registered. The dead body was sent for autopsy. The doctor, who conducted the postmortem, opined that the cause of death was due to electric shock leading to fibrillation (very rapid irregular contractions of the muscle fiber of the heart resulting in a lack of synchronism between heartbeat and pulse) and sudden death. The father of the petitioner is stated to have approached the authorities concerned but in vain. Hence the present petition.

6. The documents, placed on the file, do disclose, prima facie, that it is a case where a Writ Court should intervene and come to the rescue of the victims in order to save them from destitution, vagaries and social evils and also provide them some sort of help at this stage.

7. The Apex Court in Civil Appeal No.11466 of 2014, titled as **Raman vs. Uttar Haryana Bijli Vitran Nigam Ltd. & Ors., decided on 17th December, 2014,** has laid down guidelines how to assess and grant compensation in such like cases. One of us (Justice Mansoor Ahmad Mir, Chief Justice), the then Judge of Jammu and Kashmir High Court, has also dealt with such an issue in **Chief Engineer and others vs. Mst. Zeba,** reported in **II (2005) ACC 705,** in which case, compensation was granted in favour of the victims.

8. We have also dealt with the similar issue in a public interest litigation, being **CWPIL No.7 of 2014, titled as Court on its own motion vs. State of Himachal Pradesh and others, decided on 25th June, 2014**, wherein interim compensation to the tune of Rs.5.00 lacs, to each of the victims, was granted. It is apt to reproduce paragraphs 20 to 22 of the said order hereunder:

> "20. In order to achieve the purpose of grant of interim or final relief promptly and spurn any attempt at procrastination in view of the facts and circumstances of the case, which are crying for the same, the Courts should not succumb to niceties, technicalities and mystic maybe's.
>
> 21. We are of the considered view that the Writ Court can exercise powers in terms of the mandate of the Constitution read with the inherent powers and can grant interim relief, even though it is not specifically provided for.
>
> 22. We have laid our hands on a judgment which is delivered by one of us (Justice Mansoor Ahmad Mir, Chief Justice) as a Judge of Jammu and Kashmir High Court, wherein interim compensation was granted in a First Civil Appeal, titled as **Chief Engineer & Ors. versus Mst. Zeba,** reported in **II (2005) ACC 705.** It is apt to reproduce paras 10 to 17 of the said judgment herein:
>
> *"10. While going through the provisions of Section 151, C.P.C., this Court can exercise inherent powers in order to do justice in between the parties and can pass such orders which are warranted in the interests of justice.*

11. Section 140 of Motor Vehicles Act mandates how to grant interim compensation. This remedy stands introduced in terms of the recommendations made by the Apex Court in the judgments reported in 1977 ACJ 134 (SC), 1980 ACJ 435 (SC) and 1981 ACJ 507 (SC). In terms of the said judgments the legislation was made. The aim and object of the said provision is to save the victims/sufferers from starvation, destitution and from other social evils. It is just to ameliorate the sufferings of the victims.

12. The Apex Court has passed a judgment reported in AIR 1996 SC 922, titled Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty, wherein Their Lordships have granted interim compensation to the victims of a rape case. In terms of the said judgment the Court is not powerless to come to the rescue of victims and save them from social evils as discussed above. It is profitable to reproduce para-18 of the said judgment herein:

> *"18. This decision recognizes the right of the victim for compensation by providing that it shall be awarded by the Court on conviction of the offender subject to the finalization of scheme by the Central Government. If the Court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the Court the right to award interim compensation which should also be provided in the scheme. On the basis of principles set out in the aforesaid decision in Delhi Domestic Working Women's Forum, the jurisdiction to pay interim compensation shall be treated to be part of the overall jurisdiction of the Courts trying the offences of rape which, as pointed out above is an offence against basic human rights as also the Fundamental Right of Personal Liberty and Life."*

13. The Apex Court has also held in the judgment reported in AIR 1986 SC 984, Smt. Savitri v. Govind Singh Rawat, that the Courts can grant interim maintenance in the proceedings under Section 488 (Section 125, Cr.P.C.), Cr.P.C. It is profitable to reproduce relevant portion of para-6 herein:

> *".....if a Civil Court can pass such interim orders on affidavits, there is no reason why a Magistrate should not rely on them for the purpose of issuing directions regarding payment of interim maintenance. The affidavit may be treated as supplying prima facie proof of the case of the applicant. If the allegations in the application or the affidavit are not true, it is always open to the person against whom such an order is made to show that the order is unsustainable. Having regard to the nature of the jurisdiction exercised by a Magistrate under Section 125 of the Code, we feel that the said provision should be interpreted as conferring power by necessary implication on the Magistrate to pass an order directing a person against whom an application is made under it to pay a reasonable sum by way of interim maintenance subject to the other conditions referred to the pending final disposal of the application. In taking this view we have also taken note of the provisions of Section 7(2)(a) of the Family Courts Act, 1984 (Act No. 66 of 1984) passed recently by Parliament proposing to transfer the jurisdiction exercisable by Magistrates under Section 125 of the Code to the Family Court constituted under the said Act."*

14. While going through the said provisions of law and while keeping in view of the above discussion, I am of the considered view that Civil Court can exercise inherent powers and can grant interim compensation at any stage even though not provided by any other provision of law. It is profitable to reproduce relevant portion of para-4 of the judgment of Apex Court reported in AIR 1995 SC 350, State of Maharashtra and others v. Admane Anita Moti and Others.

> *".....Interim orders are granted by the Court as they are necessary to protect the interest of the petitioner till the rights are finally adjudicated upon.*

Even where it is not provided in the statute this Court has held that the Courts have inherent power to grant it……"

15. It is also profitable to reproduce paras 9 & 10 of the Apex Court judgment reported in AIR 2004 SC 3992, Vareed Jacob v. Sosamma Geevarghese and Others, herein:

"9. In the case of M/s. Ram Chand and Sons Sugar Mills Pvt. Ltd. v. Kanhayalal Bhargava, reported in AIR 1966 SC 1899, it has been held by this Court that the inherent power of the Court under Section 151 C.P.C. is in addition to and complimentary to the powers expressly conferred under C.P.C., but that power will not be exercised in conflict with any of the powers expressly or by implication conferred by other provisions of C.P.C. If there is express provision covering a particular topic, then Section 151, C.P.C. cannot be applied. Therefore, Section 151, C.P.C. recognizes inherent power of the Court by virtue of its duty to do justice and which inherent power is in addition to and complimentary to powers conferred under C.P.C. expressly or by implication.

10. In the case of Jagjit Singh Khanna v. Rakhal Das Mullick, reported in AIR 1988 Cal. 95, it has been held that temporary injunction may be granted under Section 94(c) only if a case satisfies Order 39 Rule 1 and Rule 2. It is not correct to say that the Court has two powers, one to grant temporary injunction under Section 94 (c) and the other under Order 39 Rule 1 and Rule 2. That Section 94 (C), C.P.C. shows that the Court may grant a temporary injunction thereunder only if it is so prescribed by Rule 1 and Rule 2 of Order 39. The Court can also grant temporary injunction in exercise of its inherent powers under Section 151, but in that case, it does not grant temporary injunction under any of the powers conferred by C.P.C. but under powers inherent in the constitution of the Court, which is saved by Section 151, C.P.C."

16. In terms of the said judgments, the Civil Court can exercise inherent powers and grant interim compensation in order to do justice, save victims from social evils and just to ameliorate their sufferings.

17. Thus, I am of the considered view that Civil Court can grant interim compensation in the cases, where the claimants/plaintiffs have lost their bread earner, son or daughter due to the negligence of the defendant/s and even in the cases where the plaintiff has sustained injuries due to the negligence of the defendant/s which has rendered the plaintiff permanently disabled."

9. Keeping in view the discussion made hereinabove, we are of the considered view that the applicant/petitioner has carved out a case for grant of interim compensation. Accordingly, interim compensation to the tune of Rs.2 lacs, is awarded in favour of the applicant/petitioner. The respondents are directed to deposit the amount of Rs.2 lacs, within a period of six weeks from today. The application stands disposed of accordingly.

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

Heera Mani …Petitioner.

Versus

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

CWP No. 514 of 2016
Date of decision: 22.9.2016

Indian Limitation Act, 1963- Section 12 (2)- It was held by Commissioner, Mandi that Limitation Act is not applicable to the proceedings for the appointment of Anganwari Worker/Helper- held, that provision of Limitation Act applies to the proceedings conducted in the Courts as understood in the strict sense of being part of the Judicial Branch of the State- the

principles underlying the provisions of the Limitation Act may be applied to quasi-judicial tribunals so long as provision of Limitation Act are not specifically excluded- it was not pointed out that there was any clause of the scheme which expressly bars the applicability of the Limitation Act- provision of Section 12 excludes the time taken for getting the copy and if the copy is not supplied within the period of appeal, right of filing appeal cannot be lost- law does not compel one to do what cannot be possibly done - order of the Commissioner set aside.

(Para-2 to 8)

Case referred:

M.P. Steel Corporation vs. Commissioner of Central Excise (2015) 7 SCC 58

For the Petitioner:	Ms. Shalini Thakur, Advocate.
For the Respondents	Ms. Meenakshi Sharma, Additional Advocate General with Mr. J. S. Guleria, Assistant Advocate General, for respondents No. 1 to 3. None for respondent No.4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (*Oral*)

The moot question involved in this petition is whether the provisions of Section 12 (2) of the Limitation Act are applicable to the appeals filed under Clause 12 of the Scheme for the appointment of Anganwari Worker/Helper (for short Scheme).

2. The learned Commissioner, Mandi, vide impugned decision dated 18.9.2015 dismissed the appeal by holding that the provisions of the Limitation Act were not applicable to the proceedings carried out under the Scheme. It is apt to reproduce the relevant observation which reads thus:

> *"…After perusal of the record and hearing both parties I come to the conclusion that Limitation Act is not applicable in these cases as also held by the Hon'ble High Court of H.P. Shimla in the CWP cited above, hence the appeal is dismissed being time barred as this court does not have the power to condone delay of even one day, as per the High Court's orders. The copy of this order be sent to the lower Court while returning the record of lower Court. The case file of this Court be consigned to GRR after due completion."*

3. Sections 12 (2) and 29(2) of the Limitation Act, read thus:

> ***"12.(2):*** *In computing the period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded."*
>
> *"**29(2).** Where by special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."*

4. Adverting to the question as to whether the Limitation Act applies in respect of proceedings being prosecuted in Courts appropriate or to quasi judicial proceedings also, it would be noticed that the said question is no longer *res integra* in view of the judgment rendered by the Hon'ble Supreme Court in ***M.P. Steel Corporation vs. Commissioner of Central Excise (2015) 7 SCC 58*** wherein it was reiterated that the proceedings of the Limitation Act apply in respect of

the proceedings being prosecuted in the Courts appropriate i.e. Courts as understood in the strict sense of being part of the Judicial Branch of the State.

5. However, it was clarified that the principles underlying the provisions of the Limitation Act may be applied to quasi-judicial tribunals so long as there is nothing in relevant statutory scheme that rules out or bars applicability of such principles. This in turn was based on the principles that the Courts always lean in favour of advancing the cause of justice where a clear case is made out for doing so, since justice and reason is at the heart of all legislation.

6. That apart, the respondents have failed to point out any clause in the Scheme which may bar the applicability of the principles of Limitation Act, more particularly, the provisions as contained in Section 12 (2) thereof. It is a settled legal position that the law does not compel the impossible. There is well known legal maxim "l*ex non cogit ad impossibilia"* which means the law cannot compel a man to do what he cannot possibly perform. There can be no dispute that the litigant can have no access or control to have the certified copy prepared, that too, within the statutory period prescribed for filing of the appeal. This virtually would be calling upon to a person to perform an act which is impossible for him.

7. Furthermore, there is really no answer to the question that in case the certified copy of the decision is not made available within the prescribed period of limitation for filing of the appeal, would it mean that the right of the aggrieved party to file an appeal is lost?. Obviously, that cannot be the intention of the law.

8. The maxim of law *'impotentia excusat legem'* is intimately connected with another maxim of law *'lex non cogit ad impossibilia'*. *'Impotentia execusat legem'* is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him". Therefore, when it appears that the performance of the formalities prescribed by a statute or Scheme etc. has been rendered impossible by circumstances over which the person interested has no control, the circumstances will be taken as a valid excuse.

9. For all the aforesaid reasons, I find that the impugned order dated 18.9.2015 passed by learned Commissioner, Mandi is not sustainable and the same is accordingly set-aside. The parties through their counsel are directed to appear before the Commissioner on **7.10.2016** and the learned Commissioner is requested to decide the case as expeditiously as possible and in no event later than 30th November, 2016.

10. With the aforesaid observations, the petition stands disposed of, so also the pending application(s) if any.

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

Mohan Dutt & Anr. ....Petitioners

Versus

Union of India & Others. ....Respondents

CWP No.1307 of 2016
Judgment Reserved on: 01.09.2016
Date of decision: 22.09.2016

Constitution of India, 1950- Article 226- State had decided to construct Government Degree College at village Kahan- Government changed its earlier decision to set up the College at Kahan and decided to construct it at Sarahan- a writ petition was filed for challenging this decision-

held, that serious allegations of misuse of power were leveled against various public representatives of the area that too without placing on record any material evidence to substantiate the claim- land at Village Kahan could not be finalized because 2.43 hectares area was forest land- hence, decision was taken to shift the college to Sarahan- public had donated the land for construction of the college -proposal for setting up of Degree College in the area was hanging fire since year, 2007- no public interest is involved in the writ petition - petition dismissed. (Para-15 to 36)

Cases referred:

Godavarman Thirumulpad vs. Union of India & Ors, 1997 (2) SCC 267

Vijay Kumar Gupta vs. State of Himachal Pradesh and Others, decided on 09.01.2015,

Central Electricity Supply Utility of Odisha vs. Dhobei Sahoo and Others (2014)1 SCC 161

State of Uttaranchal vs. Balwant Singh Chaufal and Others, (2010)3 SCC 402

Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Paritosh Bhupeshkumar Sheth and Others and Alpana V.Mehta vs. Maharashtra State Board of Secondary Education and Another, (1984)4 SCC 27

Parisons Agrotech Private Limited and Another vs. Union of India and Others, (2015)9 SCC 657

Census Commissioner and Others vs. R.Krishnamurthy, (2015)2 SCC 796

For the Petitioners:	Mr.Varun Thakur, Advocate.
For the Respondents:	Mr. Arvind Sharma, Central Government Counsel, for respondent No. 1. Mr.Shrawan Dogra, Advocate General with Mr.Rupinder Singh, Mr.Anup Rattan, Mr.Romesh Verma & Mr. Varun Chandel, Additional Advocate Generals and Mr. Kush Sharma, Deputy Advocate General, for respondents No. 2 to 7.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

By way of present writ petition filed under Article 226 of the Constitution of India, the petitioners have prayed for following main reliefs:-

"a) That a writ of certiorari may kindly be issued quashing and setting aside the decision of the respondent State Government to select the site of Modern Degree College, Sarahan at Village Tikker, out of land comprised in Khata Khatauni No. 30/42, plots 20, measuring 464.10 Bighas situated in Mohal Tikker, Tehsil Pachhad, District Sirmaur (H.P.) as per copy of Jamabandi for the year 2013-14.

b) That the writ of mandamus may be issued against the respondent State Government not to carry out any type of construction work at village Tikker for the construction of Govt. Modern Degree College, Sarahan including the construction of link road to the site.

c) That necessary directions may be issued against the respondents No. 2, 3, 5 to 7 directing them to select/approve or to examine the feasibility of land for the construction of Govt. Modern College, Sarahan at the following villages, which are situated near and around Sarahan, as per the latest Guidelines of the respondent State Government annexed at Annexure P-9:-

i) Bag-Pashog/Kawagdhar,

ii)Between village Bhellan & Nawal-Labhan,

iii) Barasra

iv) Kahan (New Site)

Or any other suitable place near to Sarahan, so that sufficient land is available as per requirement for the construction of Govt. Modern College, for the convenience of general public of Tehsil Pachhad, District Sirmaur (H.P.)

d) That the Writ of mandamus may be issued against the respondent State Govt. to take suitable action with the respondent No. 1 for obtaining no objection with regard to the land situated at village Kahan near to Petrol Pump which site was earlier selected for the construction of College.

2. Present petition has been filed as Public Interest Litigation (in short 'PIL') by petitioners specifically laying challenge to the decision of the respondents-State, wherein, it was decided to establish Govt. Degree College, Sarahan at village Tikker on the land comprised Khata Khatauni No. 30/42, plots 20, measuring 464.10 Bighas situated in Mohal Tikker, Hadbast No. 260, Tehsil Pachhad, District Sirmaur (H.P.)

3. Perusal of pleadings available on record suggests that earlier respondents-State had decided to construct Govt. Degree College at village Kahan, and the then Chief Minister, Himachal Pradesh had also laid foundation stone. Since, respondents-State changed its earlier decision of setting up Govt. Degree College at village Kahan, present petitioners filed writ petition in the shape of public interest litigation before this Court praying therein issuance of writ of mandamus against respondents-State not to construct Govt. Degree College, Sarahan at village Tikker. Petitioners also sought directions to the respondents-State to select/approve or to examine the feasibility of land for construction of aforesaid College at the villages which are situated near and around Sarahan, strictly in terms of Guidelines issued by respondents-State, so that College is constructed on sufficient land.

4. Close scrutiny of the pleadings on record suggests that earlier respondents-State had selected site for Govt. Degree College at village Kahan on the National Highway towards Nahan i.e. 1 kilometer from Sarahan. But, thereafter, respondents-State vide Notification dated 14.01.2014 decided to open nine (9) Government Colleges in different places in the State of Himachal Pradesh including Government Degree College, Sarahan, District Sirmaur at village Tikker. It also emerges from the record that some of the owners of the land, gifted 20 bighas of land comprising Khata Khatauni No. 30/42, plots 20, measuring 464.10 bighas situated in revenue village Tikker, Tehsil Pachhad, District Sirmaur (H.P.) as per the copy of jamabandi for the year 2013-14. On the basis of aforesaid gift deeds executed by the owners of the land of village Tikker, mutations No. 279 to 287 were attested by Assistant Collector, Pachhad in favour of Education Department. Subsequent to aforesaid development, Chief Minister of Himachal Pradesh laid foundation stone of aforesaid Government College, Sarahan at village Tikker, Tehsil Pachhad, District Sirmuar on 22.11.2015.

5. At this stage it would be relevant to refer para 1 of writ petition preferred by present petitioners:-

"1.That the petitioner No. 1 and 2 are the citizen of India and the petitioner No. 1 is a resident of village & Post Office Bag-Pashog, Tehsil Pachhad, District Simarur (H.P.) and petitioner No. 2 is a resident of village Rister-Panwa, Post Office Panwa, Tehsil Pachhad, District Sirmaur (H.P.). Both the petitioners are agriculturists. Since, there is involvement of local politics for opening of the Government College at Sarahan, the students of Tehsil Pachhad, particularly the girl students are suffering, morally, financially & educationally. It is a matter of grave concern that the site selected for the construction of Government Model College at village Tikker near Sarahan is against the legitimate expectation of the people of Tehsil Pachhad, District Sirmaur. The present land/site selected for the construction of Modern Govt. College is not as per the Guidelines of the State Government and the same is very steep gradient, the decision for selecting the land for the construction of the Modern college was only taken by respondent No. 8 and respondent No. 9 alongwtih few people of village Tikker alone and not with the consent of the general public of Tehsil Pachhad. There is apprehension of mishappenings with the

students during their studies in future there at site. A huge amount of the State Government is being wasted unnecessary for the construction of 1 k.m. link road and for leveling of the site for college. Moreover, there is no chance at all to construct the play ground or stadium for sports at the present College site as required under the new/latest guidelines of the State Government. As the huge public amount is being wasted for nothing and there is another sufficient suitable land is available near to Sarahan where the Model College as per guidelines of the State Government can be established/constructed, in pursuance of the Judgment delivered by the Hon'ble High Court of Himachal Pradesh in CWP No. 1468 of 2013, titled as Dhrub Dev Sharma & others (De-notifying 08 Govt. Colleges) on 18th June, 2013, regarding opening of new Government Degree Colleges in the State to achieve the objectives of access, equity and quality in higher Education, therefore, the petitioners being resident of Tehsil Pachhad are entitled to file and maintain this writ petition in the interest of general public to save the public money being unnecessarily wasted on political considerations, in this Hon'ble Court which has jurisdiction to hear and adjudicate upon the matter."

6. Careful perusal of averments contained in para 1 of the petition suggests that petitioner No. 1 is resident of Village & Post Office Bag-Pashog, Tehsil Pachhad, District Sirmaur (H.P.) and petitioner No. 2 is resident of Village Rister-Panwa, Post Office Panwa, Tehsil Pachhad, District Sirmaur (H.P.). Petitioners have specifically stated that site selected for construction of Government Modern College at village Tikker near Sarahan is against the legitimate expectation of the people of Pachhad, District Sirmaur. As per petitioners, land/site selected for the construction of the College is not as per the Guidelines of the State Government. Petitioners have further stated that land selected for construction of college is steep gradient and decision for selecting the land for the construction of Modern College was only taken by respondents No. 8 and 9 alongwith few people of village Tikker and not with the consent of the general public of the Tehsil Pachhad. Similarly, petitioners expressed apprehension that there is no chance of constructing the playground or stadium for sports at the present College site as required under new/latest guidelines of the State Government. Petitioners further alleged that huge public money is being wasted for nothing and there is another sufficient suitable land available near to Sarahan, where the Modern Degree College can be opened that too in terms of guidelines issued by State Government. Petitioners also alleged that respondents-State has not followed the mandate of this Court passed vide judgment dated 18th June, 2013 in CWP No. 1468 of 2013, titled as "***Dhrub Dev Sharma & others vs. State of Himachal Pradesh"***, wherein, guidelines were laid down with regard to opening of new Government Degree College in State.

7. If the averments contained in the writ petition are read in entirety, it can be safely concluded that petitioners have leveled serious allegations against various public representatives of the area that too without placing on record any material evidence to substantiate their claim with regard to misuse of power by persons, who allegedly persuaded respondents-State to change its decision to shift site of Modern Degree College from village Kahan to village Tikker, District Sirmaur, H.P.

8. Primarily, petitioners are aggrieved with the shifting of Modern Degree College, Sarahan from village Kahan to Tikker, but careful perusal of reply filed by respondents itself clearly suggests that land at village Kahan, where, earlier, College was proposed to be constructed could not be finalized because 2.43 hectares area (proposed site) was forest land. In this regard, it would be profitable to refer to para 4 of the reply filed by respondents No. 2, 3 and 7:-

"4.That the contents of this Para are admitted to the extent that State Govt. had selected the site for the Govt. Degree College Sarahan near to petrol pump at village Kahan. It is further submitted that there are 700 green trees standing on the site and said land was in the category of dense forest which attracts the provision for the Forest Conservation Act, 1980. The matter was taken up with the Govt. of India, Ministry of Environment, Forest and Climate change Regional Office by the

Principal, Govt. College, Sarahan but no approval was obtained. The GOI has raised many observations and work being delayed to construct the college building and students were suffering. Copy of observations made by FRI, Dehradun is submitted as Annexure R-3. It is further submitted that in the meantime, the land was offered by the local residents for construction of college building in favour of Education Department on 3.10.2015."

9. Perusal of aforesaid reply clearly suggests that respondents-State had earlier selected site for construction of Govt. Degree College, Sarahan near to petrol pump at village Kahan. But, since there were more than 700 green trees standing on the site and Govt. of India had raised many objections, decision was taken to construct Modern Degree College at village Tikker, that too, on the land donated by the people of the area. Further, perusal of Para 20 of aforesaid reply also suggests that Govt. of Himachal Pradesh proposed to open Govt. College at Sarahan and in this regard accorded administrative approval of Rs.17,87,35,000/- against which amount of Rs.2,77,00,000/- has been released to HPPWD, Rajgarh. It would be apt to reproduce below Paras 20 and 21 of the reply:-

"20.That in reply to this para, it is submitted that Govt. of Himachal Pradesh has opened Govt. College at Sarahan and administrative approval of RS. 17,87,35,000/- has been accorded by the Govt. against which Rs.2,77,00,000/- has been released to HPPWD, Rajgarh. Besides there is a provision of Rs. 12.00 crore under RUSA which is yet to be released. The remaining contents are wrong, hence denied.

21. That in reply to this para, it is submitted that 20 bighas of land has been donated by the owners of land and with the consent of co-owners, the separate Tatima of specific portion has been carved out. No co-owners objected the carving out of Tatima from the joint land."

10. Similarly, respondent No. 6 i.e. Sub Divisional Magistrate, Rajgarh has stated that they received letter No. GC/SRN-Bhawan/14-210, dated 21.10.2015, from Principal, Govt. Degree College, Sarahan, wherein it was mentioned that with respect to the land selected earlier at village Kahan for construction of Govt. Degree College, he has not received the approval from the Forest Department, therefore, the local residents of village Tikker donated 20 bighas of land comprised in Khata Khatauni No. 30/42 for the construction of Govt. Degree College, Sarahan. Accordingly, he requested for conducting joint inspection of the newly selected site so that issues related to land identification/transfer with respect to newly opened college are resolved to avoid delay in construction of the College at newly selected site at village Tikker. Reply filed by respondent No. 6 i.e. Sub Divisional Magistrate further reveals that 20 bighas of land comprised in Khata Khatauni No. 30/42 situated in Mauja Tikker was donated by 8 out of 64 co-sharers in favour of Department of Education, Govt. of H.P. and said land was mutated in favour of Education Department, Govt. of H.P.

11. Similarly, respondent No. 5 i.e. Superintending Engineer, 12th Circle, HPPWD, Nahan in his reply has categorically stated that at earlier site proposed for construction of Govt. Degree College, the land included 2.43 hectares area is forest land, which required forest clearance under Forest Right Act, 1980. Aforesaid Superintending Engineer has specifically stated in his reply that as per report of Forest Department there are 694 Chil trees (pinusroxburghai) standing over the site. He further stated that matter was referred to Forest Department by Education Department for obtaining No Objection Certificate ('NOC' for short) from Ministry of Environment and Forest, Govt. of India but same could not be arranged by the Education Department. Since, there was no NOC from Govt. of India, no architectural drawing could be prepared for construction of college at village Kahan, District Sirmaur.

12. Mr. Varun Thakur, learned counsel for the petitioners, vehemently argued that the action of respondents-State in constructing Govt. Degree College at village Tikker is in complete violation of guidelines/instructions issued in this regard by the Govt. of H.P. Pursuant to judgment passed by this Court in CWP No. 1468 of 2013 titled as ***"Dhrub Dev Sharma &***

others vs. State of H.P.”, he contended that aforesaid college is being constructed in complete violation of Rule in vogue and land at village Tikker is not at all suitable for construction of the College. Mr. Varun Thakur forcefully contended that no College can be constructed on the proposed site as it is steep gradient, but despite aforesaid, respondents-State by concealing material facts got the land transferred in the name of Education Department for construction of College. He further argued that respondents-State before taking any steps for construction of College at proposed site failed to take into confidence the residents of that area, as NOC whatsoever was never obtained from the concerned Gram Panchayat. Despite there being lot of resistance from the local residents, respondents are hell bent to construct college at village Tikker**.** Mr. Varun further argued that respondents of the area are not happy with the construction on the proposed site, which was otherwise not suitable for the construction of the same. During arguments, he invited the attention of this Court to various documents placed on record to suggest that there is lot of opposition from the residents of that area as well as of Panchayat. He also invited the attention of this Court to Annexure P-6 to demonstrate that earlier foundation stone was laid down by the then Chief Minister for construction of Degree College at village Kahan but now that decision has been changed solely at the instance of political bigwigs of the area for political gains. Accordingly, in view of above, he prayed for issuance of direction restraining respondents from raising any construction of college at village Tikker on the land allegedly gifted by few people.

13. Mr. Shrawan Dogra, learned Advocate General, appearing on behalf of respondents-State forcefully contended that present writ petition is not maintainable because petitioners have not been able to prove their locus to file the present petition. He strenuously argued that in garb of so called PIL, few interested people are trying to stall the construction of College at new site, which is admittedly being constructed for the benefit of public at large of the area. Mr. Dogra further contended that while making proposal for constructing Degree College at new proposed site, each and every instructions issued in this regard by the authorities concerned, have been duly complied with. During arguments having been made by him, he invited the attention of this Court to various documents annexed with the reply to demonstrate that at earlier site more than 700 Chil trees were standing and despite best efforts, no forest clearance could be procured from the competent authority. Similarly, Mr. Dogra further contended that respondents-State before issuing order of transfer of land in the name of Education Department actually obtained report from the revenue authority, wherein it was categorically informed that proposed land is suitable for construction of College and no trees exist there. While concluding his argument, Mr. Dogra forcefully contended that Degree College is being constructed solely in the interest of residents of the area and in this regard already huge amount has been spent by respondents-State and, as such, construction on the spot cannot be ordered to be stopped at the behest of some vested interests.

14. We have heard learned counsel for the parties and gone through the record of the case carefully.

15. Conjoint reading of aforesaid replies filed by respondents clearly suggests that earlier site selected for construction of Govt. Degree College at village Kahan could not be finalized solely for the reason that there were approximately 700 Chil trees standing on the land and no NOC could be procured from the Forest Department for utilizing the said land. This Court after perusing the reply filed by respondents is fully satisfied that Govt. Degree College could not be constructed at village Kahan in absence of NOC from the Ministry of Environment & Forest, Govt. of India.

16. On the other hand, respondents-State got considerable land from the private persons, who, on their own, donated considerable land for construction of Govt. Degree College at village Tikker. It also emerges from record that after selection of site at village Tikker, respondents have considerably worked on the new proposed site for construction of college and as such, this Court sees no reason, whatsoever, to interfere in the policy decision taken by the respondents-State to construct college at village Tikker.

17. Perusal of documents available on record itself suggests that matter with regard to opening of new Govt. College at Sarahan, Tehsil Pachhad, District Sirmaur is hanging fire since 8th October, 2007 and public of that area is deprived of the basic facility of college in the area on one pretext or other. Petitioners specifically stated in the petition that the site on which construction of college is proposed at village Tikker is not suitable, but in this regard nothing has been placed on record to demonstrate that the site on which, the college is now proposed to be constructed, is not suitable, rather careful perusal of the averments contained in the writ petition suggests that the petitioners while terming present site un-suitable for construction of college, have suggested their own villages for construction of the college. At this stage, it would be apt to reproduce prayer 'c' made in the writ petition:-

> "c*) That necessary directions may be issued against the respondents No. 2, 3, 5 to 7 directing them to select/approve or to examine the feasibility of land for the construction of Govt. Modern College, Sarahan at the following villages, which are situated near and around Sarahan, as per the latest Guidelines of the respondent State Government annexed at Annexure P-9:-*
>
> *i) Bag-Pashog/Kawagdhar,*
>
> *ii)Between village Bhellan & Nawal-Labhan,*
>
> *iii) Barasra*
>
> *iv) Kahan (New Site)*
>
> *Or any other suitable place near to Sarahan, so that sufficient land is available as per requirement for the construction of Govt. Modern College, for the convenience of general public of Tehsil Pachhad, District Sirmaur (H.P.)*

18. Perusal of aforesaid relief clause clearly suggests that petitioners have prayed that college may be opened at village Bag-Pashog/Kawagdhar, which is admittedly village of petitioner No. 1. Aforesaid prayer itself suggests that present writ petition has not been filed in public interest, rather in the garb of present PIL, petitioner No. 1 has proposed his own village for construction of the College. Since, it clearly stands proved on record that at earlier site at village 'Kahan' number of trees were standing and as per judgment passed by Hon'ble Apex Court in "***Godavarman Thirumulpad vs. Union of India & Ors, 1997 (2) SCC 267"*** wherein it has been held that no forest land can be put to any non-forestory purpose, this Court sees no illegality and infirmity in the decision taken by the respondents-State where they proposed new site to construct Govt. College at village Tikker, that too, on the land donated by the people of that area.

19. In the present case, petitioners have leveled serious allegations with regard to irregularities committed by the respondents-State while proposing construction of Degree College at village Tikker instead of village Kahan but same appears to be ill-founded and without any basis because all the respondents have unequivocally stated in their reply that earlier site at village Kahan was not suitable for construction of Degree College since there are more than 700 Chil trees standing on that site and no forest clearance is accorded by the Ministry of Environment and Forest, Government of India.

20. At this stage, it is observed that such petitions, that too, in the name of PIL cannot be allowed to be used as a tool by some vested interests, who for some ulterior motive do not want the Govt. College to come up in that area. At the cost of repetition, it may be observed that proposal with regard to setting up of Degree College in the area is hanging fire since year, 2007 but till date no College could be set-up in that area. In the present case, though petitioners have claimed themselves to be *`Pro Bono Publico'* but no material, whatsoever, has been placed on record to suggest that present petition has been filed in the public interest, rather careful perusal of the averments contained in the writ petition clearly suggests that petitioners wanted this college to come up in their own village as clearly emerged from prayer (c) made in the writ petition.

21. This Court vide judgment in ***CWP No.9480 of 2014, titled: Vijay Kumar Gupta vs. State of Himachal Pradesh and Others, decided on 09.01.2015,*** has already issued the following guidelines as far as filing of PIL is concerned:-

> *"29. From the aforesaid exposition of law, it can safely be concluded that the Court would allow litigation in public interest only if it is found:-*
>
> *(i) That the impugned action is violative of any of the rights enshrined in Part III of the Constitution of India or any other legal right and relief is sought for its enforcement;*
>
> *(ii) That the action complained of is palpably illegal or malafide and affects the group of persons who are not in a position to protect their own interest or on account of poverty, incapacity or ignorance;*
>
> *(iii) That the person or a group of persons were approaching the Court in public interest for redressal of public injury arising from the breach of public duty or from violation of some provision of the Constitutional law;*
>
> *(iv) That such person or group of persons is not a busy body or a meddlesome interloper and have not approached with mala fide intention of vindicating their personal vengeance or grievance;*
>
> *(v) That the process of public interest litigation was not being abused by politicians or other busy bodies for political or unrelated objective. Every default on the part of the State or Public Authority being not justiciable in such litigation;*
>
> *(vi) That the litigation initiated in public interest was such that if not remedied or prevented would weaken the faith of the common man in the institution of the judicial and the democratic set up of the country;*
>
> *(vii) That the State action was being tried to be covered under the carpet and intended to be thrown out on technicalities;*
>
> *(viii) Public interest litigation may be initiated either upon a petition filed or on the basis of a letter or other information received but upon satisfaction that the information laid before the Court was of such a nature which required examination;*
>
> *(ix) That the person approaching the Court has come with clean hands, clean heart and clean objectives;*
>
> *(x) That before taking any action in public interest the Court must be satisfied that its forum was not being misused by any unscrupulous litigant, politicians, busy body or persons of groups with mala fide objective or either for vindication of their personal grievance or by resorting to black-mailing or considerations extraneous to public interest."*

In the present case there is no compliance whatsoever, of the guidelines, referred herein above, and, as such, present petition cannot be termed as PIL, in any manner, and the same deserves to be dismissed.

22. Though, by way of present petition, it has been claimed that the same has been filed in public interest but as clearly emerges from the record, as has been discussed hereinabove, there is no material, whatsoever available on record, which could persuade this Court to believe that the petitioners are *`Pro Bono Publico'* and petition is filed in public interest. Rather, careful perusal/analysis of the documents available on record suggests that it is a handy work of some vested interests, who certainly for extraneous reasons do not want the Govt. College to come up at village Tikker.

23. During arguments, this Court had an occasion to sift the entire documentary evidence made available on record as well as pleadings of the parties, perusal whereof clearly suggests that the College which is being sought to be shifted by invoking extra ordinary

jurisdiction of this Court is in larger public interest. Careful reading of the specific reply given by the respondents-State to the averments made in the writ petition clearly depicts that the petitioners have not approached this Court with clean hands, rather attempt has been made to hoodwink the Court by concealing material facts solely with a view to obtain orders from the Court restraining the respondents from constructing Govt. Degree College at village Tikker. None of the averments, with regard to cutting of trees, steep gradients and misuse of power by authorities have been admitted by the respondents in their respective replies. To the contrary, the reply filed by the respondents, which is duly supported by an affidavit of responsible officer of the State, suggests that necessary precautions/measures have been taken by the Department to protect the ecology/environment before granting necessary permission for the construction of Degree College at village Tikker. Moreover, as has been noticed above, petitioners have not placed on record any document/material to show their locus to lay challenge to decision of Govt. to construct college at village Tikker, which is admittedly in the interest of public at large**.**

24. Hence in view of the facts and circumstances enumerated hereinabove, this Court has no hesitation to conclude that by no stretch of imagination present petition can be termed as PIL. Rather contents of the same appear to be frivolous, vexatious and far-far away from the correct position on the spot. This court as well as Hon'ble Apex Court have repeatedly expressed concern with regard to growing menace of so called PIL, whereby some vested interests by concealing material facts attempt to rope in the Courts in the name of public interest.

25. Hon'ble Apex Court expressing its serious concern over misuse of PIL has repeatedly observed that use of the PIL has to be done with care, caution and circumspection so that it is not misused by certain people having vested interest.

26. Hon'ble Apex Court in case ***Central Electricity Supply Utility of Odisha vs. Dhobei Sahoo and Others (2014)1 SCC 161***, observed as under:

> *"24. Ordinarily, after so stating we would have proceeded to scan the anatomy of the Act, the Rules, the concept of the Scheme under the Act and other facets but we have thought it imperative to revisit certain authorities pertaining to public interest litigation, its abuses and the way sometimes the courts perceive the entire spectrum. It is an ingenious and adroit innovation of the judge-made law within the constitutional parameters and serves as a weapon for certain purposes. It is regarded as a weapon to mitigate grievances of the poor and the marginalized sections of the society and to check the abuse of power at the hands of the Executive and further to see that the necessitous law and order situation, which is the duty of the State, is properly sustained, the people in impecuniosities do not die of hunger, the national economy is not jeopardized; the rule of law is not imperiled; human rights are not endangered, and probity, transparency and integrity in governance remain in a constant state of stability. The use of the said weapon has to be done with care, caution and circumspection. We have a reason to say so, as in the case at hand there has been a fallacious perception not only as regards the merits of the case but also there is an erroneous approach in issuance of direction pertaining to recovery of the sum from the holder of the post. We shall dwell upon the same at a later stage.*
>
> *25. As advised at present, we may refer to certain authorities in the field in this regard. In Bandhua Mukti Morcha v. Union of India (1984) 3 SCC 161 Bhagwati, J., (as his Lordship then was) had observed thus: (SCC p.183, para 9)*
>
> > *"9. ….When the Court entertains public interest litigation, it does not do so in a caviling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it, but its attempt is only to ensure observance of social and economic rescue programme, legislative as well as executive, framed for the benefit of the have-nots and the handicapped and to protect them against violation of their basic human rights, which is also the*

constitutional obligation of the executive. The Court is thus merely assisting in the realization of the constitutional objectives."

"26. In Dr. D.C. Wadhwa and others v. State of Bihar (1987) 1 SCC 378 the Constitution Bench, while entertaining a petition under Article 32 of the Constitution on behalf of the petitioner therein, observed that it is the right of every citizen to insist that he should be governed by laws made in accordance with the Constitution and not laws made by the executive in violation of the constitutional provisions. It has also been stated therein that the rule of law constitutes the core of our Constitution and it is the essence of rule of law that the exercise of the power by the State whether it be the legislature or the executive or any other authority should be within the constitutional limitation and if any practice is adopted by the executive which is in flagrant violation of the constitutional limitations, a member of the public would have sufficient interest to challenge such practice and it would be the constitutional duty of the Court to entertain the writ petition.

27. In Neetu v. State of Punjab (2007) 10 SCC 614 the Court has opined that it is shocking to note that Courts are flooded with large number of so called public interest litigations where even a minuscule percentage can legitimately be called as public interest litigation. Commenting on entertaining public interest litigations without being careful of the parameters by the High Courts the learned Judges observed as follows: (SCC p. 617, para 5)

"5. `16....Though the parameters of public interest litigation have been indicated by this Court in large number of cases, yet unmindful of the real intentions and objectives, [High Courts] are entertaining such petitions and wasting valuable judicial time which, as noted above, could be otherwise utilized for disposal of genuine cases. (Ashok Kumar Pandey v. State of West Bengal (2004) 3 SCC 349, SCC p.358, para 16)"

Thereafter, giving a note on caution, the Court stated:

"6. `12. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens." (B.Singh versus Union of India (2004)3 SCC 363, SCC p.372, para 12)"

(pp.175-176)

27. Hon'ble Apex Court in ***State of Uttaranchal vs. Balwant Singh Chaufal and Others, (2010)3 SCC 402,*** while dealing with the issue of growing menace of Public Interest in the Country, observed as under:-

"143. Unfortunately, of late, it has been noticed that such an important jurisdiction which has been carefully carved out, created and nurtured with great care and caution by the courts, is being blatantly abused by filing some petitions with oblique motives. We think time has come when genuine and bona fide public interest must be encouraged whereas frivolous public interest litigation should be discouraged. In our considered opinion, we have to protect and preserve this important jurisdiction in the larger interest of the people of this country but we must take effective steps to prevent and cure its abuse on the basis of monetary and non- monetary directions by the courts.

144. In BALCO Employees' Union (Regd.) v. Union of India & Others (2002)2 SCC 333, this Court recognized that there have been, in recent times, increasing instances of abuse of public interest litigation. Accordingly, the court has devised a number of strategies to ensure that the attractive brand name of public interest litigation should not be allowed to be used for suspicious products of mischief. Firstly, the Supreme Court has limited standing in PIL to individuals "acting bonafide."

Secondly, the Supreme Court has sanctioned the imposition of "exemplary costs" as a deterrent against frivolous and vexatious public interest litigations. Thirdly, the Supreme Court has instructed the High Courts to be more selective in entertaining the public interest litigations.

153. In J. Jayalalitha v. Government of T.N. (1999) 1 SCC 53, this court laid down that public interest litigation can be filed by any person challenging the misuse or improper use of any public property including the political party in power for the reason that interest of individuals cannot be placed above or preferred to a larger public interest.

155. In Dattaraj Nathuji Thaware V. State of Maharashtra (2005) 1 SCC 590, this court expressed its anguish on misuse of the forum of the court under the garb of public interest litigation and observed (SCC p.595, para 12) that the

"public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest, an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens. The court must not allow its process to be abused for oblique considerations...."

28. Perusal of the observations made hereinabove as well as law laid down by Hon'ble Apex Court and by this Court, PIL cannot be allowed to be used as a tool by irresponsible unscrupulous litigants to serve their vested interest in the garb of public interest.

29. In the present case, we are constrained to observe that no material whatsoever has been made available from where it could be inferred that the present petition has been filed in the Public Interest, rather, careful perusal of the pleadings on record persuaded this Court to draw a conclusion that the petitioners, with vested interests, have made an attempt by filing this frivolous petition to obtain illegal orders from the Court in the name of PIL. Moreover, careful perusal of the pleadings on record nowhere suggests that petitioners fulfill the criteria as has been identified/laid down by this Court in ***Vijay Kumar Gupta's*** case *supra* which can persuade this Court to consider the instant petition as a PIL.

30. As has been noticed above that respondents have already made considerable progress for constructing Govt. Degree College at village Tikker, which otherwise appears to be being constructed strictly in conformity with the Rules and guidelines issued by the competent authorities in that regard, petitioners cannot be allowed to make sheer abuse of the process of law by filing such frivolous petitions. It is seen that people of area are deprived of college, which would have been completed by now but for illegal/unjust approach adopted by certain people like petitioners, who without there being sufficient material on record resorted to legal proceedings, as in the instant case, to halt the developmental activities being taken up by the respondents-State, rather such practice deserves to be deprecated and such persons need to be dealt with sternly.

31. Moreover, it is a complete domain of the respondents-State to select site, if any, for construction of College keeping in view various factors in mind and as such this Court has very limited jurisdiction to interfere, especially, in policy decision taken by the respondents-State.

32. In this regard reliance is placed upon ***Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Paritosh Bhupeshkumar Sheth and Others and Alpana V.Mehta vs. Maharashtra State Board of Secondary Education and Another, (1984)4 SCC 27,*** wherein the Hon'ble Supreme Court held:

"16. In our opinion, the aforesaid approach made by the High Court is wholly incorrect and fallacious. The Court cannot sit in judgment over the wisdom of the policy evolved by the Legislature and the subordinate regulation-making body. It may be a wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any drawbacks in the policy incorporated in a rule or regulation will not render

it ultra vires and the Court cannot strike it down on the ground that, in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act. The Legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act and there is no scope for interference by the Court unless the particular provision impugned before it can be said to suffer from any legal infirmity, in the sense of its being wholly beyond the scope of the regulation-making power or its being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitations imposed by the Constitution. None of these vitiating factors are shown to exist in the present case and hence there was no scope at all for the High Court to invalidate the provision contained in clause (3) of Regulation 104 as ultra vires on the grounds of its being in excess of the regulation-making power conferred on the Board. Equally untenable, in our opinion, is the next and last ground by the High Court for striking down clause (3) of Regulation 104 as unreasonable, namely, that it is in the nature of a bye-law and is ultra vires on the ground of its being an unreasonable provision. It is clear from the scheme of the Act and more particularly, Sections 18, 19 and 34 that the Legislature has laid down in broad terms its policy to provide for the establishment of a State Board and Divisional Boards to regulate matters pertaining to secondary and higher secondary education in the State and it has authorised the State Government in the first instance and subsequently the Board to enunciate the details for carrying into effect the purposes of the Act by framing regulations. It is a common legislative practice that the Legislature may choose to lay down only the general policy and leave to its delegate to make detailed provisions for carrying into effect the said policy and effectuate the purposes of the Statute by framing rules/regulations which are in the nature of subordinate legislation. Section 3(39) of the Bombay General Clauses Act, 1904, which defines the expression 'rule' states: Rule shall mean a rule made in exercise of the power under any enactment and shall include any regulation made under a rule or under any enactment." It is important to notice that a distinct power of making bye-laws has been conferred by the Act on the State Board under Section 38. The Legislature has thus maintained in the Statute in question a clear distinction between 'bye-laws' and 'regulations'. The bye-laws to be framed under Section 38 are to relate only to procedural matters concerning the holding of meetings of State Board, Divisional Boards and the Committee, the quorum required, etc. More important matters affecting the rights of parties and laying down the manner in which the provisions of the Act are to be carried into effect have been reserved to be provided for by regulations made under Section 36. The Legislature, while enacting Sections 36 and 38, must be assumed to have been fully aware of the niceties of the legal position governing the distinction between rules/regulations properly so called and bye-laws. When the statute contains a clear indication that the distinct regulation-making power conferred under Section 36 was not intended as a power merely to frame bye-laws, it is not open to the Court to ignore the same and treat the regulations made under Section 36 as mere bye-laws in order to bring them within the scope of justiciability by applying the test of reasonableness.

21. The legal position is now well-established that even a bye-law cannot be struck down by the Court on the ground of unreasonableness merely because the Court thinks that it goes further than "is necessary" or that it does not incorporate certain provisions which, in the opinion of the court, would have been fair and wholesome. The Court cannot say that a bye-law is unreasonable merely because the judges do not approve of it. Unless it can be said that a bye law is manifestly unjust, capricious, inequitable, or partial in its operation, it cannot be invalidated by the Court on the ground of unreasonableness. The responsible representative body entrusted with the power to make by laws must ordinarily be presumed to

know what is necessary, reasonable, just and fair. In this connection we may usefully extract the following off-quoted observations of Lord Russell of Killowen in Kruse v. Johnson, (1898) 2 QB 91, 98, 99 (quoted in Trustees of the Port of Madras v. Adminchand Pyarelal, (1976)! SCR 721, 733) (SCC p.178, para 23):

> *(1) "When the Court is called upon to consider the byelaws of public representative bodies clothed with the ample authority which I have described, accompanied by the checks and safeguards which I have mentioned, I think the consideration of such bye-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, 'benevolently interpreted' and credit ought to be given to those who have to administer them that they will be reasonably administered."*
>
> *"The learned Chief Justice said further that there may be cases in which it would be the duty of the court to condemn by-laws made under such authority as these were made (by a county council) as invalid because unreasonable. But unreasonable in what sense? If for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.' But it is in this and this sense only, as I conceive, that the question of reasonableness or unreasonableness can properly be regarded. A bye-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient or because it is not accompanied by an exception which some judges may think ought to be there'.*
>
> *" We may also refer with advantage to the well-known decision of the Privy Council in Slattery v. Naylor, (1988) 13 AC 446, where it has been laid down that when considering whether a bye-law is reasonable or not, the Court would need a strong case to be made against it and would decline to determine whether it would have been wiser or more prudent to make the bye-law less absolute or will it hold the bye-law to be unreasonable because considerations which the court would itself have regarded in framing such a bye-law have been over looked or reflected by its framers. The principles laid down as aforesaid in Kruse v. Johnson, (1898) 2 QB 91, 98, 99 and Stattery v. Naylor, (1988) 13 AC 446 have been cited with approval and applied by this Court in Trustees of the Port of Madras v. Aminchand Pyarelal & Ors.,(1976) 1 SCR 721, 733."*

33. In ***Parisons Agrotech Private Limited and Another vs. Union of India and Others, (2015)9 SCC 657,*** the Hon'ble Supreme Court held:

> *"14. No doubt, the writ court has adequate power of judicial review in respect of such decisions. However, once it is found that there is sufficient material for taking a particular policy decision, bringing it within the four corners of Article 14 of the Constitution, power of judicial review would not extend to determine the correctness of such a policy decision or to indulge into the exercise of finding out whether there could be more appropriate or better alternatives. Once we find that parameters of Article 14 are satisfied; there was due application of mind in arriving at the decision which is backed by cogent material; the decision is not arbitrary or irrational and; it is taken in public interest, the Court has to respect such a decision of the Executive as the policy making is the domain of the Executive and the decision in question has passed the test of the judicial review.*

15. In Union of India v. Dinesh Engg. Corpn., (2001)8 SCC 491, this Court delineated the aforesaid principle of judicial review in the following manner: (SCC pp.498-99, para 12)

> *"12……There is no doubt that this Court has held in more than one case that where the decision of the authority is in regard to the policy matter, this Court will not ordinarily interfere since these policy matters are taken based on expert knowledge of the persons concerned and courts are normally not equipped to question the correctness of a policy decision. But then this does not mean that the courts have to abdicate their right to scrutinize whether the policy in question is formulated keeping in mind all the relevant facts and the said policy can be held to be beyond the pale of discrimination or unreasonableness, bearing in mind the material on record. ….. Any decision be it a simple administrative decision or policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision. If it is so, then be it a policy decision or otherwise, it will be violative of the mandate of Article 14 of the Constitution."*

16. The power of the Court under writ jurisdiction has been discussed in Asif Hameed. v. State of J&K, 1989 Supp.(2) SCC 364: 1 SCEC 358 in paras 17 and 19, which read as under: (SCC pp. 373-74)

> *"17. Before adverting to the controversy directly involved in these appeals we may have a fresh look on the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, the two facets of people's will, they have all the powers including that of finance. Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self-imposed discipline of judicial restraint.*
>
> * * *
>
> *19. When a State action is challenged, the function of the court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution and if not, the court must strike down the action. While doing so the court must remain within its self-imposed limits. The court sits in judgment on the action of a coordinate branch of the government. While exercising power of judicial review of administrative action, the court is not an appellate authority. The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers."*

17. The aforesaid doctrine of separation of power and limited scope of judicial review in policy matters is reiterated in State of Orissa v. Gopinath Dash, (2005) 13 SCC 495 : (SCC p.497, paras 5-7)

> *"5. While exercising the power of judicial review of administrative action, the Court is not the Appellate Authority and the Constitution does not permit the Court to direct or advise the executive in the matter of policy or to sermonise qua any matter which under the Constitution lies within the sphere of the legislature or the executive, provided these authorities do not transgress their constitutional limits or statutory power. (See Asif Hameed v. State of J&K; 1989 Supp (2) SCC 364 and Shri Sitaram Sugar Co. Ltd. v. Union of India; (1990) 3 SCC 223). The scope of judicial enquiry is confined to the question whether the decision taken by the Government is against any statutory provisions or it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution. Thus, the position is that even if the decision taken by the Government does not appear to be agreeable to the Court, it cannot interfere.*
>
> *6. The correctness of the reasons which prompted the Government in decision-making taking one course of action instead of another is not a matter of concern in judicial review and the Court is not the appropriate forum for such investigation.*
>
> *7. The policy decision must be left to the Government as it alone can adopt which policy should be adopted after considering all the points from different angles. In the matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown the courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the Government the Court cannot interfere even if a second view is possible from that of the Government."*

34. The Hon'ble Apex Court in ***Census Commissioner and Others vs. R.Krishnamurthy, (2015)2 SCC 796*** held as under:

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

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

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

> *"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 (SCC para 51) it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. This view has been reiterated in state of J & K v A.R. Zakki,1992 Supp(1) SCC 548. In A.K. Roy v. Union of India, (1982)1 SCC 271it was held that no mandamus can be issued to enforce an Act which has been passed by the legislature."*

35. Consequently, in view of the aforesaid discussion, we do not see any reason to invoke extra ordinary jurisdiction of this Court to issue writ of mandamus, commanding respondents to stop the construction of Govt. Degree College at village Tikker, District Sirmaur.

36. Viewed thus, the present petition is dismissed being devoid of any merit, alongwith pending application(s), if any.

37. Interim directions, if any, shall stand vacated.

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

Rajinder Singh ...Petitioner.

Versus

Registrar under Societies Registration Act and others ...Respondents.

CWP No. 4003 of 2015
Decided on: 22.09.2016

Constitution of India, 1950- Article 226- A show notice was issued by sub Registrar Sub Division, Nahan- aggrieved from the notice, present appeal has been filed- held, that show cause notice is not a final order- it is for the petitioner to show cause and to take all the available

grounds - petition disposed of with a direction to decide the matter within two weeks after seeking reply from the petitioner and giving an opportunity of hearing to him. (Paga-4 to 10)

Cases referred:
Union of India and Anr. vesus Kunisetty Satyanarayana, 2007 AIR (SCW) 607
Special Director and another versus Mohd. Ghulam Ghouse and another, 2004 AIR(SCW) 416

For the petitioner:	Mr. Deepak Kaushal, Advocate.
For the respondent:	Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this writ petition is show cause notice, dated 26th May, 2015 (Annexure P-4) issued by the Sub-Registrar (SDM), Sub Division Nahan, under H.P. Society Registration Act, District Sirmaur, H.P., while exercising powers under Sections 41 and 45 (3) of The Himachal Pradesh Societies Registration Act, 2006 (for short "the Act").

2. It is a moot question – whether the writ petition is maintainable?

3. The show-cause notice is not a final order. It is for the petitioner to show-cause and take all the grounds, which are available as weapons in his armoury.

4. This Court in **CWP No. 1159 of 2014-F** titled as **Sandeep Sethi versus State of H.P. and others,** decided on 10th March, 2014; **CWP No. 3012 of 2015,** titled as **Micromax Informatics Ltd. versus State of H.P. and others,** decided on 24th June, 2015; and **CWP No. 4989 of 2014,** titled as **Partap Shukla versus State of H.P. and others,** decided on 17th July, 2014, while relying upon the judgments rendered by the Apex Court in the cases titled as **Union of India and Anr. vesus Kunisetty Satyanarayana,** reported in 2007 AIR (SCW) 607, and **Special Director and another versus Mohd. Ghulam Ghouse and another,** reported in **2004 AIR(SCW) 416,** has held that the show cause notice cannot be questioned by the medium of the writ petition and the writ petition is pre-mature.

5. In the case titled as **M/s Indian Technomac Company Ltd. versus State of H.P. & others,** being **CWP No. 4779 of 2014,** decided on 4th August, 2014, this Court has held that the writ petition is not maintainable when the alternative efficacious remedy is available to the petitioner.

6. While going through the mandate of the Act, it appears that the concerned authority has exercised the power in terms of Sections 41 and 45 (3) of the Act.

7. Having said so, the writ petition is not maintainable.

8. At this stage, Mr. Deepak Kaushal, learned counsel for the petitioner, stated at the Bar that he has moved an application before the competent authority for inclusion of some of the members of the society, but in view of the show cause notice, the concerned authority is not making the orders.

9. In the given circumstances, we deem it proper to dispose of this writ petition by directing the concerned authority to determine the show cause notice within two weeks after seeking reply from the petitioner and giving an opportunity of hearing to him.

10. It goes without saying that in case the decision goes against the petitioner, he is at liberty to challenge the same before the competent authority and the order be not

implemented/ executed for a period of two weeks enabling the petitioner to seek appropriate remedy.

11. The writ petition is disposed of accordingly alongwith all pending applications.

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

CWP Nos.375, 376 & 377 of 2016
Decided on: September 22, 2016.

CWP No.375 of 2016
Raman Kumar .....Petitioner.
versus
State of H.P. and another .....Respondents.

CWP No.376 of 2016
Gagan Singh .....Petitioner.
versus
State of H.P. and another .....Respondents.

CWP No.377 of 2016
Shankar Lal .....Petitioner.
versus
State of H.P. and another .....Respondents.

Constitution of India, 1950- Article 226- Petitioners had invoked the jurisdiction of the Labour Court- they were ordered to be re-engaged without any monetary benefits – awards were made subject matter of writ petitions, letters patent appeals and special leave petitions, which were dismissed- a writ petition was filed to implement the award and to modify the same by granting full back wages and interest/emoluments @ 18% per annum from the date of retrenchment – held, that the award passed by Labour Court is to be executed as a decree of Civil Court- no writ petition can be filed for execution of the award- writ petitions held to be not maintainable.

(Para-3 to 6)

For the Petitioner(s): Mr.Naresh Kaul, Advocate.
For the Respondents: Mr.Shrawan Dogra, Advocate General, with M/s Romesh Verma & Anup Rattan, Addl.A.Gs., and J.K. Verma, Dy.A.G.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

All these writ petitions have been filed with following identical prayer:

"i) That the respondents may kindly be directed to implement the award dated 12.08.2013 (Annexure P-1) forthwith in its true letter and spirit, after the dismissal of CWP No.9576/2013 dated 08.01.2014 (Annexure P-2) and CWP No.4658/2014 dated 06.04.2015 (Annexure P-3) & also dismissal of LPA 4/2016 (Annexure P-4) on 02.01.2016, since the petitioner is out of job and regularly visiting the office of respondent No.2 for his re-engagement and the award has also attained the finality qua the respondents, further, the award dated 12.08.2013 (Annexure P-1) may kindly be modified after awarding full back wages alongwtih interest/emoluments & cost, in view of judgment passed by the Hon'ble Apex Court in Jasmer Singh's case (Annexure P-5) 2015(4) SCC 458, including the full back wages and interest/emoluments @ 18% per annum from the date of illegal retrenchment/termination alongwtih cost (Rs.25000/-) in view of the peculiar

proved facts and circumstance of the present case, in the interest of law and justice."

2. Petitioners, in all the writ petitions, had invoked the jurisdiction of Labour Court for redressal of their grievances, awards were made and the petitioners were ordered to be re-engaged, without any monetary benefits, awards were subject matter of writ petitions, Letters Patent Appeals before this Court and Special Leave Petitions before the Apex Court, which, as per the learned counsel for the petitioners, came to be dismissed and the awards passed by the Labour Court have attained finality.

3. The moot question is - whether the petitioners can invoke writ jurisdiction under Articles 226 and 227 of the Constitution of India for the execution of an award passed by a Labour Court?

4. For that, we may make a reference to Section 11 of the Industrial Disputes Act, 1947, (for short, the Act), which deals with the procedure, powers and duties of the Authorities. Sub Sections (4), (8) and (9) of Section 11 of the Act provide that an award made by the Labour Court shall be executed in accordance with the procedure laid down for execution of orders and decree of a Civil Court under Order 21 of the Code of Civil Procedure. It is apt to reproduce sub sections (4), (8) and (9) of the Act hereunder:

> "(4) A conciliation officer may enforce the attendance of any person for the purpose of examination of such person or call for and inspect any document which he has ground for considering to be relevant to the industrial dispute or to be necessary for the purpose of verifying the implementation of any award or carrying out any other duty imposed on him under this Act, and for the aforesaid purposes, the conciliation officer shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), in respect of enforcing the attendance of any person and examining him or of compelling the production of documents.
>
> (8) Every Labour Court, Tribunal or National Tribunal shall be deemed to be Civil Court for the purposes of sections 345, 346 and 348 of the Code of Criminal Procedure, 1973 (2 of 1974).
>
> (9) Every award made, order issued or settlement arrived at by or before Labour Court or Tribunal or National Tribunal shall be executed in accordance with the procedure laid down for execution of orders and decree of a Civil Court under order 21 of the Code of Civil Procedure, 1908 (5 of 1908)."

5. Bare perusal of the above quoted provision does disclose that for execution of an award passed by a Labour Court, the mechanism contained in the Act itself has to be followed. Thus, the petitioners ought not to approach this Court under Articles 226 and 227 of the Constitution of India seeking execution of the award passed by the Labour Court, rather they should have resorted to execution proceedings, as provided under the Act.

6. It is apt to record herein that this Court in terms of order, dated 18th February, 2016, commanded the respondents to reinstate the petitioners, is a factor to be kept in mind.

7. Viewed thus, the writ petitions are not maintainable. Accordingly, we dispose of the writ petitions by directing the respondents to reinstate the petitioners, as directed by the Labour Court, within a period of four weeks from today. However, it is made clear that this order shall not be treated as precedent. Pending CMPs, if any, also stand disposed of.

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

Satish Kumar ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Criminal Appeal No. 385 of 2015
Judgment reserved on: 01.07.2016
Date of Decision 22 .09.2016

N.D.P.S. Act, 1985- Section 15- Accused was found transporting 100 Kgs. poppy husk/poppy straw in five plastic bags in dickey of the car- accused was tried and convicted by the trial Court- held, in appeal that merely because PW-1 had cordial relation with the police is no ground to doubt the prosecution version when the witness was available on the spot- there was no occasion to call the witnesses from the adjoining shops or barrier situated at some distance- minor omission or failure to recall the facts is no ground to doubt the prosecution version- case cannot be doubted due to failure to produce the seal- police had no prior information- police was on patrolling duty for detection of crime- accused was driving car with registration number of another vehicle- mere failure to take photograph from particular angle will not make the prosecution case doubtful- prosecution version was duly proved beyond reasonable doubt and the accused was rightly convicted by the trial Court- appeal dismissed. (Para-6 to 31)

For the appellant	:	Mr. Anupam Anzranni Mehta, Advocate.
For the respondents	:	Mr. P.M. Negi Deputy Advocate General

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

In the instant case appellant has assailed his conviction and sentence imposed upon him vide judgment dated 29.07.2015, passed in Sessions trial No. 4-N/7 of 2014 by Special Judge-II, Sirmaur, District at Nahan, H.P., Section 15 of Narcotic Drugs and Psychotropic Substances Act, 1985 registered in case FIR No. 347/2013 in Police Station, Paonta Sahib, H.P.

2. During checking of vehicles by police in Nakabandi near Check Post Behral, appellant was found transporting 100 Kgs. poppy husk/poppy straw in five plastic bags in dicky of vehicle Indigo car with number plate UK-07AE-7839. Other number plates bearing No. DL-4CR-7283 were also found in the car. Recovered contraband was seized and samples of the same were sent for chemical analysis to State FSL. As per Chemical Analysis report recovered contraband was found to be poppy straw. On completion of investigation, challan under Section 15 of Narcotic Drugs and Psychotropic Substances Act, 1985 was presented in the court against appellant and on conclusion of trial appellant was convicted and sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs.1.00 lac and in default in payment of fine to undergo further undergo simple imprisonment for six months.

3. We have heard learned counsel for parties and also have gone through the material placed on record.

4. On 07.10.2013 at about 3.45 PM, Police Party headed by PW-14 ASI Mohar Singh consisting of PW-7 Head Constable Kalyan Singh, PW-8 Head Constable Sunil and PW-6 HC Tapender Singh departed Police Station Paonta Sahib towards Batapur Chowk Bahral Barrier etc. in Government vehicle bearing No. HP-17C-1222, being driven by HHC Varinder Singh for patrolling to detect offences under Excise and Forest Act. Copy of departure entry in Daily Diary Report is Ex. PW-10/A. Police Party was also accompanied by HC Dharam Singh, Incharge

Security branch Paonta Sahib. They set up a 'Naka' at Behral Check Post and started checking vehicles. List of vehicles checked during 'Naka' was also prepared. Copy of said list is Ex. PW-14/A.

5. At about 5.30 PM, Indigo Car bearing No. UK-07-AE-7839 coming from Yamunanagar side was stopped by Police Party. On inquiry, driver of car disclosed his name Satish Kumar. On account of his gesture and also due to condition of vehicle suspicion arose and therefore constable Tara Dutt who was on duty at barrier, Mustak Ali an employee of Marketing Committee and Yaseen Ali, B.O. Forest Department was associated in search of vehicle and vehicle were searched in their presence. On opening of dicky of car powder like substance was found in 5 yellow colour plastic sacks. Appellant stated the said powder to be cattle feed. At the time of checking, plastic sacks, two number plates bearing No.DL-4CR-7283 were also found in dicky. Sealed plastic sacks were marked as Sl. No. 1 to 5 and opened in presence of witnesses. Powder in plastic sacks was found packed in transparent plastic panies. On tasting and smelling as well as on the basis of experience, police officials found it to be poppy husk. Identification memo of this substance Ex. PW-11/A was prepared. PW-8 HC Sunil brought electronic weighing scale from Hotel Grand Rivera in Government vehicle under instructions of PW-14 ASI Mohar Singh. On weighing each plastic sacks was found containing 20 Kgs. Poppy husk and total quantity of recovered contraband was found 100 Kgs. After mixing contraband homogenously, two samples of contraband one Kg each were taken out from every plastic sack and samples were put in separate cloth parcels and sealed with seal impression 'T'. 5 plastic sacks were also sealed with seal impression 'T'. Column Nos. 1 to 9 of NCB form Ex. PW-3/C were filled in triplicate and seal impression 'T' was also embossed on the said form. Samples of seal impression 'T' Ex. PW-14/B were also taken on separate piece of cloth. Photography and videography of proceedings was done by HC Kalyan Singh with Government camera. Seal after its use was handed over to PW-1 Yaseen Ali. PW-1 Yaseen Ali, Mustak Ali, PW-6 HC Tapender Singh and appellant signed memo. Ex. 1/C. Rukka PW-11/A was prepared and sent to Police Station, Paonta Sahib through PW-6 Tepender Singh.

6. On the basis of Rukka, Ex. PW-11/A, FIR Ex. PW-11/B was registered. PW-11, Inspector Bhishan Singh Thakur made endorsement of FIR Ex.PW-11/C on Rukka and handed over case file to PW-6, Tapender Singh, who further handed over the said file to PW-14 ASI Mohar Singh. Spot map Ex.PW-14/D was prepared. Appellant was arrested after completion of formalities on the spot. Police party left for Police Station. Sealed plastic sacks and 10 samples of contraband alongwith NCB forms in triplicate and sample of seal 'T' were produced before PW-11 Inspector Bhisham Singh Thakur, who resealed sample and recovered contraband with seal 'A' and prepared reseal Memo PW-11/D. Seized vehicle alongwith number plates and key was also handed over to the Incharge Malkhana.

7. Special report Ex. PW-13/A was sent through PW-5 Constable Pardeep Kumar to SDPO Paonta Sahib which was received by PW-13 HC Tejinder Singh and produced before the then SDPO, Ranbir Singh Rathore who after perusing the same put his signature on it and entry in this regard was made in Register.

8. During investigation, screening report of vehicle UK-07AE-7839 was obtained form RTO Office Dehradun and it was found that this number pertained to Alto Car owned by one Dhirender Singh. Copy of screening report Ex. PW-14/F and details downloaded from internet are Ex. PW-14/G. On verification about the vehicle bearing No. DL 4CR-7223, it was found that against this number an Indgo car was registered in the name of Sanjay Sihna. However, on the address given at the time of registration of vehicle, no person named as Sanjay Sinha was found to be residing. Downloaded details of vehicle No DL 4CR-7223 are Ex. PW-14/H.

9. Samples were sent for chemical examination to State FSL Junga by PW-3 HC Narayan Singh, Incharge Malakhana through PW-4 Constable Vipin Kumar vide RC No. 149/13 Ex. PW-3/B. Samples were deposited in State FSL Junga on 10.10.2013 under receipt obtained on road certificate itself. As per Chemical analysis report Ex. PW-11/F recovered contraband was found to be poppy straw.

10. Prosecution examined PW-1 Yaseen Ali as independent witness who duly supported and corroborated prosecution story.

11. PW-6 HC Tapender Singh, PW-7 HC Kalyan Singh, PW-8 HC Sunil and PW-14 ASI Mohar Sing are spot official witnesses examined in the Court. All of them corroborated prosecution case with slight insignificant variations. PW-2 Nirmal Sharma corroborated the fact of providing weighing machine to police. PW-3 HHC Narayan Singh Incharge Malkhana proved deposit of case property with him and sending samples to State FSL, Junga for chemical analysis and filling column No. 12 of NCB Form.

12. PW-4 Constable Vipin Kumar proved depositing sample of recovered contraband in State FSL, Junga. PW-5 Constable Pardeep Kumar proved handing over of Special report to PW-13 HC Tejinder Singh, Reader to SDPO and PW-13 HC Tejinder Singh proved placing Special Report before SDPO and signing the same by SDPO.

13. PW-9 HC Rajesh Kumar proved registration of FIR Ex. 11/B on receiving Rukka Ex.PW-11/A. PW-10 Deepak Chauhan proved DDR entry with regard to departure of police party on 7.10.2013. PW-11 Inspector Bhisham Singh proved resealing of case property and filling remaining columns of NCB Form in triplicate.

14. In statement under Section 313 of the code of Criminal Procedure, only defence taken by appellant was that police apprehended one person namely Kapil on the spot but he was released and recovered contraband was wrongly planted upon him.

15. Brother of appellant DW-1 Suresh Pal was examined as defence witness. He stated that they were members of joint family. On 13.10.2013, one constable and one ASI of Himachal Police went their house in their village and demanded driving licence of his brother Satish Kumar from him and he handed over the same to them in presence of his neighbour Rajiv. He admitted that Shubhlesh Kumari was wife of appellant and her mobile bearing No. 90453-48619. He further admitted that on 07.10.2013, police informed Subhlesh Kumari on her mobile about arrest of appellant in present case. No other evidence was led by appellant.

16. Learned counsel for appellant referred statement of PW-1 Yaseen Ali and raised doubt on his impartiality for admitting his cordial relations with police officials and for not saying that he was called by police and therefore only inference of joining police party at his own as interest person could be drawn. It is urged that PW-1 admitted that there were Tea stall, cold drink shop, wine shop and Toll Tax at a some distance from barrier but no one from these shops or Tall Tax barrier was called for associating in investigation but person having cordial relations with police officials was associated. Submission of learned counsel was not sustainable for the reason that there was nothing on record to impeach impartiality of this witness. To have cordial relations with police officials could not be basis for rejecting testimony of witness and for drawing inference that witness was not an independent witness. There is no enmity of PW-1 with appellant and also there was no personal interest of PW-1 Yaseen Ali for seeking conviction of appellant in a false case. PW-14 Mohar Singh specifically stated that constable Tara Dutt, Musthak Ali and PW-1 Yaseen Ali were called on suspicion for condition of vehicle and gesture of appellant. Omission by PW-1 to mention this fact in his deposition in the court was a minor discrepancy. There was no suggestion put in his cross examination that he was not called or associated by police but he joined police and participated in process with intention to implicate appellant in a false case.

17. Counsel for appellant referred admission of PW-1 that Investigating Officer did not call any independent witness from adjacent shops. But from this admission inference cannot be drawn at any stretch of imagination that PW-1 was not an independent witness. This question was with respect to calling of independent witnesses from adjoining shops. When witness was available on the spot there was no occasion to call independent witnesses from adjoining shops or a barrier situated as some distance.

18. It was also pointed out on behalf of appellant that PW-1 stated that remaining quantity of 80 Kgs. was sealed whereas after taking out 10 samples of one Kg. each out of alleged total quantity of 100 Kg. remaining quantity could have been 90 Kgs. Therefore doubt on prosecution case was raised. It was a minor mistake based on wrong calculation because in Rukka Ex. PW-11/A, it was stated that 5 bags having 18 Kg. contraband in each were sealed and seized. PW-1 Yaseen Ali stated that 100 Kg. Poppy was found in 5 bags weighing 20 Kg. of poppy husk in each bag. He further stated that from every bag two samples of 1 Kgs each were taken out. Therefore, his statement that 5 bags containing 80 Kgs. poppy husk were sealed by police was only miscalculations having no bearing on genesis of prosecution case.

19. Counsel for appellant further pointed out statement of PW-1 wherein he stated that he did not remember that which document was prepared by IO first and one or two documents were signed by him after going through contents and he did not know what was NCB form. It was further argued that when this witness did not remember documents prepared in his presence and did not know about NCB form, then statement of this witness lost its relevancy and signature of PW-1 over NCB form are of no significance. PW-1 specifically admitted preparation of documents PW-1/A, PW-1/B, PW-1/C in his presence and admitted signatures on these documents. Therefore, not remembering documents prepared did not vitiate or render evidence of PW-2 unreliable and documents irrelevant. So far NCB form was concerned, the same was neither filled nor signed by PW-1. Hence, ignorance of PW-1 about NCB form was insignificant.

20. Non production of original seal by PW-1 in the court was argued to be fatal for prosecution case. Statement of this witness that he did not remember whether seal was of wood, iron or lead and seal impression affixed on samples and bags and also number of seal impression affixed on the same was also referred sufficient material for disbelieving prosecution case and it was contended that in absence of production of seal, it was not possible to compare seals affixed upon the contraband and samples which was fatal for prosecution case. Purpose of production of seal is to compare seal impression affixed on parcels of contraband at the time of recovery with case property produced in the court and also with parcels of samples sent to State FSL for chemical analysis. In absence of original seal, this comparison is possible with sample seal impression taken on clothes as well as on NCB form and it was done in present case with sample seal impression taken on cloth Ex. PW-14/B. Appellant failed to point out prejudice caused to him for non production of original seal in court.

21. Counsel for appellant also referred that PW-1 Yaseen Ali stated that police official informed him that these bags were recovered from the vehicle of appellant but he failed to notice next line in his statement wherein he specifically stated that search was conducted by police in his presence. Statement as a whole is to be read. Similarly another part of his statement was referred for disbelieving him in which he stated that it was correct that he put his signatures on documents on direction of police and one or two documents were singed by him after going through the contents and police officials did not explain contents of documents to him. This contention was also not sustainable because statement of PW-1 was to be considered as a whole and PW-1 did not dispute or deny contents of documents signed by him.

22. Non supply of documents in presence of PW-1 did not mean that documents were not supplied at all. Moreover even if it is considered that documents were not supplied, then also appellant has failed to point out document which was tempered by police and prejudiced caused to appellant.

23. Counsel for appellant referred statement of PW-1 in which he stated that he went back but police remained on spot for 3-4 hours and argued that after leaving spot, it was not possible for PW-1 to tell or notice time for which police remained on the spot. Counsel for appellant did not notice the fact that PW-1 was posted at Forest Check Post at Behral which was adjacent to police Naka. Therefore, it was possible for PW-1 to notice police party from the forest check post even after leaving spot also. There was no contradiction in his statement on this aspect.

23. It has been contended on behalf of appellant that bridging weighing machine from Hotel Grand Revera situated a distance of 4-5 Kms. from spot cast doubt on fairness of investigation as there were various Hotels, shops and factory near spot and also on the way from spot to Hotel Grand Revera wherefrom weighing machine could have been brought as PW-2 Nirmal Sharma stated that shop keepers in the way might be having such type of machines. In present case five huge plastic sacks containing total quantity of one quintal were found in the car of appellant. Perusal of Rukka PW-11/A reflected that PW-8 HC Sunil was sent for electronic weighing machine, from Hotel Grand Rivera in official vehicle in peculiar circumstances and also keeping in view the quantity of recovered contraband, to be weighed. Therefore there was nothing wrong in bringing electronic weighing machine having capacity to weigh recovered contraband, from a specific hotel which might be in knowledge of Investigating Officer. It was but natural to bring an instrument from a known place instead of making inquiry here and there for searching of weighting machine having capacity to weigh huge quantity of contraband.

24. PW-2 Nirmal Sharma stated that there were Hotel, shops and factory at Bata Mandi and such type of weighting machines might be available with them. This averment was not suggesting that even this witness was sure about the availability of such type of machines in other places. Possibility of such machines with other shop keepers does not render bringing weighing machine from Hotel Grand Revera suspicious. Appellant failed to point out how bringing of weighing machine from Hotel Grand Revera had prejudiced him. Appellant also referred that there was no mention of NCB form in copy of RC Ex. PW-3/B vide which samples were taken to State FSL Junga and also there was no mention of sending NCB forms with samples in Col. No. 6 to 8 in Malkhana Register No. 19. Further, there was no mention in Register No. 19 regarding deposit of case property in State SFL Junga. It was further argued that receipt of State FSL was also not produced in the Court and therefore, it was not possible to compare seals on sample parcels with seals affixed at the time of recovery of contraband. This plea of the appellant was also misconceived. Receipt of sample parcels in State FSL Junga was endorsed on left corner of road certificate itself indicating that sample parcels were received in State FSL Junga on 10.10.2013 NCB form was also sent in triplicate to State FSL and the same was evident from report of State FSL Ex. PW-11/F in which it was mentioned as under:-

"6: Parcel(s) articles received:	Five sealed cloth parcels alongwith docket, Xerox copies of FIR & Seizure memo; NCB forms in triplicate & sample seals of T&A (Total-08 leaves).
7: Description of the parcel:	Five sealed cloth parcels marked as SA-I, SB-I, SC-I, SD-I & SE-1, each bearing three seals of "T" &three seals of "A". The seals were found intact and tallied with specimen seals sent by the forwarding authority and seals impressions impressed on the form NCB-I. The parcels were kept in the safe custody of the Assistant Chemical Examiner till the report of the same was signed & dispatched for Laboratory examination & report.

25. It was pointed out that PW-6 Tapender Singh stated that they did not check any car thereafter but reason for not checking any vehicle after apprehending vehicle of appellant was not explained. There is nothing abnormal in it as it was not a regular check post but a 'naka' for detection for crime and after finding contraband in apprehended vehicle police party was involved in completing investigation and after completing cumbersome procedure and formalities related thereto police party left for police station.

26. Failure of PW-2 Nirmal Sharma stating exact name of police official who approached him requesting weighing machine was not fatal but natural in normal circumstances and indicated that witnesses was not tutored.

27. Plea of appellant that there is non compliance of Section 42(2) of NDPS Act, on the basis of departure report Ex. PW-10/A, is also not sustainable as PW-10 Deepak Chauhan clarified that meaning of 'Surag Burari' was 'detection of crime'. Detection of crime never means

prior information of crime. On receiving specific information the police party would have departed for raiding and not for detection.

28. Two spare number plates bearing No. DL- 4 CR-7283 were also found in Indigo car. The said number was found to be actual registration number of apprehended car whereas, that car was being driven by appellant using a registration number of another vehicle. Said fact was proved by placing on record screening reports and NET details Ex. PW-14/F and Ex. PW 14/H. Non association of any witness with regard to visit of Investigation Officer to Delhi on the address given at the time of registration of Indio Car did not effect genesis of prosecution case.

29. Objection with regard to non deposit of driving licence in Malkhana was explained by Investigating Officer by stating that driving licence was in the case file.

30. Counsel for Appellant also pointed out discrepancies in taking photographs by PW-7 HC Kalyan Singh. Photographs and videography is a piece of evidence to corroborate prosecution story. Photographs proved on record definitely suggest that appellant, police party and independent witnesses PW-1 Yaseen Ali and Mustak were present on the spot. Failure to take photograph from particular angle might have been insignificant in case there were material contradictions and discrepancies in ocular version of witnesses. Prosecution case has been proved beyond reasonable doubt on the basis of ocular as well as documentary evidence. Therefore any lapse on the part of PW-7 in taking photographs from particular angle did not have effect on prosecution case. Even ignoring all photographs, there is sufficient material on record to prove the guilt of appellant.

31. No other point was urged. In view of above discussion, we are of considered view that prosecution has been able to establish the guilt of the accused beyond reasonable doubt by leading clear, cogent, convincing and reliable evidence. Thus, in our considered view, findings returned by the trial Court are based on correct and complete appreciation of material on record, warranting no interference.

32. It is a fit case for invoking provisions of Section 60 of NDPS Act to conveyance used for transporting narcotic substance. Therefore, trial court is also directed to initiate proceedings under Section 60(3) of the NDPS Act for confiscation of apprehended Indigo car in accordance with law.

33. In view of the above discussion, appeal filed by appellant is dismissed being devoid of any merit and findings returned by trial court are affirmed and conviction and sentence is maintained.

34. Record of the case also be returned forthwith.

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

State of Himachal Pradesh ...Appellant

Versus

Anil Kumar and others ...Respondents

Criminal Appeal No. 271 of 2013
Judgment reserved on: 01.09.2016
Date of Decision: 22.09.2016

Indian Penal Code, 1860- Section 147, 148, 324, 307, 302 and 201 read with Section 149- Accused had assaulted PW-1 and B at about 4:30 P.M. with sticks, dandas and knives - A stabbed on leg of B – P gave blow of rod on his head due to which B fell down- accused were tried and acquitted by the trial Court- held, in appeal that PW-1 to 4, PW-11 and PW-14 had not supported the prosecution version- recovery witnesses also turned hostile- PW-1 had given a

different version before Juvenile Justice Board- PW-26 is not an eye witness and the incident was narrated to him subsequently - his statement was recorded after three months - testimonies of prosecution witnesses cannot be said to be satisfactory- trial Court had rightly rejected them- appeal dismissed. (Para-7 to 23)

For the appellant	:	Mr. Ramesh Thakur, Deputy Advocate General.
For the respondent	:	Mr. K.D. Sood, Senior Advocate with Mr. A.S. Shah and Mr. Sanjeev Sood, Advocates

The following judgment of the Court was delivered:

Vivek Singh Thakur,Judge.

State has preferred instant appeal against acquittal of respondents-accused vide judgment dated 12.07.2012 passed by learned Sessions Judge, Sirmaur, District Nanan H.P. in Sessions Trial No.57-ST/7 of 2011 in case FIR No.104/2011 dated 07.05.2011 registered under Sections 147,148,324,307,302, 201 read with Section 149 of the Indian Penal Code in Police Station Nahan, District Sirmaur, H.P. for setting aside the impugned judgment and to convict respondents-accused.

2. We have heard learned Deputy Advocate General for the appellant-State and counsel for respondents-accused and have also perused record of the case.

3. Prosecution case is that on 07.05.2011 at about 1.15 PM in Police Post Kala Amb an information was received from Poonam Nursing Home, Kala Amb that one boy named 'Sunil Kumar' was brought for treatment in case of fight. This information was recorded as report No. 8 of Daily Diary dated 07.05.2011. In pursuance to said report HC Ram Gopal went to Poonam Nursing Home and recorded statement of respondent No. 4 Sunil Kumar that Manu son of Sleem, Vishal and one another boy had assaulted him and his brother Anil on 07.05.2011 at about 12.30 PM in front of Gogia Sweet Shop Trilokpur road and one boy gave danda blow on his head and another boy hit him with stone and thereafter assailants fled from spot on Motor Cycle towards Trilokpur. On return HC Ram Gopal recorded this information in Daily Diary Report No. 12.

4. On that day i.e. 07.05.2011 ASI Bihari Lal was on patrolling duty. He was informed by Head Constable Rajeev Kumar on his mobile that in incident of fighting two persons were brought for treatment in Sneh Hospital Kala Amb and they were serious. On receiving this information, ASI Bihari Lal went to Sneh Hospital and recorded statement of PW-1 Manu Khan Ex. PW-1/A under Section 154 Cr.PC. In this statement PW-1 stated that respondents assaulted him and Banti @ Pankaj Sharma at about 4.30 PM near gate No. 2 of Ruchira Factory and assailants were armed with sticks, dandas and knives who beat them bitterly. Anil stabbed on leg of Banti @ Pankaj Sharma, Pardeep Kumar gave blow of rod on his head whereupon Banti @ Pankaj Sharma fell down. Thereafter assailants fled away in white colour car and on 2-3 Motor Cycles. He was brought to Hospital by his uncle in Bolero Jeep and Banti @ Pankaj Sharma was also brought to Hospital by some one else. Banti @ Pankaj Sharma was referred to PGI Chandigarh. He also gave details of series of incidents of quarrelling with respondents taking place since morning.

5. After recording statement Ex. PW-1/A, it was sent to Police Station as 'Rukka' and FIR Ex. PW-23/A was registered under Sections 147,148,149, 323, 394 and 307 of IPC. Bunti @ Pankaj Sharma was referred to PGI, Chandigarh where he was admitted at 9.15 PM but he succumbed to injuries at 3.15 AM on 08.05.2011 whereupon case was converted into Section 302 of the Indian Penal Code.

6. On completion of investigation, challan was presented in court and accused were charge sheeted under Sections 147,148, 324,307,302, 201 read with Section 149 of the Indian

Penal Code. The prosecution examined 28 witnesses. Statement of respondents under Section 313 Cr.PC was recorded. No defence evidence was led.

7. PW-1 Manu Khan was injured and was the complainant in the present case. At the time of deposition in Court in his examination-in-chief, he stated about minor altercations taken place between him and respondents. However he desisted to support prosecution case by disowning contents of FIR Ex. PW-23/A. He was declared hostile witness on the request of learned Public Prosecutor. However nothing material in favour of prosecution could be elucidated during his cross-examination. He admitted his signatures on statement Ex. PW-1/A but stated that at the time of signing, he was in the Hospital and there were so many persons present alongwith police and the statement was already written by police on which he was made to sign. He further stated that his signatures on the said statement were taken after two days of the incident. He admitted injuries caused to him and Banti @ Pankaj near gate of Ruchira Factory. However he stated that assailants were muffled and their faces were not visible and therefore he could not identify them.

8. PW-2 Jahur Hussan, PW-3 Gurmeet Singh and PW-4 Goverdhan Singh were examined as witnesses to the incident but they did not lend any support to prosecution case. For resiling their statements recorded by police under Section 161 Cr.PC, they were declared hostile on the request of learned Public Prosecutor. PW-2 stated that he saw one injured person lying on the ground who was lifted by people and was taken to hospital. He also admitted visit of police on the spot and lifting blood stained earth and seizure of Motor Cycle but he denied to seen assailants.

9. PW-3 stated that he saw Shillu indulged in scuffle with two persons in front of his shop. He stated that respondent No. 4 Shillu was lying injured who was taken to hospital for treatment at about 12.30 PM but he denied having knowledge of scuffle taken place in the evening and about death of Banti @ Pankaj Sharma due to injures sustained in that scuffle.

10. PW-4 stated that police came to his shop and recorded his name and address but he did not know anything about the incident.

11. PW-11 Gian Chand deposed that when he reached near Ruchira Paper Mills at Trilokpur Kala Amb road, lot of people were gathered there and Manu Khan was lying injured on the road. He took Manu Khan from Sneh Hospital Kala Amb. In the meanwhile some other people also brought other injured in Sneh Hospital to whom people were calling Banti @ Pankaj Sharma. Banti @ Pankaj Sharma was referred to PGI Chandigarh and Manu Khan remained admitted in Sneh Hospital.

12. PW-14 also turned hostile and resiled from his statement recorded by police. He stated that on 07.05.2011 at about 12.00(noon) when he reached near Gogia Sweet Shop, he noticed respondent No. 4 Shillu @ Sunil Kumar lying on the road on opposite side of Gogia Sweet Shop. He further stated that he did not witness the fight. He was also subjected to cross-examination by learned Public Prosecutor but nothing in favour of prosecution could be extracted.

13. As per prosecution case, Pardeep Kumar and Deepak Pandey were also amongst the respondents-assailants. They were juvenile and were subjected to separate trial before the Juvenile Justice Board. PW-6 Surmukh Singh is uncle and PW-7 is father of Juvenile Pardeep Kumar. They were examined to prove production of iron rod by Juvenile Pardeep Kumar. Both of them turned hostile and stated that Pardeep Kumar was apprehended by police. Police called and advised them to produce iron rod stating that it was necessary in order to enlarge Pardeep Kumar on bail. Despite cross-examination by learned Public Prosecutor nothing material could be brought on record in favour of prosecution.

14. PW-8 Raj Kumar Mittal and PW-9 Dev Raj were examined to prove recovery of knife and danda at the instance of respondent Anil Kumar. PW-8 also turned hostile. He stated that ASI told him that knife and danda were recovered at the instance of Anil Kumar and ASI

asked him to sign document Ex. PW-8/A but contents of said document were not read over to him before his signature. PW-9 Dev Raj supported prosecution case but during cross-examination, he admitted that he was posted as Home Guard in Police Post Kala Amb. He was also witness in case State versus Pardeep Kumar. His statement Ex. DA was recorded in that case before Juvenile Justice Board on 28.10.2011. He was confronted with that statement Ex. DA. There was difference of version in statement EX. DA and deposition made in court in present case. He explained that on 28.10.2011, before making statement in Juvenile Justice Board he was not read over statement under Section 161 Cr.PC whereas before deposing in present case, the statement under Section 161 Cr.PC was read over to him by ASI outside the Court. Therefore this witness cannot be relied upon to prove recovery of danda and knife at the instance of Anil Kumar.

15. PW-5 HHC Gobind Singh was witness to seizer of vehicle No. HR-02L-0041 vide Memo Ex. PW-5/A. PW-12 Daya Nand was witness to taking into possession of RC of Motor Cycle No. HR-54-9454 vide memo Ex. PW-12/A. PW-10 is Patwari who issued Tatima and Jamabandi of place of occurrence. From statements of these witnesses nothing incriminatory against respondents was brought on record.

16. PW-13 Dr. Ajay Goel medically examined respondent Sunil Kumar and PW-16 Dr. M.L. Gupta medically examined PW-1 Manu Khan and deceased Banti @ Pankaj Sharma. PW-15 Dr. Himanshu admitted Banti in PGI Chandigarh and proved his treatment and death in PGI Chandigarh.

17. PW-17 to PW-25, PW-27 and PW-28 were police officials who proved their role performed during investigation.

18. PW-26 Naresh Kumar Sharma, father of deceased Banti @ Pankaj Sharma was only witness who deposed against respondents by naming them in his statement as assailants claiming that their names were disclosed by his son in Sneh Hospital Kala Amb on the date of incident and which were also affirmed by PW-1 on the same day. As per him he had requested police to record statement of his son but the police told him that they had heard his statement. He further stated that he had requested the police to record his statement. On 20th August, 2011, Police came to his house and recorded his statement and also of his wife. During cross-examination he stated that statements of his brothers Nand Lal and Lalit were recorded by police. He further stated that after the incident he got himself transferred to Surla and he joined his duties after 15 days of death of his son but he did not visit police post to ascertain progress of the case but his uncle and brother were attending investigation and the police came to his house on 20th August, 2011 and he could not meet PW-28 Bihari Lal prior to 20.08.2011 as he was in shock due to murder of his son and he came to know from his brother Lalit that statement of Banti @ Pankaj Sharma was not recorded by police when he was alive, but he did not do anything after knowing the said fact. However in later part of his statement he admitted that on 14th June, 2011 he and his wife were party to a delegation of Gram Panchayat alongwith Pradhan and others who met the Superintendent of Police at Nahan and submitted representation Ex. D-2 which was signed by him and his wife alongwith others. He admitted that in the said representation Ex. D-2 it was not recorded that his son Banti @ Panjaj Sharma made a disclosure in Sneh Hospital to him naming assailants. He also admitted that he did not inform the Superintendent of Police that Banti @ Pankaj Sharma had made a statement to him in Sneh Hospital. He admitted that after representation Ex. D-2, PW-28 ASI Bihari Lal met him and inquired about his representation but he did not disclose this fact to said Investigation Officer at that time as stated by him in examination-in-chief regarding disclosure by his son Banti @ Pankaj Sharma.

19. It emerged from admissions of PW-26 during his cross-examination that after more than three months of the incident for the first time his statement under Section 161 Cr.PC was recorded on 20.08.2011 in which he claimed disclosure by his son about the names of assailants to him on 07.05.2011. After 07.05.2011 his brothers and uncle were monitoring investigation and also representation to the Superintendent of Police was submitted by him

with delegation of Gram Panchayat but prior to 20th August, 2011 he never disclosed that deceased Banti @ Pankaj Sharma had informed him about assailants and PW-1 had also affirmed those names on that day.

20. PW-26 appeared to be designed and introduced in order to rope respondent somehow. He kept mum for three months despite the fact that his only son was murdered. There was no threat to him from any quarter. But suddenly after 3 months he came with plea that his son had disclosed names of assailants. In these circumstances claim of PW-26 Naresh Kumar Sharma was shrouded by suspicion and definitely was a result of afterthought. Therefore his statement is not trustworthy and confidence inspiring and thus cannot be made the basis to convict the respondents.

22. It is evident from aforesaid discussion that the evidence so adduced by the prosecution cannot be treated as cogent, reliable, credible and trustworthy to prove guilt of the respondents-accused beyond reasonable doubt for committing offences under Sections 147, 148, 324, 307,302, 201 read with Section 149 of the Indian Penal Code.

23. It is a settled principle of law that acquittal leads to presumption of innocence in favour of accused. To dislodge the same, onus heavily lies upon the prosecution. It cannot be said that learned trial court has not appreciated evidence correctly and completely and acquittal of accused has resulted into travesty of justice or has caused mis-carriage of justice. The respondents-accused have been acquitted by the trial Court. No case for interference is made out.

24. The present appeal, devoid of any merit, is dismissed, so also pending applications, if any. Bail bonds, if any, furnished by the accused are discharged. Records of the Court below be sent back forthwith.

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

State of Himachal Pradesh ... Appellant.

Versus

Taro Devi & another ... Accused/respondents.

Cr. Appeal No. 462 of 2009.
Reserved on 6.9.2016.
Decided on: 22.9.2016.

Indian penal Code, 1860- Section 307 read with Section 34- Informant had gone to bring medicine for his ailing wife along with his son- when they reached a little ahead of his courtyard near the house of the accused, accused T, her son and her daughter attacked the informant- son of the T gave danda blow on his head, whereas, T and her daughter gave beating with fist and kick blows- son of the informant told his mother about the incident- father and wife of the informant reached at the spot and rescued the informant from the clutches of the accused- accused were tried and acquitted by the trial Court- held, in appeal that there are discrepancies in the testimonies of the prosecution witnesses- witnesses have also made improvement in their statement- recovery of danda was not proved satisfactorily- prosecution version that accused had given beating to the informant was not proved beyond reasonable doubt- trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-10 to 32)

For the appellant. : Mr. V.S. Chauhan, Addl. Advocate General with Mr. Vikram Thakur, Dy. Advocate General.

For the respondents. : Mr. N.K. Thakur, Sr. Advocate with Ms. Jamuna Pathik, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of this appeal, the State has challenged the judgment passed by the Court of learned Additional Sessions Judge, Fast Track Court, Una in Sessions Trial No. 10/2008 dated 17.1.2009 vide which the learned trial court has acquitted the accused for commission of offence punishable under Section 307 read with Section 34 IPC.

2. The case of prosecution was that the complainant who is a resident of village Dharampur, Tehsil Haroli, District Una on 20.2.2008 at around 7:30 p.m. along with his son had gone to bring medicine for his ailing wife and when complainant along with his son reached a little ahead of his courtyard near the house of accused, accused Taro Devi, her son and daughter attacked him. Taro Devi's son gave a danda blow on his head, whereas accused Taro Devi and her daughter beat him with fist and kick blows. Son of the complainant rushed to his house and informed his mother about the said incident. Thereafter father as well as wife of the complainant reached the spot and rescued him (complainant) from the clutches of the accused, who ran away from the spot. The complainant was taken to Hospital at Haroli and matter was also reported to the police. Statement of complainant was recorded under Section 154 Cr.P.C., on the basis of which FIR Ext. PW7/C was recorded. During the course of investigation, spot map was prepared and blood stained T-shirt of the complainant as well as weapon of offence, 'Danda' were taken into possession vide recovery memos Ext. PW3/B and Ext. PW3/C. Dr. A.K. Sharma medically examined the complainant and issued MLC Ext. PW1/A and thereafter complainant was referred to R.H. Una for surgical opinion. At R.H. Una complainant was examined by Dr. Indu Bhardwaj who advised CT Scan for injuries suffered by him on his skull. Based on the report of CT Scan, Ext. PW2/A, Dr. Indu Bhardwaj found the injury suffered by the complainant to be dangerous to life. Accused Taro Devi and Chanchla Devi were arrested on 20.3.2008 and were subsequently released on bail on 31.3.2008. As accused Lekh Raj @ Laddi was a juvenile when the alleged incident took place, he was produced before the Juvenile Justice Board Una and was dealt with under the Juvenile Justice Act.

3. After completion of the investigation, challan was filed in the Court and as a prima facie case was found against the accused, they were charged for commission of offence punishable under Section 307 read with Section 34 IPC to which they pleaded not guilty and claimed trial.

4. In order to prove its case the prosecution, in all, examined 11 witnesses. Two witnesses were also examined by the defence.

5. Learned trial court after taking into consideration the entire evidence produced on record by the prosecution concluded that there were number of discrepancies, contradictions and doubtful circumstances in the case of the prosecution which went to the root of the case and create doubt in the story as was propounded by the prosecution. Learned trial court did not found the testimony of the complainant to be cogent and reliable. Recovery of Danda Ext. P2 was also held by the learned trial court to be doubtful. Learned trial court also took note of the fact that the complainant had stated that he had made a handwritten complaint to the police but the so-called complaint was never produced on record. It further took note of the fact that after the occurrence of alleged incident neither the complainant nor his family members reported the matter to the Panchayat Pradhan etc. and in fact police reached the hospital on the basis of information received by it from the hospital about there being an injury case received at the hospital. Learned trial court further held that even the testimony of the wife of complainant Smt. Urmila Devi who entered the witness box as PW4 was not reliable. It also did not found the testimony of the minor son of complainant, who entered the witness box as PW11 to be trustworthy. It was further held by learned trial court on the basis of testimonies of the doctors as well as medical reports on record that the Court has not only to see the nature of injury but also the intention and motive of the accused and whether the injury was in fact inflicted by the accused with an intention and motive to kill the injured or not. Learned trial court went to hold

that the said ingredients were missing in this case and simply because of enmity or hostile relations between the parties being neighbourers it could not be presumed that there was intention and motive of the accused to kill the complainant. Accordingly, on these basis it was held by learned trial court that when no independent witness had supported the case of the prosecution and on the other hand defence had examined two witnesses who seemed to be independent and the possibility of the occurrence having taken place in the manner as was alleged by the accused could not be ruled out, then the prosecution could not be said to have had proved its case against the accused beyond reasonable doubt. On these basis, learned trial court acquitted the accused for commission of offence punishable under Section 307 read with Section 34 IPC.

6. Mr. V.S. Chauhan, learned Additional Advocate General submitted that the judgment of acquittal passed by learned trial court was not sustainable in the eyes of law, as the findings returned by learned trial court were based on hypothetical reasoning, surmises and conjectures. It was further submitted by Mr. Chauhan that learned trial court discarded the testimony of prosecution witnesses on account of untenable reasons without appreciating that the prosecution witnesses had proved the case of the prosecution on all material points. It was further argued by Mr. Chauhan that the conclusion arrived at by learned trial court to the effect that there were material discrepancies and contradictions in the case of the prosecution was also totally ill-founded, as the learned trial court had erred in not appreciating the testimony of the complainant in its correct perspective. Mr. Chauhan submitted that the testimony of Rakesh Kumar which was duly corroborated by doctor and other prosecution witnesses including the son of complainant proved beyond reasonable doubt the guilt of the accused. It was further argued by Mr. Chauhan that learned trial court had erred in holding that the wife of the complainant had made improvements in her statements without appreciating that no improvements had been made in her testimony by the said witness. According to Mr. Chauhan, learned trial court otherwise also erred in placing undue reliance on the statement of DWs without appreciating that the statement of defence witnesses was neither cogent nor reliable. On these basis it was argued by Mr. Chauhan that the judgment passed by learned trial court was not sustainable in the eyes of law and accordingly the same be set aside. He further argued that accused be convicted for commission of offence for which they were charged.

7. Mr. N.K. Thakur, learned Senior Counsel for the respondents on the other hand argued that the judgment passed by learned trial court was neither perverse nor there was any infirmity in the findings returned by learned trial court while acquitting the respondents of the charges framed against them. It was submitted by Mr. Thakur that as the prosecution had miserably failed to prove its case against the accused beyond all reasonable doubt, the judgment of acquittal returned in their favour by learned trial court could not be faulted with. Mr. Thakur further argued that the evidence produced on record both ocular as well as documentary by the prosecution was totally unreliable and the same by no stretch of imagination proved the factum of accused having committed the offence for which they were charged. According to Mr. Thakur, accused were falsely implicated by the complainant and learned trial court on the basis of correct appreciation of the material on record produced by the prosecution acquitted them, as no case was actually made out against the accused. On these basis it was urged by Mr. Thakur that there was no merit in the appeal and the same be dismissed.

8. We have heard learned counsel for the parties and have also gone through the records of the case as well as judgment passed by the learned trial court.

9. Before proceeding further we will refer to the testimony of material prosecution witnesses in order to appreciate the contention of both the parties.

10. Dr. A.K. Sharma entered the witness box as PW1 and deposed that in the month of February, 2008 he was posted as Medical Officer at CHC Haroli and on 20.2.2008 he had examined Rakesh Kumar (complainant) at around 10:30 p.m. and on examination of the complainant he had found the following injuries on his person:-

1. *Clean lacerated wound on left side parietal 2 inches x 1;2 cmx bone deep, margins were irregular and bleeding was present.*
2. *Clean lacerated wound on left side frontal region skull 3inch x ½ cm x bone depth margins were irregular, bleeding was present."*

He further deposed that he had advised x-ray of the skull and after receipt of x-ray report, the same showed no evidence of fracture and he referred the matter for surgical opinion to RH Una. This witness further deposed that injuries on the person of complainant were possible by danda blows. In his cross-examination he stated that according to x-ray report injuries on the person of complainant were simple in nature. He further stated in his cross-examination that injuries on the person of complainant were possible if a person strikes against a hard surface like pillar etc.

11. Dr. Satvir Singh Consultant Radiologist, Satluj CT Scan and Diagnostic Centre, Nangal entered the witness box as PW2 and deposed that he conducted CT Scan of the complainant Rakesh Kumar on 4.3.2008 and observed an epidural haematoma measuring 7 mm in depth in the left parietal region and there was also a fracture on the left parietal bone. This witness further deposed that epidural haematoma has a possibility of increasing and in case it increases it can be dangerous to life. In his cross examination this witness stated that duration of injuries cannot be exactly predicted but the injury in issue was a fresh injury and the injury detected was of less than one week. He also admitted in his cross examination that injuries in issue were possible if a person strikes with a hard surface. It is pertinent to point out at this stage that the alleged incident took place on 20.2.2008, whereas CT Scan of the complainant was conducted by PW2 on 4.3.2008, i.e. after a period of 12 days from the date of incident.

12. The complainant entered the witness box as PW3 and deposed that on 20.2.2008 at around 7:30 p.m. he was going to the market along with his son to bring medicine for his wife when accused attacked him with danda due to enmity. This witness further deposed that as a result thereof he sustained injuries on the head as well as other parts of his body. He further stated that his father and wife Urmila Devi came to the spot and saved him from the clutches of accused persons who thereafter ran away from the spot. He further deposed that thereafter he was taken to hospital by his father at Haroli. He further deposed that from there he was referred to RH Una where x-ray and CT Scan of the complainant were conducted and he remained admitted in the hospital for about 15-20 days. In the cross examination this witness admitted it to be correct that accused Taro Devi had complained against him at police station Haroli and he was called by the police. He also admitted it to be correct that a compromise was effected between him and accused Taro Devi on the said complaint in the presence of Panchayat Members in the police station. He also admitted it to be correct that his house was adjoining to the village path towards north and the house of accused was towards south in front of his house. He also admitted it to be correct that there were 5-7 houses near his house and boundary wall had been erected by the accused persons towards the side of his house about two years back. He also admitted it to be correct that there were pillars supporting the verandah which had been white washed. Complainant further stated that he was given 5-7 blows of danda on his head. He also stated that he was given beatings by dandas blows on his body including the knee. He stated that all the three persons were having danda in their hands. He was confronted with the statement Ext. PW3/A and supplementary statement mark DA in which it was not so recorded that all the persons were having danda in their hands and they were given beatings with the said danda on his head as well as other parts of his body. He further stated in his cross examination that he did not raise any hue and cry. He also stated that he did not see whether neighbourers had gathered there or not. He stated that he was semi conscious when he was taken to hospital. He further stated that police station Haroli was on the way to Haroli hospital

13. Urmila Devi wife of complainant entered the witness box as PW4 and she also corroborated the case of the prosecution. This witness stated that on 20.2.2008 at around 7:30 p.m. her husband had gone with her son to bring some medicine for her when at a little distance from their house accused attacked him with dandas. This witness further deposed that her son

came to her and told her that accused persons were beating the complainant with dandas. She further stated that on this she along with her father-in-law rushed to the spot and saw that the accused beating her husband with dandas. She further stated that they rescued her husband from the clutches of accused persons who ran away from the spot. She further deposed that thereafter her father-in-law took her husband to hospital Haroli. In her cross examination she stated that their house and the house of accused persons were opposite to each other and there was a Gali in between the two which was partly cemented and partly was paved with stones and mud. She further stated that her husband had raised cries 'bachao-bachao' and she and her father-in-law reached the complainant together. She further stated that when she reached the spot many persons from the locality had gathered there. She further stated that she was also hit with danda on her hips and had received injuries. She further stated that accused persons gave them beatings for about 5 minutes and thereafter they ran away. She stated that she had disclosed to the police that she was also beaten up by accused persons and had also received injuries while protecting her husband. She further stated that she told the police that her husband was beaten by all accused mercilessly with dandas. This witness was confronted with Mark DB wherein it was not so recorded.

14. PW5 Kishan Chand deposed that he was Ward Panch of Ward No.5 of Gram Panchayat Dharampur and was associated during the investigation of the case. This witness further deposed that police took into possession one danda Ext. P2 vide seizure memo Ext. PW3/C in his presence. In his cross-examination he stated that he was sitting in the house of Rakesh Kumar, who was inside the room and police brought the danda from outside. He further deposed that he cannot tell as to from where the police brought the danda. He admitted it to be correct that Lekh Raj alias Laddi was not present there nor he produced weapon of offence in question in his presence nor Ladi signed seizure memo in his presence.

15. HHC Sansar Chand entered the witness box as PW6 and deposed that he was posted at police station Haroli for the last 2 ½ years and on 20.2.2008 a telephonic information was received from CHC Haroli that an injured person was admitted in the hospital on which he along with Constable Tirath Ram went to CHC Haroli and got the injured medically examined. He further deposed that he recorded the statement of injured, Rakesh Kumar, and also obtained MLC Ext. PW1/A. He further deposed that doctor advised x-ray and radiological opinion. He further stated that till that time no cognizable offence appeared to have been made out so he accordingly informed in the police station regarding which report was prepared. In his cross examination this witness stated that injured did not give him any written complaint.

16. HC Ramesh Chand entered the witness box as PW7 and deposed that on 20.2.2008 he was posted as MHC and was acting as SHO PS Haroli. He further deposed the factum of entering report No. 28 in daily diary and recording of FIR Ext. PW7/C on 18.3.2008 which was in his own hand.

17. ASI Bakhtawar Singh entered the witness box as PW8 and deposed that he was handed over the investigation of the case on 18.3.2008 after registration of FIR. He further stated that on 19.3.2008 he went on the spot and on identification of the complainant he inspected the spot and prepared the spot map. He also stated that accused Lekh Raj alias Laddi produced one danda in presence of Hans Raj and Kishan Chand which was taken into possession vide seizure memo Ext. PW3/C.

18. SI Kapoor Chand entered the witness box as PW9 and stated that on 20.2.2008 information was received from CHC Haroli by MHC Ramesh Chand to the effect that an injured person had been admitted in the hospital. He further deposed that on receipt of this information HHC Sansar Chand and Constable Tirath Ram were sent to CHC Haroli who got the injured medically examined. He further stated that after the treatment of the injured final opinion of the doctor was obtained and on the basis of said final opinion FIR Ext. PW3/C was registered. In his cross examination this witness stated that he was not aware whether doctor had advised CT Scan of injured Rakesh Kumar or not. He further stated that he did not know that when doctor

advised CT Scan in police cases then CT Scan was conducted at Dharamshala. He further stated that he did not collect the CT Scan report either from hospital or from Satluj CT Scan Centre, Nangal.

19. Dr. Indu Bhardwaj entered the witness box as PW10 and she stated that she was posted as Medical Officer in RH Una since March, 2006 and patient Rakesh Kumar was examined by her on 22.2.2008 as a referred case from CHC Haroli. This witness further stated that on examination it was found that patient had infected wound on his skull and was complaining of giddiness. She further deposed that head injury was suspected and the patient was advised CT Scan, however, due to shortage of money the patient could not get the CT Scan done immediately. She further deposed that complainant reported to her on 4.3.2008 with CT Scan and when she examined him she found that patient had a badly infected wound with swelling. She further stated that he had CT Scan with him which revealed fracture skull and head injury. She further deposed that complainant was admitted on 4.3.2008 and was discharged on 12.3.2008. She stated that she had given her final opinion on MLC Ext. PW1/A which was Ext. PW10/C. She further deposed that injuries observed by her were dangerous to life as there was a fracture in the skull. She further stated that she had seen danda and the injuries observed by her on the head of Rakesh Kumar can be caused by such danda. In her cross examination though she denied CT Scan was done free of cost at Kangra, however self stated that government charges were nominal obtained from the patient. She stated that she had not admitted the patient on 22.2.2008, as he had left the hospital by saying that he had no money for CT Scan and also had no attendant with him. She admitted it to be correct that she did not hand over the in-patient record Ext. PW10/B to the police. She admitted it to be correct that injury could be caused if a person strikes against the edges of the rectangle pillar. She also stated that injuries were also possible if a person falls on irregular, rough stony surface.

20. Minor son of the complainant Mani Ram entered the witness box as PW11. He stated that on 20.2.2008 he and his father were going to bring medicine for his mother and at around 7:30 p.m. when they reached near the house of accused, accused started beating his father with dandas and they gave danda blows on the head of his father. This witness further deposed that on seeing this he ran away from the spot and told the entire incident to his mother and grand father and thereafter his mother and grandfather went to the spot. In his cross examination he stated that the shop of Dr. Deep was situated at a distance from their house and his dispensary was situated near road which falls in village Dharampur. He further stated that there were only two shops and other shop of daily needs owned by Gurmeet. He admitted it to be correct that Atta Chakki of Gurmeet was also there. He stated that at the time of occurrence of alleged incident the lights were on and it was not pitch dark. He further deposed that all three accused were having dandas with them in their hands. He stated that he could not tell how many danda blows were given to his father. He stated that there was a distance of 10 feet between him and his father. He stated that he did not raise noise but his father raised noise by saying 'bachao-bachao'. He further stated that there were 10-12 persons who gathered from the Mohalla after the incident. He denied that he was deposing as directed by his parents. He stated that his mother was also slapped by Chanchla Devi. He further stated that this fact was told to him by his mother.

21. From the perusal of the testimony of prosecution witnesses there are some material factors which need to be highlighted.

22. Complainant in his testimony as PW3 has stated that when he was allegedly given beatings by the accused, he did not raise any hue and cry. PW11 Mani Ram son of the complainant has stated that when complainant was beaten up by the accused, his father raised noise by saying 'bachao-bachao'. PW11 further stated that when accused were beating his father he immediately rushed to his house from the spot and told the entire incident to his mother and grandfather who immediately rushed back where his father was beaten. PW4 Urmila Devi wife of the complainant has stated that on the fateful day when her husband and her son had gone to

purchase medicine for her, her son came to her and told her that accused were giving danda beatings to her husband with danda blows and on this she and her father-in-law rushed to the spot and rescued the complainant from the clutches of accused. Incidentally, Hans Raj father of the complainant has not been examined by the prosecution. It has come in the testimony of the complainant that when he was being beaten up by the accused with dandas he sustained injuries as a result of the same and he was saved from the clutches of the accused by his father and his wife. He further deposed that when his father and wife came to the spot accused persons ran away from the spot. However, a perusal of the testimony of Urmila Devi demonstrates that she has stated that when she reached the spot along with her father-in-law in order to save her husband she was also beaten up by the accused with danda. This witness further deposed that in fact accused gave beatings to her also for about 5 minutes and thereafter they ran away.

23. As we have already discussed above the complainant has stated in his statement that when he was being beaten by the accused he did not raise any hue and cry, however, PW4 has stated that deceased was crying 'bachao-bachao'. PW3 and PW4 in their cross examinations have been confronted with their statements made to the police wherein it was not so recorded that accused persons were having danda in their hands and they had given beating to him on his head and on other parts of his body. This demonstrates that besides there being inconsistencies and contradictions in the testimonies of the above mentioned prosecution witnesses, the said witnesses have also made improvements in their statements with the passage of time. The factum of PW4 having received injuries or her being beaten up by the accused is not corroborated by any material on record. Said contradictions, inconsistencies and improvements in their statements raise doubt over the reliability and trustworthiness of the testimonies of these witnesses. This is more so keeping in view the fact that PW3 happens to be the complainant and PW4 happens to be his wife. Similarly, PW11 is also the son of the complainant and as per his version, after the accused started beating the complainant he ran to his house where he narrated the said incident to his mother and grandfather and thereafter he did not come back to the spot.

24. Another important aspect of the matter is the mode and manner in which the weapon of offence, i.e. 'danda' has been recovered by the police. PW8 ASI Bakhtawar Singh has deposed that Lekh Raj alias Laddi produced the danda in presence of Hans Raj and Kishan Chand which was taken into possession vide seizure memo Ext. PW3/C. A perusal of Ext. PW3/C demonstrates that it is mentioned therein that Lekh Raj produced the weapon of offence, i.e. the danda before the police with which he had caused injuries to the complainant. As per Ext. PW3/C the danda has been handed over by the accused to the police in the presence of Hans Raj and Kishan Chand. Whereas Hans Raj has not been examined by the prosecution, Kishan Chand who entered the witness box as PW5 has not corroborated the case of the prosecution. In his deposition this witness has stated that while he was sitting in the house of accused, police brought the danda from outside. He further stated that he could not tell from where police brought the danda and he admitted it to be correct that accused Lekh Raj was not present when the danda was brought by the police nor the accused was there in the room in which PW5 was sitting. He also stated that accused did not sign any seizure memo in his presence. The testimony of PW5 in fact shatters the entire case of the prosecution with regard to the alleged recovery of the danda in the mode and manner in which the prosecution wants us to believe. This casts a serious doubt over the truthfulness of the case of the prosecution and lends support to the contention of the accused that the accused have been falsely implicated in the case because of enmity.

25. Before proceeding further it is relevant to take note of the fact that defence has examined Ram Pal alias Bheema as DW1 and Smt. Asha Rani as DW2.

26. DW1 Ram Pal has stated that complainant and accused both are residents of his village and on 20.2.2008 at about 7:30- 7:45 p.m. he was coming from his fields and when he reached near the house of the parties he saw that Rakesh Kumar running out of the house of Taro and he also saw him falling down on the street. This witness stated that he went to the

house of Taro Devi and asked her as to what had happened to which Taro Devi informed that Rakesh Kumar was trying to misbehave with her daughter with an intention to outrage her modesty. This witness further deposed that he advised Taro Devi to inform the Pardhan and thereafter he left to his house. In his cross examination this witness stated that he had not disclosed this fact earlier to anyone. He also denied the fact that he was deposing falsely in favour of the accused and he self stated that both the parties were related to him.

27. Asha Rani entered the witness box as DW2 and deposed that she was Pradhan of Gram Panchayat Dharampur since 2001 and complainant and accused were residents of her village and she had seen their houses. This witness further deposed that their houses are situated near to each other separated by street. She further deposed that on 20.2.2008 she was at her home and received a telephonic call from Chanchla Devi at about 8:00 p.m. who called her to her home and stated that Rakesh Kumar had entered into their house and was abusing them and then she went to the house of Up-Pardhan so that he may accompanied her. This witness further deposed that in the meantime Chanchlo reached there barefooted without having Dupatta and told that Rakesh Kumar had grappled her. She further stated that Chanchla was nervous and they offered her water. This witness further deposed that thereafter they visited the house of Chanchla Devi along with Up-Pardhan Shankar Dass and saw that articles like pitchers etc. lying scattered in the house of Taro Devi. This witness further deposed that thereafter they went to the house of Rakesh Kumar and snubbed him as to why he had gone to the house of Taro Devi under the influence of liquor. She further stated that at the relevant time family members of Rakesh Kumar, i.e. wife, father and mother were also there. Father of the complainant stated that since Rakesh Kumar was under the influence of liquor they will talk in the next day. She further stated that in the morning none came to them. This witness further deposed that complainant was a quarrelsome person who was in the habit of taking quarrels while drunk. She also stated that Taro Devi had already got a case registered against him which was subsequently compromised by the parties and copy of the compromise was placed on record as Ext. DW2/A. She further stated that said compromise was signed by her, Up Pardhan Shankar Dass and father and brother of Rakesh Kumar. In her cross examination this witness stated that compromise had taken place in police station, Haroli. She also stated that with regard to compromise a written complaint had been made by Taro Devi to the police. She feigned her ignorance to the effect as to whether the complainant had remained admitted in hospital or not. A perusal of the cross examination of this witness demonstrates that except the general suggestion that this witness was deposing falsely there are no specific suggestion or question put to this witness to the effect that on 20.2.2008 events did not take place as she had narrated and Chanchla Devi never visited her nor thereafter she went to the house of Rakesh Kumar. Not only this, the testimony of DW2 who otherwise is an independent witness is cogent, reliable and trustworthy. In the cross examination of this witness, the prosecution could not impinge the credibility of the said witness.

28. Therefore, in our considered view whereas on the one hand on the basis of evidence produced on record by the prosecution it cannot be said beyond reasonable doubt that in fact Rakesh Kumar was beaten up with danda blows by the accused in the mode and manner as has been put forth by the prosecution, on the other hand the deposition of DW2 seems to give credence to the contention of the accused that in fact Rakesh Kumar in drunken condition had entered her house and tried to molest her daughter and had hurt himself by falling down.

29. Now we will deal with the testimony of the doctors who have examined the complainant. It is an admitted case of the parties that the alleged incident took place on 20.2.2008 and the complaint was lodged on 18.3.2008. It is also a matter of record that after the alleged incident, the complainant did not report the matter either to Panchayat etc. or to the police. Police reached CHC Haroli on the basis of telephonic information received in this regard from CHC Haroli. At CHC Haroli the complainant was examined by Dr. A. K. Sharma who entered the witness box as PW1. This witness in his testimony has stated that he after examining the complainant advised x-ray and after receipt of x-ray report which showed no evidence of fracture he referred the matter to surgical opinion to RH Una. He further deposed that injuries on the

body of injured were simple in nature and these injuries were possible by danda blows. In cross examination this witness deposed that injuries were possible if a person strikes against a hard surface like pillar etc. It is also borne out from the records of the case that the CT Scan of the complainant was done by PW2-Dr. Satvir Singh, Consultant Radiologist Satluj, CT Scan and Diagnostic Centre, Nangal. Dr. Satvir Singh entered the witness box as PW2 and deposed that he had conducted the CT Scan of Rakesh Kumar on 4.3.2008 and observed an epidural haematoma in the left parietal region and there was also fracture seen on the left parietal bone. Though this witness stated that epidural haematoma has a possibility of increasing and in case it increases it can be dangerous to life but he also stated that though duration of injury could not exactly be predicted but it was a fresh injury and the injury detected was less than of one week. Keeping in view the fact that the incident had taken place on 20.2.2008 and as per PW2 the injury which was found in CT Scan conducted on 4.3.2008 was not more than one week old, this inference cannot be drawn that the injury which was detected in the CT Scan was the one which the complainant allegedly suffered on 20.2.2008.

30. Now when we come to the testimony of PW10, Dr. Indu Bhardwaj, it has come in her statement that the complainant was examined by her initially on 22.2.2008 as a referred case from CHC Haroli. This witness further stated that she had advised the complainant CT Scan but due to shortage of money he did not get the said CT Scan done immediately. This witness further deposed that thereafter Rakesh Kumar reported to her on 4.3.2008 with CT Scan which was conducted by Dr. Satvir Singh, PW2, and he (Rakesh Kumar) was admitted on the same very day, i.e. 4.3.2008. Ext. PW1/A is the MLC of the complainant on which final opinion of PW10 was dated 18.3.2008 to the effect that injury suffered by the complainant was dangerous to life. In her cross examination this witness stated that the complainant was not operated upon but he was kept on conservative treatment. She also admitted it to be correct that she did not hand over in-patient record, Ext. PW10/B, to the police. She also admitted it to be correct that injuries observed on Rakesh Kumar can be caused if a person strikes against the edges of the rectangle pillar. She also admitted it to be correct that such injuries are possible if a person falls on irregular, rough stony surface.

31. As we have already discussed above, the prosecution has not been able to prove beyond all reasonable doubt that on the fateful day the complainant was actually given danda blows by the accused. It has come in the testimony of Dr. Satvir Singh, PW2, that the injury which was found in CT Scan was not more than one week old as from the date when the CT Scan was done. CT Scan was done on 4.3.2008. Alleged incident took place on 20.2.2008. The final medical opinion given by PW10, Dr. Indu Bhardwaj is also based on the said CT Scan which was dated 4.3.2008. In our considered view, the prosecution has not been able to prove beyond all reasonable doubt that the injury which was reflected in the CT Scan was done on 4.3.2008 was in fact the same which was allegedly received by the complainant on 20.2.2008. Our conclusion is strengthened by the fact that PW2 has stated that injury discovered in CT Scan conducted on 4.3.2008 was a fresh injury and was of less than one week, whereas the alleged incident had taken place about 13 days before the CT Scan was done. Therefore, on the basis of the discussion held above, in our considered view it cannot be said that the prosecution was able to prove its case against the accused beyond all reasonable doubt.

32. We have gone through the judgment passed by the learned trial court and a perusal of the same demonstrates that the entire evidence on record produced by the prosecution has been gone into by the learned trial court and after appreciation of the same learned trial court has returned the findings of acquittal in favour of the accused. We have also independently assessed the material on record produced by the prosecution and in our considered view also, the prosecution has not been able to prove the guilt of the accused beyond all reasonable doubt.

Therefore, while concurring with the judgment passed by the learned trial court vide which the accused have been acquitted for the commission of offence punishable under Section 307 IPC, we dismiss the present appeal being devoid of merit.

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

FAO Nos.473 & 474 of 2011, and 352 of 2012
Decided on : 23.09.2016

1. FAO No.473 of 2011

Bajaj Allianz General Insurance Co. Ltd. .....Appellant
Versus
Seema Devi and others .....Respondents

2. FAO No.474 of 2011

Bajaj Allianz General Insurance Co. Ltd. .....Appellant
Versus
Surti Devi and others ....Respondents

3. FAO No.352 of 2012

Bajaj Allianz General Insurance Co. Ltd. .....Appellant
Versus
Leela Devi and others .....Respondents

Motor Vehicles Act, 1988- Section 173- Insurer has filed appeal on the ground of adequacy of compensation- held, that limited grounds are available to insurer- it can contest claim petition on all the grounds after obtaining permission under Section 170- no such application for seeking permission was filed - thus, insurer is precluded from questioning the award on adequacy of compensation- appeal dismissed. (Para-9 to 15)

Cases referred:

United India Insurance Co. Ltd. Versus Shila Datta & Ors., 2011 AIR SCW 6541
Josphine James versus United India Insurance Co. Ltd. & Anr., 2013 AIR SCW 6633

For the appellant(s): Mr. Aman Sood, Advocate.
For the respondents: Mr.H.C. Sharma, Advocate, for the claimants.
Mr.Raman Sethi, Advocate, for the owner.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

The awards, impugned in these appeals, passed by Motor Accident Claims Tribunal-II, Shimla, (for short, the Tribunal), are the outcome of one accident caused by driver Sanjay Sahil, while driving Pick Up bearing registration No.HP-63-1907, rashly and negligently, on 18th January, 2008, at about 12.45 p.m. Therefore, all the three appeals are clubbed and are being disposed of by this common judgment.

2. Facts of the case, in brief, are that on 18th Janaury, 2008, the deceased (Kewal Ram, Gayaru Ram and Chet Ram) were traveling in the offending vehicle and when the said vehicle reached Manan, the vehicle met with an accident, as a result of which the deceased sustained multiple injuries and later on succumbed to the same.

3. The claimants/legal representatives of deceased Kewal Ram filed Claim Petition No.13-S/2 of 2008, titled Seema Devi and others vs. Sanjay Sahil and another, (subject matter of FAO No.473 of 2011), claiming compensation to the tune of Rs.15.00 lacs, as per the break-ups given in the claim petition.

4. The claimants/legal representatives of deceased Gayaru Ram invoked the jurisdiction of the Tribunal by filing Claim Petition No.12-S/2 of 2008, titled Surti Devi and

others vs. Sanjay Sahil and another, whereby compensation to the tune of Rs.12.00 lacs was claimed, (subject matter of FAO No.474 of 2011).

5. The legal representatives of deceased Chet Ram filed claim petition No.14-S/2 of 2008, titled Leela Devi and others vs. Sanjay Sahil and another, before the Tribunal claiming compensation to the tune of Rs.14.00 lacs, as per the break-ups given in the claim petition, (subject matter of FAO No.352 of 2012).

6. The Tribunal, after appreciating the pleadings of the parties and the evidence adduced, allowed all the three claim petitions vide the awards impugned in the instant appeals and the insurer was saddled with the liability.

7. In claim petition No.13-S/2 of 2008, titled Seema Devi and others vs. Sanjay Sahil and another, (subject matter of FAO No.473 of 2011), the Tribunal awarded compensation in favour of the claimants to the tune of Rs.5,87,000/-, alongwith interest at the rate of 7.5% per annum. The Tribunal, vide award impugned in FAO No.474 of 2011, has awarded compensation to the tune of Rs.2,84,600/-, with interest at the rate of 7.5% per annum. In claim petition filed by the legal representatives of deceased Chet Ram (subject matter of FAO No.352 of 2012), the Tribunal has awarded compensation for a sum of Rs.3,93,000/- with interest at the rate of 7.5% per annum, in favour of the claimants.

8. Feeling aggrieved, the insurer has questioned the impugned awards only on the ground of adequacy of compensation.

9. The question is – whether the appeals are maintainable? The answer is in the negative for the following reasons:

10. In terms of the mandate of Sections 147 and 149 of the Motor Vehicles Act, 1988 (for short "MV Act") read with the terms and conditions contained in the insurance policy, the insurer has limited grounds available, but, it can contest the claim petition on other grounds provided permission in terms of Section 170 of the Motor Vehicles Act, 1988 (for short, MV Act) has been obtained.

11. It is apt to reproduce Section 170 of the MV Act herein:

> *"**170. Impleading insurer in certain cases.** - Where in the course of any inquiry, the claims Tribunal is satisfied that -*
>
> *(a) there is collusion between the person making the claim and the person against whom the claim is made, or*
>
> *(b) the person against whom the claim is made has failed to contest the claim,*
>
> *it may, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in sub-section (2) of section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made."*

12. The insurer can seek permission to contest the claim petition on all grounds available to it and in case permission has not been sought and granted, it is precluded from questioning the award on adequacy of compensation or any other ground, which is not otherwise available to it.

13. This question arose before the Apex Court in the case titled as **United India Insurance Co. Ltd. Versus Shila Datta & Ors.,** reported in **2011 AIR SCW 6541,** and the matter was referred to the larger Bench.

14. The question again arose before the Apex Court in the case titled as **Josphine James versus United India Insurance Co. Ltd. & Anr.,** reported in **2013 AIR SCW 6633.** It is apt to reproduce paras 8, 17 and 18 of the judgment herein:

"8. Aggrieved by the impugned judgment and award passed by the High Court in MAC Appeal no. 433/2005 and the review petition, the present appeal is filed by the appellant urging certain grounds and assailing the impugned judgment in allowing the appeal of the Insurance Company without following the law laid down by this Court in Nicolletta Rohtagi's case and instead, placing reliance upon the Bhushan Sachdeva's case. Nicolletta Rohtagi's case was exhaustively discussed by a three judge bench in the case of United India Insurance Company Vs. Shila Datta, 2011 10 SCC 509. Though the Court has expressed its reservations against the correctness of the legal position in Nicolletta Rohtagi decision on various aspects, the same has been referred to higher bench and has not been overruled as yet. Hence, the ratio of Nicolletta Rohtagi's case will be still applicable in the present case. The appellant claimed that interference by the High Court with the quantum of compensation awarded by the Tribunal in favour of appellant and considerably reducing the same by modifying the judgment of the Tribunal is vitiated in law. Therefore, the impugned judgments and awards are liable to be set aside.

9. to 16. .....

17. The said order was reviewed by the High Court at the instance of the appellant in view of the aforesaid decision on the question of maintainability of the appeal of the Insurance Company. The High Court, in the review petition, has further reduced the compensation to Rs. 4,20,000/- from Rs. 6,75,000/- which was earlier awarded by it. This approach is contrary to the facts and law laid down by this Court. The High Court, in reducing the quantum of compensation under the heading of loss of dependency of the appellant, was required to follow the decision rendered by three judge Bench of this Court in Nicolletta Rohtagi case (2002) 7 SCC 456 : AIR 2002 SC 3350 : 2002 AIR SCW 3899, and earlier decisions wherein this Court after interpreting Section 170 (b) of the M. V. Act, has rightly held that in the absence of permission obtained by the Insurance Company from the Tribunal to avail the defence of the insured, it is not permitted to contest the case on merits. The aforesaid legal principle is applicable to the fact situation in view of the three judge bench decision referred to though the correctness of the aforesaid decision is referred to larger bench. This important aspect of the matter has been overlooked by the High Court while passing the impugned judgment and the said approach is contrary to law laid down by this Court.

18. In view of the aforesaid reasons, the Insurance Company is not entitled to file appeal questioning the quantum of compensation awarded in favour of the appellant for the reasons stated supra. In the absence of the same, the Insurance Company had only limited defence to contest in the proceedings as provided under Section 149 (2) of the M.V. Act. Therefore, the impugned judgment passed by the High Court on 13.1.2012 reducing the compensation to 4,20,000/- under the heading of loss of dependency by deducting 50% from the monthly income of the deceased of Rs. 5,000/- and applying 14 multiplier, is factually and legally incorrect. The High Court has erroneously arrived at this amount by applying the principle of law laid down in Sarla Verma v. Delhi Transport Corporation, 2009 6 SCC 121 instead of applying the principle laid down in Baby Radhika Gupta's case regarding the multiplier applied to the fact situation and also contrary to the law applicable regarding the maintainability of appeal of the Insurance Company on the question of quantum of compensation in the absence of permission to be obtained by it from the Tribunal under Section 170 (b) of the M.V. Act. In view of the aforesaid reason, the High Court should not have allowed the appeal of the Insurance Company as it has got limited defence as provided under section 149(2) of the M.V. Act. Therefore, the impugned judgment and award is vitiated in law and hence, is liable to be set aside by allowing the appeal of the appellant."

15. Thus, the insurer can question the adequacy of compensation only if it has sought permission under Section 170 of the MV Act.

16. In the present cases, it has to be seen whether the insurer has sought any such permission?

17. I have gone through the records, which do disclose that neither any such application was filed by the insurer nor such permission was granted. Learned counsel appearing on behalf of the insurer frankly conceded that no such permission was sought.

18. Having said so, the only ground of attack projected and urged is not available to the insurer.

19. Viewed thus, the impugned awards are upheld and the appeals are dismissed.

20. The Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned awards through payee's account cheque or by depositing the same in their respective bank accounts.

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

Bajaj Allianz General Insurance Company Ltd. .....Appellant

Versus

Smt. Veena Devi & others ....Respondents

FAO No. 108 of 2011
Decided on : 23.09.2016.

Motor Vehicles Act, 1988- Section 163-A- Income of the deceased was Rs. 3,300/- per month- 1/3rd amount was rightly deducted towards personal expenses of the deceased- multiplier of 15 is applicable- claimant is entitled to Rs. 2200 x 12 x 15 = Rs. 3,96,000/- under the head 'loss of dependency'- interest should be awarded as per prevailing rate, therefore, rate of interest reduced from 12% to 7.5% per annum from the date of filing of the claim petition till realization- claimants are entitled to Rs. 3,96,000/- + Rs. 25,000/- + Rs. 50,000/-+ Rs. 50,000/- + Rs. 30,000/- = Rs. 5,51,000/- along with interest at the rate of 7.5% per annum from the date of filing of the claim petition. (Para-9 to 16)

Cases referred:

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

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

Munna Lal Jain & another versus Vipin Kumar Sharma & others, 2015 AIR SCW 3105

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281

Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892

Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 SCC 738

Savita versus Binder Singh & others, 2014 AIR SCW 2053

Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982

Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433

Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434

Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

For the Appellant : Mr. Aman Sood, Advocate.

For the Respondents: Mr. Vijay Chaudhary, Advocate, for respondents no. 1 to 3.
Nemo for respondents No. 4 & 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject matter of this appeal is the award, dated 2nd November, 2010, made by the Motor Accident Claims Tribnal, Chamba, Himachal Pradesh (for short "the Tribunal") in M.A.C. Petition No. 108 of 2009, titled as Smt. Veena Devi & others versus The Milestone Gears Private Limited & others, whereby compensation to the tune of Rs. 5,77,400/- with interest @ 12% per annum from the date of filing of the claim petition till its realization with costs to the tune of Rs. 10,000/- was awarded in favour of the claimants and the insurer came to be saddled with liability (for short "the impugned award").

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

3. The insurer has questioned the impugned award on the grounds taken in the memo of the appeal.

4. The questions to be determined in this appeal are as under:--

i) Whether the Tribunal has rightly saddled the insurer with liability?

ii) Whether the amount awarded is adequate or otherwise?

5. I have gone through the impugned award. It appears that the claimants have invoked jurisdiction of the Tribunal in terms of Section 163-A of the Motor Vehicles Act, 1988, for short 'MV Act'.

6. As per the 2nd Schedule appended with the MV Act, the income slab provided is Rs. 40,000/- per annum.

7. The claimants have averred in the claim petition that the income of the deceased was Rs. 3300/- per month. The Tribunal has rightly made discussion in para-9 of the impugned award.

8. Having said so, the claimants have rightly filed the claim petition under Section 163-A of the MV Act.

9. It is a beaten law of the land that in terms of Section 163-A of the MV Act, compensation is to be awarded "On The Structured Formula Basis". Further, Sub-Section (2) of Section 163-A of the MV Act provides that the claimants are not required to plead or establish the wrongful act or neglect or default of the owner of the vehicle.

10. Having said so, the Tribunal has rightly determined that the claimants are the victims of the vehicular accident. Accordingly, the findings returned by the Tribunal on Issue No. 1 are upheld.

11. The Tribunal has determined the income of the deceased at Rs. 3300/- per month and deducted 1/3rd towards the personal expenses of the deceased, but has fallen in an error in applying the multiplier of '16'.

12. The multiplier of '15' is applicable in this case, in view of the 2nd Schedule appended to the Motor Vehicles Act read with the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104,** upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120** read with the judgment rendered by the Apex Court in case titled as **Munna Lal Jain & another versus Vipin Kumar Sharma & others,** reported in **2015 AIR SCW 3105.**

13. Thus, the claimants are held entitled to compensation to the tune of Rs. 2200 x 12 x 15 = Rs. 3,96,000/- under the head 'loss of dependency'.

14. The compensation awarded under other heads is just and appropriate, accordingly upheld.

15. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as **United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,** reported in (**2002) 6 SCC 281; Santosh Devi versus National Insurance Company Ltd. and others,** reported in **2012 AIR SCW 2892**; **Amrit Bhanu Shali and others versus National Insurance Company Limited and others,** reported in **(2012) 11 SCC 738; Smt. Savita versus Binder Singh & others**, reported in **2014 AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn.,** reported in **2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,** reported in **(2015) 4 SCC 433;** and **Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,** reported in **(2015) 4 SCC 434,** and discussed by this Court in a batch of FAOs, **FAO No. 256 of 2010, titled as Oriental Insurance Company versus Smt. Indiro and others,** being the lead case, decided on 19.06.2015.

16. Having said so, I deem it proper to reduce the rate of interest from 12% per annum to 7.5% per annum from the date of filing of the claim petition till its realization.

17. Viewed thus, the claimants are entitled to total compensation to the tune of Rs. 3,96,000/- + Rs. 25,000/- + Rs. 50,000/-+ Rs. 50,000/- + Rs. 30,000/- = 5,51,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization.

18. The appellant-insurer has failed to prove that the driver was not having a valid and effective driving licence at the time of accident. Hence, it is held that the Tribunal has rightly made discussion in para-16 of the impugned award. Thus, the insurer has to satisfy the compensation.

19. At this stage, learned Counsel for the appellant stated at the Bar that the amount awarded by the Tribunal stands released and disbursed in favour of the claimants.

20. In the given circumstances and keeping in view the aim, object and purpose of granting compensation read with the fact that it will be painful to effect recovery from the claimants, at this stage, who are victims, as it will add to their injuries. Thus, I deem it proper to direct the insurer not to effect recovery.

21. The appeal is, disposed of, accordingly.

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

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

Harpreet Singh and another ...Petitioners

Versus

Subhash Chand ...Respondent

Civil Revision No. 70 of 2007
Reserved on: 22.09.2016
Date of decision: 23.09.2016

Code of Civil Procedure, 1908- Order 41 Rule 1- A civil suit was filed for seeking injunction, which was decreed- an appeal was filed, which was dismissed but the order of the trial Court was modified and 173.99 square metres area was incorporated in the decree- a second appeal was filed in which it was observed that Appellate Court had not specified in which part of khasra number area of 173.99 square metres is located and it was further held that remedy available to

the defendants to file a review petition before the Appellate Court- a review petition was filed, which was dismissed- aggrieved from the order, present revision has been filed- held, that petitioner has challenged the judgment and decree passed by the trial Court which has attained finality- it was not specified as to what is an error apparent on the face of record- hence, review petition was rightly dismissed by the Appellate Court- petition dismissed. (Para-4 to 15)

Case referred:
Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal, AIR 1980 (SC) 2041

For the petitioners: Mr. Dinesh Bhanot, Advocate.
For the respondent: Mr. Jeet Ram Poswal, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of the present revision petition, the petitioners have prayed for setting aside of order dated 16.03.2007 passed by the Court of learned District Judge, Solan, Camp Court at Nalagarh, in Review Petition No. 48-NL/6 of 2006 in Civil Appeal No. 12/NL/13 of 2005/2003 titled Harpreet Singh and another Vs. Subhash Chand.

2. Brief facts necessary for the adjudication of the present revision petition are that respondent herein filed Civil Suit No. 250/1 of 1999 for permanent prohibitory injunction for restraining the petitioners herein from raising construction over the suit property measuring 209-25 Sq. Mtrs., comprised in Khasra No. 969/429, Khewat Khatauni No. 116/126 i.e. suit property, in the Court of learned Sub Judge Ist Class, Nalagarh, District Solan, which suit was decreed in favour of the plaintiff on 07.11.2002 therein i.e. present respondent in the following terms:-

> "In view of the above, the suit of the plaintiff is decreed for permanent prohibitory injunction from restraining the defendants from interfering with the suit land or wall constructed thereon with costs. Decree sheet be prepared accordingly and the file after its due completion be consigned to record room."

3. Feeling aggrieved by the judgment and decree so passed by the Court of learned Sub Judge Ist Class, Nalagarh, District Solan, present petitioners filed an appeal in the Court of learned District Judge, Solan, i.e. Civil Appeal No. 12/NL/13 of 2005/2003.

4. Vide judgment and decree dated 16.12.2005, learned Appellate Court while dismissing the appeal, partly modified the judgment and decree passed by the Court of learned Sub Judge Ist Class, Nalagarh, District Solan, in the following terms:-

> "10. Therefore, for the reasons enumerated above, the findings of the learned trial court are sustainable in law and on facts, but the judgment and decree require to be modified to the extent of incorporating the area of the suit land which hitherto is missing from it which is 173.99 square metres.
>
> Final Order:
>
> 11. In view of my above discussion and conclusions, the appeal is dismissed and the judgment and decree of the trial court are affirmed with modification that the suit of the respondent/plaintiff is decreed and the appellants/defendants are restrained from causing any interference in the suit land measuring 173.99 square metres comprised in Khasra No. 969/429, Khewat Khatauni No. 116/126 situated in the area of Nalagarh town. Parties are left to bear their own costs. Decree be drawn accordingly. The record of the trial court be sent back with a copy of this judgment. File be consigned to records after due completion."

5. Being dissatisfied with the judgment and decree so passed by learned Appellate Court, present petitioners filed a Regular Second Appeal in this Court i.e. RSA No. 102 of 2006, which was dismissed on 22.03.2006 in following terms:

> "The grievance of the appellant in this case is that though the learned first Appellate has modified the decree of the learned trial court, whereby he found the plaintiff to the owner in possession to the extent of 173.99 square metres comprised in Khasra No. 969/429, Khewat Khatauni No. 116/126 situate in the area of Nalagarh town. However, the learned first Appellate Court has not specified, that which part of Khasra No. 969/429 comprises 173.99 square metres is in the ownership and possession of the plaintiff.
>
> The remedy available with the appellants-defendants to file a review application before the learned first Appellate Court and not by way of this second appeal. This second appeal is mislaid and is dismissed.
>
> It is directed that if a review application is filed by the appellants, the first Appellate Court shall decide the same expeditiously within a period of fours weeks of filing of such review application and specify the area which is in possession of the plaintiff and defendants respectively in Khasra No. 969/429 Khewat Khatauni No. 116/126 measures 173.99 square metres. The appeal is disposed of in the terms indicated above."

6. Accordingly, petitioners filed a review petition before the Court of learned District Judge, Solan and prayed for the following relief in the review petition:-

> "It is, therefore, prayed that the impugned Judgment & Decree dated 07.11.2002, passed by the Ld. Trial Court in C. Suit No. 250/1 of 1999, may kindly be reversed and set aside and the suit of the respondent/plaintiff may kindly be dismissed with costs, by way of accepting this review petition in favour of the petitioners/ appellants/defendants and against the respondent/plaintiff with costs, after restoring the original appellate file and after requisition of the case of the Ld. Trial Court, in the interest of justice.

7. Learned Appellate Court vide order dated 16.03.2007 dismissed the review petition so filed by the present petitioners by holding that the grounds which were taken by the petitioners for review were in fact grounds challenging the judgment and decree passed by learned trial Court on merit and no ground in fact was taken in the review petition for reviewing of judgment and decree passed by learned Appellate Court. It was held by learned Appellate Court that there was no mention in the review petition that the judgment and decree passed by learned Appellate Court was suffering from any error apparent on the face of record and review was necessitated on account of discovery of new facts, on point of law as well as point of facts, subsequent amendment of law or judgment of Hon'ble Supreme Court or on account of erroneous decision. Learned Appellate Court further held that whatsoever was stated in the grounds of review petition were averments against the judgment and decree passed by learned trial Court and not averments as to in what manner the judgment and decree passed by learned Appellate Court was wrong. Learned Appellate Court further held that the decree in favour of the plaintiff had been passed on the basis of the plaintiff having purchased 173.99 Sq. Mtrs. of land comprised in Khasra No. 969/429 which as per sale deed executed had earlier been represented by Khasra No. 311/131 Khata Khatauni No. 1 min/1 and accordingly, it was held by learned Appellate Court that even otherwise the judgment and decree passed by learned Appellate Court did not suffer from any of the defects on which review was maintainable. Accordingly, the review petition was dismissed.

8. Feeling aggrieved by the rejection of the said review petition by learned Appellate Court, petitioners challenged the same by way of present revision petition under Section 115 of the Code of Civil Procedure.

9. Mr. Dinesh Bhanot, learned counsel appearing for the petitioners, has argued that order passed by learned Appellate Court dated 16.03.2007, vide which, review petition of the present petitioners was dismissed, is erroneous and not sustainable in the eyes of law as while dismissing the review petition filed by the present petitioners, learned Appellate Court lost site of the directions issued by this Court in RSA No. 102 of 2006 vide order dated 22.03.2006. Mr. Bhanot argued that it was incumbent upon learned Appellate Court to have had specified the area which was in possession of the plaintiff and defendants respectively in Khasra No. 969/429, Khewat Khatauni No. 116/126 measuring 173.99 Sq. Mtrs. According to Mr. Bhanot, by not doing so, learned Appellate Court had misdirected itself and on this account alone, the order impugned was liable to be set aside. No other point was urged.

10. On the other hand, Mr. Jeet Ram Poswal, learned counsel for the respondent, argued that there was no merit in the contention of learned counsel for the petitioners in view of the fact that learned Appellate Court had rightly dismissed the review petition so filed by the petitioners because besides their being no merit in the same even otherwise the grounds on which the review petition was filed were not available to the petitioners to file and maintain a review petition under Section 114 of the Code of Civil Procedure. According to Mr. Poswal, learned Appellate Court rightly held that there was no mention in the entire review petition as to what was the error apparent with the judgment and decree passed by learned Appellate Court. On this ground, it was urged by Mr. Poswal that there was no merit in the present petition and the same be dismissed.

11. I have heard learned counsel for the parties and have also perused the records of the case as well as the order passed by learned Appellate Court.

12. A perusal of the grounds of the review petition filed by the present petitioners after the dismissal of their regular second appeal reveals that in the said review petition, petitioners challenged the judgment and decree passed by learned trial Court dated 07.11.2002 passed in Civil Suit No. 250/1 of 1999, which in fact had attained finality by subsequent adjudication upon the same by learned Appellate Court as well as by this Court in a Regular Second Appeal. Not only this, there was not even a whisper in the said review petition as to what was error apparent on the face of record as far as the judgment and decree passed by learned Appellate Court was concerned, nor was there any averment or prayer in the same for specifying the area which was in possession of the plaintiff and defendants respectively in Khasra No. 969/429, Khewat Khatauni No. 116/126 measuring 173.99 Sq. Mtrs.

13. In this view of the matter, in my considered view, the review petition so filed by the petitioners was rightly dismissed by learned Appellate Court by holding that besides challenging the judgment and decree passed by learned trial Court there were no averments made in the review petition as to on what grounds the review of the judgment and decree passed by learned Appellate Court in Civil Appeal No. 12/NL/ 13 of 2005/2003 dated 16.12.2005, was being called for by the petitioners. The findings returned by learned Appellate Court while dismissing the review petition to the effect that in the review petition none of the grounds contemplated in Section 114 of the Code of Civil Procedure were made out, can also not be faulted it. The findings so returned by learned Appellate Court are borne out from the averments which were made in the review petition.

14. Even otherwise, it is settled law that the principle enunciated in Section 114 of the Civil Procedure Code read with Order 47 speaks of error apparent on the face of record. In ***Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal***, ***AIR 1980 (SC) 2041***, it was held by the Hon'ble Supreme Court that review cannot be made in a routine procedure unless the Court is satisfied that manifest error, apparent on the face of it, results in miscarriage of justice or results in undermining the soundness of that judgment. Thus, the scope of review is very limited when there is error apparent on the face of record.

15. Therefore, in my considered view, there is no infirmity with the order passed by learned Appellate Court in dismissing the review petition so filed by the petitioners and the order

under challenge does not suffer from any jurisdictional error nor it can be said that learned Appellate Court either did not exercise jurisdiction vested in it or exercised jurisdiction vested in it with material irregularity.

16. Therefore, as there is no merit in the present petition, the same is dismissed with costs. Pending miscellaneous application(s), if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J

Hem Raj ...Appellant.
Versus
State of Himachal Pradesh ...Respondent.

Cr. Appeal No. 194 of 2016
Judgment reserved on: 16.09.2016
Date of Decision: September 23 , 2016

Protection of Children from Sexual Offences Act, 2012- Section 4- **Indian Penal Code, 1860-** Section 506- Prosecutrix aged 10 years was subjected to repeated sexual assault by the accused - accused threatened the prosecutrix not to disclose the incident to anyone – accused was tried and convicted by the trial Court- held, in appeal that date of birth of the prosecutrix was duly proved as 2.8.2004- she was studying in Class 6th- prosecutrix had supported the prosecution version- her testimony was duly corroborated by her mother and medical evidence- other prosecution witnesses also supported the prosecution version- defence version was not probablized – minor contradictions in the statements are not sufficient to doubt the prosecution version- prosecution version was duly proved beyond reasonable doubt and the trial Court had rightly convicted the accused- appeal dismissed. (Para-8 to 33)

Cases referred:
Satpal Singh Versus State of Haryana, (2010) 8 SCC 714,
State of Uttar Pradesh Versus Manoj Kumar Pandey, (2009) 1 SCC 72
State of Rajasthan Versus Roshan Khan and others, (2014) 2 SCC 476

For the Appellant: Mr. Anoop Chitkara, Advocate, for the appellant.
For the Respondent: M/s Vikram Thakur and Puneet Rajta, Deputy Advocate Generals, for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In this appeal filed under Section 374 Cr.P.C., convict Hem Raj has assailed judgment dated 10.02.2016, passed by Special Judge, Hamirpur, H.P., in Sessions Trial No.21 of 2014, titled as *State of H.P. Versus Hem Raj,* whereby he stands convicted for having committed offences punishable under the provisions of Section 4 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the POCSO Act) and Section 506 Part-II of the Indian Penal Code and sentenced to serve rigorous imprisonment for a period of seven years and to pay fine of Rs.20,000/- and in default thereof, further to undergo simple imprisonment for a period of one year for commission of offence punishable under the provisions of Section 4 of the POCSO Act. Also he was sentenced to undergo rigorous imprisonment for a period of one year for the commission of offence punishable under the provisions of Section 506 Part-II of the Indian Penal Code and to pay fine of Rs.5000/- and in default thereof, further to undergo one month simple imprisonment.

2. It is the case of prosecution that prosecutrix aged approximately ten years was subjected to sexual assault by the accused. Such act was committed by extending threats and with criminal intimidation. Last of such acts was committed on 22.06.2014 and the matter reported to the police on 13.07.2014, when FIR No.104/2014 (Ex.PW.20/A) came to be registered. With the completion of investigation, which *prima facie* revealed complicity of the accused in the alleged crime, *Challan* was presented in the Court for trial.

3. The accused was charged for having committed offences punishable under the provisions of Section 4 of POCSO Act and Sections 376(2)(i) and 506(2) of the Indian Penal Code, to which he did not plead guilty and claimed trial.

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

5. Appreciating the testimonies of the prosecution witnesses, Trial Court convicted the accused of having committed offences punishable under the provisions of Section 4 of the POCSO Act and Section 506 Part-II of IPC and sentenced as aforesaid. Hence the present appeal by the convict.

6. Challenge is laid to the judgment passed by the trial Court, on the grounds that (a) testimony of the prosecutrix and her mother cannot be said to be inspiring in confidence or the witnesses reliable and trustworthy; (b) there is inordinate delay in lodging the FIR and also on this aspect, there is material contradiction with regard to the date of narration of the incident.

7. Having heard learned counsel for the parties as also perused the record, one finds that trial Court has clearly appreciated the material on record in its entirety and in consonance with the settled principles of law. There is neither any illegality nor any perversity therein, warranting interference by this Court. Also reasons assigned are based on clear, cogent, consistent and reliable piece of evidence.

8. Record reveals that with the registration of FIR dated 13.07.2014, prosecutrix was got medically examined from Dr.Sunita Galoda (PW.16), who issued MLC (Ex.PW.16/A). Clearly the doctor was of the opinion that prosecutrix was subjected to sexual assault. But by whom? That is the question for determination.

9. That prosecutrix was born on 02.08.2004, stands established through Birth Certificate (Ex.PW.18/B), issued under the Registration of Births and Deaths Act, 1969 as also Rules framed thereunder. Significantly, all throughout, age of the prosecutrix is disclosed to be ten years. Such fact also stands corroborated by the prosecutrix, her mother Promila Devi (PW.2) and HC Hem Raj (PW.18).

10. That prosecutrix was studying in Class 6th in Government Senior Secondary School, Mundkhar, District Hamirpur, stands established through the testimony of Hem Raj (PW.8).

11. One finds that statement of the prosecutrix, under Section 164 Cr.P.C. (Ex.PW.22/D), came to be recorded before the Judicial Magistrate, 1st Class, Court No.II, Hamirpur, wherein she disclosed that she would leave her house for school in the vehicle of Hem Raj, who before the school hours would take her alone in the vehicle towards Nehlvi side and after committing sexual assault drop her back to the school. On her crying, accused would gag her mouth. She was threatened and intimidated not to disclose the incident to anyone, lest she and her parents be killed with Darat. Lastly it was so done on 20th/21st June. Noticing red and white stains on her clothes, her mother made inquiries but on account of threats, initially she did not disclose the incident.

12. When examined in Court, one finds such version to have been clearly deposed. She is clear that she would travel to her school in a jeep driven by the accused, who would

sexually assault her inside the vehicle. At that time she would be alone. Accused would drag her inside the vehicle and gag her mouth. Also she was threatened and intimidated not to disclose the incident either to her parents or the police, lest she and her parents would be killed with darat. Last of such act was done on 20/21.06.2014. Finding her clothes to be stained with red and white stains, on 22.06.2014, her mother made queries when out of fear she did not disclose the incident. However, on 07.07.2014, when her mother, with affection, inquired again, she divulged everything. Thereafter, matter came to be reported on 13.07.2014. Prior thereto, her mother repeatedly made inquiries for ascertaining as to whether she was telling the truth or not.

13. This witness has totally withstood the test of cross-examination. It cannot be said that her credit stands impeached. It is not a case of an isolated incident. Repeatedly, she was subjected to sexual assault over a period of time. Out of fear, she did not divulge the incident to anyone, till her mother affectionately made inquires, finding her clothes to be stained.

14. Her version stands materially corroborated by her mother Smt. Promila Devi (PW.2), who is also categorical that probably on 22.06.2014, while she was bathing the prosecutrix, she noticed tenderness and swelling on the private part and blood stains on the salwar worn by the prosecutrix. By taking her daughter into confidence, affectionately she inquired reasons thereof, and only on 07.07.2014, prosecutrix disclosed that accused used to take her towards village Nehli and sexually assault her. Prosecutrix also disclosed that accused had threatened to kill her and her parents with a Darat. When confronted accused denied having committed such an act. The incident also came to be narrated to the Pradhan, who advised to remain silent, as any disclosure of such fact would have brought insult to the family. On 12.07.2014, when her husband returned from Rampur, matter came to be reported to the police with the recording of her statement (Ex.PW.2/A). One finds that even her version is clear on the issue of sexual assault.

15. Pradhan Smt.Veena Devi (PW.4), corroborates version of the prosecutrix and her mother. Even she had made inquiries from accused Hem Raj, who denied the allegations. She is categorical that mother of the victim had informed her that she would verify the allegations and take action on the return of her husband.

16. Kamlesh Kumar (PW.3), father of the prosecutrix, simply states that on his return from Rampur to his village on 12.07.2014, his wife informed him that prosecutrix had been subjected to sexual assault by the accused on 20/21.06.2014.

17. Now significantly, in his statement under Section 313 Cr.P.C., accused admits to have been called by Veena Devi, in connection with the allegations in issue when he had expressed his innocence and false implication.

18. At this juncture, it would be relevant to deal with the defence taken by the accused in his statement under Section 313 Cr.P.C., which reads as under:-

> "In the month of January 2014 marriage of daughter of PW.2 Promila Devi named Santosh Kumari was fixed and PW.2 being my co-villager had demanded money from me i.e. Rs.50,000/- on credit basis. I and my father refused to advance loan to PW.2 Promila Devi and her husband PW.3 Kamlesh Kumar. On our refusal PW.2 and PW.3 got annoyed with us and the result is that I have been roped in a false case. PW.3 Kamlesh Kumar had threatened me to get my jeep impounded as I had not advanced loan to them. As a matter of fact the case has been lodged against me at the instance of one Budhi Singh and Mehar Singh, residents of our village. My father had purchased a piece of land from Harnam Singh for constructing a temple of Baba Bharbhag Singh. With the purchase of land and construction of temple, passage of tractor to their fields was blocked. Therefore, they got annoyed with us and father-in-law of PW.2 Promila Devi works in the fields of Budhi Singh and at the instance of Budhi Singh I have been implicated in this false case. Budhi Singh etc. had ganged against me."

19. Significantly the said defence cannot be said to have been probablized at all either through the testimony of prosecution witnesses or by examining any defence witness.

20. From the testimony of prosecutrix (PW.1) and Promila Devi (PW.2), unrebuttedly, and yes, it has come on record that prosecutrix was a student of 6th Class in Government Senior Secondary School, Mundkhar, Hamirpur. She used to travel to the school in a vehicle owned by accused Hem Raj. When one peruses the testimony of the prosecution witnesses, on the issue of sexual assault, one does not find any contradiction at all. On the question of sexual assault, threats and intimidation, version is clear and consistent.

21. Perusal of testimony of Promila Devi (PW.2) does reveal certain improvements to have been made in Court and that being with regard to her noticing tenderness on the private part of the prosecutrix and the Pradhan having advised the parties to remain silent, till things clear out. But then such fact in itself, in no manner, renders the genesis of the prosecution story to be doubtful. After all, medically prosecutrix was found to have been subjected to sexual assault and the Pradhan having been told by this witness that she would verify the allegations and take action on the return of her husband. Also accused admits to have been called by the Pradhan and inquiries made.

22. One cannot forget the fact that accused is a close relative of the prosecutrix.

23. The only noticeable and as argued, relevant contradiction is of the disclosure of exact date of the incident by the prosecutrix to her mother; by her mother to her father; and by her mother to the Pradhan.

24. Prosecutrix states that despite the fact that her mother made inquiries from her on 22.06.2014, she disclosed the incident only on 07.07.2014, whereas, according to Pradhan Veena Devi (PW.4), mother had told her that victim had narrated the incident to her on 20.06.2014. Further according to the mother, she disclosed the incident to her husband only on his return to the village on 12.07.2014, whereas, according to the husband, his wife had already disclosed the incident on 22.06.2014. Based on these contradictions, it is argued that there is inordinate delay in lodging the FIR, which came to be so done only on 13.07.2014.

25. Can it be said that the contradictions are material or the delay fatal? In the given facts and circumstances, no. Court is dealing with the witnesses, who hail from rural areas. Father of the prosecutrix is a small businessman doing business at a far-off place. Mother is a rustic villager. There is none else in the house except for one elder daughter. The accused is none else, but her close relative. The incident which the husband is talking about is not clearly that of sexual assault. After all, on 22.06.2014 itself, mother had found clothes of the prosecutrix to be stained with blood. Also statements of the witnesses came to be recorded in Court not immediately but after a period of 7/8 months. As such, some leeway is required to be given to the witnesses in not remembering the exact dates. This contradiction alone has not impeached the credit of the witnesses who with regard to the actual occurrence of the incident, are clear and consistent and their deposition reliable and trustworthy. Delay in lodging the FIR, in the given facts and circumstances, considering the nature of offence, cannot be said to be fatal. Uncontrovertedly, it has come on record that father of the prosecutrix returned only on 12.07.2014 and promptly, matter came to be reported to the police.

26. The Apex Court in *Satpal Singh Versus State of Haryana,* (2010) 8 SCC 714, held as under:-

> 14. In a rape case the prosecutrix remains worried about her future. She remains in traumatic state of mind. The family of the victim generally shows reluctance to go to the police station because of society's attitude towards such a woman. It casts doubts and shame upon her rather than comfort and sympathise with her. Family remains concern about its honour and reputation of the prosecutrix. After only having a cool thought is it possible for the family to lodge a complaint in sexual offences. Vide

(Karnel Singh Vs. Stale of MP., 1995 AIR(SC) 2472; and {State of Punjab Vs. Gurmeet Singh & Ors., 1996 AIR(SC) 1393.

15. This Court has consistently highlighted the reasons, objects and means of prompt lodging of FIR. Delay in lodging FIR more often than not, results in embellishment and exaggeration, which is a creature of an afterthought. A delayed report not only gets bereft of the advantage of spontaneity, the danger of the introduction of a coloured version, an exaggerated account of the incident or a concocted story as a result of deliberations and consultations, also creeps in, casting a serious doubt on its veracity. Thus, FIR is to be filed more promptly and if there is any delay, the prosecution must furnish a satisfactory explanation for the same for the reason that in case the substratum of the evidence given by the complainant/informant is found to be unreliable, the prosecution case has to be rejected in its entirety. [Vide (State of Andhra Pradesh Vs. M. Madhusudhan Rao, (2008) 15 SCC 582].

16. However, no straight jacket formula can be laid down in this regard. In case of sexual offences, the criteria may be different altogether. As honour of the family is involved, its members have to decide whether to take the matter to the Court or not. In such a fact-situation, near relations of the prosecutrix may take time as to what course of action should be adopted. Thus, delay is bound to occur. This Court has always taken judicial notice of the fact that:

> "Ordinarily the family of the victim would not intend to get a stigma attached to the victim. Delay in lodging the First Information Report in a case of this nature is a normal phenomenon"".

[vide (Satyapal Vs. State of Haryana, 2009 AIR (SC) 2190].

17. In *State of H.P. v. Prem Singh,* (2009) 1 SCC 420, this Court considered the issue at length and observed as under: (SCC p. 421, para 6)

> "6. So far as the delay in lodging the FIR is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition-bound society prevalent in India, more particularly rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR."

18. Thus, in view of the above, the delay in lodging the FIR in sexual offences has to be considered with a different yardstick. If the instant case is examined in the light of the aforesaid settled legal proposition, we are of the considered opinion that the delay in lodging the FIR has been satisfactorily explained."

27. Further the Apex Court in *State of Uttar Pradesh Versus Manoj Kumar Pandey,* (2009) 1 SCC 72, has held that:-

> "3.....Apart from that normal rule regarding the duty of the prosecution to explain the delay in lodging FIR and the lack of prejudice and/or prejudice caused because of such delayed lodging of FIR does not per se apply to cases of rape."

28. In *State of Rajasthan Versus Roshan Khan and others,* (2014) 2 SCC 476, Court has observed that complainant would not come forward to lodge a false report pertaining to the character and chastity of his daughter. As such, prosecution story on the ground of delay *per se* cannot be said to be false.

29. Testimonies of prosecution witnesses, more so that of minor cannot be said to be unbelievable. Witnesses are trustworthy, and in the opinion of the Court, have deposed truthfully. Safely it can be held that prosecution has discharged the initial burden of establishing its case and the statutory burden, so required by the accused under Section 30 of the POCSO Act. Ocular evidence stands materially corroborated by other evidence on record.

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

31. From the material placed on record, it stands clearly established by the prosecution witnesses, beyond reasonable doubt, that the convict is guilty of having committed the offences charged for. There is sufficient, clear, convincing, cogent and reliable piece of evidence on record to this effect. The guilt of the convict stands proved beyond reasonable doubt to the hilt. It cannot be said that convict is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

32. Thus, from the material placed on record, it stands established by the prosecution, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, that convict committed penetrative sexual assault on the child/prosecutrix and criminally intimidated her to do away with her life.

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

Records of the Court below be immediately sent back.

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

ICICI Lombard General Insurance Company Limited ...Appellant.

Versus

Smt. Gita Devi and others ...Respondents.

FAO No. 271 of 2011
Decided on: 23.09.2016

Motor Vehicles Act, 1988- Section 173- Insurer cannot question the adequacy of compensation- it has limited ground available- it can contest claim petition on all the grounds after obtaining permission under Section 170- no such application for seeking permission was filed, which was dismissed by the Tribunal- thus, insurer is precluded from questioning the award on adequacy of compensation- however, rate of interest reduced from 9% to 7.5% per annum. (Para-11 to 20)

Cases referred:

United India Insurance co. Ltd. Versus Shila Datta & Ors., 2011 AIR SCW 6541

Josphine James versus United India Insurance Co. Ltd. & Anr., 2013 AIR SCW 6633

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281

Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892

Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 SCC 738

Savita versus Binder Singh & others, 2014 AIR SCW 2053

Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982

Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433

Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434

Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

For the appellant: Mr. Divya Raj Singh, Advocate, vice Mr. Jagdish Thakur, Advocate.
For the respondents: Mr. Arun Kumar, Advocate, vice Mr. R.R. Rahi, Advocate, for respondents No. 1 to 3.
Nemo for respondents No. 4 to 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is award, dated 30th September, 2010, made by the Motor Accident Claims Tribunal (I), Mandi (for short "the Tribunal") in Claim Petition No. 15 of 2009, titled as Geeta Devi and others versus Meera Devi and others, whereby compensation to the tune of ₹ 7,93,000/- with interest @ 9% per annum from the date of petition till its realization came to be awarded in favour of the claimants and against the insurer (for short "the impugned award").

2. The claimants and the legal representatives of owner/insured-cum-driver of the offending vehicle have not questioned the impugned award, thus, has attained finality so far it relates to them.

3. The insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. The claimants had invoked the jurisdiction of the Tribunal in terms of the mandate of Section 166 of the Motor Vehicles Act, 1988 (for short "MV Act") for grant of compensation, as per the break-ups given in the claim petition, was resisted by the respondents in the claim petition on the grounds taken in the respective memo of objections.

5. Following issues came to be framed by the Tribunal on 22nd May, 2009:

"1. Whether on 31.10.2008 at 9.00 P.M. near Shana Pangna the driver was driving the bus No. HP-65-7530 rashly and negligently and caused death of Sh. Harish Kumar? OPP

2. If issue No. 1 is proved, to what amount of compensation the petitioners are entitled to and from whom? OPP

3. Whether the driver of bus No. HP-65-7530 was not holding a valid and effective driving licence to drive the bus at the time of accident? OPR

4. Whether the accident has been caused due to rash and negligent driving of the driver of bus No. HP-65-7530 and Pick up Van as alleged? OPR

5. Relief."

6. The claimants have examined three witnesses and one of the claimants herself appeared in the witness box. One of the legal representatives of owner/insured-cum-driver has appeared in the witness box. The insurer has not led any evidence.

Issues No. 1 and 4:

7. There is no dispute viz-a-vis issues No. 1 and 4. Accordingly, the findings returned by the Tribunal on issues No. 1 and 4 are upheld.

8. Before dealing with issue No. 2, I deem it proper to determine issue No. 3.

Issue No. 3:

9. Learned proxy counsel appearing on behalf of the appellant-insurer argued that the driver of the offending vehicle was not having a valid and effective driving licence to drive the same.

10. It was for the insurer to prove issue No. 3 by leading evidence, has not led any evidence, thus, has failed to discharge the onus. However, I have gone through the findings recorded by the Tribunal in para 22 of the impugned award. The Tribunal has rightly recorded the said findings and decided the issue against the insurer. Accordingly, the findings returned by the Tribunal on issue no. 3 are upheld.

Issue No. 2:

11. The insurer cannot question the adequacy of compensation. In terms of the mandate of Sections 147 and 149 of the MV Act read with the terms and conditions contained in the insurance policy, the insurer has limited grounds available, but, it can contest the claim petition on other grounds provided permission in terms of Section 170 of the MV Act has been obtained.

12. The insurer can seek permission to contest the claim petition on all grounds available to it and in case permission has not been sought and granted, it is precluded from questioning the award on adequacy of compensation or any other ground, which is not otherwise available to it.

13. This question arose before the Apex Court in the case titled as **United India Insurance co. Ltd. Versus Shila Datta & Ors.,** reported in **2011 AIR SCW 6541,** and the matter was referred to the larger Bench.

14. The question again arose before the Apex Court in the case titled as **Josphine James versus United India Insurance Co. Ltd. & Anr.,** reported in **2013 AIR SCW 6633.** It is apt to reproduce paras 8, 17 and 18 of the judgment herein:

> *"8. Aggrieved by the impugned judgment and award passed by the High Court in MAC Appeal no. 433/2005 and the review petition, the present appeal is filed by the appellant urging certain grounds and assailing the impugned judgment in allowing the appeal of the Insurance Company without following the law laid down by this Court in Nicolletta Rohtagi's case and instead, placing reliance upon the Bhushan Sachdeva's case. Nicolletta Rohtagi's case was exhaustively discussed by a three judge bench in the case of United India Insurance Company Vs. Shila Datta, 2011 10 SCC 509. Though the Court has expressed its reservations against the correctness of the legal position in Nicolletta Rohtagi decision on various aspects, the same has been referred to higher bench and has not been overruled as yet. Hence, the ratio of Nicolletta Rohtagi's case will be still applicable in the present case. The appellant claimed that interference by the High Court with the quantum of compensation awarded by the Tribunal in favour of appellant and considerably reducing the same by modifying the judgment of the Tribunal is vitiated in law. Therefore, the impugned judgments and awards are liable to be set aside.*
>
> *9. to 16. .....*
>
> *17. The said order was reviewed by the High Court at the instance of the appellant in view of the aforesaid decision on the question of maintainability of the appeal of the Insurance Company. The High Court, in the review petition, has further reduced the compensation to Rs. 4,20,000/- from Rs. 6,75,000/- which was earlier awarded by it. This approach is contrary to the facts and law laid down by this Court. The High Court, in reducing the quantum of compensation under the heading of loss of dependency of the appellant, was required to follow the decision rendered by three judge Bench of this Court in Nicolletta Rohtagi case (2002) 7 SCC 456 : AIR 2002 SC 3350 : 2002 AIR SCW 3899, and earlier decisions wherein this Court after interpreting Section 170 (b) of the M. V. Act, has rightly held that in the absence of permission obtained by the Insurance Company from the Tribunal to avail the defence of the insured, it is not permitted to contest the case on merits. The aforesaid legal principle is applicable to the fact situation in view of the three*

judge bench decision referred to though the correctness of the aforesaid decision is referred to larger bench. This important aspect of the matter has been overlooked by the High Court while passing the impugned judgment and the said approach is contrary to law laid down by this Court.

18. In view of the aforesaid reasons, the Insurance Company is not entitled to file appeal questioning the quantum of compensation awarded in favour of the appellant for the reasons stated supra. In the absence of the same, the Insurance Company had only limited defence to contest in the proceedings as provided under Section 149 (2) of the M.V. Act. Therefore, the impugned judgment passed by the High Court on 13.1.2012 reducing the compensation to 4,20,000/- under the heading of loss of dependency by deducting 50% from the monthly income of the deceased of Rs. 5,000/- and applying 14 multiplier, is factually and legally incorrect. The High Court has erroneously arrived at this amount by applying the principle of law laid down in Sarla Verma v. Delhi Transport Corporation, 2009 6 SCC 121 instead of applying the principle laid down in Baby Radhika Gupta's case regarding the multiplier applied to the fact situation and also contrary to the law applicable regarding the maintainability of appeal of the Insurance Company on the question of quantum of compensation in the absence of permission to be obtained by it from the Tribunal under Section 170 (b) of the M.V. Act. In view of the aforesaid reason, the High Court should not have allowed the appeal of the Insurance Company as it has got limited defence as provided under section 149(2) of the M.V. Act. Therefore, the impugned judgment and award is vitiated in law and hence, is liable to be set aside by allowing the appeal of the appellant."

15. Thus, the insurer can question the adequacy of compensation only if it has sought permission under Section 170 of the MV Act.

16. In the present case, the application filed by the insurer under Section 170 of the MV Act was dismissed by the Tribunal vide order, dated 22nd May, 2009. Thus, the insurer is precluded from questioning the adequacy of compensation. Accordingly, the findings recorded by the Tribunal on issue No. 2 are upheld.

17. The only ground available to the insurer for questioning the impugned award was breach of the terms and conditions of the insurance policy, has not led any evidence, thus, has failed to do so.

18. However, the Tribunal has fallen in an error in awarding interest at the rate of 9% per annum, which was to be awarded as per the prevailing rates.

19. It is beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as **United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,** reported in (**2002) 6 SCC 281; Santosh Devi versus National Insurance Company Ltd. and others,** reported in **2012 AIR SCW 2892**; **Amrit Bhanu Shali and others versus National Insurance Company Limited and others,** reported in **(2012) 11 SCC 738; Smt. Savita versus Binder Singh & others**, reported in **2014 AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn.,** reported in **2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,** reported in **(2015) 4 SCC 433;** and **Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,** reported in **(2015) 4 SCC 434,** and discussed by this Court in a batch of FAOs, **FAO No. 256 of 2010, titled as Oriental Insurance Company versus Smt. Indiro and others,** being the lead case, decided on 19.06.2015.

20. Having said so, I deem it proper to reduce the rate of interest from 9% per annum to 7.5% per annum from the date of filing of the claim petition till its realization.

21. Having glance of the above discussions, the impugned award is modified and the appeal is disposed of, as indicated hereinabove.

22. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank accounts.

23. Excess amount, if any, be released in favour of the appellant-insurer through payee's account cheque.

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

****

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

Ishwar Dass ..Appellant.

Versus

Smt. Neem Dassi deceased through her LRs Shesh Ram and others. .. Respondents.

RSA No. 459 of 2002 & CMP No. 8073 of 2015
Judgment reserved on 19th July, 2016
Decided on: 23rd September, 2016

Specific Relief Act, 1963- Section 34- The suit land was owned by N, the husband of the plaintiff- plaintiff inherited the same on his death- revenue entries are in the name of brother of the plaintiff- plaintiff made an application to Land Reforms Officer for correction of the entries – the application was partly allowed directing the correction of 2/3rd share and observing that plaintiff can file a suit for remaining 1/3rd share – the suit was opposed by the defendant- the suit was dismissed by the trial Court- an appeal was preferred, which was allowed- held, in second appeal that plaintiff had inherited the suit land from her previous husband L- she died during the pendency of the appeal- the children of second husband are not entitled to inherit the suit land- plaintiff had lost her rights in the suit land on her re-marriage prior to commencement of Hindu Succession Act- the suit land was required to be recorded in the ownership and possession of her previous husband L or that of her father-in-law – therefore, neither the successors of the plaintiff nor the defendant is entitled to succeed to the land – direction issued to the Deputy Commissioner to mutate the land in favour of legal heirs of L and in the absence of the legal heirs to initiate the proceedings for escheat. (Para- 10 to 20)

Cases referred:

Velamuri Venkata Sivaprasad (Dead) by LRs V. Kothuri Venkateshwarlu (Dead) by LRs and others (2000) 2 Supreme Court Cases 139

Fate Ram and others V. Smt. Parvati Latest HLJ 2015 (HP) 816

Gurudwara Sahib Vs. Gram Panchayat Village Sirthala, (2014) 1 SCC 669

For the appellant	Mr. Ankush Dass Sood, Senior Advocate with Ms. Shweta Joolka, Advocate.
For the respondents:	Mr. P.P. Chauhan, Advocate for respondents No. 1(a) to 1(e). Mr. Virender Verma, Addl. A.G for the respondent-State.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Defendant Ishwar Dass is in second appeal before this Court, as learned lower appellate Court on reversal of judgment and decree dated 30th June, 2001, passed in Case No.09-01 of 1999-2001, has decreed the suit vide impugned judgment and decree dated 31st July, 2002 and held the Neem Dassi (since dead), the predecessor-in-interest of the respondents (hereinafter

referred to as the plaintiffs) owner in possession of the suit land. As a consequence thereof, the defendant has also been restrained from causing any interference in the suit land.

2. It is seen that the subject matter of dispute is a parcel of land measuring 31-3 bighas entered in Khata Khatauni No.170/201, Kita 4, situate in revenue estate Phati Tawar, Kothi Kandi, Tehsil Nirmand, District Kullu. One Shri Luder Ram, husband of deceased plaintiff Neem Dassi, was owner of the suit land. She inherited the suit land on his death. On finding that the entries in revenue record qua possession of the suit land are in the name of her brother Rukam Ram (since dead). She made an application to Land Reforms Officer exercising the powers of Assistant Collector 1st Grade, Nirmand, registered as case No.2/98 with a prayer that the entries showing Rukam Ram as owner in possession of the suit land are wrong and that the same may be ordered to be corrected. The application was partly allowed vide order dated 6th May, 1998, Ext.PW-1/B, directing thereby the revenue staff to enter the suit land to the extent of 2/3rd in the name of said Neem Dassi and 1/3rd in that of defendant Ishwar Dass with further observations that since Shri Rukam Ram was never in possession of the suit land, therefore, Neem Dassi aforesaid may file a suit in a civil Court having jurisdiction over the matter to challenge the entries showing him in possession of the suit land to the extent of 1/3rd share also. This seems to have led in filing the present suit in the trial Court by the deceased plaintiff Smt. Neem Dassi with the following prayer:

> "That the plaintiff is in possession and cultivation of the land as comprised in Khata/Khatauni No.170/201 Kitas 4 measuring 31-8-0 bighas situate in Phati Tawar, Kothi Kandi, Tehsil Nirmand, District Kullu, HP with all right, title and interest and the entries in the revenue records (in column of possession in Jamabandi) showing the defendant in possession of 1/3rd share in the suit land are wrong, illegal and inoperative in law with consequential relief of perpetual injunction restraining the defendant from interfering with the peaceful possession and cultivations of the plaintiff (owner) over the suit land."

on the ground that late Shri Rukam Ram was never in possession of the suit land or any portion thereof and rather it is she who throughout remained in possession thereof openly, continuously and to the knowledge and notice of the defendant as well as other legal heirs of deceased Rukam Ram. They never objected to her possession over the suit land. On coming to know about wrong entries qua possession of the suit land in revenue record in the month of January, 1998, she made an application before the Assistant Collector 1st Grade, Nirmand with a prayer to order correction thereof. The defendant, according to the plaintiff, has no right, title or interest in the suit land.

3. The defendant in the written statement raised the preliminary objections qua maintainability of the suit, jurisdiction of the trial Court and also that in view of the protection of the provisions contained under HP Tenancy and Land Reforms Act, 1972, he can not be ejected from the suit land. The suit has also been sought to be dismissed on the ground that no cause of action exists in favour of the plaintiff and bad for want of proper valuation for the purposes of court fee and jurisdiction.

4. On merits, while submitting that the land was inherited by the plaintiff from her previous husband Luder Ram (now re-married to one Chet Ram), however, his father Rukam Ram remained cultivating the same throughout continuously and peacefully. It is for this reason the suit land was entered in his possession in the revenue record. The entries in the Jamabandi for the year 1993-94 have, therefore, been said to be correct, whereas, the order passed by Assistant Collector 1st Grade, Nirmand illegal, arbitrary, hence void ab initio. It is the defendant who allegedly is in possession of the suit land after the death of his father Rukam Ram. The plaintiff now started causing interference therein with the sole object to eject him forcibly from the suit land.

5. On such pleadings of the parties, learned trial Court has framed following issues:

1. Whether the plaintiff is entitled for the relief of declaration? OPP.

2. Whether the plaintiff is entitled to the relief of injunction? OPP.
3. Whether the suit is bad for non-joinder and mis-joinder of necessary parties? OPD.
4. Whether the plaintiff has no cause of action tot file the present suit? OPD.
5. Whether the suit is not properly valued for the court fees and jurisdiction, as alleged? OPD.
6. Whether the defendant has become owner by virtue of Section 104 of HP Land Reforms Act? OPD.
7. Relief.

6. The parties after having undergone the trial, learned trial Court on appreciation of the evidence available on record has held the defendant in possession of the suit land and having acquired title therein by virtue of the provisions contained under the HP Tenancy and Land Reforms Act and also that he has become owner of the suit land automatically under Section 104 of the Act ibid. It has further been observed that the present is a suit simplicitor for correction of revenue entries without seeking declaration to the effect that plaintiff is owner in possession thereof and as such the civil Court has no jurisdiction to try and entertain the same. The suit has also been held to be bad for non-joinder and mis-joinder of necessary parties, viz other legal heirs of deceased Rukam Ram.

7. As noticed supra, learned lower appellate Court has reversed the judgment and decree passed by learned trial Court and decreed the suit. The present appeal has been preferred on the grounds, *inter alia*, that the findings as recorded by learned lower appellate Court are based upon conjectures and surmises. The evidence as produced by the plaintiff herself before Assistant Collector 1st Grade that Shri Rukam Ram, father of the defendant was inducted by her as tenant to safeguard the suit property has not been appreciated at all and the lower appellate Court rather felled in error in not appreciating the order of Assistant Collector 1st Grade whereby the controversy qua the suit land was decided in the ratio of 2/3rd share and 1/3rd share between the plaintiff and defendant. The defendant allegedly claiming only his 1/3rd share in the suit land which is in his possession. The own evidence produced by the plaintiff that she tried to snatch the possession of the suit land to the extent of 1/3rd share from the defendant has been misread and misconstrued by learned lower appellate Court. Such evidence is the conclusive proof qua the defendant is in possession of 1/3rd share of the suit land. Learned lower appellate Court should have drawn an adverse inference against the plaintiff as she failed to step into witness box. However, it has not been done and the same resulted into miscarriage of justice to the defendant.

8. The plaintiff claims herself to be owner in possession of the suit land whereas the defendant is in possession thereof to the extent of 1/3rd share and as such has become owner under the provisions of HP Tenancy and Land Reforms Act. The civil Court has, therefore, no jurisdiction to try and entertain the controversy. The judgment and decree under challenge, therefore, is said to be nullity. The plaintiff having been convicted in a case registered against her vide FIR No.55 of 1994 also demonstrates that it is the defendant who was in possession of the suit land and not the plaintiff. Issue No.3 was decided in favour of the defendant and the lower appellate Court has not adverted to the findings arrived at on this issue. Therefore, it has been submitted that the case is required to be remanded to the lower appellate Court.

9. The appeal has been admitted on the following substantial questions of law:

1. Whether the first appellate Court could have decreed the suit only on the ground that the tenancy could not have been created by a real sister in favour of her brother?
2. Whether the judgment of the first appellate Court is result of misreading and misappreciation of the evidence on record?

3. Whether the admission made by brothers of the defendant could bind the defendant?

10. During the course of arguments, it transpired that suit land had come in the hands of deceased plaintiff Neem Dassi from her previous husband Ludar Ram. Admittedly, no issue was born to her from the lions of her previous husband and rather he died within 4-5 months of his marriage with deceased plaintiff Neem Dassi. Taking note of the provisions contained under Section 15(2) (b) of the Hindu Succession Act, the land inherited by a female Hindu from her husband or father-in-law on her death can only be inherited by the legal representatives of her husband and none else. On her death, the respondents born to her from the lions of Chet Ram, with whom she had solemnized marriage after the death of her previous husband Ludar Ram were substituted as her legal representatives, however, in view of the provisions contained under Section 15(2) (b) of the Hindu Succession Act, since they could have not inherit the suit land on her death, therefore, the following order came to be passed in this appeal on 8.5.2015:-

> "The record reveals that the suit land came in the hands of deceased Neem Dassi from her previous husband Luder Ram. Whether she has any issue born and alive from the lions of said Luder Ram, the record is silent. The present respondent Shesh Ram etc., are born to her from the lions of Chet Ram with whom she was settled, perhaps after the death of her previous husband Luder Ram. The land inherited from husband by a Hindu woman, in terms of Section 15(2) (b) of the Hindu Succession Act, can only be inherited by the legal heirs of her husband and her father-in-law and none else. It is also not known that her husband Luder Ram or her father-in-law had left behind any legal heir or not. The question on the death of said Smt. Neem Dassi, therefore, arises that the present respondents, who are born to her from the lions of Chet Ram can inherit the suit land or not. In order to decide this part of the matter effectively and judiciously, further arguments need to be heard. On the request of learned counsel on both sides, list on 27th May, 2015."

11. On the next date of hearing, learned counsel on both sides were in agreement that on re-marriage well before coming in force Hindu Succession Act, 1956, deceased plaintiff Neem Dassi had lost all her rights, title and interest in the suit land. Therefore, in the order passed on that day i.e. 27.5.2015, this Court has observed that the respondents, who were born to deceased plaintiff Neem Dassi from the lions of her second husband Chet Ram are not entitled to inherit the suit property, particularly, when on her re-marriage, she herself had lost all rights and interest therein. The order passed on that day reads as follows:-

> "In terms of the order passed on the previous date, heard for sometimes. As per the legal position, learned counsel on both sides are almost all in agreement that on re-marriage of Smt. Neem Dassi deceased respondent-plaintiff with Chet Ram, her rights and interests in the suit land stood forfeited and the land, as a matter of fact, should have been reverted back to the heirs of her previous husband Ludar Ram or the heirs of her father-in-law. It being so, no right to sue survives in favour of the respondents herein, who admittedly are born to deceased respondent Neem Dassi from the lions of Chet Ram with whom she had solemnized second marriage. They, however, have been brought on record of this appeal, consequent upon the order passed on 25.9.2013 in an application filed under Order 22 Rule 4 CPC during the pendency of this appeal. Learned counsel for the appellant intends to take appropriate steps and address this Court on the issue of their substitution also. List on ***26th June, 2015***, as prayed."

12. Consequent upon this order, application CMP No. 8073/2015 has been filed by the appellant-defendant for rejection of plaint with a further prayer to recall the order dated 25.9.2013 passed in CMP(M) Nos. 1413, 1414 and 1418 of 2013, whereby the respondents herein were ordered to be substituted as legal representatives of deceased plaintiff Neem Dassi.

13. The appeal when heard further on 3.11.2015, in view of this Court was considering an important and vital legal question that on solemnization of 2nd marriage well before coming in force the Hindu Succession Act, deceased plaintiff Neem Dassi could have still claim ownership in the suit land has necessitated to seek assistance from learned Additional Advocate General also. Therefore, following order came to be passed on that day:-

> "Heard further.
>
> In view of an important and vital legal question qua the competency of deceased plaintiff Smt. Neem Dassi, to claim the ownership of the suit land belonging to her previous husband Sh. Ludar Ram on solemnization of second marriage with one Chet Ram after his death involved for adjudication. It is felt necessary that learned Additional Advocate General also to assist this Court in the matter after obtaining instructions from the Collector, Kullu District at Kullu particularly as to whether the previous owner Sh. Ludar Ram or his father Kesu are survived by any legal heir(s) in terms of Section 15(2) of the Hindu Succession Act and if not, whether the suit land can be vested in the State Government and also as to why actually is in possession of the suit land on the spot at present, after verifying the factual position on the spot in this regard. The Collector to furnish the information as aforesaid by way of affidavit within a period of four weeks. The parties to the suit also to satisfy this Court as to on what basis they are claiming themselves to be owners or in possession of the suit land.
>
> An authenticated copy of this order be supplied to learned Additional Advocate General for compliance."

14. In terms of this order, the Deputy Commissioner, Kullu has filed the compliance report on his own affidavit, which reveals that the previous owner of the suit land was one Beli Ram. He had two sons, namely, Keshu and Kanshi Ram. Keshu was married to one Jeevan Dassi to whom Ludar Ram, previous husband of deceased plaintiff Neem Dassi was born. Keshu died earlier to his wife Smt. Jeevan Dassi. Said Smt. Jeevan Dassi came with her son Ludar Ram to Nirmand and started living there with his family. It is she who was owner in possession of the suit land. She gifted away the suit land to her son Ludar Ram in order to enable him to earn his livilhood. Mutation No. 702 was attested in the name of Ludar Ram aforesaid on 4.8.1937.

15. Ludar Ram later on was married to deceased plaintiff Neem Dassi. They did not have any issue and as such Ludar Ram died issueless somewhere in 1948. The land in Nirmand Tehsil passed into the ownership of his wife deceased plaintiff Neem Dassi. As per 'Shazra Nasab' prepared at the time of settlement operations (1955-1951), she was recorded as owner in possession of the suit land in the capacity of widow of Ludar Ram and by virtue of being in physical possession of the suit land. The land of Ludar Ram in Tehsil Rampur was recorded in the ownership of Amar Singh his cousin being the son of Kanshi Ram, Ludar Ram's uncle. The mutation in this regard was attested on 25.7.1948. Smt. Neem Dassi died in the year 2007 and her inheritance has now been passed to the respondents herein born to her from the lions of her husband Chet Ram and they are continuing as owner in possession of the suit land.

16. It Is thus seen that deceased plaintiff Neem Dassi was the wife of Ludar Ram, who was owner in possession of the suit land. In the pleadings of the parties, nothing has come on record as to when the marriage was solemnized and what is the date of death of Ludar Ram and also the date when Neem Dassi solemnized 2nd marriage with Chet Ram. The compliance report filed by the Deputy Commissioner, Kullu discussed in para supra, however, reveals that Ludar Ram died issueless in the year 1948. On his death, Neem Dassi aforesaid came to be recorded as owner in possession of the suit land. The compliance report makes reference to 'Shazra Nasab' prepared during the settlement operations carried out in the area in 1950-51 in this regard. The other property of deceased Ludar Ram in Rampur Tehsil was mutated in the name of his cousin Amar Singh on 25.7.1948. Deceased plaintiff Neem Dassi had rightly inherited the suit land on the death of Ludar Ram being his wife. Nothing has come on record qua her 2nd marriage with Chet Ram. PW-1 Sher Singh her son and attorney while in the witness

box has stated in the very opening lines of his cross-examination that Neem Dassi was married to Ludar Ram 50-60 years ago, who died within 4-5 months of marriage with her. After his death she lived with one Govind for 4-5 months and it is thereafter she solemnized 2nd marriage with Chet Ram. Ludar Ram appears to have died somewhere in July, 1948 because mutation of inheritance qua his land in Rampur Tehsil as per the compliance report was attested on 25.7.1948. Therefore, taking into consideration the testimony of PW-1 Sher Singh, if after the death of Ludar Ram she lived with Govind for 4-5 months and thereafter solemnized 2nd marriage with Chet Ram, such marriage most probably had taken place in the year 1948 itself. Therefore, on her re-marriage she forfeited her right to the estate of her deceased husband under Section 2 of the Hindu Widow's Re-marriage Act, 1856 and as such, had lost all rights and interest in the suit land. On coming into force the Hindu Succession Act, 1956, the suit land was required to be recorded in the ownership and possession of the legal heirs of her previous husband Ludar Ram or that of her father-in-law as required under Section 15(2) (b) of the Act ibid.

17. The matter seems to be not agitated by anyone including Amar Singh, the cousin of Ludar Ram and it is for this reason, the deceased plaintiff continued to be recorded owner in possession of the suit land. The Apex Court in ***Velamuri Venkata Sivaprasad (Dead) by LRs*** V. ***Kothuri Venkateshwarlu (Dead) by LRs and others (2000) 2 Supreme Court Cases 139***, a case having more or less similar facts has held as under:

> "**12**. Undisputably the Hindu Succession Act, 1956 in particular Section 14 has introduced far reaching changes having due regard to the role and place of womanhood in the country on the basis of the prevailing socio-economic perspective. It is now a well-settled principle of law that legislations having socio-economic perspective ought to be interpreted with widest possible connotation as otherwise, the intent of the legislature would stand frustrated. Recognition of Rights and protection thereof thus ought to be given its full play for which the particular legislation has been introduced in the Statute Book. Gender bias is being debated throughout the globe and the basic structure of the Constitution permeates equality of status and thus negates gender bias. Gender equality is one of the basic principles of our Constitution. The endeavour of the law court should thus be to give due weightage to the requirement of the Constitution in the matter of interpretation of statutes wherein specially the women folk would otherwise be involved. The legislation of 1956 therefore, ought to receive an interpretation which would be in consonance with the wishes and desires of framers of our Constitution....."
>
> **14**. Having due regard to the language as above introduced by Section 14 question of attributing a different interpretation, apart from what has been given in Tulasamma's case, does not arise but needless however to note that in order to have the provision applicable there shall have to be some right existing and not de hors the same. In Raghubir's case (supra) the Shastric law has been taken recourse to in order to ascribe a pre-existing right so far as the widow is concerned by reason of the social and temporal relationship between the husband and the wife during the life time of the husband and the solemn obligation of the husband towards the wife. Hindu marriage is not a mere formality or a contract but has its due religious sanctity even in the present day society. Homam i.e. oblation to fire and Saptapadi (seven steps together) are being observed in order to have a holy union between the husband and the wife. In this context, the observations in the decision of Raghubir Singh's case seem to be apposite and in paragraph 14 of the Report, Dr. Anand, CJ observed:-
>
> > "According to the old Shastric Hindu law, marriage between two Hindus is a sacrament-a religious ceremony which results in a sacred and a holy union of man and wife by virtue of which the wife becomes a part and parcel of the body of the husband. She is, therefore, called ardhangani. It is on account of this status of a Hindu wife, under the Shastric Hindu law, that a

husband was held to be under a personal obligation to maintain his wife and where he dies possessed of properties, then his widow was entitled as of right, to be maintained out of those properties. The right of a Hindu widow to be maintained out of the properties of her deceased husband is, thus a spiritual and moral right, which flows from the spiritual and temporal relationship of husband and wife, though the right is available only so long as the wife continues to remain chaste and does not remarry."

47. Incidentally, be it noted that the Succession Act of 1956 obviously is prospective in operation and in the event of a divestation prior to 1956, question of applicability of Section 14(1) would not arise since on the date when it applied, there was already a re-marriage disentitling the widow to inherit the property of the deceased husband. The Act of 1856 had its full play on the date of re-marriage itself, as such Succession Act could not confer the widow who has already re-married, any right in terms of Section 14(1) of the Act of 1956. The Succession Act has transformed a limited ownership to an absolute ownership but it cannot be made applicable in the event of there being a factum of pre divestation of estate as a limited owner. If there existed a limited estate or interest for the widow, it could become absolute but if she had no such limited estate or interest in lieu of her right of maintenance from out of deceased husband's estate, there would be no occasion to get such non-existing limited right converted into full ownership right.

18. This Court in ***Fate Ram and others*** V. ***Smt. Parvati Latest HLJ 2015 (HP) 816*** while taking note of the law laid down by the Apex Court has also held as under:-

"**15**. It is crystal clear form the bare perusal of the Section ibid that the son or daughter begotten by the deceased female not through her husband, whose property was with her during her lifetime but from someone else, such son or daughter have no right to inherit such property on her death. Object of Section 15(2) is to ensure that the property left by a Hindu female does not loose its real source. If it was the property she had inherited from her parents, the same on her death should go to legal heirs of her father. In case the property was inherited by her from her husband or her father-in-law the same on her death shall devolve upon the heirs of the husband or her father-in-law i.e. the source from which the property was inherited by her. The ***Apex Court in (2009) 15 Supreme Court Cases 66*** has held that when the property is devolved upon the deceased Hindu female from the parent's side, on her death, the same would go to her parents family and not to her husband's family. Similarly, in case where she had inherited some property from her husband or from her husband's family, on her death, the same would revert back to her husband's family and not to her own heirs. The ***Apex Court in Bhagat Ram (D) by L.Rs versus Teja Singh (D) by L.Rs., AIR 2002 Supreme Court (1)*** has held that the factum of a Hindu female originally had a limited right and later acquired full right, in any way would not alter the rules of Successions given in sub-Section (2) of Section 15 of the Act."

19. In the case in hand, the factum of re-marriage though has been established on record, however, not taken note of by both Courts below and even by the Assistant Collector 2nd Grade also who decided the application filed for correction of entries in the revenue record showing the appellant-defendant to be in possession of the suit land. As a matter of fact, the appellant-defendant and for that matter his predecessor-in-interest Rukam Ram could have not claimed any right, title or interest in the suit land on the alleged ground of tenancy because when the deceased plaintiff Neem Dassi itself had lost all right, title or interest in the suit land after her re-marriage, how she could have inducted the defendant or their father as tenant in the suit land. Therefore, neither the deceased plaintiff Neem Dassi could have claimed herself to be owner in possession of the suit land nor the defendant. She could have also not filed the suit for declaration and permanent prohibitory injunction. The suit land should have either been devolved upon heirs of her deceased husband Ludar Ram alone because Ludar Ram had died

issueless or in the absence of his heirs, devolved upon the Himachal Pradesh Government by way of *Escheat* under Section 29 of the Hindu Succession Act. The provisions contained under the Hindu Succession Act has escaped the notice of revenue authorities while allowing to continue entries in the revenue record showing Neem Dassi and for that matter the defendant as co- owner in possession of the suit land. This aspect of the matter has also lost sight of the learned trial Court and also learned lower appellate Court.

20. Therefore, not only the claim as laid by the plaintiff in the suit is false but the claim of the defendant that he having been inducted as tenant over the suit land by deceased plaintiff Neem Dassi has became owner thereof is also false. Therefore, neither the successors (respondents herein) of deceased plaintiff Neem Dassi nor the defendant is entitled to claim any right, title or interest in the suit land. Therefore, the suit in all fairness and in the ends of justice was neither maintainable nor should have been entertained and the plaint rather should have been rejected. No doubt, in reply to the application, CMP No. 8073 of 2015, it is denied that the provisions contained under Section 2 of the Hindu Widow's Re-Marriage Act, 1856 were attracted in this case, however, merely for rejection because there is no explanation as to why such provisions are not applicable in this case. On the other hand, the stand of the respondents is that their mother Neem Dassi remained in possession of the suit land for a period of 50-55 years and thereafter, it is they who are in possession of the same. By making such submissions, the respondents have reiterated the plea of adverse possession raised in the plaint. However, in view of the judgment of the Apex Court in ***Gurudwara Sahib*** Vs. ***Gram Panchayat Village Sirthala, (2014) 1 SCC 669***, the plea of adverse possession as raised in the plaint was not available to the plaintiff. Being so, the plaint is hereby ordered to be rejected and the application, CMP No. 8073 of 2015 allowed. Consequently, order dated 25.09.2013 passed in CMP(M) Nos. 1413 and 1414 of 2012, impleading the present respondents as legal representatives of deceased Neem Dssi for the purpose of this appeal is also recalled. Consequently, this appeal does not survive and as such, there is no occasion for this Court to enter upon the controversy on merits and adjudicate the question of law as formulated at the time of its admission.

21. In view of what has been said hereinabove, the plaint is ordered to be rejected. There shall be a direction to the District Collector, Kullu to examine the matter thoroughly in accordance with law. In the event of Ludar Ram is survived by any heir(s) as per provisions contained under the Hindu Succession Act, to ensure that the suit land is devolved upon such heir(s). In the event of any heir of Ludar Ram is not found to be available, the Collector shall take the possession of the suit land and also necessary steps in accordance with law to get the same devolved on the Government of Himachal Pradesh.

22. The appeal is accordingly disposed of, so also the pending application(s), if any. No orders so as to costs.

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

Smt. Keblu Devi and others ...Appellants.

Versus

Sh. Lagan Dass and others ...Respondents.

FAO No. 422 of 2011
Decided on: 23.09.2016

Motor Vehicles Act, 1988- Section 166- Deceased was 30 years of age at the time of accident- he was earning Rs. 7,000/- per month as driver and was also being paid Rs.100/- per day as pocket/diet money- 1/4th amount was to be deducted towards personal expenses- it was held that claimant had suffered loss of dependency of Rs. 36,000/- per annum, which is reasonable- however, multiplier of 14 was wrongly applied as multiplier of 16 was to be applied- thus, claimants are entitled to Rs.36,000 x 16= Rs.5,76,000/- under the head 'loss of

income/dependency', in addition to this, Rs.10,000/- each under the heads 'loss of consortium', 'loss of estate', 'loss of love and affection' and 'funeral expenses' also awarded- claimants are entitled to total compensation of Rs. 6,16,000/- -interest was wrongly awarded @ 8% per annum, whereas it should have been 7.5% per annum. (Para-6 to 13)

Cases referred:

Sarla Verma (Smt.) and others vs Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120
United India Insurance Co. Ltd. and others vs Patricia Jean Mahajan & others, (2002) 6 SCC 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 SCC 738
Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

For the appellants: Mr. K.R. Thakur, Advocate.
For the respondents: Mr. Y.P. Sood, Advocate, for respondents No. 1 and 2.
Mr. B.S. Chauhan, Senior Advocae, with Mr. Munish Dhatwalia, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is award, dated 12th September, 2011, made by the Motor Accident Claims Tribunal, Shimla, Himachal Pradesh (for short "the Tribunal") in M.A.C. Petition No. 45-S/2 of 2008, titled as Smt. Keblu Devi and others versus Sh. Lagan Dass and others, whereby compensation to the tune of ₹ 5,04,000/- with interest @ 8% per annum from the date of the claim petition till its realization and costs assessed at ₹ 5,000/- came to be awarded in favour of the claimants and against the insurer (for short "the impugned award").

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

3. The appellants-claimants have questioned the adequacy of compensation on the grounds taken in the memo of the appeal.

4. Thus, the only question to be determined in this appeal is – whether the amount awarded is inadequate? The answer is in the affirmative for the following reasons:

5. The insurer and the owner-insured of the offending vehicle have not questioned the impugned award, thus, the factum of insurance and liability is not in dispute.

6. Admittedly, the deceased was 30 years of age at the time of the accident. The appellants-claimants have specifically pleaded in the claim petition that the deceased was earning ₹ 7,000/- per month as driver and was also being paid ₹ 100/- per day as pocket/diet money. The Tribunal, after making assessment vide paras 18 to 21, came to be conclusion that the income of the deceased was not more than ₹ 4,000/- per month, deducted one fourth towards personal expenses of the deceased and held that the claimants have suffered loss of dependency to the tune of ₹ 36,000/- per annum, appears to be reasonable.

7. But, the Tribunal has fallen in an error in applying the multiplier of '14' as the multiplier of '16' was to be applied in view of the law laid down by the Apex Court in the case

titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120,** read with the Second Schedule appended with the MV Act.

8. Thus, the claimants are held entitled to ₹ 36,000/- x 16 = ₹ 5,76,000/- under the head 'loss of income/dependency'.

9. The Tribunal has also erred in not awarding compensation under the other heads. Accordingly, the claimants are held entitled to ₹ 10,000/- each under the heads 'loss of consortium', 'loss of estate', 'loss of love and affection' and 'funeral expenses'.

10. Viewed thus, it is held that the claimants are entitled to compensation to the tune of ₹ 5,76,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- = ₹ 6,16,000/-.

11. The Tribunal has also committed a legal mistake while awarding interest @ 8% per annum, which was to be awarded as per the prevailing rates.

12. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as **United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,** reported in (**2002) 6 SCC 281; Santosh Devi versus National Insurance Company Ltd. and others,** reported in **2012 AIR SCW 2892**; **Amrit Bhanu Shali and others versus National Insurance Company Limited and others,** reported in **(2012) 11 SCC 738; Smt. Savita versus Binder Singh & others**, reported in **2014 AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn.,** reported in **2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,** reported in **(2015) 4 SCC 433;** and **Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,** reported in **(2015) 4 SCC 434,** and discussed by this Court in a batch of FAOs, **FAO No. 256 of 2010,** titled as **Oriental Insurance Company versus Smt. Indiro and others,** being the lead case, decided on 19.06.2015.

13. Having said so, I deem it proper to reduce the rate of interest from 8% per annum to 7.5% per annum from the date of filing of the claim petition till its realization.

14. Having glance of the above discussions, the impugned award is modified, as indicated hereinabove.

15. The insurer is directed to deposit the enhanced awarded amount before the Registry within eight weeks. On deposition of the amount, the entire awarded amount be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification through payee's account cheque or by depositing the same in their respective bank accounts.

16. The appeal is disposed of accordingly.

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

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

Oriental Insurance Co. Ltd. .....Appellant

Versus

Usha Rani and others ..... Respondents

FAO No.91 of 2011
Date of decision: 23.09.2016

Motor Vehicles Act, 1988- Section 149- It was contended by insurer that vehicle bearing registration No. HR-38C-7858 was insured, and not the vehicle bearing registration No.HR-38D-7858- police record shows that FIR was registered against the driver of the truck bearing No.HR-38D-7858- no insurance policy of that vehicle was produced on record and the insurance policy of the vehicle bearing registration No. HR-38C-7858 was produced – hence, appeal allowed and right of recovery granted to the insurer. (Para-3 to 8)

For the appellant: Mr.Ashwani K. Sharma, Senior Advocate, with Mr.Ishan Thakur, Advocate.
For the respondents: Mr.Dinesh Sharma, Advocate, for respondents No.1 and 2.
Respondent No.3 is deleted.
Nemo for respondents No.4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 31st August, 2010, passed by the Motor Accident Claims Tribunal, Fast Track Court, Solan, District Solan, H.P., (for short, "the Tribunal") in Claim Petition No.24/FTC/2 of 05/06, titled Guljari Lal (deceased) through LRs vs. Sardar Karamjeet Singh and others, whereby compensation to the tune of Rs.4,46,100/- came to be awarded in favour of the claimants and the insurer was saddled with the liability, (for short the "impugned award").

2. Feeling aggrieved, the insurer has challenged the impugned award on the ground that the Tribunal has wrongly fastened the liability on it.

3. On the last date of hearing, learned counsel for the appellant/insurer argued that the vehicle bearing No.HR-38C-7858 was insured, and not the vehicle having No.HR-38D-7858, as was pleaded by the claimants and held by the Tribunal.

4. To verify whether the vehicle having registration No.HR-38C-7858 or the vehicle with registration No.HR-38D-7858 was involved in the accident, this Court, on the last date of hearing, in order to secure presence of the owner and the driver i.e. respondents No.4 and 5, respectively, issued bailable warrants against them through Superintendent of Police concerned, which have been returned unexecuted with the report that the address was not correct. The Superintendent of Police, Ambala was also asked to direct the Station House Officer, Shehzadpur, where the FIR in regard to the accident was registered, to produce the copy of the case diary or shadow diary before this Court.

5. Today, Head Constable Rajinder Singh, Police Station, Shehzadpur, is present. He stated that in regard to the FIR No.58/2004, challan has already been presented before the court of competent jurisdiction for which reason he could not bring the case diary. He, however, made available photocopy of the shadow diary, made part of the file. On perusal, it transpires that FIR No.58 of 2004, was registered against the driver of truck bearing No.HR-38D-7858, namely, Gurbant Singh. Claimants have also pleaded in the claim petition that the offending truck involved in the accident was HR-38D-7858 and the Tribunal has also held that the offending vehicle was HR-38D-7858.

6. In the above backdrop, the learned counsel for the appellant/insurer argued that though the owner/insured is same, but the vehicle which was insured with the insurer was having No.HP-38C-7858 and that the offending vehicle having registration No.HP-38D-7858 was not insured with the appellant/insurer.

7. In the given circumstances, it cannot be held that the offending vehicle bearing No.HP-38D-7858 was insured for the reason that the insured has not appeared either before the Tribunal or before this Court and has not produced the insurance policy viz. a viz. vehicle bearing No.HR-38D-7858. The insurance policy on record is relating to vehicle bearing No.HR-38C-7858.

8. Having said so, the appeal is allowed, the insurer is directed to satisfy the award, with right of recovery from the owner. It is informed that the amount deposited before the Tribunal by the insurer has already been disbursed to the claimants. It being so, the insurer is at liberty to file execution petition. The owner is at liberty to defend the execution proceedings by placing on record the insurance policy of the offending vehicle bearing No.HR-38D-77858, if any.

9. The impugned award is modified, as indicated above and the appeal is disposed of.

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

Oriental Insurance Company Ltd. .....Appellant
Versus
Sh. Anand Kumar & others ...Respondents

FAO No. 238 of 2011
Decided on : 23.09.2016.

Motor Vehicles Act, 1988- Section 149- It was for the insurer to plead and prove that driver did not possess any valid and effective driving licence at the time of accident or owner-insured has committed willful breach or the petition was bad for non-joinder of necessary parties- no evidence was led by the insurer- hence, insurer has failed to discharge the onus- Tribunal had rightly saddled the insurer with liability- appeal dismissed. (Para-10)

For the Appellant : Mr. Ashwani K. Sharma, Senior Advocate with Mr. Ishan Thakur, Advocate.
For the Respondents: Mr. R.L. Chaudhary, Advocate, for respondent No. 1.
Mr. G.R. Palsra, Advocate, for respondents no. 2 & 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Subject matter of this appeal is the award, dated 17th March, 2011, made by the Motor Accident Claims Tribunal-II, Mandi, District Mandi H.P. (for short "the Tribunal") in M.A.C. Petition No. 53 of 2003, titled as Shri Anand Kumar versus Sh. Santosh Kumar & others, whereby compensation to the tune of Rs.1,32,783/- with interest @ 6% per annum from the date of filing of the claim petition till its realization was awarded in favour of the claimant and the insurer was saddled with liability (for short "the impugned award").

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

3. The insurer has questioned the impugned award on the following grounds:

"(i) Whether the driver was not having a valid and effective driving licence at the time of accident;

(ii) Whether the owner-insured has committed willful breach.

4. The claimant had invoked the jurisdiction of the Tribunal for grant of compensation to the tune of Rs. 4,00,000/- as per the break-ups given in the claim petition.

5. The respondents resisted and contested the claim petition by filing replies.

6. Following issues came to be framed by the Tribunal:

"1. Whether the petitioner sustained injuries due to the rash and negligent driving of Bus No. HP-33-2107 on 18.03.2003 at place Pirdi, being driven by respondent No. 2? ....OPP

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

3. Whether respondent No. 2 was not having a valid and effective driving license at the time of accident? ...OPR-3

4. Whether the offending vehicle was being driven in contravention of the terms and conditions of the Insurance Police as well as provisions of Motor Vehicle Act, as alleged? ...OPR-3

5. Whether this petition is bad for non-joinder of necessary parties? ...OPR 1 & 2

6. Relief."

7. The parties led evidence. The Tribunal after scanning the evidence, oral as well as documentary, granted compensation to the tune of 1,32,783/- in favour of the claimant and saddled the insurer with liability.

Issue No. 1

8. There is no dispute qua findings recorded on issue No. 1. Accordingly, the findings returned by the Tribunal on Issue No. 1 are upheld.

9. Before dealing with issue No. 2, I deem it proper to deal with Issues No. 3 to 5.

Issues No. 3 to 5.

10. It was for the insurer to plead and prove that the driver was not having a valid and effective driving licence at the time of accident or the owner-insured has committed willful breach, or the petition was bad for non-joinder of necessary parties, has not led any evidence, has failed to discharge the onus. Thus, the Tribunal has rightly recorded findings in paras 30 to 32 of the impugned award.

11. Learned Counsel for the appellant-insurer has argued that he has moved CMP No. 461 of 2011, for leading additional evidence.

12. The aim and object of granting compensation in terms of the mandate of the Motor Vehicles Act, 1988, is to grant compensation to the claimants, as early as possible, in order to save them from social evils.

13. More than 13 years have elapsed from the date of accident till today and the claimant is waiting for the compensation. Only on this ground, the application merits to be dismissed, is accordingly dismissed.

14. Viewed thus, the Tribunal has rightly saddled the insurer with liability.

Issue No. 2.

15. I have gone through the entire record. The Tribunal has awarded just and appropriate compensation, is accordingly upheld.

16. Having glance of the above discussion, the impugned award is to be upheld and the appeal merits to be dismissed. Accordingly, the impugned award is upheld and the appeal is dismissed.

17. The Registry is directed to release the entire amount in favour of the claimant, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing it in his account.

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

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

Oriental Insurance Company Ltd. .....Appellant
Versus
Gurdeep Singh & another ...Respondents

FAO No. 239 of 2011
Decided on : 23.09.2016.

Motor Vehicles Act, 1988- Section 173- Insurance Company has filed an appeal challenging the quantum of compensation- held, that insurer has limited grounds available to it unless permission is obtained under Section 170 of the Act- Insurer had not obtained such permission, therefore, appeal challenging the award on quantum of compensation is not maintainable. (Para-4 to 11)

Cases referred:
United India Insurance co. Ltd. Versus Shila Datta & Ors., 2011 AIR SCW 6541
Josphine James versus United India Insurance Co. Ltd. & Anr., 2013 AIR SCW 6633

For the Appellant : Mr. Ajay Chandel, Advocate.
For the Respondents: Mr. Raman Sethi, Advocate, for respondent No. 1
Respondent No. 2 already ex-parte.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Subject matter of this appeal is the award dated 30th March, 2011, made by the Motor Accident Claims Tribunal-II, Solan, District Solan, H.P. (hereinafter referred to as 'the Tribunal') in M.A.C. Petition No. 10-NL/2 of 2008, titled as **Gurdeep Singh alias Bhag Singh** versus **M/s Shree Rama Steel Ltd.,** whereby compensation to the tune of Rs. 1,20,000/- with interest at the rate of 9% per annum from the date of filing of the claim petition, was granted in favour of the claimant and the insurer came to be saddled with liability (for short, "the impugned award").

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

3. The appellant-insurer has questioned the impugned award on the ground of adequacy of compensation.

4. The question is – whether the appeal is maintainable? The answer is in the negative for the following reasons:

5. In terms of the mandate of Sections 147 and 149 of the Motor Vehicles Act, 1988 (for short "MV Act") read with the terms and conditions contained in the insurance policy, the insurer has limited grounds available, but, it can contest the claim petition on other grounds provided permission in terms of Section 170 of the MV Act has been obtained.

6. This question arose before the Apex Court in the case titled as **United India Insurance co. Ltd. Versus Shila Datta & Ors.,** reported in **2011 AIR SCW 6541,** and the matter was referred to the larger Bench.

7. The question again arose before the Apex Court in the case titled as **Josphine James versus United India Insurance Co. Ltd. & Anr.,** reported in **2013 AIR SCW 6633.** It is apt to reproduce paras 8, 17 and 18 of the judgment herein:

"8. Aggrieved by the impugned judgment and award passed by the High Court in MAC Appeal no. 433/2005 and the review petition, the present appeal is filed by

the appellant urging certain grounds and assailing the impugned judgment in allowing the appeal of the Insurance Company without following the law laid down by this Court in Nicolletta Rohtagi's case and instead, placing reliance upon the Bhushan Sachdeva's case. Nicolletta Rohtagi's case was exhaustively discussed by a three judge bench in the case of United India Insurance Company Vs. Shila Datta, 2011 10 SCC 509. Though the Court has expressed its reservations against the correctness of the legal position in Nicolletta Rohtagi decision on various aspects, the same has been referred to higher bench and has not been overruled as yet. Hence, the ratio of Nicolletta Rohtagi's case will be still applicable in the present case. The appellant claimed that interference by the High Court with the quantum of compensation awarded by the Tribunal in favour of appellant and considerably reducing the same by modifying the judgment of the Tribunal is vitiated in law. Therefore, the impugned judgments and awards are liable to be set aside.

9. to 16. .....

17. The said order was reviewed by the High Court at the instance of the appellant in view of the aforesaid decision on the question of maintainability of the appeal of the Insurance Company. The High Court, in the review petition, has further reduced the compensation to Rs. 4,20,000/- from Rs. 6,75,000/- which was earlier awarded by it. This approach is contrary to the facts and law laid down by this Court. The High Court, in reducing the quantum of compensation under the heading of loss of dependency of the appellant, was required to follow the decision rendered by three judge Bench of this Court in Nicolletta Rohtagi case (2002) 7 SCC 456 : AIR 2002 SC 3350 : 2002 AIR SCW 3899, and earlier decisions wherein this Court after interpreting Section 170 (b) of the M. V. Act, has rightly held that in the absence of permission obtained by the Insurance Company from the Tribunal to avail the defence of the insured, it is not permitted to contest the case on merits. The aforesaid legal principle is applicable to the fact situation in view of the three judge bench decision referred to though the correctness of the aforesaid decision is referred to larger bench. This important aspect of the matter has been overlooked by the High Court while passing the impugned judgment and the said approach is contrary to law laid down by this Court.

18. In view of the aforesaid reasons, the Insurance Company is not entitled to file appeal questioning the quantum of compensation awarded in favour of the appellant for the reasons stated supra. In the absence of the same, the Insurance Company had only limited defence to contest in the proceedings as provided under Section 149 (2) of the M.V. Act. Therefore, the impugned judgment passed by the High Court on 13.1.2012 reducing the compensation to 4,20,000/- under the heading of loss of dependency by deducting 50% from the monthly income of the deceased of Rs. 5,000/- and applying 14 multiplier, is factually and legally incorrect. The High Court has erroneously arrived at this amount by applying the principle of law laid down in Sarla Verma v. Delhi Transport Corporation, 2009 6 SCC 121 instead of applying the principle laid down in Baby Radhika Gupta's case regarding the multiplier applied to the fact situation and also contrary to the law applicable regarding the maintainability of appeal of the Insurance Company on the question of quantum of compensation in the absence of permission to be obtained by it from the Tribunal under Section 170 (b) of the M.V. Act. In view of the aforesaid reason, the High Court should not have allowed the appeal of the Insurance Company as it has got limited defence as provided under section 149(2) of the M.V. Act. Therefore, the impugned judgment and award is vitiated in law and hence, is liable to be set aside by allowing the appeal of the appellant."

8. Thus, the insurer can question the adequacy of compensation only if it has sought permission under Section 170 of the MV Act.

9. In the present case, it has to be seen whether the insurer has sought any such permission?

10. I have gone through the record, which does disclose that neither any such application was filed by the insurer nor such permission was granted.

11. Having said so, the only ground of attack projected and urged is not available to the insurer. However, I have gone through the record. The claimant has become the victim of the motor vehicular accident, was admitted in the Civil Hospital, Nalagarh, was referred to PGI, Chandigarh and has placed on record OPD slips Ext. PW-3/B to PW-3/D. The amount of compensation appears to be too meager. But, unfortunately, the claimant has not questioned the same, is reluctantly upheld.

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

13. The Registry is directed to release the awarded amount in favour of the claimant-injured, strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in his bank account.

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

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

Oriental Insurance Company Ltd. .....Appellant

Versus

Sh. Ramesh Kumar @ Naresh Kumar & others .....Respondents

FAO No. 236 of 2011
Decided on : 23.09.2016.

Motor Vehicles Act, 1988- Section 149- Driver was driving a jeep unladen weight of which is 1720 kilograms -it falls within the definition of light motor vehicle- no PSV endorsement is required- Tribunal had rightly saddled the insurer with liability- appeal dismissed. (Para-5 to 11)

Cases referred:

Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors., 2013 AIR SCW 2791

National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors., 2008 AIR SCW 906

Kulwant Singh & Ors. versus Oriental Insurance Company Ltd., JT 2014 (12) SC 110

For the Appellant : Mr. Ashwani K. Sharma, Senior Advocate with Mr. Ishan Thakur, Advocate.

For the Respondents: Mr. L.S. Mehta, Advocate, for respondent No. 1.
Mr. Dinesh Thakur, Advocate, for respondents no. 2 & 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject matter of this appeal is the award, dated 4th April, 2011, made by the Motor Accident Claims Tribunal-II, Mandi, District Mandi H.P. (Camp at Karsog) (for short "the Tribunal") in M.A.C. Petition No. 27 of 2006, titled as Ramesh Kumar @ Naresh Kumar versus Smt. Kamla Devi & others, whereby compensation to the tune of Rs.1,10,576/- with interest @ 6% per annum from the date of filing of the claim petition till its realization was awarded in favour of the claimant and the insurer was saddled with liability (for short "the impugned award").

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

3. The insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. The only question to be determined in this appeal is-whether the driver was having a valid and effective driving licence.

5. Admittedly, the driver was driving jeep No. HP-01A-3635, the unladen weight of which is 1720 kilograms, as per the Registration Certificate Mark-A thus falls within the definition of 'light motor vehicle' in terms of Section 2(21) of the Motor Vehicles Act, 1988, for short 'the MV Act'.

6. A Division Bench of the High Court of Jammu and Kashmir at Srinagar, of which I (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **National Insurance Co. Ltd. versus Muhammad Sidiq Kuchey & ors.,** being **LPA No. 180 of 2002,** decided on **27th September, 2007,** has discussed this issue and held that a driver having licence to drive "LMV" requires no "PSV" endorsement. It is apt to reproduce the relevant portion of the judgment herein:

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

7. The mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as **Chairman, Rajasthan State Road Transport Corporation &**

ors. versus Smt. Santosh & Ors., reported in **2013 AIR SCW 2791,** and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:

> *"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi- trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.*
>
> *20. .....*
>
> *21. .....*
>
> *22. .....*
>
> *23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."*

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

> *"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.*
>
> *A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.*
>
> *Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].*
>
> *9. .....*
>
> *10. .....*
>
> *11. .....*

12. .....

13. .....

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

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

15. .....

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

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

9. The Apex Court in the latest judgment in the case titled as **Kulwant Singh & Ors. versus Oriental Insurance Company Ltd.,** reported in **JT 2014 (12) SC 110,** held that PSV endorsement is not required.

10. The same principle has been laid down by this Court in a series of cases.

11. Viewed thus, the Tribunal has rightly saddled the insurer with liability.

12. I have gone through the entire record. It appears that the compensation amount is meager. But, the claimant has not questioned the same. Accordingly, the same is reluctantly upheld.

13. Having glance of the above discussions, the impugned award is to be upheld and the appeal merits to be dismissed. Accordingly, the impugned award is upheld and the appeal is dismissed.

14. The Registry is directed to release the entire amount in favour of the claimant, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing it in his account.

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

****

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

Oriental Insurance Company Ltd. ...Appellant.

Versus

Smt. Suman Kumari and another ...Respondents.

FAO No. 287 of 2011
Decided on: 23.09.2016

Motor Vehicles Act, 1988- Section 173- Appeal is outcome of vehicular accident which had given birth to a number of claim petitions, which were subject matter of a batch of FAOs, **FAO No. 255 of 2011,** titled as **Oriental Insurance Company Ltd. versus Kushal Kumar and others,** decided on 28th November, 2014- insurer was saddled with liability in view of the judgment- appeal dismissed. (Para-2)

For the appellant: Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Ishan Thakur, Advocate.

For the respondents: Mr. Surinder Saklani, Advocate, for respondent No. 1.
Nemo for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Challenge in this appeal is to award, dated 18th June, 2011, made by the Motor Accident Claims Tribunal-II, Kangra at Dharamshala, (H.P.) (for short "the Tribunal") in M.A.C.P. No. 19-B/07/05, titled as Smt. Suman Kumari versus Indira Rana and another, whereby compensation to the tune of ₹ 27,700/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in favour of the claimant-injured and against the insurer (for short "the impugned award").

2. Learned counsel for the insurer stated at the Bar that the appeal in hand is outcome of the vehicular accident, which has given birth to a number of claim petitions, were subject matter of a batch of FAOs, **FAO No. 255 of 2011,** titled as **Oriental Insurance Company Ltd. versus Kushal Kumar and others,** being the lead case, decided on 28th November, 2014, whereby the insurer was saddled with liability. His statement is taken on record.

3. Keeping in view the findings returned in the judgment (supra), this appeal is not maintainable.

4. Having said so, the impugned award is upheld and the appeal is dismissed.

5. Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in her bank account.

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

****

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

Shri Pyar Chand ...Appellant.
Versus
Smt. Mangla Devi and others ...Respondents.

FAO No. 295 of 2011
Decided on: 23.09.2016

Motor Vehicles Act, 1988- Section 149- It was contended that deceased was negligent as he was not supposed to travel in the goods vehicles- held, that passenger cannot be said to be negligent until the act of the passenger had contributed towards the cause of the accident- owner had not pleaded in the reply that deceased was travelling with the goods- hence, he was a gratuitous passenger and the insurer was rightly absolved of the liability. (Para-15 to 17)

Motor Vehicles Act, 1988- Section 166- Income of the deceased was Rs. 4,200/- per month- claimants are four in numbers- 1/4th amount was to be deducted towards personal expenses- age of the deceased was 30 years at the time of accident- multiplier of 15 was rightly applied. (Para-20 and 21)

Case referred:
Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 SCC121

For the appellant: Mr. Devender Kumar, Advocate, vice Mr. C.N. Singh, Advocate.
For the respondents: Mr. B.N. Sharma, Advocate, for respondents No. 1 to 4.
Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

This appeal is directed against award, dated 25th March, 2011, made by the Motor Accident Claims Tribunal, Kinnaur Civil Division at Rampur Bushahr, H.P. (for short "the Tribunal") in MAC Petition No. 58 of 2007, titled as Smt Mangla Devi and others versus Sh. Pyar Chand and another, whereby compensation to the tune of ₹ 5,26,500/- with interest @ 7.5% per annum from the date of petition till its realization came to be awarded in favour of the claimants and owner-insured of the offending vehicle came to be saddled with liability (for short "the impugned award").

2. The claimants and the insurer of the offending vehicle have not questioned the impugned award, thus, has attained finality so far it relates to them.

3. The appellant-owner-insured has questioned the impugned award on the grounds taken in the memo of appeal.

4. In order to determine this appeal, it is necessary to give a brief resume of the case, the womb of which has given birth to the instant appeal:

5. The claimants had invoked the jurisdiction of the Tribunal in terms of the mandate of Section 166 of the Motor Vehicles Act, 1988 (for short "MV Act") for grant of compensation, as per the break-ups given in the claim petition, was resisted by the respondents in the claim petition on the grounds taken in the respective memo of objections.

6. Following issues came to be framed by the Tribunal on 22nd May, 2009:

"1. Whether on 16.5.2007 at 5.30 P.M. at Ganvi, the driver was driving Mahindra Pick up bearing No. HP-66-714 in rash and negligent manner and caused death of Balwant Singh? OPP

2. If issue No. 1 is proved, to what amount of compensation the petitioners are entitled to and from whom? OPP

3. Whether the driver of vehicle in question was not holding a valid and effective driving license at the time of the accident within the knowledge of insured, if so its effect? OPR

4. Whether the vehicle in question was being plied in violation of policy conditions i.e. without registration-cum-fitness certificate at the time of accident, if so its effect? OPR

5. Whether the deceased was travelling in the vehicle in question as gratuitous passenger at the time of accident? OPR

5A. Whether there was no privity of contract between respondents No. 1 and 2 insured and the insurer as alleged? OPR-2

6. Relief."

7. Parties have led the evidence.

8. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants have proved that the driver, namely Shri Jitender alias Pappu, had driven Mahindra Pick Up, bearing registration No. HP-66-0714, rashly and negligently, on 16th May, 2007, near place Ganvi, Police Station Jhakri and caused the accident in which deceased-Balwant Singh sustained injuries and succumbed to the injuries. The driver of the offending vehicle also died in the accident.

9. I have gone through the findings recorded and perused the record and am of the considered view that the Tribunal has rightly recorded the findings.

10. Learned proxy counsel appearing on behalf of the appellant-owner-insured argued that the deceased was also negligent as he was not supposed to travel in the goods vehicles. Further argued that the appellant-owner-insured had strictly instructed the driver of the offending vehicle not to allow any person to travel in the vehicle.

11. The argument is not tenable for the reason that a passenger cannot be said to be negligent until the act of the passenger has not contributed towards the cause of the accident. Moreover, if the said argument is taken into consideration, it is admission on the part of the appellant-owner-insured that the deceased was travelling in the offending vehicle as gratuitous passenger. Having said so, the findings returned by the Tribunal on issue No. 1 are upheld.

12. Before dealing with issue No. 2, I deem it proper to determine issues No. 3 to 5A.

Issue No. 3:

13. It was for the insurer to plead and prove that the driver of the offending vehicle was not having a valid and effective driving licence to drive the same and the said fact was within the knowledge of the owner-insured. There is no proof on the file except mere statement of RW-2, Shri Mohinder Sharma to this effect.

14. However, I have gone through the record. The driving licence of the driver of the offending vehicle is on the record as Ex. R3, the perusal of which does disclose that the driver was having a valid and effective driving licence to drive the offending vehicle. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

Issue No. 4:

15. It was for the insurer to plead and prove that the offending vehicle was being plied in violation of policy conditions without registration-cum-fitness certificate at the time of the accident, has not led any evidence to this effect, thus, has failed to discharge the onus. Even otherwise, the relevant documents are on the record, which are valid and effective. Accordingly, the findings returned by the Tribunal on issue No. 4 are upheld.

Issue No. 5:

16. The claimants have specifically pleaded in para 10 of the claim petition that the deceased was traveling in the ill fated vehicle and was going from Ganvi to Rampur. The appellant-owner-insured, in his reply, has specifically replied to para 10 of the claim petition as under:

> *"Para 10 of the petition is denied for want of knowledge. It is further submitted that the replying respondent has specifically instructed his driver not to allow any person to travel in the vehicle of the respondent."*

17. I have gone through the discussion made by the Tribunal in paras 9 to 13 of the impugned award and am of the considered view that the Tribunal has rightly recorded the findings and held that the deceased was travelling as a gratuitous passenger in the offending vehicle. Having said so, the findings returned by the Tribunal on issue No. 5 are upheld.

Issue No. 5A:

18. It was for the insurer to prove that there was no privity of contract between the insurer and the appellant-owner-insured, has failed to do so. Even otherwise, the findings recorded by the Tribunal on this issue are not in dispute. Accordingly, the findings returned by the Tribunal on issues No. 5A are upheld.

Issue No. 2:

19. Learned proxy counsel appearing on behalf of the appellant-owner-insured argued that the amount awarded is excessive.

20. The claimants have specifically averred in the claim petition that the deceased was a contractor and horticulturist by profession and his monthly income was ₹ 10,000/- per month at the time of the accident. The Tribunal, after scanning the evidence, and exercising guess work, held that the income of the deceased was 4,200/- per month. While deducting one

third towards his personal expenses, the Tribunal has held that the claimants have suffered loss of dependency to the tune of ₹ 2,800/- per month, which is not legally correct for the reason that the claimants were four in number and one fourth was to be deducted in view of the ratio laid down by the Apex Court in para 30 of the judgment rendered in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121.** But, unfortunately, the claimants have not questioned the same, is reluctantly upheld.

21. The age of the deceased was 30 years at the time of the accident. The Tribunal has rightly applied the multiplier of '15' and has awarded compensation to the tune of ₹ 5,04,000/- under the head 'loss of dependency'. The Tribunal has also awarded ₹ 2500/- under the head 'funeral expenses', ₹ 10,000/- under the head 'conventional amount' and ₹ 10,000/- under the head 'loss of consortium', which is also maintained.

22. Having said so, the impugned award needs no interference.

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

24. The appellant-owner-insured is directed to deposit the awarded amount before the Tribunal within eight weeks. On deposition, the same be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank accounts.

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

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

Rajiv Kumar @ Raju .....Appellant.

Versus

Smt. Raksha Devi and others .....Respondents

FAO (MVA) No. 396 of 2010.
Date of decision: 23rd September, 2016.

Motor Vehicles Act, 1988- Section 149- driver was driving a tractor-trolley – he had a licence to drive Light Motor Vehicle- Tribunal held that driver did not have valid driving licence at the time of accident- held, that tractor falls within the definition of light motor vehicle- a person holding a licence to drive car, jeep and motor cycle only, is also competent to drive tractor and the insurance company is liable to pay the compensation- insured and the insurer had not examined any witness to prove their version - insurer had failed to prove the willful breach of the terms and conditions of the policy- award set aside and the insurer saddled with liability- MACT has awarded interest @ 9% per annum, which is excessive and is reduced to 7.5% per annum.

(Para-4 to 15)

Cases referred:

Baldev Singh versus Jagdish Chand & another, I L R 2016 (II) HP 977

Oriental Insurance Company versus Gulam Mohammad (since deceased) & others, Latest HLJ 2014 (HP) 244

Joginder Singh @ Pamma versus Vikram @ Vickey and others, Latest HLJ 2014 (HP) Suppl. 292

Oriental Insurance Company versus Sudesh Kumari and others, 2014 (2) Shim. LC 918

For the appellant: Mr. Sunny Modgil, Advocate.

For the respondents: Mr.Divya Raj Singh, proxy counsel for respondents No. 1 to 7.
Mr. J.S. Bagga, Advocate, for respondent No.9.
Nemo for respondent No.8.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral)*

This appeal is directed against the judgment and award dated 30.7.2010, made by the Motor Accident Claims Tribunal-II Una, H.P., in MACP No.09/2008, titled *Smt. Raksha Devi and others versus Sh. Rakesh Kumar and others*, for short "the Tribunal", whereby compensation to the tune of Rs.3,43,500/- alongwith interest @ 9% with fee of learned counsel to the tune of Rs.1,000/- came to be awarded in favour of the claimants and insurer was saddled with the liability with right of recovery from the owner/insured, hereinafter referred to as "the impugned award", for short.

2. The only question to be determined in this appeal is-whether the Tribunal has rightly granted the right of recovery to the insurer. The answer is in negative for the following reasons.

3. Following issues were framed by the Tribunal.

"(i) Whether deceased Kashmir Singh had died on 3.1.08 at about 6.35 P.M. Near Amb-Una main road in between village Bhera and Dussara because of the rash and negligent driving of respondent No.2 ?OPP

(ii) If issue No. 1 is proved in affirmative as to what amount of compensation the petitioners are entitled to and from whom? OPP.

(iii) Whether the respondent No. 2 was not holding a valid and an effective driving licence as alleged. If so, its effect thereto? OPR.

(iv) Whether the vehicle in question was being used in violation of the expressed terms and conditions of the insurance policy as alleged. If so, its effect thereto? OPR.

(v) Relief."

4. The offending vehicle was a tractor-trolley and the driver was having licence to drive Light Motor Vehicle. The Tribunal has held that the driver was not having a valid driving licence. It is apt to reproduce para 25 of the impugned award herein.

> *"25.Section 2 (26) of the Act defines the word 'motor car'. The tractor does not fall within the definition of a 'motor car'. This clearly indicates that the respondent No. 2 was not having a valid driving licence to drive the tractor trolley. Otherwise too, the same was not being used for agricultural purposes or any purpose subservient to agriculture at the material time. Therefore, it can be safely said that neither the respondent No. 2 was holding a valid and effective licence to drive the tractor trolley nor the same was being used in consonance with the terms and conditions of the insurance policy. In view of these reasons, the insurance company (respondent No.3) is not liable to indemnify the owner/insured(respondent No.1) (The Oriental Insurance Company Limited-Appellant versus Vidya Devi and others-Respondents, 2009 (1) Shim.LC 99. relied upon)."*

5. The learned Tribunal has lost sight of Section 2 (21) of the Motor Vehicles Act, for short "the Act", which reads as under:

> *"2 (21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 2 [7500] kilograms;"*

6. Thus, it does include tractor.

7. This Court in **FAO No. 187 of 2010,** titled as **Baldev Singh versus Jagdish Chand & another,** decided on 8th April, 2016, has held that tractor falls within the definition of 'light motor vehicle'.

8. The same principle has been laid down by this Court in the cases titled as **Oriental Insurance Company versus Gulam Mohammad (since deceased) & others,** reported in **Latest HLJ 2014 (HP) 244; Joginder Singh @ Pamma versus Vikram @ Vickey and others,** reported in **Latest HLJ 2014 (HP) Suppl. 292;** and **Oriental Insurance Company versus Sudesh Kumari and others,** reported in **2014 (2) Shim. LC 918.**

9. The Punjab and Haryana High Court in ***FAO No. 5114 of 2009*** titled, ***The New India Assurance Company Limited vs. Mahender Singh*** decided 26.10.2009 held that the driver, who was driving a tractor, was holding a licence to drive car, jeep and motor cycle only, is also competent to drive tractor and the Insurance company was held liable to pay the compensation.

10. The claimants examined three witnesses, including claimant No. 1. The insured and the insurer have not examined any witness. Only driver has stepped into the witness-box as RW-1. Thus, the insurer has failed to discharge the onus viz-a-viz issues No. 3 and 5. Having said so, the insurer has failed to prove that the owner has committed willful breach and is entitled to seek exoneration. Even otherwise, as held hereinabove, the driver was having a valid and effective driving licence to drive the offending vehicle. Accordingly, the findings returned by the Tribunal, in para 25 of the impugned award are set aside and the insurer is saddled with the liability.

11. The Tribunal has awarded interest @9% per annum. However, interest was to be awarded at rate of 7.5% per annum, for the following reasons.

12. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as *United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, reported in (2002) 6 SCC 281; Satosh Devi versus National Insurance Company Ltd. and others, reported in 2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others reported in (2012) 11 SCC 738; Smt. Savita versus Binder Singh & others, reported in 2014, AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn., reported in 2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, reported in (2015) 4 SCC 433, and Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, reported in (2015) 4 SCC 434,* and discussed by this Court in a batch of *FAOs, FAO No. 256 of 2010*, titled as *Oriental Insurance Company versus Smt. Indiro and others*, being the lead case, decided on 19.06.2015.

13. Accordingly, interest @7.5% per annum is awarded from the date of claim petition till realization of the amount.

14. Viewed thus, the appeal is allowed and impugned award is modified, as indicated hereinabove.

15. The insurer is directed to deposit the amount, within six weeks from today before this Registry. On deposit, the entire amount be released to the claimants, strictly, in terms of the conditions contained in the impugned award, through payees' cheque account or by depositing the same in their bank accounts. The statutory amount deposited by the appellant be released in favour of the claimants as costs of this appeal.

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

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

Sadhu Singh .....Appellant

Versus

Sh. Chander Dev & others .....Respondents

FAO No. 247 of 2011
Decided on : 23.09.2016.

Motor Vehicles Act, 1988- Section 149- Tribunal held that owners had not obtained fitness certificate at the time of accident- photostat copies of registration certificate and fitness certificate filed which shows that owner had all the documents- insurer was rightly held liable to pay the compensation. (Para-12)

For the Appellant : Ms. Archana Dutt, Advocate.
For the Respondents: Mr. Anuj Nag, Advocate, for respondent No. 1.
Nemo for respondent No. 2.
Mr. Ashwani Sharma, Senior Advocate with Mr. Ishan Thakur, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

The appellant-owner-insured has questioned the award, dated 31.03.2011, made by the Motor Accident Claims Tribunal (I) Kangra at Dharamshala (for short "the Tribunal") in M.A.C.T.R.B.T. No. 90-I/II-2010/2007, titled as Chander Dev versus Sh. Sadhu Singh & others, whereby compensation to the tune of Rs.4,09,400/- with interest @ 9% per annum from the date of filing of the claim petition till its realization and costs to the tune of Rs. 2,000/- was awarded in favour of the claimant and the insurer was directed to satisfy the award at the first instance with right of recovery (for short "the impugned award").

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

3. The owner-insured has questioned the impugned award on the ground that the Tribunal has fallen in an error in granting right of recovery to the insurer.

4. The ground is tenable for the following reasons.

6. The claimant had invoked the jurisdiction of the Tribunal for grant of compensation to the tune of Rs. 10,00,000/- as per the break-ups given in the claim petition.

7. The claim petition was resisted by the respondents on the grounds taken in their memo of replies.

8. Following issues came to be framed by the Tribunal:

"1. Whether Chander Dev suffered injuries on his person as a result of rash and negligent driving of respondent No. 2, on 10.12.2006?...OPP

2. If issue No. 1 is proved to what compensation the petitioner is entitled and from whom? ...OPP

3. Whether the petition is bad for non-joinder of owner, driver and insurer of car No. PB-08AB-7260 and motor cycle No. HP-38A-7458? ...OPR

4. Whether the respondent No. 2 was not having valid and effective driving licence at the time of accident? ...OPR-3

5. Whether accident is result of rash and negligent driving of car No. PB-08AB-7260 and driving of motor cycle No. HP-38A-7458? ...OPR

6. *Relief."*

9. The claimants examined Head Constable, Sushil Kumar (PW-1), Sh. Surinder Singh (PW-2) and Dr. G.D. Gupta (PW-3). Claimant also appeared himself in the witness box as PW-4. On the other hand, insurer has examined Sukhwinder Paul Singh as RW-1 and driver appeared in the witness box as RW-2.

Issue No. 1.

10. While going through the statement of PW-1, Head Constable Sushil Kumar, one comes to an inescapable conclusion that the accident was the outcome of the rash and negligent driving of driver, namely, Charanjeet Singh, in which the claimant sustained injuries. The Tribunal has decided this issue in favour of the claimant. The findings returned by the Tribunal on Issue No. 1 have attained finality, thus the same are upheld.

11. Before dealing with issue No. 2, I deem it proper to deal with issues No. 3 to 5.

Issues No. 3 to 5.

12. It was also for the insurer to plead and prove that the insured-owner has committed willful breach. The Tribunal in para-17 of the impugned award has discussed that the owner had not obtained Fitness Certificate at the time of accident. The appellant has filed CMP No. 479 of 2011, for taking on record the photostat copies of the Registration Certificate and Fitness Certificate which do disclose that the owner-insured was having all the documents.

13. The insurer has not led any evidence, thus has failed to discharge the onus.

14. Viewed thus, it is held that the insurer has to satisfy the liability.

Issue No. 2.

15. I have gone through the entire record. The Tribunal has awarded the just and appropriate compensation, is accordingly upheld.

16. The statutory amount of Rs. 25,000/- deposited by the insured-owner, is awarded as costs in favour of the claimant.

17. The insurer is directed to deposit the award amount alongwith interest, if not already deposited, within a period of eight weeks from today before the Registry.

18. If the insurer-appellant has deposited the award amount before the Tribunal or the Registry, the same be released in favour of the claimant, strictly in terms of conditions contained in the impugned award, through payees' account cheque or by depositing the same in his account.

19. Accordingly, the impugned award is modified and the appeal is allowed, as indicated above. Pending application stands disposed of.

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

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE TARLOK SINGH CHAUHAN, J.

LPA No.260 of 2011 & CWP No.379 of 2012
Decided on: September 26, 2016.

LPA No.260 of 2011
Inder Singh Rahal .....Appellant.
Versus
State of Himachal Pradesh and others .....Respondents.
CWP No.379 of 2012
Om Prakash and another .....Petitioners.
Versus
State of Himachal Pradesh and others .....Respondents.

Constitution of India, 1950- Article 226- Petitioner claimed that he was entitled to promotion prior to the promotion of R and M- however, his case was not considered- the writ Court rejected

the claim of the petitioner on the ground that he had not sought the quashing of the order promoting R and M- held, that it was for the petitioner to plead and prove that he was entitled for promotion before R and M in which he had failed- had he been able to make out the case for his promotion, he would have been entitled for promotion and quashing the order of the promotion- petition dismissed. (Para-2 and 3)

Cases referred:

R & M Trust versus Koramangala Residents Vigilance Group and others, (2005) 3 SCC 91
S.D.O. Grid Corporation of Orissa Ltd. and ors. versus Timudu Oram, 2005 AIR(SCW) 3715
Srinivasa Bhat (Dead) by L.Rs. & Ors. versus A. Sarvothama Kini (Dead) by L.Rs. & Ors., 2010 AIR(SC) 2106
Bhakra Beas Management Board versus Kirshan Kumar Vij & Anr., 2010 AIR(SC) 3342
State of Jammu & Kashmir versus R.K. Zalpuri and others, 2015 9 JT 214

For the Appellant & Petitioner: Mr.Surender Verma, Advocate.
For the Respondents: Mr.Romesh Verma and Mr.Varun Chandel, Addl.A.Gs., Mr.J.K. Verma & Mr.Kush Sharma, Dy.A.Gs., for respondents/State.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

LPA No.260 of 2011

This appeal is directed against the judgment, dated 21st February, 2011, passed by a learned Single Judge of this Court in CWP(T) No.7877 of 2008, titled Inder Singh Rahal vs. State of H.P. and others, whereby the writ petition came to be dismissed, (for short, the impugned judgment).

2. The precise case of the writ petitioner/appellant herein was that he was entitled to promotion prior to the promotion of Ram Dass and Mohinder Kumar, but the respondents-State had not considered the case of the writ petitioner/appellant and granted him promotion. The writ Court, in terms of paragraph 11 of the impugned judgment, examined the case of the writ petitioner and rejected his claim in paragraph 14 of the impugned judgment. The foundation of the impugned judgment was made on the ground that the writ petitioner had not sought quashment of orders whereby Ram Dass and Mohinder Kumar were promoted.

3. It was for the writ petitioner to plead and show that he was entitled for promotion before Ram Dass and Mohinder Kumar, in which he has failed. Had he been able to make out a case for his promotion prior to Ram Dass and Mohinder Kumar, in that eventuality he was to seek quashment of the orders whereby these two persons stood promoted prior to the writ petitioner, which the writ petitioner has not done.

4. Having said so, there is no merit in the instant appeal and the same is dismissed. Consequently, the impugned judgment is upheld.

CWP No.379 of 2012

5. By the medium of instant petition, the petitioner has sought for the following main relief:

> *"(i) That the impugned orders dated 26.6.1998 contained in Annexure P-4 is illegal, arbitrary and unconstitutional and may kindly be quashed and set aside. The petitioners may be held entitled to notional promotion or proforma promotion from that date when Respondent No.5 was promoted."*

6. From the perusal of Annexure P-4, it transpires that the said order was made by the respondents-State on 26th September, 1998. The petitioner did not challenge the said order Annexure P-4 right from 1998 till 29th November, 2011 when the instant writ petition was filed.

7. It is beaten law of land that delay takes away the settings of law. A person who does not seek relief within the time frame, his petition has to be dismissed only on the grounds of delay and laches, waiver and acquiescence, otherwise, it would amount to gross misuse of jurisdiction.

8. The Apex Court in a case titled as **R & M Trust versus Koramangala Residents Vigilance Group and others, (2005) 3 SCC 91**, held that delay is a very important factor while exercising extraordinary jurisdiction under Article 226 of the Constitution; delay defeats equity and it cannot be brushed aside without any plausible explanation.

9. The same principle has been laid down by the Apex Court in cases titled as **S.D.O. Grid Corporation of Orissa Ltd. and others versus Timudu Oram, 2005 AIR(SCW) 3715; Srinivasa Bhat (Dead) by L.Rs. & Ors. versus A. Sarvothama Kini (Dead) by L.Rs. & Ors., 2010 AIR(SC) 2106; and Bhakra Beas Management Board versus Kirshan Kumar Vij & Anr., 2010 AIR(SC) 3342**.

10. In another case titled as **State of Jammu & Kashmir versus R.K. Zalpuri and others, 2015 9 JT 214**, the Apex Court held that a Writ Court while deciding a writ petition, is required to remain alive to the nature of the claim and the unexplained delay on the part of the writ petitioner. It is apt to reproduce paras 26 to 28 of the judgment herein:

> *"26. In the case at hand, the employee was dismissed from service in the year 1999, but he chose not to avail any departmental remedy. He woke up from his slumber to knock at the doors of the High Court after a lapse of five years. The staleness of the claim remained stale and it could not have been allowed to rise like a phoenix by the writ court.*
>
> *27. The grievance agitated by the respondent did not deserve to be addressed on merits, for doctrine of delay and laches had already visited his claim like the chill of death which does not spare anyone even the one who fosters the idea and nurtures the attitude that he can sleep to avoid death and eventually proclaim "Deo gratias" 'thanks to God'.*
>
> *28.Another aspect needs to be stated. A writ court while deciding a writ petition is required to remain alive to the nature of the claim and the unexplained delay on the part of the writ petitioner. Stale claims are not to be adjudicated unless noninterference would cause grave injustice. The present case, need less to emphasise, did not justify adjudication. It deserved to be thrown overboard at the very threshold, for the writ petitioner had accepted the order of dismissal for half a decade and cultivated the feeling that he could freeze time and forever remain in the realm of constant present."*

11. Following the law pronounced by the Apex Court, this Court has also laid down similar principles in **LPA No.317 of 2010, titled Sanatan Dharam Adarsh Sanskrit College and Others Vs. Ramesh Chander Ladohia and Others, decided on 25th May, 2016**.

12. Applying the test to the instant case, the petitioner is also caught by delay, laches, waiver and acquiescence.

13. Having said so, the writ petition deserves to be dismissed and the same is dismissed accordingly, alongwith pending CMPs, if any.

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

Abhay Walia. ....Petitioner

Versus

State of Himachal Pradesh. ...Respondent

Cr. MP (M) No.1120 of 2016
Decided on: 27th September, 2016

Code of Criminal Procedure, 1973- Section 439- An FIR has been registered against the petitioner for carrying 104 grams charas- he applied for bail- held, that petitioner is a permanent resident of District Mandi- there are no chances of tempering with the prosecution evidence and to flee from justice- application allowed- petitioner ordered to be released on bail of Rs. 50,000/- with one surety to the like amount. (Para-6)

For the petitioner: Mr. Prashant Chaudhary, Advocate.
For the respondent: Mr. Virender Kumar Verma, Addl. Advocate General with Mr. Pushpinder Singh Jaswal, Dy. Advocate General.
SI Nand Lal, I.O. P.S. Sundernagar, District Mandi, H.P.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. *(oral).*

The present bail application is maintained by the petitioner under Section 439 of the Code of Criminal Procedure for releasing him on bail in case FIR No. 234 of 2016, dated 13.9.2016, under Section 20 of Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act'), registered at Police Station, Sundernagar, District Mandi, H.P. In this case, the police report stands file.

2. As per the prosecution story, bus of Himachal Pradesh Road Transport Corporation, bearing registration No. HP 28A-1412, was on its way from Manali to Chandigarh was stopped by the Police near Rest House Chowk and on checking the petitioner was found carrying 104 grams of charas. Accordingly, he was apprehended after following the procedure.

3. Learned Counsel appearing on behalf of the petitioner has argued that the petitioner is innocent and is falsely implicated in this case and he may be released on bail. He has further argued that even the quantity of 104 grams shows that it was little more than 100 grams. The petitioner is a student and he may be released on bail under the above mentioned circumstances.

4. Learned Additional Advocate General has argued that the petitioner has committed serious crime and, in fact, he is spoiling his as well as the lives of other students and the manner in which the crime has been committed makes it a fit case where the judicial discretion is not required to be exercised in favour of the petitioner.

5. To appreciate the arguments of the learned counsel for the parties, I have gone through the police file and relevant record carefully.

6. Taking into consideration the over all aspects of the case and without discussing them at this stage, this Court finds that the petitioner is permanent resident of District Mandi, Himachal Pradesh and there are no chances of the petitioner to tamper with the prosecution evidence and flee from justice. The interest of justice demands that judicial discretion to admit the petitioner on bail is required to be exercised in favour of the petitioner. So, it is ordered that the petitioner be released on bail, on furnishing personal bond to the sum of `50,000/- (rupees fifty thousand only) with one surety in the like amount to the satisfaction of learned Chief Judicial Magistrate, Mandi. The bail is granted subject to the following conditions:

i. *That the petitioner will join investigation of the case as and appear when called for by the Investigating Officer in accordance with law.*

ii. *That the petitioner will not leave India without prior permission of the Court.*

iii. *That the petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Investigating Officer or Court.*

7. Accordingly, the petition is disposed of.

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

Abhinay Rana. ...Petitioner

Versus

State of Himachal Pradesh. ...Respondent

Cr. MP (M) No.1121 of 2016
Decided on: 27th September, 2016

Code of Criminal Procedure, 1973- Section 439- An FIR has been registered against the petitioner for carrying 104 grams charas- he applied for bail- held, that petitioner is a permanent resident of District Kangra- there are no chances of tempering with the prosecution evidence and to flee from justice- application allowed- petitioner ordered to be released on bail of Rs. 50,000/- with one surety to the like amount. (Para-6)

For the petitioner: Mr. Prashant Chaudhary, Advocate.

For the respondent: Mr. Virender Kumar Verma, Addl. Advocate General with Mr. Pushpinder Singh Jaswal, Dy. Advocate General.
SI Nand Lal, I.O. P.S. Sundernagar, District Mandi, H.P.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. *(oral).*

The present bail application is maintained by the petitioner under Section 439 of the Code of Criminal Procedure for releasing him on bail in case FIR No. 234 of 2016, dated 13.9.2016, under Sections 20 & 29 of Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act'), registered at Police Station, Sundernagar, District Mandi, H.P. In this case, the police report stands file.

2. As per the prosecution story, bus of Himachal Pradesh Road Transport Corporation, bearing registration No. HP 28A-1412, was on its way from Manali to Chandigarh was stopped by the Police near Rest House Chowk and on checking one Abhay Walia was found carrying 104 grams of charas. The petitioner alongwith Abhay Walia and Abhishek Rathour was traveling together and they had taken three tickets together. The petitioner is also involved under Section 29 of the Act. Accordingly, the petitioner was apprehended after following the procedure.

3. Learned Counsel appearing on behalf of the petitioner has argued that the petitioner is innocent and is falsely implicated in this case and he may be released on bail. He has further argued that even the quantity of 104 grams shows that it was little more than 100 grams. The petitioner is a student and he may be released on bail under the above mentioned circumstances.

4. Learned Additional Advocate General has argued that the petitioner has committed serious crime and, in fact, he is spoiling his as well as the lives of other students and the manner in which the crime has been committed makes it a fit case where the judicial discretion is not required to be exercised in favour of the petitioner.

5. To appreciate the arguments of the learned counsel for the parties, I have gone through the police file and relevant record carefully.

6. Taking into consideration the over all aspects of the case and without discussing them at this stage, this Court finds that the petitioner is permanent resident of District Kangra, Himachal Pradesh and there are no chances of the petitioner to tamper with the prosecution evidence and flee from justice. The interest of justice demands that judicial discretion to admit the petitioner on bail is required to be exercised in favour of the petitioner. So, it is ordered that the petitioner be released on bail, on furnishing personal bond to the sum of Rs.50,000/- (rupees fifty thousand only) with one surety in the like amount to the satisfaction of learned Chief Judicial Magistrate, Mandi. The bail is granted subject to the following conditions:

i. That the petitioner will join investigation of the case as and appear when called for by the Investigating Officer in accordance with law.

ii. That the petitioner will not leave India without prior permission of the Court.

iii. That the petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Investigating Officer or Court.

7. Accordingly, the petition is disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Smt. Bhadra Sheela .....Petitioner.

Versus

Sh. A.N.Rai and others .....Respondents.

COPC No. 30 of 2016
Reserved on: 19.9.2016
Date of decision: September 27, 2016.

Contempt of Courts Act, 1971- Section 12- Petitioner was working as senior telecom Officer Assistant and was wrongly denied promotion to the post of junior telecom officer- she filed a writ petition, which was allowed – a special leave petition was filed, which was dismissed- the grievance of the petitioner is that respondents are not implementing the judgment of the Court- held, that the case of the petitioner was required to be considered against 15% quota but was wrongly considered against 35% quota – she was wrongly promoted from an earlier date and excess payment was made to her – the act of the respondents should be contumacious in order to constitute contempt - the mistake was committed by the respondents while implementing the judgment which can always be corrected- the petitioner has failed to prove that respondents had violated the judgment of the Court willfully – petition dismissed. (Para-5 to 14)

Cases referred:

Ram Kishan Vs. Tarun Bajaj and others 2014 AIR SCW 1218
Union of India and another vs. Narendra Singh, (2008) 2, SCC 750

For the Petitioner : Ms. Archana Dutt, Advocate.
For the Respondents : Mr. Ashok Sharma, Assistant Solicitor General of India, with Mr. Adarsh Sharma, Advocate,

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The petitioner has filed this Contempt Petition under Section12 of the Contempt of Courts Act (for short 'Act') alleging therein that the respondents have deliberately and intentionally disobeyed the judgment passed by this Court on 27.3.2008 in CWP No. 780 of 2004 and thereby made themselves liable for being punished and prosecuted under the Act.

2. It is averred that the petitioner while working as a Senior Telecom Officer Assistant (General) was wrongly denied her promotion to the post of Junior Telecom Officer (for short 'JTO') against the 15% quota provided for the departmental candidates through a competitive examination. The petitioner filed CWP No. 780 of 2004, which was allowed by this Court vide judgment dated 27.3.2008 and the respondents were directed to consider her case for promotion to the aforesaid post from the due date against 19 available vacancies till the year 1999 within a period of six weeks.

3. It is not in dispute that not only the review, but the LPA No. 65 of 2008 and SLP (C) No.15390 of 2015 assailing the aforesaid order have all been dismissed, meaning thereby that the judgment rendered by this Court in CWP No. 780 of 2004 has attained finality. The grievance of the petitioner is that despite the judgment having been attained finality, the respondents have failed to implement the same, thereby making themselves liable for being dealt with under the Act.

4. The respondents have filed their reply wherein at the outset they have tendered unconditional apology. However, on merits, it has been averred that not only the judgment passed by this Court has been implemented in its letter and spirit, rather the petitioner has wrongly been promoted from anterior date and that apart, due to inadvertence on the part of the department has also been paid the excess amount of Rs.2,26,856/-. This position is contested by the petitioner by filing rejoinder wherein it is alleged that the A.G.M.(Admn.) of the department had ordered the grant of all benefits to the petitioner w.e.f. 2.9.2002 and the same being a conscious decision, therefore, the respondents at this stage cannot take u-turn and deny the benefits or else that would aggravate the contempt already committed.

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

5. It is not in dispute that the Senior Telecom Officer Assistant (General) is the feeder category for promotion to the post of JTO and the services are regulated by the Rules called "The Junior Telecom Officers Recruitment Rules, 1956". In terms thereof, 50% vacancies of the posts of Junior Telecom Officers are required to be filled up by way of direct recruitment, whereas the remaining 50% by way of departmental promotion/transfer of vacancies. As regards, the bifurcation of 50% quota for the departmental promotion, 15% posts of these are to be filled up by promotion of departmental candidates, through a competitive examination.

6. It is further not in dispute that even as per the judgment rendered by this Court, the case of the petitioner was required to be considered against 15% quota against 19 available vacancies till the year 1999. However, it is the specific case of the respondents that instead of considering the case of the petitioner under 15% quota, they erroneously considered her case under 35% quota and thereby the petitioner has not only been promoted from anterior date, but has also erroneously been paid an excess amount of Rs.2,26,856/- as would be evident from para-2 of the reply, which reads thus:

> *"2. That it is humbly submitted that the judgment passed by this Hon'ble Court has been implemented in letter and spirit. However, due to inadvertence, the petitioner was granted the consequential benefits w.e.f. 22.9.2002 by taking Shri Inder Singh Bhandari as the last person promoted under 15% quota whereas the said Sh. Inder Singh Bhandari was from 35% quota. When the mistake came to the notice of the*

department that the case of the petitioner was required to be considered under 15% quota as per the judgment dated 27.3.2008 and the claim of the petitioner was against 15% quota, under that quota Shri Kuldeep Singh (Benchmark) was promoted as JTO on 27.11.2003 as the last candidate against 15% quota against the vacancies upto 1999 on merits, as such, the case of the petitioner was required to be considered from the said date. Not only this, the petitioner due to the wrong date of promotion was granted the benefit of E-2 (SDE) Sub Divisional Engineer under EPP (Executive Promotion Policy) which has been granted to her w.e.f. 1.1.2007 wrongly vide letter dated 3.3.2015 and subsequently, on the basis of mistake the petitioner was entitled to E-3 i.e. Sr. SDE Grade but the same is pending due to the fact that the date of the promotion of the petitioner is required to be changed from 2.9.2002 to 27.11.2003. As such, the other benefits can be allowed only after necessary correction in view of the proposed changed date of promotion i.e. 27.11.2003. It is further submitted that the department was contesting the matter before this Hon'ble court and after the disposal of the matter the judgment rendered by the Hon'ble Single Judge has been implemented in letter and spirit. The petitioner was granted the arrears amounting to Rs.9,96,342/- however, due to inadvertence referred earlier an amount of Rs.2,26,856/- (calculated from 2.9.2002 to March 2016) in excess was paid to the petitioner which is liable to be recovered from the petitioner.

7. It would be observed that there is virtually no denial or rebuttal to the contention raised by the respondents. The petitioner did not dispute that Inder Singh Bhandari in fact belong to 35% quota and only claimed that he was junior to the petitioner. That apart, the petitioner further did not dispute that she had erroneously been promoted from anterior date and would only rely upon and harp around the decision taken by the A.G.M.(Admn.) and claimed that the respondents are now trying to sit over the judgment passed by this Court and affirmed by the Hon'ble Supreme Court. It is apt to reproduce para-2 of the rejoinder, which reads thus:

"2. That the contents of this para is denied. It is humbly submitted that while passing the judgment, the Hon'ble Court was pleased to grant promotion to the petitioner to the post of Junior Telecom Officer (JTO) from the due date against 19 vacancies available till the year 1999 within a period of six weeks alongwith all consequential benefits. It is humbly submitted that despite the fact that the benefit was to be granted w.e.f. 1999, but the respondents calculated the benefit to the petitioners w.e.f. 2.9.2002 as has been granted to Sh. Inder Singh Bhandari who was junior to the petitioner and all the arrears and further benefits was also granted to the petitioner and this fixation and promotion w.e.f. 2.9.2002 was also accepted by the petitioner.

That vide order dated 01.08.2014, the A.G.M. (Admn.) has issued a letter and in which it has been mentioned that all the benefits to the petitioner may be granted w.e.f. 2.9.2002 and even benefit of promotion and seniority to 6 non-petitioner was also fixed. Copy of order dated 01.08.2014 is placed on record as Annexure C-8 for the kind perusal of this Hon'ble Court. Now, the respondents of their own has sit over the judgment of this Hon'ble Court which was affirmed by the Hon'ble Apex Court and has taken a decision to grant the benefit to the petitioner w.e.f. 27.11.2003 as the last candidate against 15% quota was granted, this action of the respondent is highly contemptuous and required to be dealt under the Contempt of Courts Act. It is submitted that a conscious was taken by the Corporation Office (Personnel)II) Section, New Delhi, whereby they have taken a decision to include the name of the petitioner Smt. Bhadra Sheela (JTO) in the All India Eligibility List alongwith 1999 recruitees in compliance of the judgment of this Hon'ble Court. Copy of the decision taken by the Corporate Office dated 12.06.2015 is annexed herewith as Annexure C-9. Thereafter in pursuance to the decision, the name of the petitioner was included in the All India Eligibility List

which HR No. 199002179. Copy of letter dated 16.06.2015 is annexed as Annexure C-10.

That even the department has taken a decision to grant E-1,E-2 and E-3 promotion to the petitioner as per the judgment of the Hon'ble High Court. It is further submitted that in the earlier contempt petition which was rendered infructuous only when the A.G.M.(Admn.) had filed an affidavit before this Hon'ble Court by stating that all the benefits as per the judgment has been granted to the applicant. Copy of the letters which was furnished by the respondent before the Hon'ble Court is annexed as Annexure C-11. It is important to mention here that all the benefits was granted to the petitioner after approval was taken from the Corporate Office, New Delhi and now taking U-Turn by the A.G.M. (Admn.) at Shimla is more contemptuous and are required to be dealt with under the Act."

8. It is more than settled that while dealing with the contempt petitions, the Courts are not required to travel beyond the four corners of order, which is alleged to have been disobeyed or disregarded deliberately and willfully. In this connection, it shall be apposite to make a fruitful recapitulation of the judgment rendered by the Hon'ble Supreme Court in ***Ram Kishan Vs. Tarun Bajaj and others 2014 AIR SCW 1218***, wherein it was held that:-

"***9***. *Contempt jurisdiction conferred onto the law courts power to punish an offender for his willful disobedience/contumacious conduct or obstruction to the majesty of law, for the reason that respect and authority commanded by the courts of law are the greatest guarantee to an ordinary citizens that his rights shall be protected and the entire democratic fabric of the society will crumble down if the respect of the judiciary is undermined. Undoubtedly, the contempt jurisdiction is a powerful weapon in the hands of the courts of law but that by itself operates as a string of caution and unless, thus, otherwise satisfied beyond reasonable doubt, it would neither fair nor reasonable for the law courts to exercise jurisdiction under the Act. The proceedings are quasi- criminal in nature, and therefore, standard of proof required in these proceedings is beyond all reasonable doubt. It would rather be hazardous to impose sentence for contempt on the authorities in exercise of contempt jurisdiction on mere probabilities. (Vide: V.G. Nigam & Ors. v. Kedar Nath Gupta & Anr., AIR 1992 SC 2153; Chhotu Ram v. Urvashi Gulati & Anr., AIR 2001 SC 3468; Anil Ratan Sarkar & Ors. v. Hirak Ghosh & Ors., AIR 2002 SC 1405; Bank of Baroda v. Sadruddin Hasan Daya & Anr., AIR 2004 SC 942; Sahdeo alias Sahdeo Singh v. State of U.P. & Ors., (2010) 3 SCC 705; and National Fertilizers Ltd. v. Tuncay Alankus & Anr., AIR 2013 SC 1299).*

10. *Thus, in order to punish a contemnor, it has to be established that disobedience of the order is wilful. The word wilful introduces a mental element and hence, requires looking into the mind of person/contemnor by gauging his actions, which is an indication of ones state of mind. Wilful means knowingly intentional, conscious, calculated and deliberate with full knowledge of consequences flowing therefrom. It excludes casual, accidental, bonafide or unintentional acts or genuine inability. Wilful acts does not encompass involuntarily or negligent actions. The act has to be done with a bad purpose or without justifiable excuse or stubbornly, obstinately or perversely. Wilful act is to be distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. It does not include any act done negligently or involuntarily. The deliberate conduct of a person means that he knows what he is doing and intends to do the same. Therefore, there has to be a calculated action with evil motive on his part. Even if there is a disobedience of an order, but such disobedience is the result of some compelling circumstances under which it was not possible for the contemnor to comply with the order, the contemnor cannot be punished. Committal or sequestration will not be ordered unless contempt*

involves a degree of default or misconduct. (Vide: S. Sundaram Pillai, etc. v. V.R. Pattabiraman; AIR 1985 SC 582; Rakapalli Raja Rama Gopala Rao v. Naragani Govinda Sehararao & Anr., AIR 1989 SC 2185; Niaz Mohammad & Ors. etc.etc. v. State of Haryana & Ors., AIR 1995 SC 308; Chordia Automobiles v. S. Moosa, AIR 2000 SC 1880; M/s. Ashok Paper Kamgar Union & Ors. v. Dharam Godha & Ors., AIR 2004 SC 105; State of Orissa & Ors. v. Md. Illiyas, AIR 2006 SC 258; and Uniworth Textiles Ltd. v. CCE, Raipur, (2013) 9 SCC 753).

***11**. In Lt. Col. K.D. Gupta v. Union of India & Anr., AIR 1989 SC 2071,this Court dealt with a case wherein direction was issued to the Union of India to pay the amount of Rs.4 lakhs to the applicant therein and release him from defence service. The said amount was paid to the applicant after deducting the income tax payable on the said amount. While dealing with the contempt application, this Court held that withholding the amount cannot be held to be either malafide or was there any scope to impute that the respondents intended to violate the direction of this Court.*

***12**. In Mrityunjoy Das & Anr. v. Sayed Hasibur Rahaman & Ors., AIR 2001 SC 1293, the Court while dealing with the issue whether a doubt persisted as to the applicability of the order of this Court to complainants held that it would not give rise to a contempt petition. The court was dealing with a case wherein the statutory authorities had come to the conclusion that the order of this court was not applicable to the said complainants while dealing with the case under the provision of West Bengal Land Reforms Act, 1955.*

***13**. It is well settled principle of law that if two interpretations are possible, and if the action is not contumacious, a contempt proceeding would not be maintainable. The effect and purport of the order is to be taken into consideration and the same must be read in its entirety. Therefore, the element of willingness is an indispensable requirement to bring home the charge within the meaning of the Act. (See: Sushila Raje Holkar v. Anil Kak (Retd.), AIR 2008 (Supp-2) SC 1837; and Three Cheers Entertainment Pvt. Ltd. & Ors. v. C.E.S.C. Ltd., AIR 2009 SC 735): (2008 AIR SCW 7951)."*

9. While it is duty of the Court to punish a person who tries to obstruct the course of justice or brings to disrepute the institution of judiciary. However, this power has to be exercised not casually or lightly, but with great care and circumspection. Contempt proceedings serve a dual purpose of vindication of the public interest by punishment of the contumacious conduct and coercion to compel the contemnor to do what the law requires of him.

10. A question whether there is contempt of Court or not is a serious one. The Court is both the accuser as well as the judge of the accusation. It behoves the Court to act with as great circumspection as possible making all allowances for errors of judgment and difficulties arising from inveterate practices in Courts and tribunals. It is only when a clear case of contumacious conduct not explainable otherwise, arises that the contemnor must be punished. Punishment under the law of Contempt is called for when the lapse is deliberate and in disregard of one's duty and in defiance of authority.

11. Adverting to the facts, it would be noticed that the specific case of the respondents is that while implementing the judgment passed by this Court, they committed a mistake and if that be so, it is always open to the respondents to rectify and correct the same.

12. Similar issue came up before the Hon'ble Supreme Court in ***Union of India and another vs. Narendra Singh, (2008) 2, SCC 750,*** wherein the Hon'ble Supreme Court held that the mistake of the department in promoting a person though he was not eligible and qualified, was correctable and it was further observed that mistakes are mistakes and they can always be corrected by following due process of law and that the employer cannot be prevented from applying the rules rightly and in correcting the mistake. It is apt to reproduce the observations as contained in paras 32 and 33, which reads thus:-

"32. It is true that the mistake was of the Department and the respondent was promoted though he was not eligible and qualified. But, we cannot countenance the submission of the respondent that the mistake cannot be corrected. Mistakes are mistakes and they can always be corrected by following due process of law. In Indian Council of Agricultural Research & Anr. v. T.K. Suryanarayan & Ors., (1997) 6 SCC 766, it was held that if erroneous promotion is given by wrongly interpreting the rules, the employer cannot be prevented from applying the rules rightly and in correcting the mistake. It may cause hardship to the employees but a court of law cannot ignore Statutory Rules.

33. As observed by us, Statutory Rules provide for passing of Departmental Examination and the Authorities were right in not relaxing the said condition and no fault can be found with the Authorities in insisting for the requirement of law. In the circumstances, the action of the Authorities of correcting the mistake cannot be faulted."

13. The aforesaid exposition of law makes it evidently clear that if the benefit has been awarded to an employee, which was not available to him and had been granted due to mistake of the employer, the same could be rectified after such mistake came to light and could be corrected at any time. In the realm of service matter, the employer can review any fault committed by him/them and this right to review one's own decision on account of mistake or fault is not foreclosed under law.

14. The petitioner was required to prove and establish on record not only her entitlement to the promotion from anterior date but also prove her entitlement to the excess amount paid to her and having failed to do so, we have no hesitation in observing that the petitioner has misused the process of the Court by initiating the instant proceedings so as to pressurize the respondents under the threat of contempt and to grant her what she otherwise is neither legally nor legitimately entitled to.

15. The weapon of contempt is not to be used in abundance or misused. Normally, it cannot be used for implementation of an order for which alternative remedy in law is provided for.

16. In view of the above discussion, we find no merit in this contempt petition and the same is accordingly dismissed.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

CWPs No.5462, 5468 and 5469 of 2010.
Judgment reserved on: 20.09.2016.
Date of decision: September 27, 2016.

1. CWP No.5462 of 2010.
Commissioner of Central Excise .....Petitioner.
Versus
M/s Auro Weaving Mills .....Respondent.

2. CWP No.5468 of 2010.
Commissioner of Central Excise .....Petitioner.
Versus
M/s Auro Textile Ltd. .....Respondent.

3. CWP No.5469 of 2010.
Commissioner of Central Excise .....Petitioner.
Versus
M/s Auro Spinning Mills .....Respondent

Constitution of India, 1950- Article 226- Assessees are engaged in the manufacture and export of cotton yarn and woven fabrics - relief in excise duty was extended to them- subsequently, total exemption from payment of duty was extended – Assistant Commissioner Central Excise sanctioned the claim in cash- an appeal was filed, in which it was held that the rebate was required to be sanctioned by Cenvat Credit Account- a revision was filed and the order of the Appellate Authority was set aside- held, that Central Board of Excise and Custom has issued a circular clarifying that the duty must be refunded in cash- there is no dispute about the nature, quality, quantity, value, duty paid, character, actual export of good and verification of the claim within the time- once assessee is held entitled to rebate there is no discretion with the Sanctioning Authority and the payment was to be made in cash- petition dismissed.

(Para-11 to 19)

Cases referred:

Navnit Lal C. Javeri v. K.K.Sen AIR 1965 SC 1375
Ellerman Lines Ltd. v. CIT (1972) 4 SCC 474
K.P. Varghese v. ITO (1981) 4 SCC 173
Union of India v. Azadi Bachao Andolan (2004) 10 SCC 1
CCE v. Usha Martin Industries (1997) 7 SCC 47
Ranadey Micronutrients v. CCE (1996) 10 SCC 387
CCE v. Jayant Dalal (P) Ltd. (1997) 10 SCC 402
CCE v. Kores (India) Ltd. (1997) 10 SCC 338
Paper Products Ltd. v. CCE (1999) 7 SCC 84
Dabur India Ltd. v. CCE (2004) 13 SCC 107
Commissioner of Customs versus Indian Oil Corporation Ltd. (2004) 3 SCC 488
Union of India and others versus Arviva Industries India Limited and others (2014) 3 SCC 159

For the Petitioner(s) : Mr.Rajiv Jiwan, Advocate.
For the Respondent(s): Mr.Surjeet Bhadu and Ms.Aashima Sharma, Advocates.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Since common question of law and fact arise for consideration in these petitions, therefore, they were heard together and are being disposed of by way of this judgment.

2. As the petitioner does not dispute the entitlement of the respondent(s) (hereinafter referred to as the assessee) to the refund of excise duty, but has only contested the mode and manner of such refund, therefore, the seminal issue in all these petitions is whether the rebate claims of the assessee (s) were to be allowed in cash or sanctioned by way of re-credit.

3. However, before answering the question, brief facts as necessary for the disposal of these petitions may be noticed.

4. All the assessee(s) are engaged in the manufacture and export of cotton yarn and woven fabrics, both for domestic market as well as for export and excise duty leviable thereon was 16%. By a notification No.29/2004-CE dated 09.07.2004, the assessee(s) were granted relief in excise duty payable inasmuch as they were required to pay the duty at the rate of 4% on cotton yarn/fabrics and 8% on blended yarn/fabrics.

5. By another notification of the same date bearing No.30/2004-CE, the assessee(s) were granted total exemption from payment of duty on the products manufactured by them subject to the condition that no credit is taken on the inputs consumed in the manufacture of the final product. The assessee(s) started clearing the goods for export on payment of duty on export under claim for rebate. As per the declarations the assessee (s) had not availed Cenvat Credit on the inputs use.

6. The Assistant Commissioner, Central Excise, sanctioned the rebate claim in cash.

7. Aggrieved by the said order, the petitioner filed an appeal before the Commissioner (Appeals) which was allowed by holding that the adjudicating authority had erroneously allowed the rebate claim in cash and the same was required to be sanctioned by way of re-credit into their Cenvat Credit Account.

8. The petitioner filed revision petition against the order of Appellate Authority and the revisional Authority vide its order dated 03.02.2010 set aside the order passed by the appellate authority and upheld the order passed by the Assistant Commissioner and the same has not been impugned before us in these petitions.

9. Learned counsel for the petitioner has vehemently argued that the impugned orders are patently illegal and erroneous as the revisional authority had itself on an earlier occasion passed an order in another revision petition holding the assessee therein to be entitled to the rebate by way of re-credit into their Cenvat Credit Account instead of sanctioning the same in cash. Not only this, the said order has been upheld by the learned Division Bench of the Punjab and Haryana High Court at Chandigarh in CWP No.2235/2007 titled 'M/S Nahar Industrial Enterprises Ltd. versus The Union of India and another', decided on 11.09.2008 (Annexure P-7). It is further averred that the revisional authority has failed to take into consideration the various provisions of the Act, Rules and Instructions issued from time to time and has further erred in passing two contradictory orders.

10. On the other hand, learned counsel for the assessee(s) would argue that the orders passed by the revisional authority call for no interference as the same have been passed in conformity with the law.

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

11. At the outset, it may be noticed that the Central Board of Excise and Customs (for short 'Board') has issued Circular No.687 dated 03.01.2003 wherein it has been clarified that the duty paid through the actual credit or deemed credit account on the goods exported must be refunded in cash.

12. It shall be apt to reproduce the relevant circular which reads thus:-

*"**Circular: 687/3/2003-CX. Dated 03-Jan-2003***

Rebate of duty paid from Cenvat credit account for exported goods to be refunded in cash

Circular No.687/3/2003-CX., dated 3-1-2003

F.No.267/57/2002-CX-8

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject: Payment of rebate amount of the duty paid from Cenvat credit account in cash-Regarding

I am directed to draw your attention to Board's Circular No.21/89-CX. 6, dated 11-5-89 issued from F.No.210/21/87-CX.6, Circular No.153/64/95-CX., dated 12-10-95 issued from F.No.209/47/95-CX. 6 and Circular No.262/96/96-CX., dated 6-11-96 issued from F.No.209/36/96-CX. 6 [1996 (88) E.L.T.T39] wherein it has been, inter alia, clarified that rebate could be sanctioned in cash in respect of the duty payment made through credit accounts of Modvat scheme on inputs or capital goods or deemed credit account. Subsequently, Board has been

receiving representations from trade to say that the rebate is not being granted in cash.

2. The matter has been examined by the Board. It is the view that there is no discretion with the sanctioning authority to give the refund of the duty paid on goods exported through credit accounts. It is therefore clarified that the duty paid through the actual credit or deemed credit account on the goods exported must be refunded in cash.

3. Field formations may please be informed suitably.

4. Receipt of the same may be acknowledged.

5. Hindi version will follow."

13. Adverting to the contentions of the learned counsel for the petitioner whereby he has vehemently argued that the instant cases are covered by the judgment in M/S Nahar Industrial Enterprises (supra), suffice it to say that we have gone through the said judgment and find that the same is clearly distinguishable because therein the admitted case of the parties was that the assessee had paid lesser duty on the domestic product and higher duty on the export product, therefore, the Circular No.687 was inapplicable to the case. It was in this background that the Court then made the following order while dismissing the petition of the assessee.

"After giving our anxious consideration to the entire matter, we are of the opinion that this writ petition must fail. It would be noticed that there is no dispute regarding entitlement of the petitioner for refund, it is only the mode thereof which is the matter of contention. While the petitioner asserts that it is entitled to claim the entire refund in cash, it is the case of the respondents that the petitioner is entitled to cash refund only of the portion deposited by it by actual credit and for the remaining portion, refund by way of credit is appropriate. The first reliance of the petitioner is on the above quoted circular No.687. A reading of the same makes it clear that it did not deal with the distinction between the duty paid and duty payable. In our opinion, the said circular only laid down that the duty paid and payable would be refundable in cash. In the present case, as noticed above, the petitioner paid lesser duty on the domestic product and higher duty on the export product which was admittedly not payable. This circular can, thus, be of no avail to the petitioner."

14. Indisputably, this is not the fact situation obtaining in these cases as there was no dispute about the nature, quality, quantity, value, duty paid character, actual export of the goods and such claims of the assessee(s) having been verified within the time. Even the declaration filed by the assessee(s) to the effect that the value i.e. assessable value declared in ARE-I on which duty had been paid is the transaction value determined under Section 4 and the Range Officer had also verified the same and it is only thereafter that the rebate of duty mentioned in ARE-I was held admissible to the assessee(s). Once the assessee(s) are held entitled to the rebate, then obviously, in terms of Circular No.687, there was no discretion available with the sanctioning authority to give refund of duty paid on goods exported, save and except, in cash and the same could not have been paid by way of credit in the Cenvat Credit Account.

15. It is more than settled that the circulars issued by the Board are binding on the department and the department cannot be permitted to urge that the circulars issued by the Board are not binding on it. This has so been held in a series of decisions of the Hon'ble Supreme Court and reference in this regard can conveniently be made to *Navnit Lal C. Javeri v. K.K.Sen AIR 1965 SC 1375, Ellerman Lines Ltd. v. CIT (1972) 4 SCC 474, K.P. Varghese v. ITO (1981) 4 SCC 173, Union of India v. Azadi Bachao Andolan (2004) 10 SCC 1, CCE v. Usha Martin Industries (1997) 7 SCC 47, Ranadey Micronutrients v. CCE (1996) 10 SCC 387, CCE v. Jayant Dalal (P) Ltd. (1997) 10 SCC 402, CCE v. Kores (India) Ltd. (1997) 10 SCC 338, Paper Products Ltd. v. CCE (1999) 7 SCC 84 and Dabur India Ltd. v. CCE (2004) 13 SCC 107.*

16. In ***Commissioner of Customs versus Indian Oil Corporation Ltd. (2004) 3 SCC 488***, the Hon'ble Supreme Court after examining the entire case law culled out the following principles: (SCC p.497, para 12)

> *"(1) Although a circular is not binding on a court or an assessee, it is not open to the Revenue to raise a contention that is contrary to a binding circular by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it is contrary to the terms of the statue.*
>
> *(2) Despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board.*
>
> *(3) A show-cause notice and demand contrary to the existing circulars of the Board are ab initio bad.*
>
> *(4) It is not open to the Revenue to advance an argument or file an appeal contrary to the circulars."*

17. Similar reiteration of law can be found in a latter judgment of the Hon'ble Supreme Court in ***Union of India and others versus Arviva Industries India Limited and others (2014) 3 SCC 159.***

18. In view of the aforesaid exposition of law, it is evidently clear that the circular issued by the Board cannot be assailed by the petitioner herein. Further, there can be no dispute that in terms of the said circular, there was no discretion vested with the sanctioning authority to give the refund of the duty on goods exported through credit accounts, rather the duty paid through actual credit or deemed credit account on the goods exported has to be refunded only in cash.

19. That being the legal position, we do not find any merit in these petitions and the same are accordingly dismissed, leaving the parties to bear their costs. Pending applications, if any, also stand disposed of. The Registry is directed to place a copy of this judgment on the files of connected matters.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Smt. Kiran Bala and others ...Petitioners.

Versus

Smt. Mansha Devi and others ...Respondents.

CMPMO No.164 of 2016
Reserved on: 6.9.2016
Date of Decision : September 27, 2016

Code of Civil Procedure, 1908- Order 8 Rule 1A(3)- An application was filed for placing on record the original Will of the deceased, which was the allowed- aggrieved from the order, the present application has been filed- held, that both the parties are claiming right over the property originally belonging to J- the question is whether his property was inherited by the plaintiff on the basis of natural succession or on the basis of Will- the parties hail from the rural background and are not well conversant with the procedure of law- serious prejudice would be caused to the defendants by refusing the application – the petition dismissed. (Para- 7 to 18)

Cases referred:

State of Karnataka & another v. K.C. Subramanya & others, (2014) 13 SCC 468
Union of India v. Ibrahim Uddin and another, (2012) 8 SCC 148
Jagdish Chand v. Ambika Devi and others, 2014(2) Shim.LC 774

Madan Mohan Aggarwal v. Smt. Mansa Devi and others, 1985(2) PLR 206
Sat Pal v. Ram Kumar and others, 1992 PLJ 5
Soma Devi v. Guin Devi, AIR 2003 HP 158

For the Petitioners	Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
For the Respondents	Mr. Ajay Sharma, Advocate, for respondents No.1 to 3. Mr. Amit Jamwal, Advocate, for respondents No.5 to 8.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Defendants' application, so filed under Order 8 Rule 1A(3) of the Code of Civil Procedure, for placing on record original Will of deceased Jindu Ram, by leading evidence, came to be allowed by the trial Court vide order dated 19.3.2016, passed by Civil Judge (Senior Division), Court No.1, Hamirpur, Himachal Pradesh, in CMA No.49/16 in CS No.38/11, titled as *Mansha Devi and others v. Kiran Bala and others*, subject matter of challenge by the plaintiffs (petitioners herein) in the present petition, filed under Article 227 of the Constitution of India.

2. Trial Court found the document necessary for adjudication of the controversy in issue between the parties. Despite delay, the application stands allowed to avoid multiplicity of litigation between the parties.

3. Plaintiffs, as indigent, filed a suit for possession of the land in question. It is not in dispute that they are claiming succession to the property originally owned by deceased Jindu Ram.

4. In the written statement, as is evident from Para-10, defendants refuted the plaintiffs' claim, on the strength of Will executed by the original owner in their favour.

5. Issues framed by the trial Court do pertain to the proprietary rights of the parties.

6. In the application dated 20.2.2016, it stands pleaded, though not substantiated, that there had been inadvertent and bonafide mistake on their part in not placing the document on record.

7. Relevant provision of the statute reads as under:

> Order 8 Rule 1A(3)
>
> **"1A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him.**
>
> (3) A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit."

8. Evidently, before the document is produced and received in evidence, leave of the Court is absolutely necessary. Now, what are the parameters, which the court is required to consider, while granting leave, is well settled. Intent in procrastinating the proceedings; deliberate delay; irrelevant documents/evidence; are some of the factors to be weighed in mind while deciding the application.

9. In the instant case, both the parties are claiming right over the property, originally belonging to deceased Jindu Ram. Whether he had bequeathed the property in favour of some of the defendants or as to whether succession opened up with his death, are issues which necessarily require consideration for complete adjudication of the controversy *inter* se the Parties.

10. It is in this backdrop, no fault can be found with the impugned order. It cannot be said that the Court below committed any error of jurisdiction. It was within the power of the Court to have allowed the application. It cannot be said that the Court overstepped or failed to exercise jurisdiction so vested in it. It also cannot be said that the order is illegal or improper. Mistake in not promptly placing on record the document has been held to be bonafide and inadvertent. Simply because another view is possible, this in itself would not be a reason sufficient to hold the order perverse.

11. One cannot shut eyes to the fact that parties hail from rural background and are not well conversant with the procedures of law. They only go by the advice of the counsel, who in fact was duty bound to have apprised the parties of their rights and adopted the procedure required to be followed.

12. By not allowing the document to be taken on record, serious prejudice would be caused to the defendants. In fact comparative mischief and inconvenience would lie in favour of the defendants/ applicants and not otherwise. After trial, arguments have to be concluded by the parties.

13. Mr. G.D. Verma, learned Senior Advocate, assisted by Mr. B.C. Verma, Advocate, refers to various judicial pronouncements.

14. Reliance upon a decision rendered by a Coordinate Bench of this Court in CMPMO No.363 of 2015, titled as *Nirmal Singh v. Manohar Lal and others,* decided on 8.4.2016, is misconceived, for it having been based on given facts and circumstances. What primarily weighed with the Court was irrelevancy of the document sought to be placed on record.

15. In *State of Karnataka & another v. K.C. Subramanya & others,* (2014) 13 SCC 468, the apex Court was dealing with the provisions under Order 41 Rule 27 of the Code of Civil Procedure and not the ones in question. In any event, the decision is distinguishable on facts and as such not applicable. To similar effect is the decision rendered by the apex Court in *Union of India v. Ibrahim Uddin and another,* (2012) 8 SCC 148, and *Jagdish Chand v. Ambika Devi and others,* 2014(2) Shim.LC 774.

16. In *Madan Mohan Aggarwal v. Smt. Mansa Devi and others,* 1985(2) PLR 206, the Court was dealing with a case where additional evidence came to be taken on record after the hearing in the suit stood concluded, but no judgment was pronounced. To similar effect is the decision rendered in *Sat Pal v. Ram Kumar and others,* 1992 PLJ 5, and *Soma Devi v. Guin Devi,* AIR 2003 HP 158.

17. The parameters, which are required to be considered by the Court, for exercising its jurisdiction under sub-rule (3) Rule 1A of Order 8 of the Code of Civil Procedure are different than the ones laid down under Order 41 Rule 27 of the Code of Civil Procedure.

18. For all the aforesaid reasons, present petition, devoid of merit, is dismissed.

19. Any observation made hereinabove shall have no bearing whatsoever on the merits of the main case. Parties, through their learned counsel, are directed to appear before the Court below on 24.10.2016. Trial is expedited and except for official witnesses, parties shall produce their evidence, if so required and desired, at their own risk and responsibility.

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

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

Shri Kuldeep Kumar & another. .....Appellants.

Versus

Shri Ishwari Parshad & others. .....Respondents.

RSA No. 243 of 2006
Reserved on: 19.09.2016
Decided on: 27.09.2016

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit seeking permanent prohibitory and mandatory injunction pleading that they are son and daughter of defendant No. 1- suit land is ancestral in nature- defendant No. 1 threatened to alienate the suit land and to raise construction on the same- defendants denied the claim of the plaintiffs – the suit was decreed by the trial Court- an appeal was preferred, which was dismissed- a second appeal was preferred, which was allowed and the case was remanded to the Appellate Court- the District Judge allowed the appeal- held, in second appeal that as per the record defendant No. 1 is recorded to be father of the plaintiffs- there is no evidence of divorce and the plaintiffs are to be presumed to be the legitimate children of defendant No. 1- the nature of the suit land was proved to be ancestral- injunction can be granted against the manager in case of waste or ouster – there is nothing on record to show that sale is to be made for legal necessity – defendant No. 1 has disowned the plaintiffs and will oust them from the ancestral land as well- the Appellate Court had wrongly allowed the appeal- appeal allowed judgment and decree passed by the Appellate Court set aside and that passed by trial Court restored. (Para-8 to 20)

Cases referred:
Sunil Kumar and another vs. ram Parkash and others, AIR 1988 Supreme Court 576
Sheela Devi and others vs. Lal Chand and another, (2006) 8 Supreme Court Cases 581
Suresh Chand vs. Siri Chand Jai, 2000 Law Suit (Del) 913

For the appellants: Mr. N.S. Chandel, Advocate.
For the respondent: Mr. Anand Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal is maintained by the appellants/plaintiffs (hereinafter referred to as "the plaintiffs") assailing the judgment and decree passed by the learned District Judge, Chamba, in Civil Appeal No. 56 of 2004, dated 28.02.2006, whereby the learned District Judge, Chamba has set aside the judgment and decree dated 24.05.2004, passed by learned Civil Judge (Senior Division) Chamba, in Civil Suit No. 217 of 2001.

2. Brief facts giving rise to the present appeal are that the plaintiffs filed a suit for permanent prohibitory and mandatory injunction restraining the defendants/ respondents (hereinafter referred to as "the defendants") from raising any construction or disposing of land comprised in Khata/Khatauni No. 169/223, Khasra No. 7964/1, 7967, 7969, 7970 to 7978, 7989 and 7990, Kita 14, measuring 929 square yards, 2 square feet, situated in Chamba Shehar 1st, Pargana Panjla, Tehsil and District Chamba, H.P. (hereinafter referred to as "the suit land/property"). A simultaneous prayer for mandatory injunction was also made, in case any construction is raised during the pendency of the suit. As per the plaintiffs, they are son and daughter of defendant No. 1 (Shri Ishwari Parshad) and the suit property is alleged to be ancestral property. It is further averred that plaintiffs are joint ownesr-in-possession of the property in dispute. Defendant No. 1, who is father of the appellants, to deprive the plaintiffs their shares, threatened to sell the suit land and also started raising construction without keeping any share for the plaintiffs intact.

3. The suit of the plaintiffs was contested by the defendants and they have raised preliminary objections, viz., maintainability, *locus standi* and estoppel. On merits, the defendants have denied the relationship of son and daughter with the plaintiffs and it is further contended that their mother had left defendant No. 1 about 40 years back and was living with her parents. As per the defendants, the plaintiffs were born in the house of their maternal grand father. Therefore, the defendants have denied that defendant No. 1 is the father of the plaintiffs, so the plaintiffs are not entitled for any share from the ancestral property.

4. The learned Trial Court on 28.11.2002 framed the following issues for determination and adjudication:

> "1. Whether the plaintiffs are entitled to the relief of permanent prohibitory injunction, as prayed for? OPP.
>
> 2. Whether the plaintiffs are also entitled to the relief of mandatory injunction in the alternative? OPP.
>
> 3. Whether the suit is not maintainable in the present form? OPD.
>
> 4. Whether the plaintiff has no *locus standi* to file the present suit? OPD.
>
> 5. Whether the plaintiff has no cause of action? OPD.
>
> 6. Whether the plaintiffs are estopped from filing the present suit by their act and conduct? OPD.
>
> 7. Relief."

After deciding issue No. 1 in favour of the plaintiffs, issue No. 2 against the plaintiffs and issues No. 3 to 6 against the defendants, the suit of the plaintiffs was decreed for permanent prohibitory injunction and mandatory injunction was declined. The defendants preferred an appeal before the learned District Judge, Chamba and it is worthwhile to mention that earlier the appeal was dismissed by the learned District Judge, Chamba, and thereafter in the regular second appeal No. 288 of 2005, decided on 10.11.2005, whereby the case was remanded back to the Court of learned District Judge, Chamba, for the reason that Shri Ishwari Parshad, present respondent No. 1 herein, resiled from the admission made by Mr. H.N. Sharma, in the appeal before the learned District Judge, Chamba, the District Judge, Chamba, allowed the appeal vide judgment and decree under challenge. Present regular second appeal, was admitted on the following substantial questions of law:

> "1. Whether the observation by the first appellant court that the appellants do not appear to be the son and daughter of respondent Ishwari Parshad, is contrary to the evidence on record and perverse?
>
> 2. Whether the findings of the first appellant Court that even if the appellants be assumed to be the son and daughter of Ishwari Parshad, they have no right to seek the decree, restraining him from alienating that portion of the suit property which is admittedly the ancestral property, is against the law?"

5. I have heard the learned counsel for the parties and gone through the record in detail.

6. The learned counsel for the appellants has argued that it is amply proved on record by PWs 5, 6, 7, 8 and Ex. PW-8/A that the plaintiffs are the son and daughter of respondent No. 1. He has further argued that the best case of the defendants would be that the mother of the plaintiffs has left defendant No. 1 (Shri Ishwari Parshad) and she lived in her father's house. The house of the father of wife of defendant No. 1 and the house of defendant No. 1 were adjoining/nearby. He has further argued that there is no allegation to the effect that the mother of the plaintiffs has any relation with any other person in the world and no divorce ever took place, therefore, the findings of the learned Lower Appellate Court are required to be corrected and the judgment and decree passed by the learned Lower Appellate court are required to be set aside and that of the learned Trial Court are required to be restored.

7. On the other hand, the learned counsel for the respondents has argued that the mother of the plaintiffs left defendant No. 1 39-40 years ago and there is no relationship of husband and wife and, in fact, defendant No. 1 has brought another lady as his wife from whom another son was born. He has further argued that the plaintiffs are not the son and daughter of defendant No. 1 as their mother left defendant No. 1 approximately 39-40 years ago then the filing of the suit. Further the learned counsel for the respondents has argued that no injunction

can be granted against the *'Karta'* of the family on the behest of one coparcener. To support his arguments he has relied upon the following decisions:

"1. Sunil Kumar and another vs. Ram Parkash and others, AIR 1988 Supreme Court 576;

2. Suresh Chand Jain vs. Siri Chand Jai, 2000 Law Suit (Del) 913; &

3. Sheela Devi and others vs. Lal Chand and another, (2006) 8 Supreme Court Cases 581.

8. PW-1, Shri Rishi Kesh, has deposed that Gian Devi was the wife of defendant No. 1 and the plaintiffs were son and daughter of Gian Devi. Shri Bhagat Ram (PW-4) has stated that defendant No. 1 is his brother-in-law (Jeeja) and he has three sons and one daughter, including the plaintiffs. Shri Prakash (PW-5) Superintendent, Boys School, Chamba, has deposed that as per the admission form, which is available in the school, Kuldeep Kumar is recorded to be the son of Shri Ishwari Parshad, and the certificate qua this effect is Ex. PW-5/A. Shri Parmesh Puri (PW-5) has also deposed that name of the father of the plaintiff is Ishwari Parshad and it is also recorded in the voters' list, certificate whereof is Ex. PW-6/A. Ms. Nisha Kumari (PW-7) produced the records from Senior Secondary Government School, Chamba. She has deposed that Chanchal Kumari is daughter of Ishwari Parshad and as per admission form No. 5095, she took admission on 10th April, 1976. Shri Om Parkash (PW-8) has produced the record from the Education Department. He has deposed that as per the Identity Card, Ex. PW-8/A, defendant No. 1 (Ishwari Parshad) is the father of the plaintiffs. Likewise, Shri Lakshmidhar (PW-9) certified that defendant No. 1 is the father of the plaintiffs. Therefore, there is ample evidence on record that defendant No. 1 is the father of the plaintiffs. Defendant No. 1 has also admitted that he never divorced Smt. Gian Dei. Therefore, it can safely be held that the plaintiffs are the son and daughter of defendant No. 1. Nothing from the record is emanating that defendant No. 1 divorced Smt. Gian Dei and also there is nothing on record which establishes that Smt. Gian Dei was leading immoral life. In the absence of any evidence to the contrary it cannot be held that during the subsistence of marriage the mother of the plaintiffs took divorce with defendant No. 1.

9. Now coming to the suit property, as per the plaintiffs, the nature of the property is ancestral property, however, the defendants allege it as self acquired property of defendant No. 1. Thus, as per the contentions of the defendants, the suit is not maintainable, as the suit property is self acquired property. Conversely, the plaintiffs have produced documents, Ex. PA to Ex. PH, and as per these documents, earlier the suit land was recorded to be owned by the father of the defendant No. 1 and the land was succeeded by the defendants from their father. As per the statement of DW-1 (defendant No. 1), some part of the suit land is ancestral and some part is his self acquired property. He has further unequivocally deposed that he cannot distinguish between the lands which is ancestral and which is self acquired. Entries, qua the revenue record was never ever challenged by him. He has admitted that Smt. Gian Dei was his wife. No record relating to the self acquired property has been produced by the defendants. Moreover, during the arguments before the learned Trial Court, the learned counsel for the defendants has admitted that marriage between Smt. Gian Dei and defendant No. 1 was never dissolved and plaintiffs were born during the subsistence of the said marriage. Nothing is emanating from the record that the suit land is self acquired. However, the available evidence goes to establish that the suit land is ancestral and no partition ever took place. Moreover, defendant No. 1 has himself admitted that suit land is ancestral land. However, in order to fill the lacuna he has further stated some part of the suit land is self acquired property. The available evidence goes to establish that the suit land is ancestral property and during the subsistence of marriage between defendant No. 1 and Smt. Gian Dei the plaintiffs were born. Therefore, the plaintiffs being son and daughter of defendant No. 1 are entitled to have share in the suit property. Defendant No. 1 has no authority to raise construction thereon for his exclusive use or to dispose of the same, without getting the suit land partitioned.

10. The Hon'ble Supreme Court in ***Sunil Kumar and another vs. ram Parkash and others, AiR 1988 Supreme Court 576,*** has held as under:

"9. It has, however, been submitted on behalf of the appellant that the High court should have held that in appropriate cases where there are acts of waste, a suit for permanent injunction may be brought against the Karta of the joint Hindu family to restrain him from alienating the property of the joint Hindu family. This question is not required to be considered as we have already held that the instant suit for injunction as framed is not maintainable. We, of course, make it clear that in case of waste or ouster an injunction may be granted against the Manager of the joint Hindu family at the instance of the coparcener. But nonetheless a blanket injunction restraining permanently from alienating the property of the joint Hindu family even in the case of legal necessity, cannot be granted. It further appears that the defendant No. 1, Ram Parkash entered into the agreement of sale stating that he is the owner of the suit property. The plaintiff-appellants claim the suit property as ancestral property and they as coparceners of joint Hindu Mitakshara family have equal shares with their father in the suit property. The question whether the suit property is the self-acquired property of the father of it is the ancestral property has to be decided before granting any relief. The suit being one for permanent injunction, this question cannot be gone into and decided. It is also pertinent to note in this connection that the case of specific performance of agreement of sale bearing suit No. 570 of 1978 had already been decreed on 11th May, 1981 by the Sub Judge, 1st Class, Kaithal."

11. From the above, it is clear that the Hon'ble Supreme Court has held that in case of waste or ouster, an injunction may be granted against the Manager of the joint Hindu family at the instance of the coparcener. In the present case, the specific stand of defendant No. 1 is that the plaintiffs are his son and daughter. This shows that defendant No. 1 want to oust them for the reason that he married another lady without divorcing the mother of plaintiffs No. 1 and 2. The mother of plaintiffs No. 1 and 2 kept on residing in the house of her parents till death and the maternal grant father of the plaintiffs has admitted them in the 8th standard. However, before that it recorded in the school record that it is defendant No. 1 who is their father.

12. Interestingly, defendant No. 1, who was a prudent person and capable to marry another lady during the lifetime of his wife has nowhere stated that he was not having any access to the mother of the plaintiffs. He has nowhere stated that with whom the mother of the plaintiffs had any relations. It has clearly come on record that the houses of maternal grand father of the plaintiffs and defendant were adjoining. In these circumstances, the stand taken by defendant No. 1, shows that he, in order to out the plaintiffs from the suit land, is going to sell the ancestral land.

13. It has come on record that plaintiffs are the son and daughter of defendant No. 1. It is very strange that defendant No. 1 in spite of rearing his son and daughter has left them at the mercy of his father-in-law, that is, the maternal grant father of the plaintiffs. He has left their mother, who is no more in this world, as she died in the year 2003.

14. True it is that defendant No. 1 married another child from his second wife, but that does not mean that defendant No. 1 has occasion to make the plaintiffs orphan when he was the father of the plaintiffs. Therefore, from the ratio of Hon'ble Supreme Court in the judgment (supra) it is clear that an injunction can be granted in such like cases.

15. The Hon'ble Supreme court in ***Sheela Devi and others vs. Lal Chand and another, (2006) 8 Supreme Court Cases 581,*** has held as under:

"12. The principle of law applicable in this case is that so long a property remains in the hands of a single person, the same was to be treated as a separate property, and thus such a person would be entitled to dispose of the coparcenary property as the same were his separate property, but, if a son is subsequently born to him or adopted by him, the alienation whether it is by way of sale, mortgage or gift, will nevertheless stand, for a son cannot object to alienations so made by his father

before he was born or begotten (See C. Krishna Prasad v. CIT, (1097) 1 SCC 160). But once a son is born, it becomes a coparcenary property and he would acquire an interest therein."

16. The ratio of the above judgment is not applicable to the facts of the present case, as in the present case, yet the alienation has not taken place, therefore, they have every right to maintain the present suit.

17. The Hon'ble High Court of Delhi in ***Suresh Chand vs. Siri Chand Jai, 2000 Law Suit (Del) 913,*** has held as under:

"6. Considering the appellant's case at its highest that only for the purposes of appreciating the arguments and deciding this appeal and not accepting the same to be correct that the suit property is a Joint Hindu Family Property even in that case we are of the view that such a suit for injunction by a son against his father restraining him from alienating the property alleged to be belonging to the Joint Hindu Family will not be maintainable. We are fortified in views of the ratio of decision of the Supreme Court in Sunil Kumar and another v. Ram Parkash and others, AiR 1988 SC 576. It was held that such a suit will not be maintainable because the co-parcener has got the remedy of challenging the sale and getting it set aside in a suit subsequent to the completion of the sale. The Supreme court further held that a coparcener cannot interfere in the acts of management of the karta. A father apart from being a karta in addition to the power of management has also power of alienation, transfer, sell of mortgage ancestral property to discharge his antecedent debt. The Court observed:

"It is true that a coparcener takes birth an interest in the ancestral property, but he is not entitled to separate possession of the coparcenary estate. His rights are not independent of the control of the karta. It would be for the karta to consider the actual pressure on the joint family estate. It would be for him to foresee the danger to be averted. And it would be for him to examine as to how best the joint family estate could be beneficially put into use to subserve the interests of the family. A coparcener cannot interfere in these acts of management. Apart from that a father – karta in addition to the aforesaid powers of alienation has also the special power to sell or mortgage ancestral property to discharge his antecedent debt which is not tainted with immorality. If there is no such need or benefit, the purchaser fakes risk and the right had interest of coparcener will remain unimpaired in the alienated property. No doubt the law confers a right on the coparcener to challenge the alienation made by karta, but that right is not inclusive of the right to obstruct alienation. Nor the right to obstruct alienation could be considered as incidental to the right to challenge the alienation. These are two distinct rights. One is the right to claim a share in the joint family estate free from unnecessary and unwanted encumbrance. The other is a right to interfere with the act of management of the joint family affairs. The coparcener cannot claim the latter right and indeed, he is not entitled for it. Therefore, he cannot move the Court to grant relief by injunction restraining the karta from alienating the coparcenary property.""

18. The law has been settled by the Hon'ble Supreme Court and by the Hon'ble High Court of Delhi. It is clear that injunction can be granted to a coparcener in the following eventualities:

1. *If the actions of the Karta/Manager in dealing with the property, that is to change its nature and to alienate it in any manner, is without any legal necessity or betterment;*
2. *If the action of the Karta/Manager is* mala fide *and with a view to oust the coparcener from the share in the coparcenary property;*

3. *If the Karta/Manager is acting in a manner in derogation to the interest of the coparcenary property;*
4. *If the Karta/Manager with* mala fide *intentions do some act to debar some coparceners and give undue advantage to other coparceners permanently in the coparcenary property; and*
5. *Karta/Manager with his acts take away all the rights of the coparceners in coparcenary property.*

In the present case, all the above ingredients are in favour of the appellant, as Karta/Manager, who is the father of the plaintiffs is denying:

(a) the relationship of the plaintiffs as his son and daughter knowing fully well that they are his son and daughter, which the plaintiffs have to prove and they have proved conclusively by leading cogent evidence and producing witnesses and record, as discussed above;

(b) the Karta/Manager/defendant No. 1 in order to give benefit to the heirs from his second marriage, though solemnized during the lifetime of his first wife without divorcing the first wife, who was the mother of the plaintiffs, by his acts is debarring the plaintiffs from their shares in the coparcenary property; and

(c) the Karta/Manager/defendant No. 1 with *mala fide* intentions, in order to oust the plaintiffs from their share in the coparcenary property, is going to change the nature of the suit land and alienate the same.

There is nothing on record to conclude that sale, if any, is to be made by the father for any leal necessity, but the evidence on record shows that defendant No. 1, who is disowning the plaintiffs, as his son and daughter, is going to oust them from the property, even if, they are proved to be his son and daughter, for the reason that he has married another lady during the lifetime of the mother of the plaintiffs without divorcing their mother, who was residing in the parental house, that is, the maternal grand father's house of the plaintiffs, which is adjoining the house of defendant No. 1. Under these circumstances, when the act of defendant No. 1 will result into an ouster of the plaintiffs, as has been held hereinabove, applying the law as enumerated above 1 to 5, injunction is required to be granted. There is nothing on record emanating on behalf of the defendant that there is any legal necessity for disposing of the property, but his only case is that the plaintiffs are not the son and daughter of defendant No. 1. In these circumstances, as there is no legal necessity, the judgments, as cited by the learned counsel for the appellants are not of any help to the appellants. Therefore, substantial question of law No. 1 is answered holding that plaintiffs are son and daughter of defendant No. 1 and the observations made by the learned Lower Appellate Court that the plaintiffs do not appear to be the son and daughter of defendant No. 1 are highly contrary to the factual position and the same are perverse. The substantial question of law No. 2 is answered holding that since defendant No. 1 has not pleaded any legal necessity for alienating the suit land, nor any legal necessity to change the nature of the suit land is there, it is held that the learned Lower Appellate Court has committed grave illegality in reversing the findings recorded by the learned Trial Court, especially when the act of defendant No. 1 was to oust the plaintiffs from the shares in the coparcenary property, which they had acquired being born out of the wedlock of defendant No. 1 and Smt. Gian Dei (mother of the plaintiffs), to whom admittedly defendant No. 1 has left, in order to marry second lady without divorcing Gian Dei, mother of the plaintiffs, and sent her to her parental house with the minors (the plaintiffs).

19. The net result of the above discussion is that the findings recorded by the learned Lower Appellate Court are perverse, without appreciating the evidence to its right perspective and the same are not sustainable in the eyes of law.

20. In view of the above, the appeal is allowed and the judgment and decree passed by the learned Lower Appellate Court is set aside and the judgment and decree of the learned

Trial Court is restored. Accordingly, the suit of the plaintiffs is decreed in terms of the decree passed by the learned Trial Court.

21. Accordingly, the appeal stands disposed of, as also pending applications, if any. No costs.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Sarwan Kumar. ...Petitioner

Versus

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

CWP No. 3832 of 2015
Judgment Reserved on: 20.9.2016
Date of decision: 27.9.2016

Constitution of India, 1950- Article 226- Petitioner made an application for grant of land to enable him to carry out the vocation of carpenter – such application was sent for investigation to Tehsilar who submitted his report and recommended sanction of one marla of land- Deputy Commissioner recommended the case to the Divisional Commissioner, Mandi for grant of lease- objections were raised by Local residents for the grant of lease – a civil suit was filed, which was dismissed and thereafter the land was allotted on 10 years lease basis to the petitioner- a writ petition was filed against the petitioner on the ground that he had encroached upon the government land- writ petition was disposed of with a direction to pass appropriate order within 6 weeks- before action could be taken, the petitioner filed a writ petition – held, that the petitioner was a party to the earlier writ petition- he has not assailed the order passed in the previous writ petition- an order of ejectment has been passed by the Competent Authority and allowing the prayer of the petitioner would render the proceedings pending before the Competent Authority as infrucutous – the petition has been filed to scuttle the legitimate proceedings – hence, the same dismissed. (Para-6 to 8)

For the Petitioner: Mr.Sanjeev Bhushan, Senior Advocate with Ms.Abhilasha Kaundal, Advocate, for the petitioner.

For the Respondents: Mr. Shrawan Dogra, Advocate General, with Mr.Anup Rattan and Mr.Romesh Verma, Additional Advocate Generals, and Mr.J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

This case has a chequered history. In 1995, the petitioner made an application to the Deputy Commissioner for grant of land so as to enable him to carry on his vocation of carpenter. Such application was got investigated from the Tehsildar, Badsar, who submitted his report and recommended sanction of one marla of land over Khasra No. 337/1 in Village Jamli, Badsar in favour of the petitioner. On the basis of the report, the Deputy Commissioner recommended the case of the petitioner to the Divisional Commissioner, Mandi for grant of aforesaid land to the petitioner on 99 years lease.

2. However, before the Divisional Commissioner could take any decision on the basis of the recommendations, some of the inhabitants of the area raised objection against the grant of lease and filed a Civil Suit in the Court of Sub Judge 1st Class, Badar, which was

eventually dismissed on 17.1.2002 and it is thereafter the Collector Hamirpur allotted the aforesaid land on 10 years lease to the petitioner on 16.6.2002.

3. Thereafter, in the year 2015, some of the inhabitants of the area filed CWP No. 2367 of 2015 against the petitioner on the ground that he had encroached upon the government land and such proceedings were stated to be pending before the Assistant Collector 2nd Grade, Dhatwal. On 10.8.2015, this Court disposed of the writ petition with a direction to the Assistant Collector 2nd Grade, Dhatwal to pass appropriate orders within six weeks after affording an opportunity of hearing to both the parties.

4. However, before any decision could have been taken in the above referred proceedings, the petitioner approached this Court by filing the instant writ petition, claiming therein the following substantive reliefs:-

> *"i) That respondents may be directed to consider the case of the petitioner for lease of Khasra No. 337/1 measuring 1 marla on the basis of recommendations made vide annexure P-1, with further directions to the respondents to allow the petitioner to continue in possession of said land.*
>
> *ii) In the alternative it is prayed that direction may very kindly be given to the respondent to grant this small piece of land to the petitioner being a landless person and a houseless person, so that he may live with dignity."*

5. The respondents have contested the petition by filing reply, wherein it has been averred that the petitioner has encroached upon the government land comprised in Khasra No. 1072/832/1 measuring 0-00-38 hectares situated in village Jamli and in addition to this land he had also encroached the land which was leased out to him by respondent No. 3 vide order dated 16.6.2002. It is averred that the lease granted by the Collector was subject to the condition that the petitioner could raise kachha shed over the same, but the petitioner has violated the terms of the lease by raising pucca shed and even the lease period had expired. It is further averred that in compliance to the directions passed by this Court in CWP No. 2367 of 2015 (supra) the Assistant collector 2nd Grade has already passed ejectment orders and the same has been placed on record as Annexure R-1. On the basis of such pleadings the respondents have prayed for the dismissal of the instant petition.

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

6. At the outset, it may be observed that we had a complete loss to understand as to how the instant petition is maintainable, more particularly in teeth of the directions already passed by this Court on 10.8.2015 in CWP No. 2367 of 2015, which reads thus:-

> *"5. In the given circumstances, we deem it proper to dispose of this writ petition with a direction to Assistant Collector, IInd Grade, Dhatwal, to pass appropriate orders, after hearing both the parties, within six weeks."*

7. It is not in dispute that the petitioner was a party to the aforesaid writ petition and therefore, was aware of these directions, yet without assailing the aforesaid order petitioner wants this Court to direct the respondents to consider his case for lease of land in dispute and permit him to continue in possession. This virtually amounts to asking this Court to sit in judgment over its earlier orders passed in CWP No. 2367 of 2015, which obviously is not permissible under law.

8. That apart, as per the directions of this Court the Assistant Collector 2nd Grade was directed to decide the lis in a time bound manner and the same has now culminated in ejectment orders being passed against the petitioner and the said order, as informed by the petitioner, has been assailed before the appellate authority. Therefore, acceding to the prayer of the petitioner at this stage would virtually render the proceeding pending before the competent authority as redundant and infructuous, which again is not permissible under law.

9. For all the above stated reasons, we are of the firm view that not only is the present petition devoid of any merit, but is a clever attempt to stultify the proceedings pending before the competent authority. The petitioner cannot by resorting to the extra ordinary jurisdiction of this Court stifle and scuttle the legitimate proceedings and thereby thwart the final result of the pending action before the competent authority. To say the least, the petitioner has abused the process of law and in normal circumstances, a petition of this nature would have invited heavy costs, however, taking into consideration the fact that the petitioner is a poor person, we refrain from doing so.

10. The writ petition is accordingly dismissed, so also the pending application(s), if any.

However, before parting it needs to be clarified that the authorities shall decide the matter uninfluenced by any observations made and findings if any recorded in this judgment. Costs easy.

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

Sh.Gian Chand Sharma .....Appellant.

Versus

State of H.P. & others .....Respondents.

LPA No.239 of 2010.
Reserved on: 21.09.2016
Pronounced on: September 28, 2016.

Constitution of India, 1950- Article 226- Predecessor-in-interest of respondents No. 4 and 5 filed an appeal under Section 30(3) of H.P. Holdings (Consolidation and Prevention of Fragmentation) Act, 1971 before the Settlement Officer against the order of the Consolidation Officer- appeal was allowed - a revision petition was filed against the order, which was dismissed – aggrieved from the order, a writ petition was filed, which was also dismissed- another writ petition was filed praying that the order passed by Settlement Officer and Director Consolidation of Holdings be quashed – writ petition was dismissed- held, in appeal that the order made by revenue officers cannot be set aside in writ proceedings unless it is pleaded and proved that revenue officers had committed any jurisdictional error or procedural mistake- the orders were passed by the authorities on the basis of the material placed on record and the factual situation- a finding arrived by the Revenue Authority was based upon erroneous admission of inadmissible evidence or erroneous objection of admissible evidence – no such plea was taken in the present case – further, the earlier writ petition was dismissed and no liberty was granted- hence, second petition is not maintainable- the petition dismissed. (Para- 7 to 17)

Cases referred:

Bhuvnesh Kumar Dwivedi versus M/s. Hindalco Industries Ltd., 2014 AIR SCW 3157

M/s. Delux Enterprises versus H.P. State Electricity Board Ltd. & others, ILR 2014 (V) HP 970

Gurcharan Singh (deceased) through his LRs Vs. State of Himachal Pradesh and others, ILR 2015 (VI) HP 938 (D.B.)

For the appellant: Mr.R.D. Kaundal, Advocate.

For the Respondent: Mr.Shrawan Dogra, Advocate General with Mr.Anup Rattan & Mr.Romesh Verma, Additional Advocate General, for respondents No.1 to 3.

Mr.Bhuvnesh Sharma, Advocate, for respondents No.4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

This Letters Patent Appeal is directed against the judgment and order, dated 22nd June, 2007, passed by a learned Single Judge of this Court in CWP No.29 of 2004, titled Gian Chand Sharma vs. State of H.P. and others, whereby the writ petition filed by the petitioner/appellant herein came to be dismissed, and against the order, dated 30th June, 2010, passed in Civil Review No.50 of 2008, titled Gian Chand vs. State of H.P. and others, which was also dismissed by the learned Single Judge.

2. From the perusal of the facts of the case, it appears that Thakur Dayal, predecessor-in-interest of respondents No.4 and 5 (Roshan Lal and Jagdish Chand, respectively), filed appeal under Section 30(3) of the Himachal Pradesh Holdings (Consolidation and Prevention of Fragmentation) Act, 1971, (for short, the Act), before the Settlement Officer against the order of the Consolidation Officer, Hamirpur, dated 24th June, 1991. The said appeal was allowed by the Settlement Officer, vide order, dated 1st June, 1995. Feeling aggrieved, the petitioner/appellant filed revision petition before the Director of Consolidation of Holdings, which came to be dismissed vide order dated 17th October, 2002, constraining the petitioner to file writ petition, being CWP No.450 of 2003, titled Gian Chand Sharma vs. State of H.P. and others, before this Court, which was also dismissed vide order dated 30th July, 2003, on the ground that the petitioner had not annexed the copies of the orders passed by the Consolidation Officer and the Settlement Officer.

3. Thereafter, the petitioner again filed CWP No.29 of 2004 on 4th January, 2004, out of which the instant Letters Patent Appeal arises. The petitioner, by the medium of the writ petition, prayed for quashment of the orders, dated 1st June, 1995 and 17th October, 2002, passed by the Settlement Officer and the Director, Consolidation of Holdings, respectively. It was also prayed that action be drawn against the defaulting officers, on the grounds taken in the memo of writ petition.

4. The writ petition was resisted by the respondents by filing replies and the petitioner chose not to file any rejoinder. Thus, the averments contained in the replies, filed by the respondents, have remained un-rebutted.

5. Respondents No.1 and 3, in paragraphs 4 and 5 of their joint reply, have given details as to what were the facts and reasons, which were made the basis by the Settlement Officer in passing the order. It is apt to reproduce paragraphs 4 and 5 of the said reply hereunder:

> *"Para No.4. Denied. That from the perusal of the record and order passed by the Settlement Officer, Consolidation of Holdings, Hamirpur dated 1.6.1995, it transpires that Khasra Number 107(Old) falls in the center of the land of respondents No.4 and 5. Thus, the Settlement Officer (consolidation of Holdings) has rightly allotted Khasra number 107(old) to Shri Thakur Dyal, predecessor in interest of Shri Roshan Lal and Jagdish Chand, present respondents No.4 and 5 respectively by consolidating it as per the provisions of the Consolidation scheme and as such no illegality or impropriety has been done to the present petitioner. Hence, this contention of petitioner is wrong and baseless.*
>
> *Para No.5. Denied. That there is no mention of any kind of orchard or residential house of the present petitioner in the old Khasra Number 107 in the order of the Consolidation Officer. Moreover, the process of 'Kayami abadi was competed in the year 1984 on the aforesaid land of village in question and type of this land has been classified as 'Khadetar'. From the perusal of the Annexure P-2 it is clear that in the year 1989-90, the land of Khasra Number 107(old) has been classified as 'Khadetar'. Moreover, the Settlement Officer (Consolidation of Holdings) has applied his judicious mind while deciding the appeal under Section 30(3) of the H.P. Holdings (Consolidation and Prevention of Fragmentation) Act, 1971 by taking back the excess of 0-4 Marla land from the present*

petitioner and making good the deficiency of Shri Thakur Dyal, predecessor in interest of Shri Roshan Lal. Moreover, Khasra Number 107 (old) falls in the Center of Khasra Number 108 and 869/116(old), which were possessed and already stood allotted to the predecessor in interest of Respondent Nos.4 and 5. Hence, the contentions raised by the petitioner in this para are vehemently denied."

6. Respondents No.4 and 5 (Roshan Lal and Jagdish Chand, respectively), in their joint reply to the writ petition, have specifically averred that the land was allotted in favour of the writ petitioner/appellant as per his suitability from the land of his brother Sita Ram, who was having excess land in his possession. It was further averred that the petitioner has not arrayed said Sita Ram as party in the writ petition.

7. From the discussion made hereinabove, it becomes clear that the order, dated 1st June, 1995, passed by the Settlement Officer, is based on the record as well as factual position existing on the spot. The Writ Court, after examining the pleadings of the parties, has rightly held that the Settlement Officer and the Director have committed no jurisdictional error or procedural irregularity.

8. The orders made by the revenue officers cannot be set aside in writ proceedings unless it is pleaded and shown that the revenue officers have committed any jurisdictional error or procedural mistake.

9. While going through the orders made by the Settlement Officer and the Director, one comes to inescapable conclusion that the orders were made by the revenue authorities keeping in view the revenue record, the factual position existing on the spot read with the law occupying the field.

10. It is settled principle of law that question of fact cannot be gone into in writ proceedings.

11. The apex Court, in case titled ***Bhuvnesh Kumar Dwivedi versus M/s. Hindalco Industries Ltd.,*** reported in ***2014 AIR SCW 3157,*** held that question of fact cannot be interfered with by the Writ Court. It is apt to reproduce paragraph 18 of the said judgment herein.

"18. A careful reading of the judgments reveals that the High Court can interfere with an Order of the Tribunal only on the procedural level and in cases, where the decision of the lower courts has been arrived at in gross violation of the legal principles. The High Court shall interfere with factual aspect placed before the Labour Courts only when it is convinced that the Labour Court has made patent mistakes in admitting evidence illegally or have made grave errors in law in coming to the conclusion on facts. The High Court granting contrary relief under Articles 226 and 227 of the Constitution amounts to exceeding its jurisdiction conferred upon it. Therefore, we accordingly answer the point No. 1 in favour of the appellant"

12. This Court in a series of cases, being **CWP No. 4622 of 2013, titled as M/s Himachal Futuristic Communications Ltd. vs. State of H.P. and another**; **LPA No. 23 of 2006,** titled as **Ajmer Singh versus State of H.P. and others,** decided on 21st August, 2014; **LPA No. 125 of 2014,** titled as **M/s. Delux Enterprises versus H.P. State Electricity Board Ltd. & others,** decided on 21st October, 2014; and **LPA No.143 of 2015, titled Gurcharan Singh (deceaed) through his LRs vs. State of H.P. and others, decided on 15th December, 2015,** while relying upon the latest decision of the Apex Court in **Bhuvnesh Kumar Dwivedi versus M/s Hindalco Industries Ltd.,** reported in **2014 AIR SCW 3157,** has held that question of fact cannot be interfered with by the Writ Court. However, such findings can be questioned if it is shown that the Tribunal/Court has erroneously refused to admit admissible and material evidence or has erroneously admitted inadmissible evidence which has influenced the impugned findings.

13. This Court has in **LPA No.485 of 2012,** titled as **Arpana Kumari vs. State of H.P. and others, decided on 11.08.2014**, has held that orders passed by the Revenue

Authorities cannot be challenged in a writ petition unless the orders are made without jurisdiction or are passed in breach of mandatory provisions of law or have caused miscarriage of justice. It is apt to reproduce paragraphs 3 and 4 of the said judgment hereunder:

> *"3. The Writ Court after examining all the orders and the averments contained in the writ petition came to the conclusion that the orders made were legal one and had been passed by the competent Authorities while exercising the jurisdiction vested with them. While going through the impugned judgment, it also came to our notice that when the Writ Court was about to dismiss the writ petition, learned counsel for the writ petitioner-appellant sought permission to withdraw the writ petition with liberty to file a civil suit, which prayer was declined by the Writ Court.*
>
> *4. The orders, impugned in the writ petition, have been passed by the Authorities under the provisions of H.P. Tenancy and Land Reforms Act, 1972, cannot be made subject matter of the writ petition unless the orders are made without jurisdiction or having been passed in breach of the mandatory provisions of law or have caused miscarriage of justice. In the instant case, the Authorities below have recorded a finding of fact that the writ petitioner/appellant has violated the provisions of the H.P. Tenancy and Land Reforms Act, 1972. Thus, the writ petition was not maintainable."*

14. It is not the case of the writ petitioner that inadmissible evidence was recorded and on the basis of such evidence, the orders were passed by the revenue authorities.

15. From the record of the writ petition, it also transpires that the petitioner, earlier also, had filed a writ petition (CWP No.450 of 2003), challenging the orders of the Settlement Officer and the Director, came to be dismissed vide order dated 30th July, 2003. It is apt to reproduce operative portion of the order, dated 30th July, 2003, hereunder:

> *"Though the petitioner has assailed the orders of the Consolidation Officer as well as Settlement Officer (Consolidation of Holdings) passed in appeal, the copies of such orders have not been annexed with the present writ petition. In the absence of the copies of the orders, correctness or otherwise of the impugned orders cannot be gone into and on this short ground alone the present writ petition is liable to be dismissed and is accordingly dismissed."*

16. From the above, it is clear that the earlier writ petition filed by the petitioner was dismissed on the ground that the petitioner had not annexed the orders impugned in the said writ petition. While dismissing the writ petition, no liberty was provided to the petitioner to file fresh writ petition for the same cause of action. The petitioner has not questioned the order, dated 30th July, 2003 passed in CWP No.450 of 2003. Thus, the second writ petition filed by the petitioner/appellant herein on the same cause of action was not maintainable. Perhaps, the said fact was not brought to the notice of the learned Single Judge.

17. Having said so, there is no merit in the appeal filed by the appellant and the same is dismissed. Consequently, the judgment and the order passed by the learned Single Judge, dismissing the writ petition and the review petition, are upheld.

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

Oriental Insurance Company Ltd. ...Appellant.

Versus

Sh. Sihnu Ram and others ...Respondents.

FAO No. 474 of 2010
Reserved on: 07.09.2016
Decided on: 28.09.2016

Motor Vehicles Act, 1988- Section 163-A - Income of the deceased was Rs. 6,000/- per month, i.e. Rs. 72,000/- per annum which is more than the upper limit of income of Rs. 40,000/- prescribed in the schedule- questions referred to larger bench; whether the claim petition in such situation is maintainable under Section 163-A and second whether claimants can abandon a part of their claim to bring the same within limit - held, that claim petition can be maintained under Section 163-A if the income of the victim is less than Rs. 40,000/- per annum- if the Tribunal comes to the conclusion that income of the victim is more than Rs. 40,000/- per annum- it is not supposed to dismiss the petition on this ground alone - if the petition is dismissed on this ground alone, it will be defeat the purpose of Act and will amount to succumbing to the technicalities- MACT can treat the claim petition under Section 166 and provide an opportunity to the claimants to prove rashness and negligence- claimants cannot be permitted to abandon a part of their claim and to bring it below the sum of Rs. 40,000/- per annum- monthly income of the deceased was alleged to be Rs. 6,000/- per month or Rs. 72,000/- per annum- claim petition was not maintainable - deceased was travelling on the roof which by itself is negligent act- claimants are entitled to compensation under Section 166 of the Act- appeal dismissed. (Para-2 to 76)

Cases referred:

Syad Akbar versus State of Karnataka, (1980) 1 Supreme Court Cases 30
Jai Prakash versus National Insurance Company Limited and others, (2010) 2 Supreme Court Cases 607
Puttamma and others versus K.L. Narayana Reddy and another, 2014 AIR SCW 165
National Insurance Company Ltd. versus Sinitha & Ors., 2012 AIR SCW 10
Deepal Girishbhai Soni and others versus United India Insurance Co. Ltd., Baroda, (2004) 5 Supreme Court Cases 385
Surinder Kumar Arora & another versus Dr. Manoj Bisla & others, 2012 AIR SCW 2241
Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120
United India Insurance Company Ltd. versus Sunil Kumar & Anr., 2013 AIR SCW 6694
N.K.V. Bros (P.) Ltd. Versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354
Sohan Lal Passi versus P. Sesh Reddy and others, AIR 1996 Supreme Court 2627
Dulcina Fernandes and others versus Joaquim Xavier Cruz and another, (2013) 10 Supreme Court Cases 646
Savita versus Bindar Singh & others, 2014 AIR SCW 2053
Ningamma & another versus United India Insurance Co. Ltd., 2009 AIR SCW 4916
United India Insurance Co. Ltd. Versus Shila Datta & Ors., 2011 AIR SCW 6541
Asha & others versus Sh. Moti Ram & others, Latest HLJ 2014 (HP) 595
United India Insurance Company Limited versus Smt. Samitra Devi & others, Latest HLJ 2015 (HP) 85
Malati Sardar vs National Insurance Company Ltd. and others, AIR 2016 Supreme Court 247
Dhannalal versus D.P. Vijayvargiya and others, AIR 1996 Supreme Court 2155
U.P.S.R.T.C. vs. Km. Mamta and others, AIR 2016 Supreme Court 948
New India Assurance Company Ltd. versus Chanchal Devi & ors., Latest HLJ 2014 (HP) 250
Sudhir Mahajan versus United India Insurance Company Ltd. & anr., 2007 (2) Shim.LC 305
Shanti Devi & anr. versus National Insurance Company & ors, 2008 (2) Shim.LC 125
Satya Devi versus Bakshi Ram & ors., 2009 (2) Shim.LC 381
New India Assurance Company versus Smt. Veena Devi & ors., Latest HLJ 2009 (HP) 770
Sukhwant Kaur and others versus Sher Singh and another, 2008 (3) Shim.LC 93
N.K.V. Bros. (P.) Ltd. versus M. Karumani Ammal and others, AIR 1980 Supreme Court 1354
Shivaji Dayanu Patil and another versus Vatschala Uttam More, 1991 ACJ 777
New India Assurance Co. Ltd. vs Shanti Bai (Smt) and others, (1995) 2 Supreme Court Cases 539
New India Assurance Co. Ltd. versus C.M. Jaya and others, (2002) 2 Supreme Court Cases 278
North East Karnataka Road Trans. Corpn. versus Vijayalaxmi and others, 2012 ACJ 1968

For the appellant:	Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Ishan Thakur, Advocate.
For the respondents:	Mr. Varun Rana, Advocate, for respondents No. 1 and 2. Nemo for respondents No. 3 and 5. Mr. D.N. Sharma, Advocate, vice Mr. R.S. Chandel, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

This reference has been made by a learned Single Judge of this Court on noticing the conflicting judgments made by this Court. The matter was put up on administrative side before the Chief Justice and was ordered to be listed before the Division Bench. This is how the instant reference came up for consideration before this Court.

2. The learned Single Judge, vide order, dated 21st July, 2016, while recording the reasons as to why reference was required, has referred the following questions for adjudication by the larger Bench:

> "(i) Whether the claim petition under Section 163-A of the Motor Vehicles Act (for short the 'Act') was maintainable since according to the claimants themselves, income of the deceased was ₹ 6,000/- per month, i.e. ₹ 72,000/- per annum which is in excess of the upper limit of income i.e. ₹ 40,000/- provided under second schedule of the Act? and
>
> (ii) Whether the claimants, after pleading an income more than what is prescribed in the second schedule, can abandon a part of their claim and restrict the same to ₹ 40,000/- per annum or less so as to bring inconformity with the schedule?"

3. Before we deal with the questions (supra) and determine the reference, it is profitable to give a brief history as to how compensation was granted to the persons, who sustained injuries in the vehicular accidents or to the legal representatives of the persons, who sustained injuries and succumbed to the said injuries, as per the mandate of Law of Torts.

4. In earlier days, a suit was to be filed by an aggrieved person for grant of compensation and with the development of law, different legislation was made in order to provide speedy and better remedies enabling the aggrieved person to have compensation as early as possible.

5. The Apex Court in the case titled as **Syad Akbar versus State of Karnataka,** reported in **(1980) 1 Supreme Court Cases 30,** has dealt with the issue.

6. The Motor Vehicles Act came into force in the year 1939. Section 110 of the said Act provided for grant of compensation. The claim petition was to be filed by the injured-claimant or the legal representatives of the deceased, which was to be tried by the Tribunal headed by a District Judge. Thereafter, an amendment was made in the year 1982 and Section 92A was introduced in order to grant immediate relief by way of an interim award.

7. Thereafter, the Motor Vehicles Act, 1988 (for short "MV Act) came into force with effect from 1st July, 1989, replacing the Motor Vehicles Act, 1939. In the year 1994, the MV Act has gone through sea change with sole aim and object to provide speedy and effective relief to the victims, the details of which are given as under:

8. Chapter X of the MV Act, consisting of Sections 140 to 144, provides how to grant compensation 'On The Principle Of No Fault'.

9. Chapter XI of the MV Act mandates for insurance of the motor vehicles against third party risks. It contains Sections 145 to 164. Section 158 (6) provides that as soon as any

information regarding any accident involving death or bodily injury to any person is recorded or report under this section is completed by a police officer, it is the duty of the officer in-charge of the police station to forward a copy of the same to the Claims Tribunal having jurisdiction. Chapter XI also contains Section 163-A which provides for compensation 'On Structured Formula Basis'.

10. Chapter XII of the MV Act contains Sections 165 to 176. Section 166 (4) mandates the Claims Tribunal to treat the police report relating to vehicular accidents forwarded to it under Section 158 (6) as an application for compensation under this Act. Section 167 provides an option to the claimants, who also have remedy available under the Workmen's Compensation Act, 1923 (for short "WC Act"). They can claim compensation either under the MV Act or WC Act.

11. The Apex Court has discussed the said provisions of law in a judgment rendered in the case titled as **Jai Prakash versus National Insurance Company Limited and others,** reported in **(2010) 2 Supreme Court Cases 607.** It is apt to reproduce paras 9, 11, 12 and 20 to 22 of the judgment herein:

> *"9.The Legislature tried to reduce the period of pendency of claim cases and quicken the process of determination of compensation by making two significant changes in the Act, by Amendment Act 54 of 1994, making it mandatory for registration of a motor accident claim within one month of receipt of first information of the accident, without the claimants having to file a claim petition. Sub-section (6) of Section 158 of the Act provides:*
>
> > *"158. (6) As soon as any information regarding any accident involving death or bodily injury to any person is recorded or report under this section is completed by a police officer, the officer-in-charge of the police station shall forward a copy of the same within thirty days from the date of recording of information or, as the case may be, on completion of such report to the Claims Tribunal having jurisdiction and a copy thereof to the concerned insurer, and where a copy is made available to the owner, he shall also within thirty days of receipt of such report, forward the same to such Claims Tribunal and insurer."*
>
> *Sub-section (4) of Section 166 of the Act reads thus:*
>
> > *"166. (4) The Claims Tribunal shall treat any report of accidents forwarded to it under Sub-section (6) of Section 158 as an application for compensation under this Act."*
>
> *10. .....*
>
> *11. This Court in General Insurance Council v. State of A.P., 2007 12 SCC 354, emphasised the need for implementing the aforesaid provisions. This Court directed: (SCC p. 358, para 10)*
>
> > *"10. It is, therefore, directed that all the State Governments and the Union Territories shall instruct, ...all police officers concerned about the need to comply with the requirement of Section 158(6) keeping in view the requirement indicated in Rule 150 and in Form 54, Central Motor Vehicles Rules, 1989. Periodical checking shall be done by the Inspector General of Police concerned to ensure that the requirements are being complied with. In case there is non-compliance, appropriate action shall be taken against the erring officials. The Department of Road Transport and Highways shall make periodical verification to ensure that action is being taken and in case of any deviation immediately bring the same to the notice of the State Governments / Union Territories concerned so that necessary action can be taken against the officials concerned."*

12. But unfortunately neither the police nor the Motor Accidents Claims Tribunals have made any effort to implement these mandatory provisions of the Act. If these provisions are faithfully and effectively implemented, it will be possible for the victims of accident and/or their families to get compensation, in a span of few months. There is, therefore, an urgent need for the concerned police authorities and Tribunals to follow the mandate of these provisions.

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20. The Registrar General of each High Court is directed to instruct all Claims Tribunals in his State to register the reports of accidents received under Section 158(6) of the Act as applications for compensation under Section 166(4) of the Act and deal with them without waiting for the filing of claim applications by the injured or by the family of the deceased. The Registrar General shall ensure that necessary Registers, forms and other support is extended to the Tribunal to give effect to Section 166(4) of the Act.

21. For complying with Section 166(4) of the Act, the jurisdictional Motor Accident Claims Tribunals shall initiate the following steps:

(a) The Tribunal shall maintain an Institution Register for recording the AIRs which are received from the Station House Officers of the Police Stations and register them as miscellaneous petitions. If any private claim petitions are directly filed with reference to an AIR, they should also be recorded in the Register.

(b) The Tribunal shall list the AIRs as miscellaneous petitions. It shall fix a date for preliminary hearing so as to enable the police to notify such date to the victim (family of victim in the event of death) and the owner, driver and insurer of the vehicle involved in the accident. Once the claimant/s appear, the miscellaneous application shall be converted to claim petition. Where a claimant/s file the claim petition even before the receipt of the AIR by the Tribunal, the AIR may be tagged to the claim petition.

(c) The Tribunal shall enquire and satisfy itself that the AIR relates to a real accident and is not the result of any collusion and fabrication of an accident (by any 'Police Officer - Advocate -Doctor' nexus, which has come to light in several cases).

(d) The Tribunal shall by a summary enquiry ascertain the dependent family members/legal heirs. The jurisdictional police shall also enquire and submit the names of the dependent legal heirs.

(e) The Tribunal shall categories the claim cases registered, into those where the insurer disputes liability and those where the insurer does not dispute the liability.

(f) Wherever the insurer does not dispute the liability under the policy, the Tribunal shall make an endeavour to determine the compensation amount by a summary enquiry or refer the matter to the Lok Adalat for settlement, so as to dispose of the claim petition itself, within a time frame not exceeding six months from the date of registration of the claim petition.

(g) The insurance companies shall be directed to deposit the admitted amount or the amount determined, with the claims tribunals within 30 days of determination. The Tribunals should ensure that the compensation amount is kept in Fixed deposit and disbursed as per the directions contained in General Manager, KSRTC v. Susamma Thomas, 1994 2 SCC 176.

(h) As the proceedings initiated in pursuance of Section 158(6) and 166(4) of the Act, are different in nature from an application by the victim/s under Section 166(1) of the Act, Section 170 will not apply. The insurers will

therefore be entitled to assist the Tribunal (either independently or with the owners of the vehicles) to verify the correctness in regard to the accident, injuries, age, income and dependents of the deceased victim and in determining the quantum of compensation.

22. The aforesaid directions to the Tribunals are without prejudice to the discretion of each Tribunal to follow such summary procedure as it deems fit as provided under Section 169 of the Act. Many Tribunals instead of holding an inquiry into the claim by following suitable summary procedure, as mandated by Section 168 and 169 of the Act, tend to conduct motor accident cases like regular civil suits. This should be avoided. The Tribunal shall take an active role in deciding and expeditious disposal of the applications for compensation and make effective use of Section 165 of the Evidence Act, 1872, to determine the just compensation."

12. The Apex Court in the case titled as **Puttamma and others versus K.L. Narayana Reddy and another,** reported in **2014 AIR SCW 165,** has also laid down the same ratio.

13. The question is – Once the jurisdiction of the Claims Tribunal has been invoked and during the trial, evidence comes on record to the effect that the accident was outcome of rash and negligent act and income of the victim was more than ₹ 40,000/- per annum, whether the petition under Section 163-A of the MV Act can be dismissed? The answer is in the negative for the following reasons:

14. While going through the scheme, aim, object and mandate of Sections 158 (6) and 166 (4) of the MV Act and the ratio laid down by the Apex Court, it can be safely held that a claim petition under Sections 163-A or 166 of the MV Act cannot be dismissed on flimsy grounds and petition under Section 140 of the MV Act can be filed only under Section 166 of the MV Act, is based 'On The Principle Of No Fault' and is an interim measure.

15. The Second Schedule appended with the MV Act provides the income slab. Thus, petition under Section 163-A of the MV Act can be maintained in case the income of the victim of a vehicular accident is less than ₹ 40,000/- per annum.

16. In the case titled as **National Insurance Company Ltd. versus Sinitha & Ors.,** reported in **2012 AIR SCW 10,** the Apex Court held that in the claim petitions filed under Section 163-A of the MV Act, the claimants are not required to prove the wrongful act or neglect or default of the offending vehicle. It is apt to reproduce para 15 of the judgment herein:

"15. The heading of Section 163A also needs a special mention. It reads, "Special Provisions as to Payment of Compensation on Structured Formula Basis". It is abundantly clear that Section 163A, introduced a different scheme for expeditious determination of accident claims. Expeditious determination would have reference to a provision wherein litigation was hitherto before (before the insertion of Section 163A of the Act) being long drawn. The only such situation (before the insertion of Section 163A of the Act) wherein the litigation was long drawn was under Chapter XII of the Act. Since the provisions under Chapter XII are structured under the "fault" liability principle, its alternative would also inferentially be founded under the same principle. Section 163A of the Act, catered to shortening the length of litigation, by introducing a scheme regulated by a pre-structured formula to evaluate compensation. It provided for some short-cuts, as for instance, only proof of age and income, need to be established by the claimant to determine the compensation in case of death. There is also not much discretion in the determination of other damages, the limits whereof are also provided for. All in all, one cannot lose sight of the fact, that claims made under Section 163A can result in substantial compensation. When taken together the liability may be huge. It is difficult to accept, that the legislature would fasten such a prodigious liability under the "no-fault" liability principle, without reference to the "fault" grounds.

When compensation is high, it is legitimate that the insurance company is not fastened with liability when the offending vehicle suffered a "fault" ("wrongful act", "neglect", or "defect") under a valid Act only policy. Even the instant process of reasoning, leads to the inference, that Section 163A of the Act is founded under the "fault" liability principle."

17. The mandate of Section 163-A of the MV Act is to provide compensation 'On Structured Formula Basis' finally and is not an interim measure. Once it is granted, the victims cannot file claim petition under Section 166 of the MV Act for grant of enhanced compensation. But, in case the Claims Tribunal comes to the conclusion that the income of the victim is more than ₹ 40,000/- per annum, it is not supposed to dismiss the claim petition. If the claim petition is dismissed on this ground then the aim, purpose and object of Sections 158 (6), 163-A and 166 (4) of the MV Act would be defeated.

18. The Apex Court in the case titled as **Deepal Girishbhai Soni and others versus United India Insurance Co. Ltd., Baroda,** reported in **(2004) 5 Supreme Court Cases 385,** has dealt with the issue and held that claimants can file petition either under Section 163-A or Section 166 of the MV Act, is an option, rather, an election/exception. It is worthwhile to reproduce paras 52 and 57 of the judgment herein:

"52. It may be true that Section 163-B provides for an option to a claimant to either go for a claim under Section 140 or Section 163-A of the Act, as the case may be, but the same was inserted ex-abundanti cautela so as to remove any misconception in the mind of the parties to the lis having regard to the fact that both relate to the claim on the basis of no-fault liability. Having regard to the fact that Section 166 of the Act provides for a complete machinery for laying a claim on fault liability, the question of giving an option to the claimant to pursue their claims either under Section 163-A or Section 166 does not arise. If the submission of the learned Counsel is accepted the same would lead to an incongruity.

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57. We, therefore, are of the opinion that remedy for payment of compensation both under Sections 163-A and 166 being final and independent of each other as statutorily provided, a claimant cannot pursue his remedies thereunder simultaneously. One, thus, must opt/elect to go either for a proceeding under Section 163-A or under Section 166 of the Act, but not under both."

19. In the case titled as **Surinder Kumar Arora & another versus Dr. Manoj Bisla & others,** reported in **2012 AIR SCW 2241,** it has been held that the claimant has option to seek compensation either under Section 166 or under Section 163-A of the Act. It is apt to reproduce para 9 of the judgment herein:

"*9.Admittedly, the petition filed by the claimants was under Section 166 of the Act and not under Section 163-A of the Act. This is not in dispute. Therefore, it was the entire responsibility of the parents of the deceased to have established that respondent No.1 drew the vehicle in a rash and negligent manner which resulted in the fatal accident. Maybe, in order to help respondent No.1, the claimants had not taken up that plea before the Tribunal. Therefore, High Court was justified in sustaining the judgment and order passed by the Tribunal. We make it clear that if for any reason, the claimants had filed the petition under Section 163-A of the Act, then the dicta of this Court in the case of Kaushnuma Begum (Smt.) & Ors. (AIR 2001 SC 485 : 2001 AIR SCW 85) (supra) would have come to the assistance of the claimants."*

20. The Apex Court in another case tilted as **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120,** has laid down the same principle.

21. In the case titled as **United India Insurance Company Ltd. versus Sunil Kumar & Anr.,** reported in **2013 AIR SCW 6694,** the Apex Court, while discussing the judgments in **Deepal Girishbai Soni's** and **Sinitha's cases (supra),** has referred the matter to the larger Bench. It is apt to reproduce para 5 of the judgment herein:

> *"5. We find difficult to accept the reasoning expressed by the Two-Judge Bench in Sinitha's case. In our view, the principle laid down in Hansrajbhai V. Kodala's case has not been properly appreciated or applied by the Bench. In fact, another Division Bench of this Court vide its order dated 19.4.2002 had doubted the correctness of the judgment in Hansrajbhai V. Kodala's case and referred the matter to a Three- Judge Bench to examine the question whether claimant could pursue the remedies simultaneously under Sections 166 and 163-A of the Act. The Three- Judge Bench of this Court in Deepal Girishbhai Soni & Ors. v. United India Insurance Co. Ltd., Baroda, 2004 5 SCC 385 made a detailed analysis of the scope of Sections 166 and 163-A and held that the remedy for payment of compensation both under Sections 163-A and 166 being final and independent of each other, as statutorily provided, a claimant cannot pursue his remedies thereunder simultaneously. The Court also extensively examined the scope of Section 163-A and held that Section 163-A was introduced in the Act by way of a social security scheme and is a Code by itself. The Court also held that Section 140 of the Act deals with interim compensation but by inserting Section 163-A, the Parliament intended to provide for making of an award consisting of a pre-determined sum without insisting on a long- drawn trial or without proof of negligence in causing the accident. The Court noticed that Section 163-A was inserted making a deviation from the common law liability under the Law of Torts and also in derogation of the provisions of the Fatal Accidents Act. The Three-Judge Bench also held that Section 163-A has an overriding effect and provides for special provisions as to payment of compensation on structured formula basis. Sub- section (1) of Section 163-A contains a non-obstante clause, in terms whereof the owner of the motor vehicle or the authorized insurer is liable to pay, in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be. The Court also held that the scheme of the provisions of Section 163-A and Section 166 are distinct and separate in nature. In Section 163-A, the expression "notwithstanding anything contained in this Act or in any other law for the time being in force" has been used, which goes to show that the Parliament intended to insert a non-obstante clause of wide nature which would mean that the provisions of Section 163-A would apply despite the contrary provisions existing in the said Act or any other law for the time being in force. Section 163-A of the Act covers cases where even negligence is on the part of the victim. It is by way of an exception to Section 166 and the concept of social justice has been duly taken care of.*
>
> *The above-mentioned Three-Judge Bench judgment was not placed before the learned Judges who decided the Sinitha's case."*

22. The larger Bench has not yet decided the said reference and is still on the dockets of the Apex Court. But in para 5 of the said judgment, quoted hereinabove, it has specifically been held that filing a claim petition under Section 163-A of the MV Act is an exception to Section 166 of the MV Act.

23. At the cost of repetition, the Claims Tribunals have powers under Section 166 (4) of the MV Act read with Section 158 (6) of the MV Act and the Motor Vehicles Rules to treat any petition either under Section 163-A or Section 166 of the MV Act. The scope, aim, object and reasonable logic behind such legislation nowhere empowers the Claims Tribunals to dismiss a claim petition filed by the victim on the ground of income slab, who has chosen to file the same under Section 163-A of the MV Act with a hope that he will get compensation as early as possible.

The Claims Tribunals have the power to treat the same under Section 166 of the MV Act so as to redress the grievances of the victims. If the claim petition is dismissed on such grounds, that will defeat the purpose of the Act and will amount to succumbing to the technicalities.

24. While going through the aim and object of the MV Act, one comes to an inescapable conclusion that the wisdom of the Legislature was to provide compensation to the victims as early as possible and that is why amendments were made from time to time with a sole object that the claimants do not suffer and fall prey to social evils.

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

26. The same principle has been laid down by the Apex Court in the cases titled as **N.K.V. Bros (P.) Ltd. Versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354; Sohan Lal Passi versus P. Sesh Reddy and others,** reported in **AIR 1996 Supreme Court 2627;** and **Dulcina Fernandes and others versus Joaquim Xavier Cruz and another,** reported in **(2013) 10 Supreme Court Cases 646;** and by this Court in **FAO No. 339 & 340 of 2008,** titled as NIC versus Parwati & others; **FAO No. 172 of 2006,** titled as Oriental Insurance Company versus Shakuntla Devi & others; **FAO No. 396 of 2012,** titled as Asha & others versus Moti Ram & others; **FAO No. 4248 of 2013,** titled as Magni Devi & others versus Suneel Kumar & others, decided on 13.03.2015; **FAO No. 17 of 2008,** titled as United India Insurance Company Limited versus Smt. Brijbala & others, decided on 20.03.2015; and **FAO No. 186 of 2008,** titled as Oriental Insurance Co. Ltd. versus Shri Kishan Chand & others, decided on 01.05.2015.

27. The Apex Court in a latest judgment rendered in the case titled as **Smt. Savita versus Bindar Singh & others,** reported in **2014 AIR SCW 2053,** has held that the niceties or technicalities have no role to play. It is worthwhile to reproduce para 6 of the judgment herein:

> *"6. After considering the decisions of this Court in Santosh Devi (supra), AIR 2012 SC 2185 : 2012 AIR SCW 2892, as well as Rajesh v. Rajbir Singh, (2013) 9 SCC 54, we are of the opinion that it is the duty of the Court to fix a just compensation. At the time of fixing such compensation, the court should not succumb to the niceties or technicalities to grant just compensation in favour of the claimant. It is the duty of the court to equate, as far as possible, the misery on account of the accident with the compensation so that the injured or the dependants should not face the vagaries of life on account of discontinuance of the income earned by the victim. Therefore, it will be the bounden duty of the Tribunal to award just, equitable, fair and reasonable compensation judging the situation prevailing at that point of time with reference to the settled principles on assessment of damages. In doing so, the Tribunal can also ignore the claim made by the claimant in the application for compensation with the prime object to assess the award based on the principle that the award should be just, equitable, fair and reasonable compensation."*

28. The Apex Court in another case titled as **Ningamma & another versus United India Insurance Co. Ltd.,** reported in **2009 AIR SCW 4916,** held that it is the bounden duty of the Court to award just compensation in favour of the claimants to which they are entitled to, irrespective of the fact whether any plea in that behalf was raised by the claimants or not. It is profitable to reproduce para 25 of the judgment herein:

> *"25. Undoubtedly, Section 166 of the MVA deals with "Just Compensation" and even if in the pleadings no specific claim was made under section 166 of the MVA, in our considered opinion a party should not be deprived from getting "Just Compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the*

Court is duty bound and entitled to award "Just Compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not. However, whether or not the claimants would be governed with the terms and conditions of the insurance policy and whether or not the provisions of Section 147 of the MVA would be applicable in the present case and also whether or not there was rash and negligent driving on the part of the deceased, are essentially a matter of fact which was required to be considered and answered at least by the High Court."

29. In **Sinitha's case (supra),** the Apex Court has held that it is open to the owner or the insurer to defeat a claim under Section 163-A of the MV Act by pleading and establishing through cogent evidence a wrongful act or neglect or default.

30. Sub-section (2) of Section 163-A of the MV Act provides that the claimant is not required to plead or establish the wrongful act or neglect or default of the owner of the vehicle. Perhaps that was the reason that the Apex Court in **Sunil Kumar's case (supra)** made a reference to the larger Bench, which is yet to be decided. So, we refrain from making discussion and return findings.

31. The Apex Court in the case titled as **United India Insurance Co. Ltd. Versus Shila Datta & Ors.,** reported in **2011 AIR SCW 6541,** has made discussions about the aim and object of the legislation and has also provided what is the procedure to be followed by the Claims Tribunals while determining the claim petitions. Five points were framed for determination in the said reference and points No. (iii) to (v) were further referred to a larger Bench. It is not known whether said reference has been answered. However, we have laid our hands on order, dated 12th November, 2013, in terms of which the appeal, which had given birth to the said reference, has been dismissed.

32. It is also worthwhile to record herein that in **Sunil Kumar's case (supra),** points No. (iii) to (v) framed in **Shila Datta's case (supra)** have also been referred to a larger Bench. Meaning thereby, the reference is yet to be answered. But, the findings in para 5 of the judgment in **Shila Datta's case (supra)** were not the subject matter of the reference and have attained finality. It is profitable to reproduce para 5 of the judgment in **Shila Datta's case (supra)** herein:

"5. A claim petition for compensation in regard to a motor accident (filed by the injured or in case of death, by the dependant family members) before the Motor Accident Claims Tribunal constituted under section 165 of the Act is neither a suit nor an adversarial lis in the traditional sense. It is a proceedings in terms of and regulated by the provisions of Chapter XII of the Act which is a complete Code in itself. We may in this context refer to the following significant aspects in regard to the Tribunals and determination of compensation by Tribunals:

(i) A proceeding for award of compensation in regard to a motor accident before the Tribunal can be initiated either on an application for compensation made by the persons aggrieved (claimants) under section 166(1) or section 163A of the Act or suo motu by the Tribunal, by treating any report of accident (forwarded to the tribunal under section 158(6) of the Act as an application for compensation under section 166 (4) of the Act.

(ii) The rules of pleadings do not strictly apply as the claimant is required to make an application in a form prescribed under the Act. In fact, there is no pleading where the proceedings are suo motu initiated by the Tribunal.

(iii) In a proceeding initiated suo motu by the tribunal, the owner and driver are the respondents. The insurer is not a respondent, but a noticee under section 149(2) of the Act. Where a claim petition is filed by the injured or by the legal representatives of a person dying in a motor accident, the driver and owner have to be impleaded as respondents. The claimants need not implead the insurer as a party. But they have the choice of impleading the insurer also as a party respondent. When it is not impleaded as a party, the Tribunal is required to issue a notice under section

149(2) of the Act. If the insurer is impleaded as a party, it is issued as a regular notice of the proceedings.

(iv) The words 'receipt of an application for compensation' in section 168 refer not only to an application filed by the claimants claiming compensation but also to a suo motu registration of an application for compensation under section 166(4) of the Act on the basis of a report of an accident under section 158(6) of the Act.

(v) Though the tribunal adjudicates on a claim and determines the compensation, it does not do so as in an adversarial litigation. On receipt of an application (either from the applicant or suo motu registration), the Tribunal gives notice to the insurer under section 149(2) of the Act, gives an opportunity of being heard to the parties to the claim petition as also the insurer, holds an inquiry into the claim and makes an award determining the amount of compensation which appears to it to be just. (Vide Section 168 of the Act).

(vi) The Tribunal is required to follow such summary procedure as it thinks fit. It may choose one or more persons possessing special knowledge of and matters relevant to inquiry, to the assist it in holding the enquiry (vide section 169 of the Act).

(vii) The award of the Tribunal should specify the person/s to whom compensation should be paid. It should also specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them. (Vide section 168 of the Act).

(viii) The Tribunal should deliver copies of the award to the parties concerned within 15 days from the date of the award. (Vide section 168 (2) of the Act).

We have referred to the aforesaid provisions to show that an award by the tribunal cannot be seen as an adversarial adjudication between the litigating parties to a dispute, but a statutory determination of compensation on the occurrence of an accident, after due enquiry, in accordance with the statute."

33. This Court also in the case titled as **Smt. Asha & others versus Sh. Moti Ram & others,** reported in **Latest HLJ 2014 (HP) 595,** while relying upon the various pronouncements made by the Apex Court, has held that granting of compensation is just to ameliorate the woes of the victims of the vehicular accidents and the hypertechnicalities, mystic maybes and procedural wrangles and tangles cannot be made a ground to defeat the social purpose of granting compensation.

34. In the case titled as **United India Insurance Company Limited versus Smt. Samitra Devi & others,** reported in **Latest HLJ 2015 (HP) 85,** this Court held that claim petitions cannot be scuttled away enroute on the ground that the claimants have not claimed the amount to which they are entitled to. Further held that the Claims Tribunal is within its powers to grant compensation more than what is claimed and the Appellate Court has the same powers even if the claimants have not filed appeal or cross-objections. It would be profitable to reproduce paras 27, 28 and 31 of the judgment herein:

"27. The Tribunal has also fallen in error in making such a finding. It is beaten law of land that compensation should be just and proper and claim petition cannot be scuttled away enroute on the ground that the claimants have not claimed the amount to which they are entitled to.

28. I believe that the Tribunal has lost sight of the mandate of Section 158 (6) of the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act") read with Section 166 (4) of the MV Act.

29. .....

30. .....

31. My this view is fortified by the judgment of the Apex Court in the case of **Nagappa versus Gurudayal Singh and others,** reported in **AIR 2003 Supreme Court 674.** It is apt to reproduce paras 7, 9 and 10 of the judgment herein:

"7. Firstly, under the provisions of Motor Vehicles Act, 1988, (hereinafter referred to as "the MV Act") there is no restriction that compensation could be awarded only up to the amount claimed by the claimant. In an appropriate case where from the evidence brought on record if Tribunal/Court considers that claimant is entitled to get more compensation than claimed, the Tribunal may pass such award. Only embargo is – it should be 'Just' compensation, that is to say, it should be neither arbitrary, fanciful nor unjustifiable from the evidence. This would be clear by reference to the relevant provisions of the M.V. Act. Section 166 provides that an application for compensation arising out of an accident involving the death of or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both, could be made (a) by the person who has sustained the injury; or (b) by the owner of the property; (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or (d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be. Under the proviso to sub-section (1), all the legal representatives of the deceased who have not joined as the claimants are to be impleaded as respondents to the application for compensation. Other important part of the said Section is sub-section (4) which provides that "the Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act." Hence, Claims Tribunal in appropriate case can treat the report forwarded to it as an application for compensation even though no such claim is made or no specified amount is claimed.

8. .....

9. It appears that due importance is not given to sub-section (4) of Section 166 which provides that the Tribunal shall treat any report of the accidents forwarded to it under sub-section (6) of Section 158, as an application for compensation under this Act.

10. Thereafter, Section 168 empowers the Claims Tribunal to "make an award determining the amount of compensation which appears to it to be just". Therefore, only requirement for determining the compensation is that it must be 'just'. There is no other limitation or restriction on its power for awarding just compensation."

35. The same principle has been laid down in the cases titled as **Smt. Shrestha Devi and others versus Kishori Lal and others,** being FAO No. 465 of 2009, decided on 1st July, 2016; and **Dinesh Kumar versus Puran Singh and others,** being FAO (MVA) No. 189 of 2011, decided on 5th August, 2016.

36. The proceedings instituted under Sections 163-A or 166 of the MV Act are to be taken to the logical end by following a summary procedure as per the mandate of MV Act read with the Motor Vehicle Rules.

37. The Apex Court in the case titled as **Malati Sardar versus National Insurance Company Ltd. and others,** reported in **AIR 2016 Supreme Court 247,** has held that the award passed in a claim petition cannot be set aside on account of lack of territorial jurisdiction unless it has caused prejudice because that will amount to defeat the aim, object and purpose of the MV Act. The ratio of the said judgment is that the Claims Tribunals/Courts shall reach the victims as early as possible and grant compensation to which they are entitled to as per the norms applicable. It is apt to reproduce para 14 of the judgment herein:

"14. The provision in question, in the present case, is a benevolent provision for the victims of accidents of negligent driving. The provision for territorial jurisdiction has

to be interpreted consistent with the object of facilitating remedies for the victims of accidents. Hyper technical approach in such matters can hardly be appreciated. There is no bar to a claim petition being filed at a place where the insurance company, which is the main contesting parties in such cases, has its business. In such cases, there is no prejudice to any party. There is no failure of justice. Moreover, in view of categorical decision of this Court in Mantoo Sarkar,(AIR 2009 SC 1022) supra, contrary view taken by the High Court cannot be sustained. The High Court failed to notice the provision of Section 21 CPC."

38. The Claims Tribunals have the power, as discussed hereinabove, to treat the claim petition under Section 163-A or Section 166 of the MV Act, but that power can be exercised before final award is made. After passing such order, the Claims Tribunals have to provide opportunities to the parties to plead their case and take all defences available, so that no prejudice is caused to the parties, in order to ensure that the grievance of the claimants is redressed, which is the aim and object of granting compensation.

39. If a claim petition filed under Section 163-A of the MV Act is dismissed on account of income slab or on the ground of rash and negligent element involved, the claimants can file a fresh claim petition under Section 166 of the MV Act and can take all such grounds, but that would be against the concept of granting compensation and would defeat the very purpose. It would really be a travesty of justice to constrain the claimant(s) to file fresh claim petition under Section 166 of the MV Act for the reason that the claim petition can be filed at any time as the rigour of delay stands taken away by the amendment made in the year 1994 and Section 166 (3) of the MV Act stands deleted.

40. The Apex Court in the case titled as **Dhannalal versus D.P. Vijayvargiya and others,** reported in **AIR 1996 Supreme Court 2155,** has discussed the purpose of amendment made in the year 1994 deleting sub-section (3) of Section 166 of the MV Act and taking away the rigour of limitation. The ratio of the said judgment and the purpose of deletion of sub-section (3) of Section 166 of the MV Act is aimed at to provide compensation to the victims of the vehicular accident at any time in order to achieve the purpose of granting compensation in terms of the mandate of the MV Act.

41. In the given circumstances, it can be safely held that there is no legal impediment in treating the claim petition under Section 166 of the MV Act, which has been filed under Section 163-A of the MV Act and granting compensation.

42. If a claim petition filed for grant of compensation under Section 163-A of the MV Act is granted, the claimants are precluded from filing fresh claim petition under Section 166 of the MV Act for enhanced compensation because the award made under Section 163-A of the MV Act is final and operates as Res Judicata and Estoppel.

43. The Apex Court in **Deepal Girishbhai Soni's case (supra)** has also held that the proceedings under Section 163-A of the MV Act are aimed at to provide speedy and quick relief to the claimants and the award made is a final award. It would be profitable to reproduce paras 41 to 43 of the judgment herein:

"41. Section 140 of the Act dealt with interim compensation but by inserting Section 163-A, the Parliament intended to provide for making of an award consisting of a pre-determined sum without insisting on a long-drawn trial or without proof of negligence in causing the accident. The Amendment was thus a deviation from the common law liability under the law of torts and was also in derogation of the provisions of the Fatal Accidents Act. The Act and the Rules framed by the State in no uncertain terms suggest that a new device was sought to be evolved so as to grant a quick and efficacious relief to the victims falling within the specified category. The heirs of the deceased or the victim in terms of the said provisions were assured of a speedy and effective remedy which was not available to the claimants under Section. 166 of the Act.

42. Chapter XI was, thus, enacted for grant of immediate relief to a section of people whose annual income is not more than Rs. 40,000/- having regard to the fact that in terms of Section 163-A of the Act read with the Second Schedule appended thereto, compensation is to be paid on a structured formula not only having regard to the age of the victim and his income, but also the other factors relevant therefor. An award made thereunder, therefore, shall be in full and final settlement of the claim as would appear from the different columns contained in the Second Schedule appended to the Act. The same is not interim in nature. The note appended to column 1 which deals with fatal accidents makes the position furthermore clear stating that from the total amount of compensation one-third thereof is to be reduced in consideration of the expenses which the victim would have incurred towards maintaining himself had he been alive. This together with the other heads of compensation as contained in column Nos. 2 to 6 thereof leaves no manner of doubt that the Parliament intended to lay a comprehensive scheme for the purpose of grant of adequate compensation to a section of victims who would require the amount of compensation without fighting any protracted litigation for proving that the accident occurred owing to negligence on the part of the driver of the Motor Vehicle or any other fault arising out of use of a Motor Vehicle.

43. The submission of learned Counsel appearing on behalf of the appellants to the effect that Sections 140 and 163-A provide for similar scheme cannot be accepted for more than one reason. Payment of the amount in terms of Section 140 of the Act is ad hoc in nature. A claim made thereunder, as has been noticed hereinbefore, is in addition to any other claim which may be made under any other law for the time being in force. Section 163-A of the Act does not contain any such provision."

44. The appeal under Section 173 of the MV Act is alike the appeal under Section 96 of the Code of Civil Procedure, 1908 (for short, "CPC"). Therefore, the Court is under obligation to decide all factual and legal issues arising in a case.

45. The Apex Court in **U.P.S.R.T.C. vs. Km. Mamta and others,** reported in **AIR 2016 Supreme Court 948**, held that remedy under Section 173 of the MV Act and the first appeal under Section 96 CPC are alike and, therefore, the High Court has to decide all issues arising in the case. It is profitable to reproduce paragraph 24 of the said judgment hereunder:

"24. An appeal under Section 173 of the M.V. Act is essentially in the nature of first appeal alike Section 96 of the Code and, therefore, the High Court is equally under legal obligation to decide all issues arising in the case both on facts and law after appreciating the entire evidence."

46. Keeping in view the above discussion, it is not mandatory to file claim petition by the claimants because even a police report can be treated as a claim petition.

47. Having glance of the above discussions, the judgments made by this Court in the case titled as **New India Assurance Company Ltd. versus Chanchal Devi & ors.,** reported in **Latest HLJ 2014 (HP) 250,** and **FAO No. 394 of 2007,** titled as **Oriental Insurance Company Ltd. versus Meena & ors.,** decided on 11th July, 2014, are in accordance with the judgments made by the Apex Court (supra), and the judgments in the cases titled as **Sudhir Mahajan versus United India Insurance Company Ltd. & anr.,** reported in **2007 (2) Shim.LC 305; Shanti Devi & anr. versus National Insurance Company & ors,** reported in **2008 (2) Shim.LC 125; Satya Devi versus Bakshi Ram & ors.,** reported in **2009 (2) Shim.LC 381;** and **New India Assurance Company versus Smt. Veena Devi & ors.,** reported in **Latest HLJ 2009 (HP) 770,** are not in tune with the ratio laid down by the judgments made by the Apex Court, as discussed hereinabove, and are also not in accordance with the aim and object of the said Legislation.

48. The protection provided under Section 163-A of the MV Act is to the victims whose income slab is up to ₹ 40,000/- per annum and that remedy is not available to the victims whose income slab is more than ₹ 40,000/- per annum. If the Claims Tribunal comes to the

conclusion that the income slab of the victim is more than ₹ 40,000/-, the remedy under Section 163-A of the MV Act cannot be pressed into service, but, as discussed hereinabove, it can be treated as claim petition under Section 166 of the MV Act by providing opportunity to the claimants to prove rash and negligent element, which is *sine quo non* for determining the claim petition under Section 166 of the MV Act and opportunity is also required to be provided to the respondents to raise all defences available to them in terms of the mandate of the MV Act.

49. The claimants cannot be permitted to abandon a part of their claim and restrict the same to ₹ 40000/- per annum in order to avail the remedy under Section 163-A of the MV Act. That is not the aim, object and scope of the Legislation. If that would have been so, then there was no need to prescribe the income slab and in case the claimants are allowed to do so, it will amount to re-writing the provisions of Section 163-A of the MV Act.

50. Having said so, the claimants/victims cannot be permitted to abandon a part of their claim and restrict the same to ₹ 40,000/- per annum in order to maintain the claim petition under Section 163-A of the MV Act.

51. It is worthwhile to record herein that the Division Bench of this Court in the case titled as **Sukhwant Kaur and others versus Sher Singh and another,** reported in **2008 (3) Shim.LC 93,** has held that claim petition under Section 163-A of the MV Act was not maintainable in view of the fact that the income of the deceased was more than ₹ 40,000/- per annum (para 3); and the claim petition was treated under Section 166 of the MV Act in terms of para 4 of the judgment, but was dismissed on the ground that negligence was not proved.

52. Thus, it cannot be said that the judgment in **Chanchal Devi's case (supra)** is in conflict with the judgment in **Sukhwant Kaur's case (supra)**.

53. The reference is answered accordingly.

54. Whether the appeal in hand be sent to the learned Single Judge for determination is also a moot question. The claimants have already suffered because of the procedure adopted, is travesty of justice and judicial process. So, we deem it proper to determine the appeal also.

55. The claim petition was filed under Section 163-A of the MV Act for grant of compensation, as per the break-ups given in the claim petition, on the grounds taken therein.

56. The respondents in the claim petition resisted the same on the grounds taken in the respective memo of objections.

57. Following issues came to be framed by the Tribunal on 26th October, 2007:

> *"1. Whether the deceased Girdhari Lal died in an accident as a result of rash and negligent driving of Bus No. HP-09 A -0698 by the respondent No. 2 and on account of rash and negligent act of respondent No. 3, as alleged? OPP*
>
> *2. If issue No. 1 is proved in affirmative, whether the petitioners are entitled for compensation, if so to what amount and from whom? OPP*
>
> *3. Whether there has been breach of specific terms and conditions of the Insurance Policy because the respondent No. 1 has sold the vehicle to one Sh. Surat Ram, as alleged? OPR-4*
>
> *4. Whether the driver of the vehicle i.e. respondent No. 2 was not holding any valid and effective driving licence at the time of the accident? OPR-4*
>
> *5. Whether the vehicle was not holding fitness certificate at the time of the accident, if so its effect? OPR-4*
>
> *6. Whether the vehicle was not having required route permit and there is a violation of the Policy and statute, as alleged? OPR-4*
>
> *7. Relief."*

58. The claimants have examined three witnesses and one of the claimants has himself stepped into the witness box. It is apt to record herein that the respondents, including the insurer, have not led any evidence. Thus, they have failed to prove the defences taken by them and issues No. 3 to 6 came to be decided against the insurer.

59. The claimants, owner-insured, driver and conductor of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

60. The appellant-insurer has questioned the impugned award mainly on the ground that the claim petition was not maintainable for the reason that the monthly income of the deceased was alleged to be ₹ 6,000/- per month, i.e. ₹ 72,000/- per annum.

61. This ground is not available to the insurer for the reason that, as discussed hereinabove, the claim petition cannot be dismissed on that ground and it can be treated as claim petition under Section 166 of the MV Act. Though, the claimants have averred that the income of the deceased was ₹ 6,000/- per month, but, the Tribunal has held that the income of the deceased was ₹ 3300/- per month. Thus, his income was not more than ₹ 40,000/- per annum, and the claim petition under Section 163-A of the MV Act was maintainable.

62. Even otherwise, if we treat the claim petition under Section 166 of the MV Act, rash and negligent driving of the offending vehicle by its driver has been proved, which is *sine quo non* for maintaining the claim petition and granting compensation under the said Section. In para 24 of the claim petition, it has specifically been averred that the deceased was travelling on the roof top of the bus and was hit on head by an over hanging branch of tree, which factum has not been denied by the driver and conductor of the bus. Allowing a person to travel on the roof of the bus, on the face of it, is an act of negligence and rashness of the driver.

63. In a case titled as **N.K.V. Bros. (P.) Ltd. versus M. Karumani Ammal and others,** reported in **AIR 1980 Supreme Court 1354,** a bus hit an over-hanging high tension wire resulting in 26 casualties. The Apex Court upheld the findings recorded by the Tribunal and the High Court that the accident had taken place due to the rashness and negligence of the driver of the bus despite the fact that the driver earned acquittal in the criminal case on the score that the tragedy that happened was an act of God.

64. The Apex Court in the case titled as **Shivaji Dayanu Patil and another versus Vatschala Uttam More,** reported in **1991 ACJ 777,** has interpreted the words and expression 'use of motor vehicle' and held that these have a wide connotation. It is apt to reproduce paras 35 and 36 of the judgment herein:

> *"35. In the same case, Windeyer, J. has observed as under :*
>
> *"The words 'injury by or arising out of the use of the vehicle' postulate a causal relationship between the use of the vehicle and the injury. 'Caused by' connotes a 'direct' or 'Proximate' relationship of cause and effect. 'Arising out of' extends this to a result that is less immediate; but it still carries a sense of consequence."*
>
> *36. This would show that as compared to the expression 'caused by', the expression 'arising out of' has a wider connotation. The expression 'caused by' was used in sections 95(1)(b)(i) and (ii) and 96(2)(b)(ii) of the Act. In section 92-A, Parliament, however, chose to use the expression 'arising out of' which indicates that for the purpose of awarding compensation under section 92-A, the causal relationship between the use of the motor vehicle and the accident resulting in death or permanent disablement is not required to be direct and proximate and it can be less immediate. This would imply that accident should be,connected with the use of the motor vehicle but the said connection need not be direct and immediate. This construction of the expression "arising out of the use of a motor vehicle" in section 92-A enlarges the field of protection made available to the*

victims of an accident and is in consonance with the beneficial object underlying the enactment."

65. While going through the judgment (supra), one comes to an inescapable conclusion how the accident and injury/death have relationship with use of motor vehicle.

66. In the case titled as **New India Assurance Co. Ltd. versus Shanti Bai (Smt) and others,** reported in **(1995) 2 Supreme Court Cases 539,** the deceased was travelling on the roof top of the bus, met with an accident, claim petition was filed, was granted by the Claims Tribunal, awarded compensation in favour of the claimants and saddled the insurer, owner-insured and driver of the bus with liability. The said decision was upheld by the High Court, was again assailed by the insurer before the Apex Court. The Apex Court upheld the award but saddled the insurer with liability limited to ₹ 15,000/- in terms of the insurance policy.

67. It is apt to record herein that the said judgment has been upheld by Constitutional Bench of the Apex Court in the case titled as **New India Assurance Co. Ltd. versus C.M. Jaya and others,** reported in **(2002) 2 Supreme Court Cases 278.**

68. The Full Bench of the High Court of Karnataka at Bangalore in the case titled as **North East Karnataka Road Trans. Corpn. versus Vijayalaxmi and others,** reported in **2012 ACJ 1968,** held that no contributory negligence or fixed percentage of contribution could be attributed to a passenger merely because he was travelling on roof of the bus. It has further been held that travelling on the roof of the bus is a negligent act.

69. This Court in **FAO No. 44 of 2010,** titled as **Himachal Road Transport Corporation & Anr. versus Kamlesh Kumari and others,** decided on 8th April, 2016, held that allowing a person to travel on the roof of a bus in itself amounts to negligence on the part of the driver and the conductor of the bus.

70. Applying the test to the instant case, the deceased, while travelling on the roof of the bus, was hit by an over hanging branch of a tree, due to which he fell down, sustained injuries and succumbed to the injuries. Thus, it can be safely said that it was an act of negligence on the part of the driver and conductor of the bus.

71. If the claim petition is treated under Section 163-A, the income of the deceased is less than ₹ 40,000/- per annum and if it is treated under Section 166 of the MV Act, the rash and negligent driving of the offending vehicle has also been proved, is maintainable on both counts.

72. The purpose behind filing of the claim petition by the claimants was that they will be able to get the compensation as early as possible, but, unfortunately, the deceased has died on 7th October, 2003, the claim petition was filed on 5th December, 2003, about thirteen years has elapsed and the claimants have yet to reap the fruits, is a terrible commentary on the process and speaks how the insurer is contesting the claim petition.

73. The purpose of Section 163-A of the MV Act is just to give a speedy compensation to the victims of the vehicular accidents, which has been thrown to winds. So, we deem it proper to saddle the insurer with costs.

74. The adequacy of compensation is not in dispute. However, we have gone through the impugned award read with the record and are of the considered view that the amount awarded is rather inadequate, but, as the claimants have not questioned the same, is reluctantly upheld.

75. The factum of insurance is also not in dispute. Thus, the Tribunal has rightly saddled the insurer with liability.

76. Having said so, the impugned award merits to be upheld. Accordingly, the impugned award is upheld and the appeal is dismissed with costs quantified at ₹ 10,000/- payable to the claimants.

77. The insurer is directed to deposit the costs before the Registry of this Court within four weeks. On deposition of the costs, the awarded amount alongwith costs be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payees' account cheque or by depositing the same in their respective bank accounts.

78. Send down the records after placing a copy of the judgment on the Tribunal's file.

****

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

State of Himachal Pradesh ...Appellant

Versus

Arun Soni and another ...Respondents

Cr. Appeal No. 4215 of 2013
Reserved on: 19.09.2016
Date of decision: 28.09.2016

Indian Penal Code, 1860- Section 326, 307, 504 and 506 read with Section 34- PW-4 was present at Gurdawara chowk along with his friends- he called A to inquire as to why latter was calling N, a girl known to PW-4- A abused PW-4, came out of his shop armed with the cutter in his hands and stabbed him in the abdomen – K was taken to hospital- accused were tried and acquitted by the trial Court- held, in appeal that incident had taken place as accused was unnecessarily calling N- however, N denied having any acquaintance with the informant and the accused – the genesis of the prosecution version is made doubtful by this fact- nature of injury was not established – it was admitted in cross-examination that possibility of injury being sustained by a sharp edged weapon concealed in the loin area could not be ruled out – Medical Officer admitted that 2 c.m. wide wound could not be caused by paper cutter- the prosecution version regarding the infliction of injury was not proved in view of material contradictions and inconsistencies in the testimonies of the prosecution witnesses- the trial Court had correctly appreciated the evidence- appeal dismissed. (Para-10 to 46)

For the appellant: Mr. V.S. Chauhan, Addl. Advocate General, Mr. Vikram Thakur and Mr. Puneet Rajta, Deputy Advocate Generals.

For the respondents: Mr. Satyen Vaidya, Senior Advocate as Amicus Curiae.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of this appeal, State has challenged the judgment passed by the Court of learned Additional Sessions Judge, Ghumarwin, in Sessions Trial No. 8/7 of 2012 dated 20.06.2013, vide which, learned trial Court acquitted the accused for commission of offences punishable under Sections 326, 307, 504 and 506 read with Section 34 of Indian Penal Code.

2. The case of the prosecution was that on 11.07.2011 at around 8.45 P.M. PW-4 Karun Sharma, a student of Shiva College of Engineering alongwith his friends Pankaj, Rakib, Arush and Ravi etc. were present at Gurudwara Chowk at Bilaspur and Karun Sharma called Arun Soni, who at the relevant time was present in his shop to inquire as to why he was calling a girl who was known to Karun Sharma. Further as per prosecution, initially Arun Soni abused Karun Sharma on mobile and thereafter, he came out of his shop with a cutter in his hand and ran towards Karun Sharma and stabbed him in his abdomen, as a result of which, Karun Sharma received injury in his abdomen and blood also oozed out. Karun Sharma was

immediately taken to the Police Station by his friends on motor cycle, however, at the gate they were advised to take the injured to the hospital first. Accordingly, Karun Sharma was taken to Regional Hospital, Bilaspur, for treatment on the motor cycle. He made a statement in the hospital and on the basis of the same, FIR was registered at Police Station, Sadar. Medical examination of Karun Sharma was conducted by PW-3 Dr. Ankur Dharmani. According to him, there was a stab transverse injury approximately 5 cm above umbilicus, 10 cm in length and entered into the peritoneum cavity. On palpation of the wound, there seemed tear of the left lobe of the liver and fresh blood was coming from peritoneum. Patient was referred to referred to IGMC, Shimla, for further treatment and nature of injury was stated to be grievous and dangerous to life. Investigation was carried by the police.

3. After completion of the investigation, challan was presented in the Court and as a prima facie case was found against the accused persons, accordingly, they were charged for commission of offences punishable under Sections 326, 307, 504 and 506 read with Section 34 of Indian Penal Code, to which they pleaded not guilty and claimed trial.

4. Learned trial Court on the basis of material produced before it by the prosecution both ocular as well as documentary came to the conclusion that neither any recovery was effected pursuant to the statement made by the accused nor the version of the prosecution as projected before the Court was reliable and prosecution in fact had failed to prove its case beyond reasonable doubt that the accused in furtherance of their common intention had caused grievous hurt to the complainant with a paper cutter with intent/knowledge that it would cause his death and had given provocation to him to break public peace and had also criminally intimidated him to do away with his life. Accordingly, learned trial Court acquitted the accused for commission of offences alleged against them.

5. Mr. V.S. Chauhan, learned Additional Advocate General, has vehemently argued that the judgment of acquittal passed by learned trial Court was not sustainable in law. It was argued by Mr. Chauhan that learned trial Court had erred in giving undue importance to minor contradictions which appeared in the statements of prosecution witnesses without appreciating the examination-in-chief of the injured/ complainant i.e. PW-4. It was further contended by Mr. Chauhan that learned trial Court had erred in not relying upon the testimonies of other key witnesses i.e. PW-1 Pankaj Thakur and PW-5 Arush Kalyan, who had categorically proved beyond reasonable doubt that it were the accused who had committed offences for which they were tried. According to Mr. Chauhan, testimony of PW-1 and PW-5 read with that of complainant proved the case of the prosecution beyond reasonable doubt and nailed the guilt of the accused, however, cogent and reliable testimony of these witnesses had been brushed aside by learned trial Court in a cursory manner. Mr. Chauhan further argued that undue importance was given to the factum of PW-2, PW-7 and PW-12 having turned hostile without appreciating that from the other material produced on record by prosecution its case stood proved against the accused. Mr. Chauhan further argued that even the statement of Dr. Ankur Dharmani had been totally misread and misappreciated by learned trial Court. On these basis, it was urged by Mr. Chauhan that judgment of acquittal passed by learned trial Court was not sustainable in the eyes of law and the same be set aside and the accused be convicted for commission of offences they were charged for.

6. On the other hand, Mr. Satyen Vaidya, learned Senior Advocate, who has assisted this Court as Amicus Curiae, argued that judgment of acquittal passed by learned trial Court cannot be faulted with because it cannot be said that on the basis of material produced on record both ocular as well as documentary by the prosecution it had proved its case against the accused beyond reasonable doubt. Mr. Vaidya argued that learned trial Court in fact had taken into consideration the entire evidence produced on record by the prosecution and after a careful perusal of the same, it had rightly come to the conclusion that the prosecution had not been able to prove its case against the accused beyond reasonable doubt. Mr. Vaidya submitted that not only the version as was putforth by the prosecution was not reliable, there were too many inconsistencies and contradictions in the statements of prosecution witnesses which shrouded

the case of the prosecution with suspicion. He further argued that genesis of the case of the prosecution was that the complainant questioned the accused on mobile as to why he was time and again calling a girl known to him and the said girl i.e. PW-2 when she entered the witness box denied the factum of being acquainted with the complainant. This witness also denied that the accused used to call her. It was further submitted by Mr. Vaidya that another important aspect of the matter which shrouded the case of the prosecution with suspicion was that as per PW-6, complainant was referred to IGMC, Shimla and it was the case of the prosecution that from Bilaspur the complainant was in fact taken to IGMC, Shimla, however, the prosecution did not place on record any evidence with regard to the treatment undergone by the complainant at IGMC, Shimla, which tantamount to concealing material evidence from the Court. On these basis, it was submitted by Mr. Satyen Vaidya, learned Amicus Curiae, that keeping in view the fact that the respondents were having benefit of acquittal in their favour and the material produced on record by the prosecution did not prove their guilt beyond reasonable doubt, the judgment passed by learned trial Court should not be interfered with.

7. We have heard learned Additional Advocate General and learned Amicus Curiae and have also gone through the records of the case as well as the judgment passed by learned trial Court.

8. In order to prove its case, prosecution examined 17 witnesses and defence examined one witness.

9. Hereinafter we will refer to the testimony of material prosecution witnesses.

10. Pankaj Thakur entered the witness box as PW-1 and stated that he was a music teacher in New Delhi and the complainant was also practicing music with him in Main Market Bilaspur. As per this witness, in the evening of 11.07.2011 he alongwith Karun had gone to Gurudwara Chowk and Karun was talking on his mobile phone and was little ahead from where he was standing. This witness further deposed that accused Ajay Soni was talking with Karun from his shop and thereafter accused Ajay Soni came out of his shop and caught hold of Karun from his throat and hurled a blow with something in his stomach as a result of which Karun sustained injury in his stomach and fell down. This witness further deposed that Karun was taken to Police Station at Bilaspur and subsequently he was taken to hospital at Bilaspur, from where he was referred to IGMC, Shimla for treatment. In his cross-examination, he denied that on 11.07.2011 at 4.00 P.M. he, Karun and Ravi were together near Radha Rani parking in Main Market Bilaspur where they met Rishi and they told Rishi that in the evening they were to have a quarrel with Ajay Soni and asked Rishi not to come there. He also denied that Karun had shown 'Khukhari' to Rishi which was hidden by him in his loin. He also denied that on 11.07.2011 at around 8.30 P.M. he alongwith Karun, Rakib, Arush, Ravi and Manoj had gathered at Gurudwara Chowk. He stated that he reached Gurudwara Chowk alongwith Karun at about 8.00 P.M. and both of them had come on a motor cycle. He further stated that he knew Ravi and Rakib but he was not aware that Rakib, Ravi, Arush and Manoj were already there or not. He admitted it to be correct that when they reached at Gurudwara Chowk about 30-40 persons were there and one bullock was in the middle of road. This witness further deposed that Karun was at a distance of 20 meters away from him and he was talking on his mobile and then he reached near the place where bullock was on the road. He further deposed that he was the first to reach the spot after Karun was injured and had fallen down and Manoj was also present there. He further stated in his cross-examination that they did not inform the police about the quarrel and he was not aware as to who had informed the police, however one Ambulance was there for taking away drunkard person lying at the spot. He further stated that he had not seen any blood on the spot though he saw blood on the shirt of Karun.

11. Neena Panwar entered the witness as PW-2 and she stated that she was doing M. Sc. From Shoolini University, Solan. She further stated that she was not having SIM bearing No. 98164-40054. This witness further deposed that she was neither acquainted with Ajay Soni nor she knew complainant Karun. She was declared as a hostile witness and was subjected to cross-examination by the prosecution. In her cross-examination, she denied that SIM bearing No.

98164-40054 was given to her by Ajay Soni. She denied that she was either acquainted with Karun Kumar Sharma or she used to talk with him on mobile. She was confronted with her statement recorded Mark-N and she stated that portion Mark-A to A of the said statement was not given by her to the police. In her cross-examination by the defence, she admitted it to be correct that she never disclosed to Karun that Ajay Soni used to tease her and she did not ask Karun to report the matter to police about the alleged teasing. She further stated that she never met Karun during her stay at Bilaspur.

12. Dr. Ankur Dharmani entered the witness box as PW-3 and he stated that in the year 2011 he was posted at R.H. Bilaspur as Medical Officer and on 11.07.2011 at around 9.05 P.M. patient Karun Sharma was brought by his friends with alleged history of injury in the abdomen with sharp weapon. This witness further stated that patient was given primary treatment and referred to IGMC, Shimla, after consultation with and primary treatment by Surgeon. He also stated that kind of the weapon used was sharp and at the time of examination, nature of the injury seemed to be grievous and dangerous to life. In his cross-examination, this witness admitted that he was not shown treatment record of this patient which was given to him at IGMC, Shimla. He further stated that in case record was shown to him, he would be in a position to give final opinion. He admitted it to be correct that he had given his final opinion just on clinical examination of the patient by the Surgeon and him. He admitted it to be correct that if the weapon used did not rupture the peritoneum and vital part then the injury cannot be stated to be dangerous to life. He also admitted it be correct that as per report Ext. PW3/B, no blood was found on weapon i.e. on paper cutter. He further admitted it to be correct that paper cutter was neither shown to him at the time of examination of the patient nor on the day he deposed in the Court. He further stated that he could not comment without seeing paper cutter about the injury whether it was caused with a paper cutter. He further stated that the possibility of sustaining injury as mentioned in MLC Ext. PW3/D cannot be ruled out from a sharp edged weapon if concealed in the loin area by a person. He admitted the suggestion to be correct that such injury could be caused by a fall on sharp edged weapon lying on the floor.

13. Complainant Karun Sharma entered the witness box as PW-4 and he stated that on 11.07.2011 at around 8.30 P.M. he came to Gurudwara Chowk alongwith Pankaj, Rakib, Arush and Ravi and he was talking to accused Ajay on his mobile who abused him. He further stated that Ajay Soni had talked to his brother Arun Soni and pursuant thereon, Arun came out of his shop, caught hold of him and attacked him with a paper cutter in his abdomen as a result of which, he fell down and sustained injury and there was lot of bleeding. This witness further deposed that Manoj, who was standing nearby, took him to Police Station, Sadar, on his motor cycle and police directed him to go to the hospital first and said that they would assist him in the hospital. He further stated that he came to the hospital and recorded his statement. He also stated that stitches were put on injury in the hospital but the bleeding did not stop and he was referred to IGMC, Shimla, where he remained admitted for about a week and Surgery was also performed upon him. He also stated that he was thereafter associated by the police and one cutter was produced by accused Arun Soni and he identified the said cutter. In his cross-examination, he admitted it to be correct that he visited the shop of the accused on 24.09.2009 for purchasing a mobile phone. Thereafter, he stated that he was sent by Sanket to purchase mobile phone set. He further admitted it to be correct that bill Ext. D-5 was taken by him at the time of purchase of mobile and he did not make any payment of that mobile set. He admitted to be correct that blue tooth was also purchased on that day for an amount of Rs.2000/- He further stated that he did not make payment of Rs.2000/-. He further stated that he talked with accused Ajay on that day in connection with his girl friend Neena. He further stated that he did not propose Neena for marriage and that they used to meet each other frequently. He further stated that he was told by Neena that accused Ajay used to tease her and once accused Ajay had also called him to his shop on this issue, however, he did not go. He further stated that Neena told him about her being teased by accused Ajay about one month before the incident took place. He further stated that he met Rishi on 11.07.2011 at around 4.00 P.M. near Radha Rani Park. He further stated that Pankaj and Ravi were also with him. He denied that that they

had stopped Rishi on the spot. He denied that they told Rishi that they were going to attack both the saccused in the evening. He denied that he had shown 'Khukhari' to Rishi that day. He denied that he and his friends had planned to attack accused in the evening. According to him, Rakib, Arush, Ravi and Manoj were standing at the road to see the drunkard who had fallen down and who was taken away by the police. He further stated that he talked to Ajay after the police had left the spot and he had disclosed to the police about his talk with Ajay on mobile. As per him, he hardly talked for 30 seconds. He denied that the dispute arose only because of his talk with Ajay. He denied that he made phone call to accused with the intention to make them come out of their shop. He also admitted in his cross-examination that Neena had not made any complaint to the police and he also admitted it to be correct that there were 20 persons on the spot.

14. PW-3 Dr. Ankur Dharmani was re-examined on 17.12.2012 and on that date he was shown paper cutter Ext. P-1 and he stated that the injuries mentioned in MLC Ext. PW3/D were possible by Ext. P-1. In his cross-examination, this witness stated that he did not mention the width of the wounds. He further admitted it to be correct that 2 cms wide wound cannot be caused by Ext. P-1. He further admitted it to be correct that final opinion could have been given by him about the injury after he peruses the treatment record of IGMC, Shimla, regarding use of Ext. P-1.

15. Arush Kalyan entered the witness box as PW-5 and he stated that he was employed as Home Guard and on 11.07.2011 at around 8.30 P.M. he alongwith his friend Rakib were standing near Gurudwara and Manoj and Karun were standing at the other side and were talking with each other and while Karun was talking on his mobile with someone, Arun came out of his shop and he caught hold of Karun and attacked him with paper cutter Ext. P-1. He further stated that Karun fell down on the road and started bleeding. He further stated that Karun was taken to the Police Station by Manoj on his motor cycle and he also went to the Police Station. In his cross-examination, he stated that Rakib was his friend and he was not on speaking terms with Ravi, Pankaj, Manoj and Karun. He denied that on the fateful day he was called by Karun on the spot. He admitted that there were 20-25 persons available at the spot. He also stated that Karun and Manoj were standing at a distance of 5-7 feet away from him and Rakib. He admitted it to be correct that Karun did not talk to Arun Soni on mobile in his presence. He was confronted with his statement recorded by the police Mark-DA, which was in contradiction to what he deposed in the Court. He denied the suggestion that on the fateful day Karun had gone inside the shop of the accused and banged glass kept on counter with fist blow and broke the same. He also denied that Karun caught hold of accused Arun Soni from his throat and dragged him outside his shop and when accused Arun Soni tried to wriggle out from the clutches of Karun, complainant fell down and received injury in his loin.

16. Varun Sharma entered the witness box as PW-6 and he deposed that he was Production Officer in Baddi and on 11.07.2011 at around 9.15 P.M. he was called on his mobile by Arush informing him that Arun Soni had attacked his brother Karun Sharma with cutter and Karun was admitted in the hospital. He further stated that he went to the hospital alongwith his family members and found injury on the abdomen of Karun. This witness further stated that Karun was referred to IGMC, Shimla, for further treatment and he was brought to the hospital by his father and friends. In his cross-examination, he stated that he was not acquainted with Arush Kalyan. He further deposed that Rakib went to Shimla alongwith Karun and other persons.

17. Ravi Chand entered the witness box as PW-7 and he deposed that he runs a shop in Gandhi market and on 11.07.2011 at around 8.30 P.M. while he was going to his home after closing his shop and had reached near Gurudwara Chowk, he met Manoj Kumar. He further stated that Rakib was also standing nearby and while he was taking with Manoj, Karun was talking on his mobile with someone. He further stated that he did not see anyone attacking Karun. He further stated that Karun had sustained injury in his abdomen and Arun Soni was on the spot and he had also seen him going to his shop. He further stated that Karun disclosed

to him that he was attacked by Arun Soni with cutter and thereafter, they went to Police Station from where they went to hospital. He did not support the case of the prosecution and was declared as a hostile witness and he was subjected to cross-examination by learned Public Prosecutor. In his cross-examination, he denied that Karun was talking on mobile with Ajay and thereafter Ajay came out of his shop and that Ajay Soni had threatened Karun and went inside the shop. He denied that thereafter Arun Soni came out of his shop and attacked Karun with paper cutter. However, he admitted it to be correct that Karun fell down and was lifted by Manoj. But he denied that when Arun Soni produced cutter Ext. P-1 on 01.08.2011 Karun was present at that time in the Police Post. In his cross-examination by the defence, he admitted that his shop was at a distance of 200 meters from Gurudwara Chowk and that Karun was a good friend of his. He also admitted it to be correct that on 11.07.2011 at around 4.00 P.M. he alongwith Pankaj and Karun were standing at Radha Rani Park in Main Market, Bilaspur, and Karun and Rishi were talking to each other. However, he further stated that he is not aware as to what had transpired between them. In his cross-examination, he stated that Pankaj and Manoj alongwith him were present in the hospital, whereas Arush and Rakib were not present.

18. HC Parkash Chand entered the witness box as PW-8 and he stated that on 11.07.2011 telephonic information was given to him from Police Station that a quarrel had taken place at Gurudwara Chowk and injured was taken to the hospital and thereafter, he went to the hospital. He further stated that by that time ASI Narain Singh had already reached there and was conducting the proceedings. This witness further deposed that on 01.08.2011 accused Arun Soni produced one paper cutter yellow in colour which was taken into possession vide recovery memo Ext. PW4/B. He also stated that Ext.P-1 was identified by Karun and witness Ravi and both of them signed the recovery memo in his presence. He also stated that Ajay had given a disclosure statement while in police custody in the presence of Sanjeev Kumar and he led the police party and got the spot demarcated pursuant to the said disclosure statement. In his cross-examination, this witness stated that initially he received information from Police Station at about 8.35 P.M. and reached Gurudwara Chowk within five minutes. There he came to know from the people at the spot that a drunkard had already been taken to the hospital in Ambulance. He further stated that at 8.50 P.M. he again received information from the police that a quarrel had taken place at the spot and injured had been taken to the hospital. He deposed that no complaint was made to him for investigation relating to the alleged occurrence. He further stated that he did not see any blood stains on the Gurudwara Chowk. He also stated that shop of Ajay Soni was situated at a distance of 15-18 feet from the place of occurrence. He also stated that he did not insist upon Investigating Officer to associate independent witnesses at the time of recovery of cutter Ext. P-1. He denied the suggestion that Karun was not present in the Police Post. He denied the suggestion that Ajay Soni had not made any disclosure statement.

19. PW-9 Constable Surinder Pal, PW-10 Constable Rakesh Kumar, PW-11 Dy. S.P. Partap Singh and PW-13 HHC Ganesh Singh are formal witnesses.

20. Manoj Kumar entered the witness box as PW-12 and he stated that he was running a shop at Gandhi market at Bilaspur and in July, 2010, he was going from his shop to bazaar and when he reached Gurudwara Chowk, he stopped when he saw Ravi Chandel and others. He further stated that he was talking with Ravi when suddenly Karun fell down at the spot where one bullock was on the road. He further stated that Karun stood up and said that he wanted to go to the hospital as he had been given beating by Arun Soni with cutter. He further stated that he did no see Arun Soni attacking Karun with cutter. This witness was declared as a hostile witness as he had resiled from his earlier statement. He was permitted to be cross-examined by learned Public Prosecutor. In his cross-examination, this witness stated that on the fateful day when he reached Gurudwara Chowk, he met Karun, Ravi and Pankaj Chandel. He also stated that Arush was also present there. He also admitted it to be correct that Karun was speaking on his mobile with some one. He admitted it to be correct that Ajay Soni had come out of his shop and talked with Karun. He denied that thereafter Ajay Soni went inside his shop and then Arun Soni came with cutter and attacked Karun. He admitted that Karun received injury on his stomach and thereafter, he was taken to Police Station on motor cycle. In

his cross-examination by the defence, he admitted it to be correct that Karun had disclosed to him that he had some dispute with Ajay Soni with regard to girl. This witness further stated that the said girl used to speak to both Karun and Ajay Soni. He further stated that Karun was talking loudly on his mobile. He admitted it to be correct that foot of the complainant got entangled with the bullock and he fell down and thereafter, he stood up and asked him to take him to the hospital.

21. HC Dev Raj entered the witness box as PW-14 and he stated that at the relevant time he was posted as MHC in Police Station Sadar. He deposed with regard to the depositing of the case property with him. He also stated that on 27.09.2011 he had sent the case property to RFSL, Gutkar through HHC Ganesh Singh. This witness also deposed that on 11.07.2011 at around 8.30 P.M. some unknown person informed the police that one person was lying unconscious at Gurudwara Chowk, on which rapat Ext. PW14/C was entered. He further deposed that on the same day at around 8.45 P.M. some unknown person informed the police that a quarrel had taken place at Gurudwara and on this rapat Ext. PW14/D was entered. He further deposed that at around 8.55 P.M. Karun was brought to Police Station, Sadar and he was outside. In his cross-examination, this witness stated that Karun did not meet him in the Police Station and he admitted it to be correct that he was not brought inside the Police Station nor he lodged any rapat in the Police Station. He also admitted it to be correct that Karun and his friends did not disclose the cause of quarrel and injury.

22. ASI Narain Singh entered the witness box as PW-15 and he stated that on 11.07.2011 he was posted as ASI/SHO, Police Station Sadar, Bilaspur, and at around 8.45 P.M. information was received in the Police Station that quarrel had taken place at Gurudwara Chowk. This witness further stated that at around 8.55 P.M. complainant was brought to the gate of Police Station, Sadar, Bilaspur, by his friends on motor cycle and he was having injury on his stomach and blood was oozing out. This witness further stated that he immediately referred him alongwith his friends to R.H. Bilaspur, for first aid. He further stated that thereafter he alongwith Constable Ram Pal also proceeded to the hospital. This witness also stated that he moved an application Ext.PW3/C for medical examination of the complainant and obtained medical opinion of the Medical Officer. He also stated that he recorded the statement of Karun Sharma. He further deposed that as a case was made out under Section 326 and 307 I.P.C., he sent a Rukka through Constable Ram Pal on the basis of which, FIR was lodged. He also stated that thereafter he proceeded to the spot of the incident. He further stated that no witness was found at the spot and no evidence was found. In his cross-examination, this witness deposed that first information about the occurrence was received in the Police Station at around 8.45 P.M. and at that relevant time he was present in the Police Station. He further deposed that he did not visit the spot immediately but visited the same after going to the hospital. He further stated that he did not inquire about the occurrence from HC Parkash Chand. He admitted it to be correct that when he visited the spot he did not find any blood at the spot. He further admitted that Karun did not disclose to him about the cause of quarrel and the weapon with which the alleged injury was caused. He further stated that he met the complainant at the Police Station for about two minutes. He admitted it to be correct that on the day of the occurrence he did not carry out any search in the shop as well as house of the accused. He further stated that the complainant was referred in his presence to IGMC, Shimla and he did not collect any treatment, case summary or record from IGMC, Shimla.

23. ASI Ajeet Singh entered the witness box as PW-16 and he stated that he was posted as Investigating Officer in Police Station Sadar, Bilaspur. On 19.07.2011 accused Arun Soni produced one paper cutter before him. He further stated that paper cutter was got identified by him from the complainant. As per him, he did not identify the said cutter. In his cross-examination, he stated that he went alongwith cutter to the house of the complainant. He further stated that he had prepared recovery memo qua taking into possession of the cutter but said recovery memo was not in the case file. He further stated that the complainant did not disclose to him about the colour and size of the weapon of offence used, however, he stated that the weapon used was of bigger size.

24. SI Hoshiar Singh entered the witness box as PW-17. He stated that in the year 2011 he was Incharge Police Post City Bilaspur and on 11.07.2011 vide rapat Ext. PW17/A Dy.S.P. Head Quarter informed him that a quarrel had taken place at Gurudwara Chowk and thereafter, he proceeded to the spot. He further stated that SI Paras Ram and other police officials of Police Station, Sadar, were already there. This witness further stated that the accused was not found on the spot and no witness was present. He stated that he raided the house of the accused during night but they were not found. He also stated that he prepared spot map Ext. PW17/B at the instance of Manoj Kumar, Arush and Varun. He further stated that he recorded their statements also. This witness further deposed that on 01.08.2011 accused Arun Soni produced one cutter before him in the presence of witnesses Ravi Kumar and Parkash Chand. He further stated that the complainant was also present. He prepared Khaka Ext. PW17/C and got it signed from the witnesses, accused and complainant. He further stated that before this also, accused Arun Soni had produced one cutter before ASI Ajeet Kumar which was not identified by the complainant. In his cross-examination, this witness stated that patrolling of the bazaar was done during night time. Gurudwara Chowk/Roura Sector was divided in two beats for the purpose of patrolling. This witness further stated that he cannot say who was deputed on that night for patrolling at Gurudwara Chowk. He admitted it to be correct that none of the official of patrolling party informed him about the incident. He further stated that he reached at the spot at 10.30 P.M. He further stated that he had not called Varun, Manoj and Ayush on that night and they came on the spot on the next morning at 9.30 A.M. He further stated that he did not find any blood or blood stains at the spot. He further stated that Fard regarding showing cutter by ASI Ajeet Singh to complainant was not on the case file. He also stated that when on the next day, he visited the spot, shops were open and he inquired from the shop of Anshul Food and Varinder Singh in the morning about the occurrence but they stated that the occurrence was not seen by them. He also stated that none of the shopkeepers disclosed to him about the incident. He also stated that he had not mentioned the distance of the shop of Arun Soni in the site plan from Point-A, however, as per him, distance was approximately 15 meters. He also stated that during the course of investigation he had not taken the mobile of Karun through which he talked to Neena. He further stated that mobile of Karun was badly damaged by his father.

25. Defence has examined Rishi Sharma as DW-1 and this witness deposed that he runs a mobile shop at Gurudwara at Bilaspur, knew Karun Sharma, Pankaj and Ravi and on 11.07.2011, at around 4.00 P.M., he met Ravi, Pankaj and Karun at Radha Rani Parking where they stopped him and told him that why he used to be with the company of accused. This witness further deposed that on this he told Karun that they were his friends. Complainant told him that he should not be with them in the evening. This witness further stated that when he objected to this, Karun put his hand on his neck and also showed him 'Khukhari' which was hidden by him under his shirt in the loins. He stated that 'Khukhari' was without cover. This witness further stated that in the evening he went to the shop of the accused. Gaurav alongwith one customer was also in the shop. He further stated that he was talking with Arun Soni and Ajay Soni was showing mobile to the customers and his friend purchased one battery from the shop. As per him, he heard loud voice from outside and went outside the shop. He found Karun shouting loudly on his mobile and was abusing someone. He further stated that Karun thereafter got entangled with bullock while he was talking on his mobile fell down unmindful of the presence of bullock on the spot. He further stated that he did not see any quarrel having taken place between Karun and accused persons.

26. These are the material witnesses on whose testimonies prosecution had relied upon to prove its case against the accused.

27. Before proceedings further, it is relevant to take note of the fact that as per the prosecution, genesis of the dispute was the factum of accused calling Neena who was known to the complainant and as per prosecution, quarrel took place when Karun asked the accused as to why they were calling Neena who in turn came out of the shop and stabbed the complainant. Thus, the motive behind stabbing of the complainant by the accused was the quarrel which took

place on account of the complainant confronting the accused as to why they were unnecessarily calling Neena.

28. Neena Panwar denied having any acquaintance with the complainant or the accused. This witness was subjected to cross-examination by the defence and in the said cross-examination, she denied that SIM bearing No. 98164-40054 had been taken by her from Ajay Soni or that she was either acquainted with the complainant and used to talk with him on mobile. In her cross-examination by the defence, this witness admitted it to be correct that she had never disclosed to Karun that Ajay Soni used to tease her.

29. Therefore, according to us, keeping in view the fact that PW-2 Neena Panwar has not supported the case of prosecution, the genesis of the case of the prosecution and the reason and motive as to why the alleged incident took place becomes highly doubtful.

30. Now comes the issue of injury having been suffered by the complainant. According to the prosecution, the injury which was suffered by the complainant was grievous injury and was dangerous to life. The case so putforth by the prosecution was based on the testimony of PW-3 Dr. Ankur Dharmani, who had examined the complainant on 11.07.2011 at around 9.05 P.M. at R.H. Bilaspur. MLC of the complainant is on record as Ext. PW3/D. A perusal of the same demonstrates that PW-3 had referred the complainant to IGMC, Shimla. It is a matter of record that no evidence has been produced on record by the prosecution as to whether or not the complainant in fact was admitted in IGMC, Shimla, and what was the treatment he underwent at IGMC, Shimla, though it had come in the prosecution evidence that the complainant after being referred to IGMC, Shimla, remained admitted there. However, what was the nature of the injury with which he was admitted at IGMC, Shimla and what was the treatment etc. given to him, has not come on record. PW-3 in his cross-examination admitted that the possibility of injury which was found on the body of the complainant being sustained if a sharp edged weapon is concealed in the loin area by a person could not be ruled out. He also admitted it to be correct that the said injury can be caused by a fall on sharp edged weapon lying on the floor. This witness was recalled for examination when he was shown weapon of offence i.e. paper cutter Ext. P-1. In his cross-examination, this witness admitted it to be correct that 2 cms wide wound could not be caused by Ext.P-1 and he also admitted it to be correct that final opinion could have been given by him about the injury after going through the treatment record of IGMC, Shimla, regarding use of Ext. P-1. Thus, it is apparent from the testimony of PW-3 that he clarified that he could not say without going through the treatment record of the complainant pertaining to IGMC, Shimla, as to whether the injury suffered by the complainant was on account of paper cutter Ext. P-1 or not. Besides this, he also admitted it to be correct that 2 cms. wide wound could not be caused by Ext. P-1. He also admitted the suggestion that the injury suffered by the complainant could have been suffered if a weapon was concealed by a person in his loin. When we take the testimony of PW-3 in totality, the only conclusion which can be drawn is this that neither the prosecution was able to prove beyond reasonable doubt that the injury on the body of the complainant was caused by the use of paper cutter Ext. P-1 nor there was any material on record to substantiate as to what was the nature of the said injury because PW-3 stated that he could have give his final opinion regarding the use of paper cutter only after going through the treatment record of IGMC, Shimla, which record was never placed before the Court.

31. This brings us to the most important aspect of the matter as to whether the prosecution was able to prove beyond reasonable doubt that on the fateful day accused Arun Soni had in fact stabbed the complainant with paper knife Ext. P-1 or not.

32. Before proceeding further, it is relevant to take note of the fact that it has unambiguously come in the testimony of PW-15 ASI Narain Singh and PW-7 SI Hoshiar Singh, who had visited the spot, that no blood was found at the spot, though it is the case of the prosecution that after receiving the injury the complainant was bleeding profusely. It has also come in the testimony of PW-15 ASI Narain Singh that complainant had not disclosed to him the cause of quarrel and the weapon with which the alleged injury was caused. This witness has

also admitted it to be correct that he had not collected any treatment, case summary on record from IGMC, Shimla, pertaining to the complainant.

33. Complainant in his testimony stated that on the fateful day at around 8.30 P.M. he had come to Gurudwara Chowk alongwith Pankaj, Rakib, Arush and Ravi, were there. Pankaj Thakur entered the witness box as PW-1 and he stated that on 11.07.2011 he had gone to Gurudwara Chowk with Karun, complainant and while Karun was talking on his mobile and had gone little ahead and he was standing at a short distance away from him, accused who were talking from their shop with Karun, came out and hurled a blow with something in his stomach. Arush Kalyan, who entered the witness box as PW-5, stated that on the fateful day at 8.30 P.M. he alongwith his friend Rakib were standing near Gurudwara and Manoj and Karun were standing at the other side and were talking with each other and Karun was talking on his mobile with someone and accused Arun came outside from his shop and he caught hold of Karun and attacked him with paper cutter. Ravi Chandel entered the witness box as PW-7 and according to him, on 11.07.2011 at around 8.30 P.M. while he was going to his house after closing his shop and when reached near Gurudwara Chowk, he met Manoj Kumar. He further stated that Rakib was also standing nearby. PW-7 was talking with Manoj and though, he did not see anyone attacking Karun, however Karun had sustained injury in his stomach. He further stated that Arun Soni was on the spot and Karun disclosed to him that he was attacked by Arun Soni with cutter. Rakib has not been examined by the prosecution. Manoj Kumar entered the witness box as PW-12 and he stated that on the fateful day he was going from his shop to bazaar and when he reached near Gurudwara Chowk, he stopped on seeing Ravi Chandel and others. As per him, Rakib, Karun and 2-3 others were present and while he was talking with Ravi, suddenly Karun fell down at the spot where one bullock was on the road. He further stated that Karun stood up and said that he wanted to go to the hospital and further stated that he was given beatings by Arun soni with cutter. Incidentally, Ravi Candel and Manoj Kumar were declared as hostile witnesses.

34. It is a matter of record that all the above mentioned persons were acquainted with each other and were friends.

35. As per PW-1 Pankaj Thakur, he alongwith Karun had gone to Gurudwara Chowk and Karun was hurled a blow with something in his stomach by Ajay Soni.

36. As per PW-4 Karun Sharma, Arun came out of his shop and caught hold of him and attacked him with paper cutter.

37. Further, as per PW-5 Arush Kalyan, Manoj and Karun were standing in a side and were talking with each other, when accused Arun came out of his shop, he caught hold of Karun and attacked him with paper cutter.

38. PW-4 has not stated that he was talking with Manoj. As per PW-1, Karun was with him and this witness also not stated that when the complainant was attacked he was talking with Manoj.

39. Whereas, PW-1 Pankaj stated that after the complainant was stabbed by the accused, he picked him up, the version of the complainant is to the effect that it was Manoj who picked him up. Besides this, whereas the factum of meeting Rishi during day time has been admitted by the complainant, the same has been denied by Pankaj.

40. Now, when we come to the testimony of PW-7 Ravi Chandel, according to him, Manoj Kumar was talking with him. He further stated that he did not see anyone attacking Karun and it was Karun who disclosed to him that he was attacked by Arun Soni. PW-12 Manoj Kumar who otherwise also has not supported the case of the prosecution, has introduced a total new story about Karun falling down at the spot where one bullock was on the road. He also stated that he did not see Arun Soni attacking Karun with cutter.

41. In our considered view, these are material inconsistencies and contradictions in the testimonies of prosecution witnesses, which shroud the case of the prosecution with

suspicion. Not only this, it also creates doubt over the trustworthiness and truthfulness of the said witnesses, who otherwise are also interested witnesses being close friends of the complainant.

42. These were the material witnesses on whose testimony the entire case of the prosecution hinged. However, as we have already mentioned above besides there being inconsistencies and contradictions in their statements, their testimonies neither inspire any confidence nor they seem to be truthful. Therefore, the only conclusion which can be drawn from the statements of the said witnesses is that it cannot be said that the prosecution was able to prove beyond reasonable doubt that the complainant was stabbed with a paper cutter by accused Arun Soni.

43. One more aspect of the matter is the mode and manner of the recovery of the alleged weapon of offence Ext. P-1. PW-17 SI Hoshiar Singh stated that on 01.8.2011 accused produced one cutter before him in the presence of witnesses Ravi and Parkash Chand and complainant was also present there. This witness stated that he prepared Khaka Ext. PW17/C which was signed by the witnesses, accused as well as complainant. While as per PW-17 when the paper cutter was produced before him by accused Arun Soni, the same was done in the presence of complainant, however, PW-7 Ravi Chandel (who as per PW-17 was one of the witnesses in whose presence the cutter was given to him by the accused) stated in his testimony that the complainant was not present there at the relevant time. In his cross-examination, he again reiterated this fact that when the cutter was produced by accused Arun Soni, Karun was not present in the Police Post. Incidentally, the other witness to the said recovery is HC Parkash Cahnd i.e. a police official. In his cross-examination, PW-8 HC Parkash Chand stated that he did not insist upon the Investigating Officer to associate any independent witness at the time of recovery of cutter Ext. P-1. Be that as it may, as we have already taken note of the fact that PW-3 Dr. Ankur Dharmani on his re-examination on 17.12.2012 had stated that 2 cms wide wound (on the body of the complainant) could not be caused by Ext. P-1. Further, in our considered view, the evidence produced on record by prosecution as to how Ext.P-1 was recovered does not inspire confidence at all. Whereas, as per PW-17, paper cutter was handed over to him by the accused in the presence of complainant. PW-7 has denied the presence of complainant in the Police Post at that relevant time. Even otherwise witness to the said recovery, PW-8 in his cross-examination has admitted that he did not ask the Investigating Officer to associate any independent witness at the time of the said recovery of the weapon of offence.

44. Therefore, in our considered view, it is evident from the material which has been placed on record by the prosecution that the prosecution has miserably failed to prove beyond reasonable doubt that the accused in fact had stabbed the complainant with a paper cutter in the evening of 11.07.2011 and had caused him grievous injury which was dangerous to life.

45. We have carefully gone through the judgment passed by learned trial Court and perusal of the same reveals that all these aspects of the matter has been examined and after carefully examining the entire material produced by the prosecution, learned trial Court has returned the findings of acquittal in favour of the accused. According to us also, from the material on record produced by the prosecution both ocular as well as documentary, it has not been able to prove the guilt of the accused beyond reasonable doubt.

46. It is settled law that in exceptional circumstances, the Appellate Court for compelling reasons can reverse a judgment of acquittal passed by the trial Court if the findings so recorded by the Court are perverse. However, it is also settled law that an acquittal by Court below bolsters presumption of innocence in favour of the accused and, therefore, judgment of acquittal should be reversed only in exceptional circumstances. We do not find that there is either any exceptional circumstance in the present case or the findings recorded by the trial Court are perverse so as to compel us to interfere with the judgment of acquittal returned by the trial Court.

47. Therefore, keeping in view the fact that the accused have already been acquitted by learned trial Court and according to us, there is neither any perversity nor any infirmity with the findings returned in this regard by learned trial Court, the appeal being devoid of any merit is dismissed. Bail bonds, if any, furnished by the accused are discharged.

48. We place on record our appreciation for the assistance rendered to the Court by learned Amicus Curiae.

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

Brahmi Devi. ...Petitioner

Versus

Union of India and others. ...Respondents

CWP No. 4418 of 2015
Judgment Reserved on: 23.9.2016
Date of decision: 29.9.2016

Constitution of India, 1950- Article 226- D, Husband of the petitioner served Dogra Regiment – he was awarded Pacific Star, Defence Medal and War Medal – he was declared freedom fighter- Tamra Patra was awarded to him and he was recognized as a freedom fighter – however, freedom fighter pension was not given to him – respondents stated that D never approached them for completion of prescribed formalities – hence, the pension could not be awarded to him- the petitioner had also not made available a certificate of Indian National Army along with her application- the pension cannot be sanctioned after the death of the freedom fighter- State had acknowledged that D was a freedom fighter as a Tamra Patra was awarded to him- identity card of freedom fighter was also issued to him- pension was sanctioned to L who was serving with the petitioner - State cannot discriminate between two person- no genuine freedom fighter should be denied pension- the original scheme was not withdrawn and the guidelines cannot replace the same- petition allowed- direction issued to the petitioner to submit an application for grant of freedom fighter pension- the pension shall be granted from the due date failing which interest @ 9% per annum will be awarded. (Para-8 to 20)

Cases referred:

Gurdial Singh vs. Union of India and others (2001) 8 SCC 8,
State of Orissa vs. Choudhuri Nayak (2010) 8 SCC 796,
State of Maharashtra and others Vs. Raghunath Gajanan Waingankar (2004) 6 SCC 584
Mahender Singh Vs. Union of India (2010) 12 SCC 675
Union of India and another Vs. Jai Kishun Singh (2014) 10 SCC 352

For the Petitioner: Mr. R.L. Chaudhary and Mr. H.R. Sidhu, Advocates.
For the Respondents: Mr. Ashok Sharma, Assistant Solicitor General of India, for respondents No. 1 and 2.
Ms.Meenakshi Sharma, Additional Advocate General with Mr.J.S. Guleria, Assistant Advocate General, for respondents No. 3 to 5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

This writ petition has been filed for grant of following substantive reliefs:-

"(i) That writ of mandamus may kindly be issued, directing the respondents to grant Freedom Fighter's Pension as per the scheme to the petitioner being widow of

late Shri Dhani Ram (Freedom Fighter) from the due date i.e. w.e.f. 04.04.1974 with all consequential benefits in light of the ratio laid down by the Hon'ble apex Court in (2014) 10 SCC 352 titled as Union of India & another Vs. Jai Kishun Singh."

2. The facts in brief as set out in the petition are that the husband of petitioner Sh. Dhani Ram served in the Dogra Regiment as Sepoy against enrolment No. 8210 till 13.7.1946, when on account of reduction of Indian Army on demobilization, he was released from service. During his service, Sh. Dhani Ram participated in World War 2nd by joining Indian Army from 1939-1945 and was awarded Pacific Star, Defence Medal and War Medal. That apart, all the similarly situated persons, like the petitioner were declared freedom fighters of the Nation.

3. On 1.8.1973 the State of Himachal Pradesh issued a letter to award Tamrapatras to the freedom fighters of District Bilaspur, Mandi, Hamirpur and Kullu and in the said list Sh. Dhani Ram's named figured at Sr. No. 37 alongside one another freedom fighter Lashkari Ram whose name appeared at Sr. No. 12. On 15.8.1973 the Tamrapatra was awarded to Sh. Dhani Ram. The status of Sh. Dhani Ram being freedom fighter was acknowledged by the Deputy Commissioner, Bilaspur, when he issued an identity card in his favour vide Annexure P-4.

4. Sh.Dhani Ram continued to pursue his request for grant of freedom fighter pension, however, before the same could be granted he unfortunately died on 2.5.2010 and it is his widow who thereafter has been pursuing the claim. It is also claimed that the aforesaid Sh. Lashkari Ram who had also been serving with Sh. Dhani Ram in Dogra Regiment against Enrolment No. 9010222 as Lance Naik was awarded pension w.e.f. 4.4.1974 being freedom fighter, whereas the same has been illegally denied to Sh. Dhani Ram (now to his widow).

5. The Deputy Commissioner (respondent No. 4) filed his reply, wherein it was averred that Sh. Dhani Ram served as Sepoy in Dogra Regiment during the British Empire and he was discharged from service on 13th July, 1946 on deduction of Indian Army on demobilization. Thereafter Sh. Dhani Ram never approached the replying respondent for complying his case for benefit of Freedom Fighter. As regards the issuance of Identity Card, it is claimed that the same was issued in his name on the basis of "Citizen" awarded by the government of Himachal Pradesh on 15.8.1972. It is thereafter averred that in the year 2014, one e-mail request from the petitioner was received and the matter was thereafter sent to respondent No. 5 and till date neither the procedural formalities have been completed nor has the petitioner submitted any application in the prescribed proforma to the replying respondent. However, the respondent has admitted that Sh. Lashkari Ram was declared as freedom fighter on his application as per scheme vide letter No. 17-B-1095/73-FF dated 9.8.1973 by the State Government as per pre-requisite verification and documents submitted by him to the government of Himachal Pradesh.

6. The Chief Secretary, Government of Himachal Pradesh (respondent No. 3) has filed his separate reply, wherein it is admitted that Sh. Dhani Ram served in Dogra Regiment of the British Army for the time claimed in the petition. However, it is claimed that the husband of the petitioner has never submitted any application to the competent authority for grant of Freedom Fighter Pension. It is also averred that though the petitioner had submitted an application 18.2.2015 for grant of Freedom Fighter Pension to her under the Government of India Scheme, however on scrutiny it was found that the petitioner had not made available a certificate of Indian National Army along with her application, showing that her late husband had served in Indian National Army and the same is still awaited from her, despite request.

7. The Union of India (respondent No. 1) in its reply submitted that since no pension under the Swatantrata Sainik Samman Pension Scheme, 1980 had been granted to the petitioner's husband in his life time, therefore, as per the revised guidelines issued on 6th August, 2014, the claim of the petitioner is unsustainable and cannot be granted. These guidelines are clarificatory in nature and have been issued in order to make effective implementation of the scheme in the changing times and reliance has been placed on para 1.5 of the revised guidelines issued under letter F.No. 45/03/2014-FF (P) dated 6th August, 2014 which read as under:-

> *"No pension shall be sanctioned in the name of the freedom fighter after his/her death even if his/her matter was under examination. This also entails that no lifetime arrears or dependent pension shall be sanction to his/her spouse/daughter after the death of the freedom fighter."*

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

8. At the outset, it may be noticed that none of the respondents have disputed the contention of the petitioner that her late husband, Sh. Dhani Ram and Sh. Lashkari Ram were both serving in Dogra Regiment. Her husband was posted as Sepoy, whereas Sh.Lashkari Ram was a Lance Naik. It is further not in dispute that both these persons were awarded Tamrapatra by the Government of Himachal Pradesh. It is further not in dispute that names of both Sh.Lashkari Ram and late Sh.Dhani Ram appeared in the list of freedom fighters issued vide letter dated 1.8.1973 at Sr. No. 12 and 37, respectively. Yet again there is no dispute that Sh.Lashkari Ram was declared as freedom fighter, whereas the husband of the petitioner late Sh.Dhani Ram was not granted the pension for the ostensible reason that he had not submitted the requisite documents.

9. Now the question in this background that arises for consideration is whether the State after itself acknowledging Sh.Dhani Ram to be a freedom fighter, can still deny the freedom fighter pension, only on the ground that the application submitted by him was not on the prescribed proforma. A perusal of Tamrapatra clearly goes to show that the same had been awarded to Sh.Dhani Ram for his memorably contribution to the Nation in the war of impendence and the same reads thus:-

> "स्वतंत्रता के पचचीसवें वर्ष के अवसर पर स्वतंत्रता संग्राम में स्मरणीय योगदान के लिए राष्ट्र की ओर से प्रधान मंत्री श्रीमती इंदिरा गांधी ने यह ताम्रपत्र भेंट किया"

10. That apart, it would be noticed that the Deputy Commissioner, Bilaspur himself had issued Identity Card of a Freedom Fighter to Sh.Dhani Ram, which clearly mentions that "*this card has been issued to the above on account of his sacrifice for the freedom of the country.*" Therefore, can the respondents in teeth of such documents refuse to acknowledge the prime sacrifice of Sh.Dhani Ram by taking shelter and recourse to technicalities?

11. This Court cannot be oblivious to the fact that here is a widow of 82 years, who has been driven from pillar to post for the legitimate pension, which she is entitled to. I observe so because admittedly the colleague of the petitioner, Sh.Lashkari Ram, who too was working in the Dogra Regiment and whose services too like the husband of the petitioner came to be released on deduction of Indian Army on demobilization on 13.7.1946 had been given Tamrapatra had thereafter been granted pension, then why the same without any rhyme and reason has been denied for the petitioner?

12. To hold that the petitioner is not entitled to freedom fighter pension would otherwise amount to invidious discrimination. The guarantee of equal protection embraces the entire realm of State action and once such an individual discrimination is made out, it would not lie in the mouth of the respondents that they should still be permitted to protect such discrimination, more particularly, when it is proved on record that the petitioner viz-a-viz similarly situated persons, who have been granted pension has alone been denied the same.

13. Indisputably, the Scheme for granting freedom fighters'

Pension was introduced in the year 1972 on the occasion of Silver Jubilee of National Independence. The freedom fighters' pension scheme was introduced with an ultimate object of providing grant of pension to the living freedom fighters and their families and to the families of martyrs, who had participated in the freedom struggle without any expectation of grant of any scheme at that relevant point of time. The object of the scheme is not only to honour but also to mitigate the sufferings of the persons who had scarified their all for the sake of country, hence a liberal and not a technical approach is required to be followed at the time of considering the case

of a person seeking pension under such scheme. Once, it is evident on the basis of the material available on record that the claimant of pension had suffered incarceration for the cause of the Country, a presumption has to be drawn in his favour, until the same is rebutted by cogent, reasonable and reliable material evidence.

14. The Hon'ble Supreme Court in ***Gurdial Singh vs. Union of India and others (2001) 8 SCC 8***, laid down the object of the scheme in the following terms:

> *"The scheme was introduced with the object of providing grant of pension to living freedom fighters and their families and to the families of martyrs. It has to be kept in mind that millions of masses of this country had participated in the freedom struggle without any expectation of grant of any scheme at the relevant time. It has also to be kept in mind that in the partition of the country most of citizens who suffered imprisonment were handicapped to get the relevant record from the jails where they had suffered imprisonment. The problem of getting the record from the foreign country is very cumbersome and expensive. Keeping in mind the object of the scheme, the concerned authorities are required that in appreciating the scheme for the benefit of freedom fighters a rationale and not a technical approach is required to be adopted. It has also to be kept in mind that the claimants of the scheme are supposed to be such persons who had given the best part of their life for the country. This Court in Mukand Lal Bhandari case observed (SCC pp.7-8, para 9)*
>
> > *"The object in making the said relaxation was not to reward or compensate the sacrifices made in the freedom struggle. The object was to honour and where it was necessary, also to mitigate the sufferings of those who had given their all for the country in the hour of its need. In fact, many of those who do not have sufficient income to maintain themselves refuse to take benefit of it, since they consider it as an affront to the sense of patriotism with which they plunged in the Freedom Struggle. The spirit of the Scheme being both to assist and honour the needy and acknowledge the valuable sacrifices made, it would be contrary to its spirit to convert it into some kind of a programme of compensation. Yet that may be the result if the benefit is directed to be given retrospectively whatever the date the application is made. The scheme should retain its high objective with which it was motivated. It should not further be forgotten that now its benefit is made available irrespective of the income limit. Secondly, and this is equally important to note, since we are by this decision making the benefit of the scheme available irrespective of the date on which the application is made, it would not be advisable to extend the benefit retrospectively. Lastly, the pension under the present Scheme is not the only benefit made available to the freedom fighters or their dependents. The preference in employment, allotment of accommodation and in admission to schools and colleges of their kith and kin etc., are also the other benefits which have been made available to them for quite sometime now."*
>
> *The Court categorically mentioned that the pension under the scheme should be made payable from the date on which the application is made whether it is accompanied by necessary proof of eligibility or not".*

The standard of proof required to establish a case is not such standard which is required in a criminal case or in a case adjudicated upon rival contentions or evidence of a party. This position has been made clear when one reads paragraph-7 of the judgment from Gurdial Singh's case (supra) which provides:

> *"7. The standard of proof required in such cases is not such standard which is required in a criminal case or in a case adjudicated upon rival contentions or evidence of the parties. As the object of the scheme is to honour and to mitigate the*

sufferings of those who had given their all for the country, a liberal and not a technical approach is required to be followed while determining the merits of the case of a person seeking pension under the scheme. It should not be forgotten that the persons intended to be covered by scheme have suffered for the country about half a century back and had not expected to be rewarded for the imprisonment suffered by them. Once the country has decided to honour such freedom fighters, the bureaucrats entrusted with the job of examining the cases of such freedom fighters are expected to keep in mind the purpose and object of the scheme. The case of the claimants under this scheme is required to be determined on the basis of the probabilities and not on the touch-stone of the test of 'beyond reasonable doubt'. Once on the basis of the evidence it is probabilised that the claimant had suffered imprisonment for the cause of the country and during the freedom struggle, a presumption is required to be drawn in his favour unless the same is rebutted by cogent, reasonable and reliable evidence."

15. In ***State of Orissa vs. Choudhuri Nayak (2010) 8 SCC 796***, the Hon'ble Supreme Court has held that no genuine Freedom Fighter should be denied pension.

16. Learned Assistant Solicitor General of India has vehemently argued that this Court cannot sit in judgment over the decision taken by the competent authority and would rely upon the judgment rendered by the Hon'ble Supreme Court in ***State of Maharashtra and others Vs. Raghunath Gajanan Waingankar (2004) 6 SCC 584, Mahender Singh Vs. Union of India (2010) 12 SCC 675*** and ***Union of India and another Vs. Jai Kishun Singh (2014) 10 SCC 352.***

17. Obviously, there can be no dispute regarding the preposition laid down in the aforesaid cases, more particularly, when the same under Article 141 of the Constitution are binding on this Court, but these judgments would apply only in case there is any decision taken by the respondents. Here this Court is dealing with a case wherein the respondents are yet to take a decision. It is thus clear that the respondents have pre-judged the issue, by claiming that the petitioner is not entitled to the pension, though in the same breath they would claim that the petitioner has not even submitted any documents. Notably, the respondents herein are none other, but the functionaries of the State and Central Government, who are under an obligation to conduct themselves with high probity and expected candour, but unfortunately the conduct of the respondents fall short of this expectation.

18. Adverting to the defence raised by respondent No. 1, whereby it is taken shelter under the guidelines issued on 6th August, 2014, I have no hesitation to hold that the same are bad in law. After all a person's claim can deemed to be dismissed only because of procedural delays. That apart, the guidelines are even otherwise not in tune with the avowed object of the scheme, as extracted in para 13 (supra), coupled with the observations made by the Hon'ble Supreme Court in *Gurdial Singh's* case (supra). Moreover, once there is no dispute that the Swatantrata Sainik Samman Pension Scheme, 1980 has itself not been withdrawn, then obviously the same cannot indirectly be held to have become non-operative by issuance of revised guidelines or else the scheme would be deemed to have become redundant and otiose.

19. That apart, it is not in dispute that the guidelines issued subsequently by respondents in the year 2014 are only in furtherance of the scheme and therefore, once the scheme still exists, such guidelines cannot override the scheme.

Respecting and rewarding is probably the least one can do for the freedom fighters of this country.

20. In light of the aforesaid discussion, though it is proved on record that the husband of the petitioner was freedom fighter and therefore, entitled for grant of freedom fighter pension. However, as there is nothing on record to show that the petitioner or for that matter late Sh. Dhani Ram had ever applied for grant of such pension on the prescribed performa, I feel that the ends of justice would be subserved in case the following directions are passed:

(i) That the petitioner shall within a period of four weeks from passing of this judgment submit an application to the competent authority on the prescribed proforma for grant of freedom fighter pension.

(ii) The respondents thereafter shall within a period of eight weeks from receipt of such application grant pension to the petitioner from the due date i.e. w.e.f. 4.4.1974.

(iii) On failure to release pension within eight weeks aforesaid, the respondents shall be liable to pay 9% interest on the said pension w.e.f. due date.

The petition is disposed of in the aforesaid terms, so also the pending application(s), if any, leaving the parties to bear their costs.

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

Jitender Kumar ...Appellant.

Versus

State of H.P. ...Respondent.

Criminal Appeal No.4219 of 2013
Reserved on : 20.9.2016
Date of Decision: September 29, 2016

Indian Penal Code, 1860- Section 302- **Indian Arms Act, 1959-** Section 25- Dead body of S was recovered from a dry well – accused T and J made a confessional statement that they had murdered the deceased with the swords and had dumped the body thereafter in a well – motive of the crime was possible involvement of the deceased with the sister of accused J and money dispute between accused, J and the deceased – accused J was tried and convicted by the trial Court for the commission of offence punishable under Section 302 read with Section 34 of I.P.C and acquitted of the commission of offence punishable under Section 25 of Indian Arms Act- held, in appeal that prosecution case is based upon the circumstantial evidence- circumstances relating to the guilt should be proved satisfactorily and should be incapable of any interpretation other than the guilt of the accused – any confession made to the police cannot be used against the accused – even otherwise the statements of witnesses to prove the confession were inconsistent- the motive for the commission of crime was also not proved- the disclosure statement and consequent recovery were also not proved- the circumstances do not establish the guilt of the accused- the trial Court had wrongly convicted the accused J- appeal allowed and accused J acquitted of the charged offences. (Para-8 to 46)

Cases referred:

Bodhraj alias Bodha & others vs. State of Jammu and Kashmir, (2002) 8 SCC 45
Pudhu Raja and another Versus State Represented by Inspector of Police, (2012) 11 SCC 196
Madhu Versus State of Kerala, (2012) 2 SCC 399
Dilip Singh Moti Singh versus State of Gujarat, (2010) 15 SCC 622
Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC 172
Trimukh Maroti Kiran versus State of Maharashtra, (2006) 10 SCC 681
Mulakh Raj and others Versus Satish Kumar and others, (1992) 3 SCC 43
Ashok Kumar Chatterjee vs. State of M.P., 1989 Supp. (1) SCC 560
Balwinder Singh vs. State of Punjab, (1987) 1 SCC 1
State of U.P. vs. Sukhbasi, 1985 Supp. SCC 79
Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116
Earabhadrappa vs. State of Karnataka, (1983) 2 SCC 330

Hukam Singh vs. State of Rajasthan, (1977) 2 SCC 99
Eradu vs. State of Hyderabad, AIR 1956 SC 316
Sujit Biswas vs. State of Assam, (2013) 12 SCC 406
Hanumant Govind Nargundkar v. State of Madhya Pradesh, AIR 1952 SC 343
Dharam Deo Yadav v. State of Uttar Pradesh, (2014) 5 SCC 509
Pulukuri Kottaya and others v. Emperor, AIR (34) 1947 Privy Council 67
Harivadan Babubhai Patel vs. State of Gujarat, (2013) 7 SCC 45

For the Appellant	:	Mr. Surinder Saklani, Advocate.
For the Respondent	:	Mr. V.S. Chauhan, Additional Advocate General and Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Dead body of Sarwan Singh (deceased) was recovered on 15.6.2009 from the dry well owned by certain private persons. On 19.6.2009, member of the family of the deceased lodged a missing report, without raising any finger of suspicion against any one. Since investigation did not reveal involvement of any person in the crime, as such, untraced report was filed in Court.

2. Hence, during the course of investigation of another crime, in relation to which FIR stood registered at Police Station, Nalagarh, present accused Jitender Kumar and his co-accused Taranjit Singh, on 18.6.2010, while in custody, made a confessional statement of having murdered the deceased with swords and thereafter dumped the body in the well. Such information came to be passed on to Police Station, Una, having jurisdiction of the place from where initially the dead body was recovered and also accused ordinarily reside. Accused came to be arrested by the police officials of Una and during their custody, made disclosure statements, leading to discovery of the purse of the deceased and weapon of offence, i.e. swords, so concealed by them.

3. Investigation revealed dual motive of crime: (a) perhaps involvement of the deceased with the sister of accused Jitender Kumar, (b) dispute pertaining to money *inter se* the deceased and the accused, more specifically Jitender Kumar.

4. With the completion of investigation, challan came to be presented in the Court and accused Taranjit Singh stands charged for having committed offences punishable under the provisions of Sections 302 & 201, both read with Section 34 of the Indian Penal Code and Section 25 of the Arms Act, 1959; and accused Jatinder Kumar stands charged for having committed offences under Sections 302 of the Indian Penal Code and 25 of the Arms Act, 1959.

5. It is a matter of record that during trial, accused Taranjit Singh was declared as a proclaimed offender and as such, trial qua him was segregated. Lateron, after his arrest, he participated in the proceedings and separate trial conducted qua him. It is a matter of record that based on similar, but separate, evidence led by the prosecution, both the accused stand convicted.

6. Vide judgment dated 31.8.2012, passed by Additional Sessions Judge, Una, Himachal Pradesh, in Sessions Case No.11/VII/2011 (Sessions Trial No.8 of 2011), titled as *State of Himachal Pradesh v. Jitender Kumar and another,* accused Jitender Kumar stands convicted for having committed offences punishable under the provisions of Section 302 read with Section 34 of the Indian Penal Code, and sentenced to undergo imprisonment for life and pay fine of Rs.20,000/-, and in default thereof to further undergo rigorous imprisonment for a period of one year. However, he stands acquitted of the offence charged for under Section 25 of the Arms Act.

7. It is also a matter of record that both the accused have preferred separate appeals, which are being disposed of vide separate judgments. Noticeably, State has not preferred any appeal against the judgment of acquittal of the accused of offence under Section 25 of the Arms Act.

8. Trial Court framed the following points for consideration and answered Point No.1 in the affirmative, but expressed its doubts with regard to Point No.2:

1. Whether the prosecution has proved beyond all shadow of doubts that prior to the morning of 15.6.2009 in the area of village Raipur Sahoran within the jurisdiction of Police Station, Una, accused Jitender in furtherance of common intention of co-accused Taranjit @ Badal (proclaimed offender) had committed the murder of Sarwan Singh by intentionally or knowingly causing his death?
2. Whether the prosecution has also proved that accused Jitender was in possession of sword, prohibited arm?

9. While convicting the accused in relation to the charge of murder, trial Court culled out the following circumstances:

"a) Ante mortem injuries on the person of the deceased.

b) Presence of blood stains on the edge of the well and roof of the tube well.

c) Accused Jitender was in custody in case FIR No.78/2010 of P.S. Nalagarh along with his co-accused Taranjit @ Badal and during interrogation co-accused Taranjit divulged that he alongwith accused Jitender committed the murder of a sikh gentleman in the area of District Una and threw the dead body in a well in Santoshgarh area.

d) Connection of the deceased with accused Jitender over money and photo of sister of accused Jitender on the mobile handset of deceased and that deceased had left with cash to the house of accused on receipt of telephonic call and missing report of the deceased had been made at Police Station, Ajnala.

e) Identification of the place of occurrence by the accused.

f) the sword has been recovered at the instance of accused Jatinder and purse and sword had been recovered at the instance of co-accused Taranjit @ Badal."

10. Additionally, learned Additional Advocate General has pressed the following circumstances:

(a) motive of crime,

(b) after receiving call from accused Jatinder, deceased left his house with certain amount of cash but never returned, and

(c) deceased was lastly seen in the company of the accused.

11. Admittedly there is no eye-witness to the alleged incident in relation to which accused stands convicted. Prosecution case primarily rests upon circumstantial evidence. The law on circumstantial evidence is now very well settled. To base a conviction on circumstantial evidence, prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events, as would permit no conclusion other than the one of guilt of the accused. Circumstances to be proved have to be beyond reasonable doubt and not based on principle of preponderance of probability. Suspicion, howsoever, grave, cannot be a substitute for a proof and courts should take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence.

12. In *Bodhraj alias Bodha & others vs. State of Jammu and Kashmir,* (2002) 8 SCC 45, Hon'ble the Supreme Court of India held that:-

"9. Before analysing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or *factum probandum* may be proved indirectly by means of certain inferences drawn from *factum probans*, that is, the evidentiary facts. To put it differently circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed. ....."

10. .....In *Bhagat Ram v. State of Punjab* [AIR 1954 SC 621], it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt." (Emphasis supplied)

13. Also it is a settled proposition of law that when there is no direct evidence of crime, guilt of the accused can be proved by circumstantial evidence, but then the circumstances from which conclusion of guilt is to be drawn, should be fully proved and such circumstances must be conclusive in nature, to fully connect the accused with crime. All the links in the chain of circumstances, must be established beyond reasonable doubt, and the proved circumstances should be consistent only with the hypothesis of guilt of the accused, being totally inconsistent with his innocence. While appreciating the circumstantial evidence, Court must adopt a very cautious approach and great caution must be taken to evaluate the circumstantial evidence. [See: *Pudhu Raja and another Versus State Represented by Inspector of Police,* (2012) 11 SCC 196; *Madhu Versus State of Kerala,* (2012) 2 SCC 399; *Dilip Singh Moti Singh versus State of Gujarat,* (2010) 15 SCC 622; *Ramreddy Rajesh Khanna Reddy v. State of A.P.,* (2006) 10 SCC 172; *Trimukh Maroti Kiran versus State of Maharashtra,* (2006) 10 SCC 681; *Mulakh Raj and others Versus Satish Kumar and others,* (1992) 3 SCC 43; *Ashok Kumar Chatterjee vs. State of M.P.,* 1989 Supp. (1) SCC 560; *Balwinder Singh vs. State of Punjab,* (1987) 1 SCC 1; *State of U.P. vs. Sukhbasi,* 1985 Supp. SCC 79; *Sharad Birdhichand Sarda Versus State of Maharashtra,* (1984) 4 SCC 116; *Earabhadrappa vs. State of Karnataka,* (1983) 2 SCC 330; *Hukam Singh vs. State of Rajasthan,* (1977) 2 SCC 99; and *Eradu vs. State of Hyderabad,* AIR 1956 SC 316]

14. In *Sujit Biswas vs. State of Assam,* (2013) 12 SCC 406, Hon'ble the Supreme Court of India held that:-

"13. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved, and something that "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so

demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. [Vide: Hanumant Govind Nargundkar vs. State of M.P., AIR 1952 SC 343; State through CBI v. Mahender Singh Dahiya, (2011) 3 SCC 109: AIR 2011 SC 1017; and Ramesh Harijan vs. State of U.P., (2012) 5 SCC 777].

14. In Kali Ram vs. State of Himachal Pradesh, (1973) 2 SCC 808: AIR 1973 SC 2773, this Court observed as under:

> "25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases where in the guilt of the accused is sought to be established by circumstantial evidence.""

15. Relying upon its earlier decision in *Hanumant Govind Nargundkar v. State of Madhya Pradesh*, AIR 1952 SC 343, Hon'ble the Supreme Court of India in *Dharam Deo Yadav v. State of Uttar Pradesh,* (2014) 5 SCC 509, again reiterated that:

> "15. .... Each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. Even when there is no eye-witness to support the criminal charge, but prosecution has been able to establish the chain of circumstances which is complete leading to inference of guilt of accused and circumstances taken collectively are incapable of explanation on any reasonable hypothesis save of guilt sought to be proved, the accused may be convicted on the basis of such circumstantial evidence."

16. Keeping in view the aforesaid principles, we now proceed to discuss the evidence on record.

17. Insofar as identity of the deceased is concerned, there is no dispute. In any event, it stands established through the testimony of Bittu Singh (PW-2) and Bhagwan Singh (PW-3), both relatives of the deceased.

18. That dead body of the deceased was recovered from the well in village Raipur Sahoran stands established on record. Ram Kumar (not examined) saw stains of blood on the edge of the well and informed Pradhan Harpal Singh (PW-5), who visited the spot and after seeing the dead body inside the well, which was dry, informed the police, when police official Sewa Singh (PW-22) reached the spot and, in turn, informed SHO Dharam Chand (PW-21) about the same. After reaching the spot, Dharam Chand got the dead body taken out from the well, prepared inquest report (Ex.PW-1/B), took into possession mobile cover (Ex.P-10), blood stained clothes, i.e. Patka & Parna (Ex.P-8), shoes (Ex.P-9), plucker (Ex.P-11), vide memos (Ex.PW-5/B & 5/C). He sent Rukka (Ex. PW-21/B) to the Police Station, on the basis of which FIR No.224/09, dated 15.6.2009 (Ex.PW-24/D), for commission of offence under Section 302 of the Indian Penal Code, came to be registered at Police Station, Sadar (Una), District Una, Himachal Pradesh.

19. It has come on record through the testimony of ASI Sewa Singh (PW-22) that the spot, from where the dead body was recovered, was got demarcated from the revenue official, who issued relevant documents (Ex.PW-6/B & 6/C), which reveal that the land was owned by one Kishan Devi and possessed by tenants.

20. At this juncture, it be only observed that prosecution has not ruled out the possibility of involvement of these persons or that of Ram Kumar, who first spotted the dead body, in the crime.

21. It is also a matter of record that with the recovery of dead body, FIR came to be registered and untraced report filed in Court. Such fact is evident from the testimony of Amit Sharma (PW-24),

22. Prosecution wants the Court to believe that after a period of one year, while the accused were being interrogated, in connection with another FIR No.78/2010, so registered at Police Station, Nalagarh, co-accused Taranjit Singh made a disclosure statement that he alongwith accused Jatinder @ Jyoti had murdered the deceased and thereafter thrown his dead body in the dry well.

23. To establish such circumstance, our attention is invited to the testimonies of Inspector Prem Lal (PW-19) and Inspector Om Parkash (PW-23).

24. Law on disclosure/confessional statement is now well settled. Sections 25, 26 and 27 of the Indian Evidence Act read as under:

> "25. Confession to police officer not to be proved.
>
> No confession made to a police officer, shall be proved as against a person accused of any offence.
>
> 26. Confession by accused while in custody of police not to be proved against him.
>
> No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.
>
> 27. How much of information received from accused may be proved.
>
> Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.**"**

25. It be observed the principle of law as laid down in Pulukuri *Kottaya and others v. Emperor*, AIR (34) 1947 Privy Council 67, which is reproduced herein under, has been consistently followed by Hon'ble the Supreme Court of India.

> "[10] ... ... <u>On normal principles of construction their Lordships think that the proviso to S. 26, added by S. 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact.</u> Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant." (Emphasis supplied)

26. In *Bodhraj alias Bodha & others vs. State of Jammu and Kashmir,* (2002) 8 SCC 45, Hon'ble Supreme Court of India, held as under:-

> "18. Emphasis was laid as a circumstance on recovery of weapon of assault, on the basis of information given by the accused while in custody. The question is whether the evidence relating to recovery is sufficient to fasten guilt on the accused. Section 27 of the Indian Evidence Act, 1872 (in short 'the Evidence Act') is by way of proviso to Sections 25 to 26 and a statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused. This position was succinctly dealt with by this Court in *Delhi Admn. vs. Bal Krishan,* (1972) 4 SCC 659: AIR 1972 SC 3 and *Mohd. Inayatullah vs. State of Maharashtra,* (1976) 1 SCC 828: AIR 1976 SC 483. The words "so much of such information" as relates distinctly to the fact thereby discovered, are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. The ban as imposed by the preceding sections was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. If all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. The object of the provision i.e. Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequences of the preceding sections, be admitted in evidence. It would appear that under Section 27 as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police. The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken into custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible under Section 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer. The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of Privy Council in *Pulukuri Kotayya v. Emperor* (AIR 1947 PC 67), is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it,

but the information given must relate distinctly to that effect. [See: *State of Maharashtra v. Danu Gopinath Shinde,* (2000) 6 SCC 269]. No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given." (Emphasis supplied)

27. In *Harivadan Babubhai Patel vs. State of Gujarat,* (2013) 7 SCC 45, Hon'ble Supreme Court of India, held that:-

"17. In this context, we may usefully refer to A.N. Venkatesh and another v. State of Karnataka [(2005) 7 SCC 714] wherein it has been ruled that:

"By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer the place where the dead body of the kidnapped boy was found … would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act or not. …"

In the said decision, reliance was placed on the principle laid down in Prakash Chand v. State (Delhi Admin) [(1979) 3 SCC 90: AIR 1979 SC 400]. It is worth noting that in the said case, there was material on record that the accused had taken the Investigating Officer to the spot and pointed out the place where the dead body was buried and this Court treated the same as admissible piece of evidence under Section 8 as the conduct of the accused.

18. In State of Maharashtra v. Damu [(2000) 6 SCC 269], it has been held as follows: -

"35. … It is now well settled that recovery of an object is not discovery of a fact as envisaged in Section 27 of the Evidence Act, 1872. The decision of the Privy Council in Pulukuri Kottaya v. King Emperor [AIR 1947 PC 67] is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."

19. The same principle has been laid down in State of Maharashtra v. Suresh [(2000) 1 SCC 471], State of Punjab v. Gurnam Kaur and others [(2009) 11 SCC 225], Aftab Ahmad Anasari v. State of Uttaranchal [(2010) 2 SCC 583], Bhagwan Dass v. State (NCT) of Delhi [(2011) 6 SCC 396: AIR 2011 SC 1863], Manu Sharma v. State [(2010) 6 SCC 1: AIR 2010 SC 2352] and Rumi Bora Dutta v. State of Assam [(2013) 7 SCC 417]."

28. As such confessional statement made to the police officials cannot be used against the accused, in view of the aforesaid statement of law.

29. That apart, we find the version of the witnesses to be unbelievable and unworthy of credence. There are material contradictions on the issue. Whereas, Inspector Prem Lal states that it was accused Taranjit Singh, who had "*divulged that he and Sh. Jatinder Kumar had murdered a sikh person about an year ago in District Una and threw the dead body of that person in a well in Santoshgarh area*", Inspector Om Parkash states that "*a telephonic information was*

given by me to the SHO, Police Station, Una. Rapat No.44, the copy of which is Ext. PW-23/A, to that effect was entered in Police Station, Una".

30. Now, we find the confessional statements to have been made by both the accused, naming the deceased, to Om Parkash, but however such version is self-contradictory, for in the cross-examination part of his testimony, the witness admits that "*I do not record any statement of the accused in FIR No.78/10 of PS, Nalagarh. The statements of the accused were recorded by the Investigating Officer of the said case".* Further, Inspector Om Parkash wants the Court to believe that he sent the information on phone, whereas according to Inspector Prem Lal, it was he who had telephonically furnished such information. Now significantly, no independent person was associated by the police at the time of such disclosure/ confessional statement. Also, such statement was not reduced into writing. It has nowhere come on record that both the accused were under police custody in relation to the case registered at Police Station, Nalagarh.

31. Hence, we do not find this circumstance to have been established, much less beyond reasonable doubt.

32. At this juncture, it be only observed that prosecution has miserably failed to establish the motive of crime. Conjoint reading of testimonies of Bittu Singh (PW-2) and Bhagwan Singh (PW-3) reveals that after receiving call from accused Jitender @ Jyoti, deceased, by taking Rs.50,000/Rs.60,000/- in cash, left the house. This was on 14.6.2009. Apparently, there was some business transaction between the accused and the deceased. Also, co-accused Taranjit Singh owed money to the deceased. Further, photograph of sister of accused Jatinder was found on the mobile of the deceased. Significantly, both these witnesses admit that missing report dated 19.6.2009 (Ex.PW-12/B) came to be lodged by their father at Police Station, Ajnala. Now this missing report does not, even remotely, suggest complicity of the accused. In fact, it does not even name any one or point out finger of suspicion against anyone, much less the deceased, of having murdered the deceased. Missing report came to be recorded subsequent to the recovery of the dead body. Further, Bittu Singh admits that he had never seen accused Taranjit Singh with the deceased. Business dealings were only between accused Jyoti and the deceased. He does try to explain that on telephone co-accused Taranjit Singh used to have conversation with the deceased, but then there is no record establishing such fact. Even the mobile phone of the deceased or the accused has not been placed on record.

33. Significantly, the witnesses want the Court to believe that immediately after lodging of the missing report, family of the deceased visited the houses and questioned both the accused, to whom they failed to give any satisfactory reply. Obviously, they are telling lies, for the missing report came to be lodged on 19.6.2009 and dead body so recovered on 15.6.2009 came to be identified on 22.6.2010. Also, no finger of suspicion was raised by them.

34. On the very same issue, our attention is invited to the testimony of police official SI Harjit Singh (PW-13), according to whom, during investigation accused Jitender confessed of having murdered the deceased for the reason that he was in debt to him and that his sister's photograph was found on the mobile phone of the deceased. Again, this is a confessional statement before a police official, which also never came to be reduced into writing, hence, cannot be read in evidence, for being absolutely uninspiring in confidence.

35. Hence, the motive of crime cannot be said to have been established on record.

36. Our attention is invited to the disclosure statements made by accused Taranjit Singh (Ex.PW-7/A) in the presence of Jarnail Singh (PW-7) and Dharam Singh (not examined) as also Ex. PW-18/A made by accused Jitender Kumar in the presence of HC Albel Singh (PW-18) and independent witness Amrik Singh. The former pertains to the concealment of purse of the deceased and the latter about the concealment of sword, with which deceased was murdered. Purse (Ex.P-12) came to be recovered pursuant to disclosure statement (Ex.PW-7/A) in the presence of the very same witnesses and the sword came to be recovered pursuant to disclosure statement (Ex.PW-18/A) in the presence of Ravinder Kumar (PW-8). We do not find even this circumstance to have been established beyond reasonable doubt, for we find presence of Jarnail

Singh on the spot to be doubtful. He is not a resident of the area. If the police had associated the Pradhan during investigation, why would an unknown person be associated in recording statements of the accused, against whom, originally, no finger of suspicion came to be pointed out by anyone. Significantly, independent witness Amrik Singh was given up by the prosecution.

37. Recovery of purse is also uninspiring in confidence, for none has been able to establish that the purse actually belonged to the deceased. Also, recovery came to be effected from an open public place, i.e. Railway bridge, which is accessible by general public. Also, such kind of purses are easily available in the market.

38. Dr. Ravinder Mohan (PW-1), who conducted postmortem, found the following injuries on the body of the deceased:

"1. Lacerated wound on left upper part of forehead 2cm x 1.5 cm.

2. Lacerated wound 2.5 cm x 1 cm on lateral angle of right eye.

3. Lacerated wound on right side of face and right ear pinna.

4. Abraded wound on tip of right shoulder, multiple abrasion on right gluteus region superiorly, multiple abrasions on both knee joints anteriorly.

5. Big incised (slit) wound on left side of neck which was gaping starting from near angle of muddle tapering upto mid line anteriorly on neck. Internal carotid and other blood vessel, muscles of neck are cut in this area cleanly and are visible through the wound. The wound was 12 cm in length and 5 cm in width.

6. There was visible/fracture of frontal bone left side.

7. Fracture humerus right upper end and fracture pelvis right iliac crest."

39. According to the doctor, Injury No.5 could have been caused with weapon (Ex.P-1 or P-2). But significantly, there is no scientific evidence linking the weapon of offence to the accused. Neither traces of blood nor fingerprints were found.

40. Findings on circumstance (a), as culled out by the trial Court, in the affirmative, that the deceased had died due to injuries inflicted with swords (Ex.P-1 & P-2) cannot be said to have been borne out from the record. Evidence of the doctor is only suggestive in nature. There is no link evidence corroborating such fact.

41. While returning findings on circumstance (c), trial Court erred in ignoring the statutory provisions, apart from the fact that the relevant FIR so registered at Police Station, Nalagarh, was never proved on record. Also, there is nothing on record to establish that either of the accused, at the time of making confession, was either in detention or police custody.

42. While dealing with circumstance (e), trial Court itself found the prosecution not to have established the factum of destruction of evidence or sword (Ex.P-1), a prohibited arm, to have been carried without licence.

43. Trial Court, in the absence of any evidence, presumed that the deceased was called by the accused on telephone. The Court lost sight of the fact that none of the relatives of the deceased, so examined in Court, were privy to such conversation. Also where did the money came from and to whom it was handed over has not come on record. Money has not been recovered by the police. Further, Court presumed the common intention of both the accused in killing the deceased. There is nothing on record to establish that the deceased was lastly seen in the company of the accused.

44. From the material placed on record, prosecution has failed to establish that the accused is guilty of having committed the offence, he has been charged with. The circumstances cannot be said to have been proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused does not stand proved beyond reasonable doubt

to the hilt. The chain of events does not stand conclusively established, leading only to one conclusion, i.e. guilt of the accused.

45. Thus, findings of conviction and sentence, returned by the Court below, 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. It cannot be said that prosecution has been able to prove its case that the accused in furtherance of the common intention of his co-accused Taranjit Singh @ Badal, committed murder of Sarwan Singh and also possessed sword, which is a prohibited arm, without licence.

46. Hence, for all the aforesaid reasons, the appeal is allowed and the judgment of conviction and sentence, dated 31.8.2012, passed by Additional Sessions Judge, Una, Himachal Pradesh, in Sessions Case No.11/VII/2011 (Sessions Trial No.8 of 2011), titled as *State of Himachal Pradesh v. Jitender Kumar and another,* is set aside and the accused is acquitted of the charged offences. He be released from jail, if not required in any other case. Amount of fine, if deposited by the accused, be refunded to him accordingly. Release warrants be immediately prepared.

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

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

Mukesh Singh .....Petitioner

Versus

Union of India and others ..... Respondents.

CMP (M) No. 77 of 2016.
Date of order: 29th September, 2016.

Limitation Act, 1963- Section 5- An application was moved for the condonation of delay of 6 years 2 months and 7 days for the restoration of the writ petition- license of the Advocate who was representing the petitioner was suspended for five years- held, that suspension of license is a sufficient cause for the condonation of delay and the party should not be deprived of his legitimate right on account of delay. (Para-2 to 5)

Cases referred:

Brijesh Kumar and others versus State of Haryana and others 2014 AIR SCW 1831
Maniven Devraj Shah versus Municipal Corporation of Brihan Mumbai 2012 AIR SCW 2412
Balwant Singh (Dead) versus Jagdish Singh and others AIR 2010 SC 3043
Ram Nath Sao @ Sahu and others versus Govardhan Sao and others AIR 2002 SC 1201

For the petitioner: Mr. Harish Kumar Verma, Advocate,
For the respondents: Mr. Ashok Sharma, Assistant Solicitor General of India, with Mr. Ajay Chauhan, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

CMP(M) No. 77 of 2016.

This application has been moved by the applicant/petitioner for condonation of 6 years, two months' and 7 days' delay in filing the application for restoration of the writ petition.

2. Mr. Ashok Sharma, the learned Assistant Solicitor General of India, stated at the Bar that it is a fact that licence of Mr. R.P. Singh, Advocate, who was representing the petitioner, was suspended for five years. His statement is taken on record. Mr. R.P. Singh, Advocate, who is present in the Court stated that it is a fact that his licence was suspended, was not in a position to inform his client. His statement is also taken on record.

3. Learned counsel had to inform the petitioner about his non-availability.

4. Keeping in view the fact that the licence of the counsel was suspended, is sufficient cause, as defined in terms of the Limitation Act, for condonation of delay.

5. The apex Court in case titled ***Brijesh Kumar and others versus State of Haryana and others*** reported in ***2014 AIR SCW 1831, Maniven Devraj Shah versus Municipal Corporation of Brihan Mumbai*** reported in **2012 AIR SCW 2412, Balwant Singh (Dead) versus Jagdish Singh and others** reported in **AIR 2010 SC** *3043* and **Ram Nath Sao @ Sahu and others versus Govardhan Sao and others** reported in **AIR 2002 SC 1201,** has laid down the principles of law when the delay can be condoned and the ratio of the said judgments is that the petitioner should not be deprived of his legitimate right, on account of delay only. Applying the ratio and keeping in view the facts of the case, the application is allowed and the delay in filing the application for restoration of the writ petition is condoned. The application is disposed of.

CMP No.1017./2016.

6. Granted. The writ petition is restored to its original number.

CWP No. 1111/2008.

7. The writ petition is taken on Board. Mr. Ajay Chauhan, Advocate, waives notice on behalf of the respondents.

8. Mr. Ashok Sharma, learned Assistant Solicitor General of India, stated at the Bar that case is to be transferred to the Armed Forces Tribunal, Chandigarh.

9. Accordingly, the petition is transferred to the Armed Forces Tribunal, Chandigarh. Parties through their counsel to appear before the Tribunal on **7th November, 2016.**

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

Taranjit Singh @ Badal ...Appellant.
Versus
State of H.P. ...Respondent.

Criminal Appeal No.82 of 2016
Reserved on: 20.9.2016
Date of Decision : September 29, 2016

Indian Penal Code, 1860- Section 302 and 201- **Indian Arms Act, 1959-** Section 25- Dead body of S was recovered from a dry well – accused T and J made a confessional statement that they had murdered the deceased with the swords and had dumped the body thereafter in a well – motive of the crime was possible involvement of the deceased with the sister of accused J and money dispute between accused, J and the deceased – accused T was tried and convicted by the trial Court for the commission of offence punishable under Section 302 read with Section 34 of I.P.C and acquitted of the commission of offence punishable under Section 201 read with Section 34 of I.P.C and Section 25 of Indian Arms Act- held, in appeal that prosecution case is based upon the circumstantial evidence- circumstances relating to the guilt should be proved satisfactorily and should be incapable of any interpretation other than the guilt of the accused – any confession made to the police cannot be used against the accused – even otherwise, the

statements of witnesses to prove the confession were inconsistent- the motive for the commission of crime was also not proved- the disclosure statement was also not proved- purse was not proved to be belonging to the deceased- the circumstances do not establish the guilt of the accused- the trial Court had wrongly convicted the accused T- appeal allowed and accused T acquitted of the charged offences. (Para-8 to 46)

Cases referred:

Bodhraj alias Bodha & others vs. State of Jammu and Kashmir, (2002) 8 SCC 45
Pudhu Raja and another Versus State Represented by Inspector of Police, (2012) 11 SCC 196
Madhu Versus State of Kerala, (2012) 2 SCC 399
Dilip Singh Moti Singh versus State of Gujarat, (2010) 15 SCC 622
Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC 172
Trimukh Maroti Kiran versus State of Maharashtra, (2006) 10 SCC 681
Mulakh Raj and others Versus Satish Kumar and others, (1992) 3 SCC 43
Ashok Kumar Chatterjee vs. State of M.P., 1989 Supp. (1) SCC 560
Balwinder Singh vs. State of Punjab, (1987) 1 SCC 1
State of U.P. vs. Sukhbasi, 1985 Supp. SCC 79
Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116
Earabhadrappa vs. State of Karnataka, (1983) 2 SCC 330
Hukam Singh vs. State of Rajasthan, (1977) 2 SCC 99
Eradu vs. State of Hyderabad, AIR 1956 SC 316
Sujit Biswas vs. State of Assam, (2013) 12 SCC 406
Hanumant Govind Nargundkar v. State of Madhya Pradesh, AIR 1952 SC 343
Dharam Deo Yadav v. State of Uttar Pradesh, (2014) 5 SCC 509
Pulukuri Kottaya and others v. Emperor, AIR (34) 1947 Privy Council 67
Harivadan Babubhai Patel vs. State of Gujarat, (2013) 7 SCC 45

For the Appellant	:	Mr. Chander Shekhar Sharma, Advocate.
For the Respondent	:	Mr. V.S. Chauhan, Additional Advocate General and Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Dead body of Sarwan Singh (deceased) was recovered on 15.6.2009 from the dry well owned by certain private persons. On 19.6.2009, member of the family of the deceased lodged a missing report, without raising any finger of suspicion against any one. Since investigation did not reveal involvement of any person in the crime, as such, untraced report was filed in Court.

2. Hence, during the course of investigation of another crime, in relation to which FIR stood registered at Police Station, Nalagarh, present accused Taranjit Singh and his co-accused Jatinder Kumar, on 18.6.2010, while in custody, made a confessional statement of having murdered the deceased with swords and thereafter dumped the body in the well. Such information came to be passed on to Police Station, Una, having jurisdiction of the place from where initially the dead body was recovered and also accused ordinarily reside. Accused came to be arrested by the police officials of Una and during their custody, made disclosure statements, leading to discovery of the purse of the deceased and weapon of offence, i.e. swords, so concealed by them.

3. Investigation revealed dual motive of crime: (a) perhaps involvement of the deceased with the sister of accused Jatinder Kumar, (b) dispute pertaining to money *inter se* the deceased and the accused, more specifically Jatinder Kumar.

4. With the completion of investigation, challan came to be presented in the Court and accused Taranjit Singh stands charged for having committed offences punishable under the provisions of Sections 302 & 201, both read with Section 34 of the Indian Penal Code and Section 25 of the Arms Act, 1959; and accused Jatinder Kumar stands charged for having committed offences under Sections 302 of the Indian Penal Code and 25 of the Arms Act, 1959.

5. It is a matter of record that during trial, accused Taranjit Singh was declared as a proclaimed offender and as such, trial qua him was segregated. Lateron, after his arrest, he participated in the proceedings and separate trial conducted qua him. It is a matter of record that based on similar, but separate, evidence led by the prosecution, both the accused stand convicted.

6. Vide judgment dated 28.9.2015, passed by Additional Sessions Judge-I, Una, Himachal Pradesh, in Sessions Case No.11/11, titled as *State of Himachal Pradesh v. Taranjit Singh,* accused Taranjit Singh stands convicted for having committed offences punishable under the provisions of Section 302 read with Section 34 of the Indian Penal Code, and sentenced to undergo imprisonment for life and pay fine of Rs.25,000/-, and in default thereof to further undergo rigorous imprisonment for a period of one year. However, he stands acquitted of the offences charged for under Sections 201 read with Section 34 of the Indian Penal Code and 25 of the Arms Act.

7. It is also a matter of record that both the accused have preferred separate appeals, which are being disposed of vide separate judgments. Noticeably, State has not preferred any appeal against the judgment of acquittal of the accused of offences under Sections 201 read with Section 34 of the Indian Penal Code and 25 of the Arms Act.

8. Trial Court framed the following points for consideration and answered Point No.1 in the affirmative, but expressed its doubts with regard to Point No.2:

> 8. Whether the prosecution has proved beyond all reasonable doubt that prior to the morning of 15.6.2009 in the area of Raipur Sahoran within the jurisdiction of Police Station, Una, accused Taranjit @ Badal in furtherance of common intention with his co-accused Jatinder had committed the murder of Sarwan Singh?
>
> 9. Whether the prosecution has also proved beyond reasonable doubt that accused Taranjit was in possession of sword, prohibited arm and in furtherance of common intention with his co-accused Taranjit had tried to cause disappearance of evidence?

9. While convicting the accused in relation to the charge of murder, trial Court culled out the following circumstances:

> "a) Ante mortem injuries on the person of the deceased.
>
> g) Presence of blood stains on the edge of the well and roof of the tube well.
>
> h) Accused Taranjit was in custody in case FIR No.78/2010 of P.s. Nalagarh along with his co-accused Jitender alias Jyoti and during interrogation accused Taranjit disclosed that he alongwith his co-accused Jitender committed the murder of a sikh gentleman in the area of District Una and threw the dead body in a well in Santoshgarh area.
>
> i) Identification of the place of occurrence by the accused.
>
> j) Small sword has been recovered at the instance of co-accused Jatinder and purse and sword had been recovered t the instance of accused Taranjit @ Badal."

10. Additionally, learned Additional Advocate General has pressed the following circumstances:

(d) motive of crime,

(e) after receiving call from accused Jatinder, deceased left his house with certain amount of cash but never returned, and

(f) deceased was lastly seen in the company of the accused.

11. Admittedly there is no eye-witness to the alleged incident in relation to which accused stands convicted. Prosecution case primarily rests upon circumstantial evidence. The law on circumstantial evidence is now very well settled. To base a conviction on circumstantial evidence, prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events, as would permit no conclusion other than the one of guilt of the accused. Circumstances to be proved have to be beyond reasonable doubt and not based on principle of preponderance of probability. Suspicion, howsoever, grave, cannot be a substitute for a proof and courts should take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence.

12. In *Bodhraj alias Bodha & others vs. State of Jammu and Kashmir,* (2002) 8 SCC 45, Hon'ble the Supreme Court of India held that:-

> "9. Before analysing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or *factum probandum* may be proved indirectly by means of certain inferences drawn from *factum probans*, that is, the evidentiary facts. To put it differently circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed. ....."
>
> 10. .....In *Bhagat Ram v. State of Punjab* [AIR 1954 SC 621], it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt." (Emphasis supplied)

13. Also it is a settled proposition of law that when there is no direct evidence of crime, guilt of the accused can be proved by circumstantial evidence, but then the circumstances from which conclusion of guilt is to be drawn, should be fully proved and such circumstances must be conclusive in nature, to fully connect the accused with crime. All the links in the chain of circumstances, must be established beyond reasonable doubt, and the proved circumstances should be consistent only with the hypothesis of guilt of the accused, being totally inconsistent with his innocence. While appreciating the circumstantial evidence, Court must adopt a very cautious approach and great caution must be taken to evaluate the circumstantial evidence. [See: *Pudhu Raja and another Versus State Represented by Inspector of Police,* (2012) 11 SCC 196; *Madhu Versus State of Kerala,* (2012) 2 SCC 399; *Dilip Singh Moti Singh versus State of Gujarat,* (2010) 15 SCC 622; *Ramreddy Rajesh Khanna Reddy v. State of A.P.*, (2006) 10 SCC 172; *Trimukh Maroti Kiran versus State of Maharashtra,* (2006) 10 SCC 681; *Mulakh Raj and others Versus Satish Kumar and others,* (1992) 3 SCC 43; *Ashok Kumar Chatterjee vs. State of M.P.,* 1989 Supp. (1) SCC 560; *Balwinder Singh vs. State of Punjab,* (1987) 1 SCC 1; *State of U.P. vs. Sukhbasi,* 1985 Supp. SCC 79; *Sharad Birdhichand Sarda Versus State of Maharashtra,* (1984) 4 SCC 116; *Earabhadrappa vs. State of Karnataka,* (1983) 2 SCC 330; *Hukam Singh vs. State of Rajasthan,* (1977) 2 SCC 99; and *Eradu vs. State of Hyderabad,* AIR 1956 SC 316]

14. In *Sujit Biswas vs. State of Assam,* (2013) 12 SCC 406, Hon'ble the Supreme Court of India held that:-

> "13. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved, and something that "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. [Vide: Hanumant Govind Nargundkar vs. State of M.P., AIR 1952 SC 343; State through CBI v. Mahender Singh Dahiya, (2011) 3 SCC 109: AIR 2011 SC 1017; and Ramesh Harijan vs. State of U.P., (2012) 5 SCC 777].
>
> 14. In Kali Ram vs. State of Himachal Pradesh, (1973) 2 SCC 808: AIR 1973 SC 2773, this Court observed as under:
>
> > "25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases where in the guilt of the accused is sought to be established by circumstantial evidence.""

15. Relying upon its earlier decision in *Hanumant Govind Nargundkar v. State of Madhya Pradesh*, AIR 1952 SC 343, Hon'ble the Supreme Court of India in *Dharam Deo Yadav v. State of Uttar Pradesh,* (2014) 5 SCC 509, again reiterated that:

> "15. .... Each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. Even when there is no eye-witness to support the criminal charge, but prosecution has been able to establish the chain of circumstances which is complete leading to inference of guilt of accused and circumstances taken collectively are incapable of explanation on any reasonable hypothesis save of guilt sought to be proved, the accused may be convicted on the basis of such circumstantial evidence."

16. Keeping in view the aforesaid principles, we now proceed to discuss the evidence on record.

17. Insofar as identity of the deceased is concerned, there is no dispute. In any event, it stands established through the testimony of Bittu Singh (PW-1) and Bhagwan Singh (PW-3), both relatives of the deceased.

18. That dead body of the deceased was recovered from the well in village Raipur Sahoran stands established on record. Ram Kumar (not examined) saw stains of blood on the edge of the well and informed Pradhan Harpal Singh (PW-23), who visited the spot and after seeing the dead body inside the well, which was dry, informed the police, when police official Sewa Singh (PW-18) reached the spot and, in turn, informed SHO Dharam Chand (PW-17) about the same. After reaching the spot, Dharam Chand got the dead body taken out from the well, prepared inquest report (Ex.PW-1/B), took into possession mobile cover (Ex.P-10), blood stained clothes, i.e. Patka & Parna (Ex.P-8), shoes (Ex.P-9), plucker (Ex.P-11), vide memo (Ex.PW-5/B). He sent Rukka (Ex. PW-21/B) to the Police Station, on the basis of which FIR No.224/09, dated 15.6.2009 (Ex.PW-24/D), for commission of offence under Section 302 of the Indian Penal Code, came to be registered at Police Station, Sadar (Una), District Una, Himachal Pradesh.

19. It has come on record through the testimony of ASI Sewa Singh (PW-18) that the spot, from where the dead body was recovered, was got demarcated from the revenue official, who issued relevant documents (Ex.PW-6/B & 6/C), which reveal that the land was owned by one Kishan Devi and possessed by tenants.

20. At this juncture, it be only observed that prosecution has not ruled out the possibility of involvement of these persons or that of Ram Kumar, who first spotted the dead body, in the crime.

21. It is also a matter of record that with the recovery of dead body, FIR came to be registered and untraced report filed in Court. Such fact is evident from the testimony of Amit Sharma (PW-20),

22. Prosecution wants the Court to believe that after a period of one year, while the accused were being interrogated, in connection with another FIR No.78/2010, so registered at Police Station, Nalagarh, accused Taranjit Singh made a disclosure statement that he alongwith co-accused Jatinder @ Jyoti had murdered the deceased and thereafter thrown his dead body in the dry well.

23. To establish such circumstance, our attention is invited to the testimonies of Inspector Prem Lal (PW-16) and Inspector Om Parkash (PW-19).

24. Law on disclosure/confessional statement is now well settled. Sections 25, 26 and 27 of the Indian Evidence Act read as under:

> "25. Confession to police officer not to be proved.
>
> No confession made to a police officer, shall be proved as against a person accused of any offence.
>
> 26. Confession by accused while in custody of police not to be proved against him.
>
> No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.
>
> 27. How much of information received from accused may be proved.
>
> Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.**"**

25. It be observed the principle of law as laid down in Pulukuri *Kottaya and others v. Emperor*, AIR (34) 1947 Privy Council 67, which is reproduced herein under, has been consistently followed by Hon'ble the Supreme Court of India.

> "[10] ... ... On normal principles of construction their Lordships think that the proviso to S. 26, added by S. 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant." (Emphasis supplied)

26. In *Bodhraj alias Bodha & others vs. State of Jammu and Kashmir,* (2002) 8 SCC 45, Hon'ble Supreme Court of India, held as under:-

> "18. Emphasis was laid as a circumstance on recovery of weapon of assault, on the basis of information given by the accused while in custody. The question is whether the evidence relating to recovery is sufficient to fasten guilt on the accused. Section 27 of the Indian Evidence Act, 1872 (in short 'the Evidence Act') is by way of proviso to Sections 25 to 26 and a statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused. This position was succinctly dealt with by this Court in *Delhi Admn. vs. Bal Krishan,* (1972) 4 SCC 659: AIR 1972 SC 3 and *Mohd. Inayatullah vs. State of Maharashtra,* (1976) 1 SCC 828: AIR 1976 SC 483. The words "so much of such information" as relates distinctly to the fact thereby discovered, are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. The ban as imposed by the preceding sections was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. If all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. The object of the provision i.e. Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequences of the preceding sections, be admitted in evidence. It would appear that under Section 27 as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police. The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken into custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible under Section

27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer. The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of Privy Council in *Pulukuri Kotayya v. Emperor* (AIR 1947 PC 67), is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. [See: *State of Maharashtra v. Danu Gopinath Shinde,* (2000) 6 SCC 269]. No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered". <u>But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability</u>. Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given." (Emphasis supplied)

27. In *Harivadan Babubhai Patel vs. State of Gujarat,* (2013) 7 SCC 45, Hon'ble Supreme Court of India, held that:-

"17. In this context, we may usefully refer to A.N. Venkatesh and another v. State of Karnataka [(2005) 7 SCC 714] wherein it has been ruled that:

> "By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer the place where the dead body of the kidnapped boy was found … would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act or not. …"

In the said decision, reliance was placed on the principle laid down in Prakash Chand v. State (Delhi Admin) [(1979) 3 SCC 90: AIR 1979 SC 400]. It is worth noting that in the said case, there was material on record that the accused had taken the Investigating Officer to the spot and pointed out the place where the dead body was buried and this Court treated the same as admissible piece of evidence under Section 8 as the conduct of the accused.

18. In State of Maharashtra v. Damu [(2000) 6 SCC 269], it has been held as follows: -

> "35. … It is now well settled that recovery of an object is not discovery of a fact as envisaged in Section 27 of the Evidence Act, 1872. The decision

> of the Privy Council in Pulukuri Kottaya v. King Emperor [AIR 1947 PC 67] is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."
>
> 19. The same principle has been laid down in State of Maharashtra v. Suresh [(2000) 1 SCC 471], State of Punjab v. Gurnam Kaur and others [(2009) 11 SCC 225], Aftab Ahmad Anasari v. State of Uttaranchal [(2010) 2 SCC 583], Bhagwan Dass v. State (NCT) of Delhi [(2011) 6 SCC 396: AIR 2011 SC 1863], Manu Sharma v. State [(2010) 6 SCC 1: AIR 2010 SC 2352] and Rumi Bora Dutta v. State of Assam [(2013) 7 SCC 417]."

28. As such confessional statement made to the police officials cannot be used against the accused, in view of the aforesaid statement of law.

29. That apart, we find the version of the witnesses to be unbelievable and unworthy of credence. There are material contradictions on the issue. Whereas, Inspector Prem Lal states that it was accused Taranjit Singh, who had disclosed "*to me*" that "*he alongwith co-accused Jyoti @Jatinder about a year back near Mehatpur Distirct Una had murdered one Sikh with 'Kirpan' and had thrown his dead body in the dry well and further that the name of the victim was known to aforesaid co-accused*", Inspector Om Parkash states that "*I had lodged rapat Ext. PW-23/A with regard to information sent to PS, Sadar, Una*".

30. Now, we find the confessional statements to have been made by both the accused, naming the deceased, to Om Parkash, but however such version is self-contradictory, for in the cross-examination part of his testimony, the witness admits that "*no statement of accused during interrogation was recorded by me but was disclosed to me by investigating officer concerned*". Further, Inspector Om Parkash wants the Court to believe that he sent the information on phone, whereas according to Inspector Prem Lal, it was he who had telephonically furnished such information. Now significantly, no independent person was associated by the police at the time of such disclosure/ confessional statement. Also, such statement was not reduced into writing. It has nowhere come on record that both the accused were under police custody in relation to the case registered at Police Station, Nalagarh.

31. Hence, we do not find this circumstance to have been established, much less beyond reasonable doubt.

32. At this juncture, it be only observed that prosecution has miserably failed to establish the motive of crime. Conjoint reading of testimonies of Bittu Singh (PW-1) and Bhagwan Singh (PW-3) reveals that after receiving call from accused Jyoti, deceased, by taking Rs.50,000/Rs.60,000/- in cash, left the house. This was on 14.6.2009. Apparently, there was some business transaction between the accused and the deceased. Also, accused Taranjit Singh owed money to the deceased. Further, photograph of sister of accused Jatinder was found on the mobile of the deceased. Significantly, both these witnesses admit that missing report dated 19.6.2009 (Ex.PW-12/B) came to be lodged by their father at Police Station, Ajnala. Now this missing report does not, even remotely, suggest complicity of the accused. In fact, it does not even name any one or point out finger of suspicion against anyone, much less the deceased, of having murdered the deceased. Missing report came to be recorded subsequent to the recovery of the dead body. Further, Bittu Singh admits that he had never seen accused Taranjit Singh with the deceased. Business dealings were only between accused Jyoti and the deceased. He does try to explain that on telephone Taranjit Singh used to have conversation with the deceased, but then there is no record establishing such fact. Even the mobile phone of the deceased or the accused has not been placed on record.

33. Significantly, the witnesses want the Court to believe that immediately after lodging of the missing report, family of the deceased visited the houses and questioned both the accused, to whom they failed to give any satisfactory reply. Obviously, they are telling lies, for the

missing report came to be lodged on 19.6.2009 and dead body so recovered on 15.6.2009 came to be identified on 22.6.2010. Also, no finger of suspicion was raised by them.

34. On the very same issue, our attention is invited to the testimony of police official SI Harjit Singh (PW-10), according to whom, during investigation accused Jatinder confessed of having murdered the deceased for the reason that he was in debt to him and that his sister's photograph was found on the mobile phone of the deceased. Again, this is a confessional statement before a police official, which also never came to be reduced into writing, hence, cannot be read in evidence, for being absolutely uninspiring in confidence.

35. Hence, the motive of crime cannot be said to have been established on record.

36. Our attention is invited to the disclosure statements made by accused Taranjit Singh (Ex.PW-7/A) in the presence of Dharam Pal (PW-4) as also Ex. PW-18/A made in the presence of HC Albel Singh (PW-15) and independent witness Amrik Singh. The former pertains to the concealment of purse of the deceased and the latter about the concealment of sword, with which deceased was murdered. Purse (Ex.P-12) came to be recovered pursuant to disclosure statement (Ex.PW-7/A) in the presence of the very same witnesses and the sword came to be recovered pursuant to disclosure statement (Ex.PW-18/A) in the presence of Ravinder Kumar (PW-5). We do not find even this circumstance to have been established beyond reasonable doubt, for we find presence of Dharam Pal on the spot to be doubtful. He is not a resident of the area. If the police had associated the Pradhan during investigation, why would an unknown person be associated in recording statements of the accused, against whom, originally, no finger of suspicion came to be pointed out by anyone. Significantly, independent witness Amrik Singh was given up by the prosecution on 12.5.2015, whereafter only statement of police official HC Albel Singh (PW-15) came to be recorded, with regard to the disclosure statement.

37. Recovery of purse is also uninspiring in confidence, for none has been able to establish that the purse actually belonged to the deceased. Also, recovery came to be effected from an open public place, i.e. Railway bridge, which is accessible by general public. Also, such kind of purses are easily available in the market.

38. Dr. Ravinder Mohan (PW-21), who conducted postmortem, found the following injuries on the body of the deceased:

> "1. Lacerated wound on left upper part of forehead 2cm x 1.5 cm.
>
> 2. Lacerated wound 2.5 cm x 1 cm on lateral angle of right eye.
>
> 10. Lacerated wound on right side of face and right ear pinna.
>
> 11. Abraded wound on tip of right shoulder, multiple abrasion on right gluteus region superiorly, multiple abrasions on both knee joints anteriorly.
>
> 12. Big incised (slit) wound on left side of neck which was gaping starting from near angle of muddle tapering upto mid line anteriorly on neck. Internal carotid and other blood vessel, muscles of neck are cut in this area cleanly and are visible through the wound. The wound was 12 cm in length and 5 cm in width.
>
> 13. There was visible/fracture of frontal bone left side.
>
> 14. Fracture humerus right upper end and fracture pelvis right iliac crest."

39. According to the doctor, Injury No.5 could have been caused with weapon (Ex.P-1 or P-2). But significantly, there is no scientific evidence linking the weapon of offence to the accused. Neither traces of blood nor fingerprints were found.

40. Findings on circumstance (a), as culled out by the trial Court, in the affirmative, that the deceased had died due to injuries inflicted with swords (Ex.P-1 & P-2) cannot be said to have been borne out from the record. Evidence of the doctor is only suggestive in nature. There is no link evidence corroborating such fact.

41. While returning findings on circumstance (c), trial Court erred in ignoring the statutory provisions, apart from the fact that the relevant FIR so registered at Police Station, Nalagarh, was never proved on record. Also, there is nothing on record to establish that either of the accused, at the time of making confession, was either in detention or police custody.

42. While dealing with circumstance (e), trial Court itself found the prosecution not to have established the factum of destruction of evidence or sword (Ex.P-1), a prohibited arm, to have been carried without licence.

43. Trial Court, in the absence of any evidence, presumed that the deceased was called by the accused on telephone. The Court lost sight of the fact that none of the relatives of the deceased, so examined in Court, were privy to such conversation. Also where did the money came from and to whom it was handed over has not come on record. Money has not been recovered by the police. Further, Court presumed the common intention of both the accused in killing the deceased. There is nothing on record to establish that the deceased was lastly seen in the company of the accused.

44. From the material placed on record, prosecution has failed to establish that the accused is guilty of having committed the offence, he has been charged with. The circumstances cannot be said to have been proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused does not stand proved beyond reasonable doubt to the hilt. The chain of events does not stand conclusively established, leading only to one conclusion, i.e. guilt of the accused.

45. Thus, findings of conviction and sentence, returned by the Court below, 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. It cannot be said that prosecution has been able to prove its case that the accused in furtherance of the common intention of his co-accused Jatinder Kumar @ Jyoti, committed murder of Sarwan Singh, caused disappearance of evidence and also possessed sword, which is a prohibited arm, without licence.

46. Hence, for all the aforesaid reasons, the appeal is allowed and the judgment of conviction and sentence, dated 28.9.2015, passed by Additional Sessions Judge-I, Una, Himachal Pradesh, in Sessions Case No.11/11, titled as *State of Himachal Pradesh v. Taranjit Singh* is set aside and the accused is acquitted of the charged offences. He be released from jail, if not required in any other case. Amount of fine, if deposited by the accused, be refunded to him accordingly. Release warrants be immediately prepared.

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

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

FAO (MVA) No. 125 of 2013 and FAO No. 386 of 2012.
Date of decision: 30th September, 2016.

1. FAO No. 125 of 2013.

Smt. Dhani Devi and others .....Appellants.

Versus

Sh. Narender Bhardwaj and others .....Respondents

2. FAO No. 386 of 2012.

ICICI Lombard General Insurance Co. Ltd. .....Appellant.

Versus

Smt. Dhani Devi and others .....Respondents

Motor Vehicles Act, 1988- Section 149- Insurer had already satisfied the own damage vehicle claim – he cannot take U turn at this stage- the factum of insurance is admitted- thus, the Tribunal had rightly saddled the insurer with liability. (Para-5 and 6)

Cases referred:
Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellant(s):	Mr.Vikas Rathore, Proxy Advocate, for the appellant in FAO No. 125 of 2013 and Mr. Jagdish Thakur, Advocate, for the appellant in FAO No. 386 of 2012.
For the respondent(s):	Mr. Inder Sharma, Advocate, for respondent No. 1 in FAO No. 125 of 2013 and for respondent No. 6 in FAO No. 386/2012. Mr. Jagdish Thakur, Advocate, for respondent No. 2 in FAO No. 125 of 2013. Mr. Vikas Rathore, proxy Advocate, for respondents No. 1 to 5 in FAO No. 386/2012. Ms. Seema K. Guleria, Advocate, for respondent No. 3 in FAO No. 125 of 2013 and for respondent No.7 in FAO NO. 386/2012.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral)*

Both these appeals are outcome of judgment and award dated 28.4.2012, made by the Motor Accident Claims Tribunal (I) Mandi, H.P., for short "the Tribunal", in Claim Petition No. 48 of 2009, titled *Smt. Dhani Devi and others versus Sh. Narender Bhardwaj and others*, , whereby compensation to the tune of Rs.5,62,600/- alongwith interest @ 7.5% came to be awarded in favour of the claimants and insurer was saddled with the liability, hereinafter referred to as "the impugned award", for short.

2. The claimants have questioned the impugned award by the medium of FAO No. 125 of 2013, on the ground of adequacy of compensation and the insurer has questioned the same by the medium of FAO No. 386 of 2012, on the ground that the Tribunal has fallen in an error in saddling it with the liability.

3. Following points arise for consideration in these appeals.

(i) Whether the insurer came to be rightly saddled with the liability?

(ii) Whether the amount awarded is inadequate?

4. The answer is in negative for the following reasons.

5. While going through the record, one comes to an inescapable conclusion that the insurer has already satisfied the own damage vehicle claim which is also admitted by the learned counsel for the appellant in FAO No. 386 of 2012. Thus, the insurer cannot take "U" turn at this stage.

6. The factum of insurance is admitted. Thus, the Tribunal has rightly saddled the insurer with the liability, needs no interference.

7. I have gone through the assessment made by the Tribunal right from paras 21 to 25 of the impugned award. I am of the considered view that the amount awarded is not inadequate rather excessive but keeping in view the facts and circumstances of the case, it cannot be said to be excessive rather adequate.

8. I have gone through the entire record. The Tribunal has rightly made the assessment, while keeping in view of the 2nd Schedule attached to the Act, read with ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***.

9. Viewed thus, the impugned award is maintained and both the appeals are dismissed.

10. Registry is directed to release the amount in favour of the claimants, strictly, in terms of the conditions contained in the impugned award, through payees' cheque account or by depositing the same in their bank accounts.

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

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

Sh. Jagdish Kumar and another .....Appellants.
Versus
Smt. Parvati Kumari and others .....Respondents

FAO (MVA) No. 92 of 2012.
Date of decision: 30th September, 2016.

Motor Vehicles Act, 1988- Section 149- The driving licence shows that driver was competent to drive light motor vehicles- offending vehicle was Mahindra Pick-up jeep, which falls within the definition of 'light motor vehicle' -endorsement of PSV is not required and the driver had a valid driving licence – insurance was not disputed and the insurer was rightly saddled with liability.

(Para- 8 to 12)

Case referred:
Kulwant Singh and others vs. Oriental Insurance Company Limited, (2015) 2 Supreme Court Cases 186

For the appellants: Mr.J.L. Bhardwaj, Advocate.
For the respondents: Mr.H.S. Rangra, Advocate, for respondents No.1 to 4.
Mr. Lalit K. Sharma, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral)*

This appeal is directed against the judgment and award dated 2.12.2011, made by the Motor Accident Claims Tribunal (II) Mandi, H.P., for short "the Tribunal", in Claim Petition No. 40 of 2007, titled *Smt. Parvati Kumari and others versus Chet Ram and others*, whereby compensation to the tune of Rs.13,16,833.48, alongwith interest @ 7.5% came to be awarded in favour of the claimants and insured/owner was saddled with the liability, hereinafter referred to as "the impugned award", for short.

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

3. Owner and driver have questioned the impugned award on the ground that the Tribunal has fallen in an error in saddling them with the liability and exonerating the insurer from the liability.

4. The only question to be determined in this appeal is-whether the Tribunal has rightly exonerated the insurer from the liability? The answer is in negative for the following reasons.

5. The claimant invoked the jurisdiction of the Tribunal for the grant of compensation, as per the break-ups given in the claim petition, was resisted by the respondents and following issues came to be framed.

(i) Whether the deceased Parkash Chand died due to rash and negligent driving of vehicle no. HP-34-B-0289 by driver Chet Ram? OPP

(ii) If issue No. 1 is proved in affirmative, whether the petitioners are entitled for compensation, if so to what amount and from whom? OPP

(iii) Whether the vehicle in question was being driven in violation of the terms and conditions of the insurance Policy? OPR-3.

(iv) Whether the driver of the vehicle is in question was not holding a valid and effective driving license at the time of accident? OPR-3.

(v) Relief.

6. The Tribunal, after scanning the evidence, has rightly decided issues No. (i) and (ii) in favour of the claimants and against the owner and driver. The issues No. (iii) and (iv) were decided in favour of the insurer on the ground that the driver was not having a valid and effective driving licence. No other breach was pleaded and proved.

7. Thus, the only question to be determined is whether the findings returned by the Tribunal on issues No. (iii) and (iv) are legally correct.

8. The driving licence is on the record as Ext. RW1/A which does disclose that the driver was competent to driver light motor vehicle. The offending vehicle was Mahindera Pick-up Jeep which falls within the definition of light motor vehicle.

9. This Court in series of cases i.e. FAO No.320 of 2008, titled Dalip Kumar and another vs. New India Assurance Company Ltd. & another, decided on 6th June, 2014, FAO No.306 of 2012, titled Prem Singh and others vs. Dev Raj and others, decided on 18th July, 2014 and FAO No.54 of 2012, titled Mahesh Kumar and another vs. Smt.Priaro Devi and Others, decided on 25th July, 2014, has discussed the issue and held that the driver having driving licence to drive Light Motor Vehicle is not required to have endorsement of "PSV" i.e. public service vehicle. Further held that Tempo Trax is a Light Motor Vehicle.

10. The Apex Court in latest decision, in **Kulwant Singh and others vs. Oriental Insurance Company Limited, (2015) 2 Supreme Court Cases 186,** has held that the driver who is having valid and effective driving licence to drive a Light Motor Vehicle is not required to have endorsement to drive a light commercial vehicle. It is apt to reproduce paragraphs No.10 and 11 hereunder:

> *"10. In S. Iyyapan (supra), the question was whether the driver who had a licence to drive 'light motor vehicle' could drive 'light motor vehicle' used as a commercial vehicle, without obtaining endorsement to drive a commercial vehicle. It was held that in such a case, the Insurance Company could not disown its liability. It was observed :*
>
> *"18. In the instant case, admittedly the driver was holding a valid driving licence to drive light motor vehicle. There is no dispute that the motor vehicle in question, by which accident took place, was Mahindra Maxi Cab. Merely because the driver did not get any endorsement in the driving licence to drive Mahindra Maxi Cab, which is a light motor vehicle, the High Court has committed grave error of law in holding that the insurer is not liable to pay compensation because the driver was not holding the licence to drive the commercial vehicle. The impugned judgment*

(Civil Misc. Appeal No.1016 of 2002, order dated 31.10.2008 (Mad) is, therefore, liable to be set aside."

No contrary view has been brought to our notice.

11. Accordingly, we are of the view that there was no breach of any condition of insurance policy, in the present case, entitling the Insurance Company to recovery rights."

11. Having said so, the driver was having a valid and effective driving licence and the Tribunal has wrongly decided issue No. (iv) in favour of the insurer. Thus the findings recorded on issue No. (iv) are set aside and it is held that the driver was having a valid and effective driving licence and issue is decided in favour of the insured/owner and against the insurer.

Issue No.(iii).

12. It was for the insurer to prove that the owner has committed willful breach in terms of the mandate of Sections 147 and 149 of the Motor Vehicles Act, for short "the Act", has not proved that the owner has committed any breach. The only ground urged was that the driver was not having a valid and effective driving licence, stands already overruled. Accordingly, the Tribunal has wrongly decided issue No. (iii). Having said so, the findings retuned by the Tribunal on issues No. (iii) are set aside and issue is decided against the insurer and in favour of the claimants.

13. The factum of insurance is admitted. Thus, the insurer has to satisfy the award.

14. Viewed thus, the appeal is allowed, the impugned award is modified and the insurer is directed to satisfy the award.

15. The insurer is directed to deposit the amount within eight weeks in the Registry. Registry, on deposit, is directed to release the amount in favour of the claimants, strictly, in terms of the conditions contained in the impugned award, through payees' cheque account or by depositing the same in their bank accounts. The statutory amount deposited by the appellant is ordered to be paid as costs in favour of the claimants. Registry is directed to furnish a copy of this judgment to Mr. Lalit K. Sharma, Advocate, within one week.

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

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

FAos No. 325, 326 of 2009, 154, 156, 388, 389, 390 & 391 of 2012 a/w Cross Objections No. 479 of 2012 in FAO No. 154 of 2012 and Cross Objections No. 413 of 2012 in FAO No. 156 of 2012.
Decided on : 30.09.2016.

FAO No. 325 of 2009

Oriental Insurance Company Limited ...Appellant
Versus
Jeewan Singh & others ...Respondents

FAO No. 326 of 2009

Oriental Insurance Company Limited ...Appellant
Versus
Chuni Lal & others ...Respondents

FAO No. 154 of 2012

Oriental Insurance Company Limited ...Appellant
Versus
Raj Kumar & others ...Respondents

FAO No. 156 of 2012

Oriental Insurance Company Limited ...Appellant
Versus
Meena Kumari & others ...Respondents

FAO No. 388 of 2012

Oriental Insurance Company Limited ...Appellant
Versus
Shyam Lal & others ...Respondents

FAO No. 389 of 2012

Oriental Insurance Company Limited ...Appellant
Versus
Nand Lal & others ...Respondents

FAO No. 390 of 2012

Oriental Insurance Company Limited ...Appellant
Versus
Payal & others ...Respondents

FAO No. 391 of 2012

Oriental Insurance Company Limited ...Appellant
Versus
Kamla Devi & others ...Respondents

Motor Vehicles Act, 1988- Section 157- It was contended that owner insured had sold the vehicle – the risk was not covered and there was breach of the terms and conditions of the policy- held, that mere transfer of a vehicle cannot absolve the insurer from third party liability and the insurer has to satisfy the award – in these circumstances, the insurance company was rightly saddled with liability. (Para-7 to 17)

Motor Vehicles Act, 1988- Section 166- The age of the deceased was 31 years at the time of the accident- multiplier of '15' was applicable – the claimants are entitled to the compensation of Rs.2500 x 12 x 1= Rs.4,50,000/- under the head 'loss of dependency'- claimants are also entitled to Rs.10,000/- each under the heads ' loss of love and affection', 'loss of consortium' , 'loss of estate' and 'funeral expenses' – claimants are thus entitled to Rs.4,50,000 +40,000= 4,90,000/- with interest. (Para- 21 to 24)

Motor Vehicles Act, 1988- Section 166- The claimant has undergone pain and suffering and will have to undergo the same throughout the life- he remained under treatment for about one year and suffered 10% permanent disability- thus, the claimant is entitled to Rs. 50,000/- under the head 'pain and suffering' – the Tribunal had awarded Rs. 20,000/- under the head 'loss of enjoyment of life', which is too meager – the amount enhanced to Rs. 50,000/- - claimant held entitled to Rs. 1,90,029/- along with interest @ 7.5% per annum from the date of filing of the claim petition till realization. (Para-25 to 34)

Cases referred:

G. Govindan versus New India Assurance Company Ltd. and others, AIR 1999 SC 1398
Rikhi Ram and another versus Smt. Sukhrania and others, AIR 2003 SC 1446
United India Insurance Co. Ltd., Shimla versus Tilak Singh and others, (2006) 4 SCC 404
Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120
Munna Lal Jain & another versus Vipin Kumar Sharma & others, 2015 AIR SCW 3105
R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085

Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771
Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252

FAO No. 325 of 2009

For the Appellant : Mr. Ashwani Sharma, Senior Advocate with Mr. Ishan Thakur, Advocate.
For the Respondents: Mr. Surinder Saklani, Advocate, for respondent No. 1.
Mr. G.R. Palsra, Advocate, for respondents No. 2 & 3.

FAO No. 326 of 2009

For the Appellant : Mr. Ashwani Sharma, Senior Advocate with Mr. Ishan Thakur, Advocate.
For the Respondents: Mr. Surinder Saklani, Advocate, for respondents No. 1 to 3.
Mr. G.R. Palsra, Advocate, for respondents No. 5 & 6.
Respondent No. 4 deleted.

FAOs No. 154 & 156 of 2012

For the Appellant : Mr. Ashwani Sharma, Senior Advocate with Mr. Ishan Thakur, Advocate.
For the Respondents: Mr. Vijay Chaudhary, Advocate, for respondent No. 1.
Mr. Ajeet Jaswal, Advocate, for respondents No. 2 & 3.

FAO No. 388, 389, 390 & 391 of 2009

For the Appellant : Mr. Ashwani Sharma, Senior Advocate with Mr. Ishan Thakur, Advocate.
For the Respondents: Mr. Abhay Kaushal, Advocate, for respondent No. 1.
Mr. Ajeet Jaswal, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

All these appeals and cross-objections are outcome of a motor vehicular accident, which was allegedly caused by driver, namely, Gaitri Datt, while driving vehicle i.e. bus bearing registration No. HP-33-2861, rashly and negligently, on 15.08.2006, at about 8.30 a.m., near Village Kawalkot (Malramaslt) on Ratti Leda Road, District Mandi, in which, so many persons sustained injuries and one person succumbed to the injuries.

2. The claimants in Claim Petitions No. 117, 105 of 2006, 100 & 140 of 2009, subject matters of FAOs No. 325, 326 of 2009, 154 & 156 of 2012, respectively, filed claim petitions before the Motor Accident Claims Tribunal, Mandi, District Mandi, H.P. and the claimants in Claim Petitions No. 51, 52, 53, 54 of 2008, subject matters of FAOs No. 391, 388, 389 & 390 of 2012, respectively, filed claim petitions before Motor Accident Claims Tribunal, Bilaspur, District Bilaspur, H.P., for short 'the Tribunals' and compensation, as per the details given in the respective awards, came to be awarded in favour of the claimants, for short the 'impugned awards'.

3. The insured-owner and driver have not questioned the impugned awards, on any count, thus have attained finality, so far the same relate to them.

4. The claimants have not questioned the impugned awards, except in Claim Petition No. 100 of 2009, subject matter of FAO No. 154 of 2012 and Claim Petition No. 140 of 2009, subject matter of FAO No. 156 of 2012. They have questioned the impugned awards on the grounds of adequacy of compensation, by the medium of Cross Objections No. 479 of 2012 and 413 of 2012, filed in said appeals.

5. The claimants in other appeals, have not questioned the impugned awards, on any ground, thus have attained finality, so far the same relate to them.

6. Thus, I deem it proper to determine all the appeals and the cross-objections by this common judgment for the reason that the same are outcome of the same accident and the questions involved are similar.

7. The insurer has questioned the impugned awards on the grounds that the insured-owner had sold the offending vehicle, the risk was not covered, thus there was breach of the insurance policy. It has also questioned the impugned award passed in Claim Petition No. 105 of 2006, subject matter of 326 of 2009, on the ground of adequacy of compensation.

8. The following questions are to be determined in these appeals:

(i) *Whether the Tribunals have rightly saddled the insurer with liability?*

(ii) Whether the amount awarded in claim petitions No. 105/2006, 100/2009 & 140 of 2009, subject matters of FAOs No. 326 of 2009, 154 and 156 of 2012, is adequate or otherwise?

9. Learned Counsel for the insurer argued that the offending vehicle was transferred and the registered owner had no right to obtain insurance policy.

10. While going through the evidence led by the parties and the documents placed on record, one comes to an inescapable conclusion that the registered owner had obtained insurance policy. The evidence also discloses that the vehicle was sold.

11. In the given circumstances, it was for the insurer to follow the mandate of Section 157 of the Motor Vehicles Act, for short 'the MV Act'.

12. Section 157 of the Act reads as under:

"Transfer of certificate of insurance.

(1) Where a person in whose favour the certificate of insurance has been issued in accordance with the provisions of this Chapter transfers to another person the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance relating thereto, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer.

[Explanation.—For the removal of doubts, it is hereby declared that such deemed transfer shall include transfer of rights and liabilities of the said certificate of insurance and policy of insurance.]

(2) The transferee shall apply within fourteen days from the date of transfer in the prescribed form to the insurer for making necessary changes in regard to the fact of transfer in the certificate of insurance and the policy described in the certificate in his favour and the insurer shall make the necessary changes in the certificate and the policy of insurance in regard to the transfer of insurance."

13. While going through the aforesaid provision, one comes to an inescapable conclusion that the insurer has to follow the mandate of the MV Act and mere transfer of a vehicle cannot absolve the insurer from third party liability and the insurer has to satisfy the award.

14. My this view is fortified by the Apex Court Judgment in case titled as **G. Govindan versus New India Assurance Company Ltd. and others,** reported in **AIR 1999 SC 1398.** It is apt to reproduce paras-10, 13 & 15 of the aforesaid judgment herein:

" 10. This Court in the said judgment held that the provisions under the new Act and the old Act are substantially the same in relation to liability in regard to third party. This Court also recognised the view taken in the separate judgment in Kondaiah's case that the transferee-insured could not be said to be a third party qua the

vehicle in question. In other words, a victim or the legal representatives of the victim cannot be denied the compensation by the insurer on the ground that the policy was not transferred in the name of the transferee.

11. .....

12. .....

13. In our opinion that both under the old Act and under the new Act the Legislature was anxious to protect the third party (victim) interest. It appears that what was implicit in the provisions of the old Act is now made explicit, presumably in view of the conflicting decisions on this aspect among the various High Courts.

14. .....

15. As between the two conflicting views of the Full Bench judgments noticed above, we prefer to approve the ratio laid down by the Andhra Pradesh High Court in Kondaiah's case (AIR 1986 Andh Pra 62) as it advances the object of the Legislature to protect the third party interest. We hasten to add that the third party here will not include a transferee whose transferor has not followed procedure for transfer of policy. In other words in accord with the well-settled rule of interpretation of statutes we are inclined to hold that the view taken by the Andhra Pradesh High Court in Kondaiah's case is preferable to the contrary views taken by the Karnataka and Delhi High Courts (supra) even assuming that two views are possible on the interpretation of relevant sections as it promotes the object of the Legislature in protecting the third party (victim) interest. The ratio laid down in the judgment of Karnataka and Delhi High Courts (AIR 1990 Kant 166 (FB) and AIR 1989 Delhi 88) (FB) (supra) differing from Andhra Pradesh High Court is not the correct one."

15. The Apex Court in case titled as **Rikhi Ram and another** versus **Smt. Sukhrania and others,** reported in **AIR 2003 SC 1446** held that in absence of intimation of transfer to Insurance Company, the liability of Insurance Company does not cease. It is apt to reproduce paras 5, 6 & 7 of the judgment, *supra,* herein:-

"5. The aforesaid provision shows that it was intended to cover two legal objectives. Firstly, that no one who was not a party to a contract would bring an action on a contract; and secondly, that a person who has no interest in the subject matter of an insurance can claim the benefit of an insurance. Thus, once the vehicle is insured, the owner as well as any other person can use the vehicle with the consent of the owner. Section 94 does not provide that any person who will use the vehicle shall insure the vehicle in respect of his separate use.

6. On an analysis of Ss. 94 and 95, we further find that there are two third parties when a vehicle is transferred by the owner to a purchaser. The purchaser is one of the third parties to the contract and other third party is for whose benefit the vehicle was insured. So far, the transferee who is the third party in the contract, cannot get any personal benefit under the policy unless there is a compliance of the provisions of the Act. However, so far as third party injured or victim is concerned, he can enforce liability undertaken by the insurer.

7. For the aforesaid reasons, we hold that whenever a vehicle which is covered by the insurance policy is transferred to a transferee, the liability of insurer does not ceases so far as the third party/victim is concerned, even if the owner or purchaser does not give any intimation as required under the provisions of the Act."

16. The Apex Court in latest judgment titled as **United India Insurance Co. Ltd., Shimla** versus **Tilak Singh and others,** reported in **(2006) 4 SCC 404** has held the same principle. It is apt to reproduce paras- 12 & 13 of the said judgment herein:

"12. In Rikhi Ram v. Sukhrania [(2003) 3 SCC 97 : 2003 SCC (Cri) 735] a Bench of three learned Judges of this Court had occasion to consider Section 103-A of the 1939

Act. This Court reaffirmed the decision in G. Govindan case and added that the liability of an insurer does not cease even if the owner or purchaser fails to give intimation of transfer to the Insurance Company, as the purpose of the legislation was to protect the rights and interests of the third party.

13. Thus, in our view, the situation in law which arises from the failure of the transferor to notify the insurer of the fact of transfer of ownership of the insured vehicle is no different, whether under Section 103-A of the 1939 Act or under Section 157 of the 1988 Act insofar as the liability towards a third party is concerned. Thus, whether the old Act applies to the facts before us, or the new Act applies, as far as the deceased third party was concerned, the result would not be different. Hence, the contention of the appellant on the second issue must fail, either way, making a decision on the first contention unnecessary, for deciding the second issue. However, it may be necessary to decide which Act applies for deciding the third contention. In our view, it is not the transfer of the vehicle but the accident which furnishes the cause of action for the application before the Tribunal. Undoubtedly, the accident took place after the 1988 Act had come into force. Hence it is the 1988 Act which would govern the situation."

17. Having said so, the Tribunal has rightly saddled the insurance company with the liability.

18. Learned Counsel for the insurer further argued that the amount awarded in Claim Petition No. 105 of 2006, subject matter of FAO No. 326 of 2009, is excessive.

19. The Tribunal has rightly assessed the income of the deceased at Rs. 2500/- per month.

20. From the perusal of the impugned award, I am of the considered view that the Tribunal has fallen in an error in applying the multiplier of '17'.

21. Admittedly, the age of the deceased was 31 years at the time of accident. The multiplier of '15' was applicable in this case, in view of the 2nd Schedule appended to the MV Act read with the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104,** upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120** read with the judgment rendered by the Apex Court in case titled as **Munna Lal Jain & another versus Vipin Kumar Sharma & others,** reported in **2015 AIR SCW 3105.**

22. Accordingly, it is held that the claimants are entitled to compensation to the tune of Rs. 2500 x 12 x 15 = Rs.4,50,000/- under the head 'loss of dependency'.

23. The claimants are also entitled to compensation to the tune of a sum of Rs.10,000/- each, under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate' and 'funeral expenses', is accordingly granted.

24. Viewed thus, the claimants are held entitled to total compensation to the tune of Rs.4,50,000/- + 40,000/- = Rs. 4,90,000/- with interest as awarded by the Tribunal from the date of filing of the claim petition till its realization.

25. The amount awarded in Claim Petition No. 100 of 2009, subject matter of FAO No. 154 of 2012, is meager, for the following reasons.

26. The Apex Court in **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others**, reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787 and Kavita versus Deepak and others, 2012 AIR SCW 4771**, has clearly laid down the principles as to how

compensation has to be awarded in cases where the claimants have suffered permanent disability and how the assessment is to be made.

27. The Apex Court in its latest decision in **Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252,** while discussing its earlier pronouncements, observed that in injury cases, the compensation would include not only the actual expenses incurred, but the compensation has to be assessed keeping in view the struggle which the injured has to face throughout his life due to the permanent disability and the amount likely to be incurred for future medical treatment, loss of amenities of life, pain and suffering to undergo for the whole life etc. It is apt to reproduce paragraphs 11 and 18 of the said decision hereunder:

> *"11. With regard to the pain, suffering and trauma which have been caused to the appellant due to his crushed hand, it is contended that the compensation awarded by the Tribunal was meagre and insufficient. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the courts to make a precise assessment of the pain and trauma suffered by a person whose arm got crushed and has suffered permanent disability due to the accident that occurred. The appellant will have to struggle and face different challenges as being handicapped permanently. Therefore, in all such cases, the Tribunals and the courts should make a broad estimate for the purpose of determining the amount of just and reasonable compensation under pecuniary loss. Admittedly, at the time of accident, the appellant was a young man of 33 years. For the rest of his life, the appellant will suffer from the trauma of not being able to do his normal work of his job as a driver. Therefore, it is submitted that to meet the ends of justice it would be just and proper to award him a sum of Rs.1,50,000/- towards pain, suffering and trauma caused to him and a further amount of Rs.1,50,000/- for the loss of amenities and enjoyment of life.*
>
> ....
>
> *18. Further, we refer to the case of Rekha Jain & Anr. v. National Insurance Co. Ltd., 2013 8 SCC 389 wherein this Court examined catena of cases and principles to be borne in mind while granting compensation under the heads of (i) pain, suffering and (ii) loss of amenities and so on. Therefore, as per the principles laid down in the case of Rekha Jain & Anr. and considering the suffering undergone by the appellant herein, and it will persist in future also and therefore, we are of the view to grant Rs.1,50,000/- towards the pain, suffering and trauma which will be undergone by the appellant throughout his life. Further, as he is not in a position to move freely, we additionally award Rs.1,50,000/- towards loss of amenities & enjoyment of life and happiness."*

28. The claim of the claimant for enhancement has to be tested in view of the principles laid down by the Apex Court in the decisions, *supra*.

29. The Tribunal has fallen in an error in awarding compensation to the tune of Rs. 2,000/- under the head 'pain and sufferings'.

30. The claimant-injured has undergone pain and sufferings and has to undergo the same throughout the life. He remained under treatment for about one year, has suffered 10% permanent disability, in terms of Disability Certificates Ext. PW-2/A and Ext. PW-3/A. In view of the above, the claimant-injured is held entitled to Rs. 50,000/- under the head 'pain and sufferings'.

31. The Tribunal has awarded Rs. 20,000/- under the head 'loss of enjoyment of life', which is too meager.

32. It appears that because of the said injury, the claimant-injured is deprived of the amenities of life, as the injury has shattered his physical frame and affected his charm of

enjoyment of life. The claimant-injured is held entitled to Rs. 50,000/- under the head 'loss of enjoyment of life.'

33. The amount awarded under the other heads is maintained.

34. Viewed thus, the claimant-injured is held entitled to compensation to the tune of Rs.1,90,029/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization. Accordingly, Cross Objections No. 479 of 2012 are allowed.

35. In Claim Petition No. 140 of 2009, subject matter of FAO No. 156 of 2012, the Tribunal has awarded compensation to the tune of Rs.10,000/- under the head 'pain and suffering' and Rs.40,000/- under the head 'loss of enjoyment of life', which is too meager.

36. The claimant-injured has suffered permanent disability to the extent of 20%, in terms of Disability Certificate Ext. PW-2/A, which has affected her earning capacity.

37. In view of the ratio laid by the Apex Court in the judgments, *supra,* the claimant-injured is held entitled to Rs.50,000/- under the head 'pain and sufferings' and Rs.50,000/- under the head 'loss of enjoyment of life.'

38. The compensation amount awarded under the other heads is maintained.

39. Viewed thus, the claimant-injured is held entitled to compensation to the tune of Rs. 1,24,919/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition. Accordingly, Cross Objections No. 413 of 2012 are allowed.

40. Having said so, all the appeals except FAO No. 326 of 2009, are dismissed.

41. The impugned award passed in Claim Petition No. 105 of 2006, subject matter of FAO No. 326 of 2009, is modified, as indicated above.

42. The amount awarded in Claim Petitions No. 100 & 140 of 2009, subject matter of FAOs No. 154 & 156 of 2012, is enhanced, as indicated above. Accordingly, the impugned awards passed in the said claim petitions, are modified.

43. The insurer is directed to deposit the enhanced amount in FAOs No. 154 & 156 of 2012, within a period of six weeks from today. On deposit, the Registry is directed to release same in favour of the claimants, strictly in terms of the conditions contained in the impugned awards, through payees' account cheque or by depositing the same in their accounts.

44. The excess amount, if any, deposited in FAO No. 326 of 2009, be refunded to the insurer through payees' account cheque or by depositing the same in its account.

45. Accordingly, the appeals and cross objections are disposed of.

46. Send down the record after placing a copy of the judgment on each of the Tribunals' file.

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

Oriental Insurance Company .....Appellant

Versus

Sh. Parveen and another .....Respondents.

FAO (MVA) No. 279 of 2011.
Judgment reserved on 9.9.2016
Date of decision: 30.09.2016.

Motor Vehicles Act, 1988- Section 149 and 170- The application under Section 170 of Motor Vehicles Act filed by the insurer was allowed and he was permitted to contest the claim petition

on all grounds available to it- factum of accident, rashness and negligence of the driver and disability suffered by the claimant were not disputed- insured had not committed any willful breach of the terms and conditions of the policy- driving licence shows that driver had a valid and effective driving licence- once the licence was allowed to be exhibited without any objection, insurer cannot raise any objection about its admissibility at a later stage- insurer was rightly saddled with liability. (Para-18 to 22)

Motor Vehicles Act, 1988- Section 166- Claimant had lost his right arm and is not in a position to work as a driver- the age of the claimant was 24 years at the time of the accident- multiplier of 16 is applicable- Tribunal had assessed the income of the claimant as Rs.4,000/- per month- the injury has permanently affected the earning capacity of the claimant- hence, claimant is entitled to Rs.4,000 x 12 x 16= Rs.7,68,000/- as loss of source of dependency- the claimant is entitled to Rs.1,50,000/- under the head 'pain and suffering' and Rs.1,50,000/- under the head 'loss of amenities of life' – Appellate Court has power to enhance the compensation and to award more amount than claimed- the rate of interest reduced to 7.5% per annum from 8%. (Para-23 to 46)

Cases referred:

Rakesh Kumar & Etc. v. United India Insurance Company Ltd. and others. Etc. Etc., JT 2016 (6) SC 504

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

Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085

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

Kavita versus Deepak and others, 2012 AIR SCW 4771

Sarla Verma and others versus Delhi Transport Corporation and another AIR 2009 SC 3104

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

Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252

United India Insurance Company Ltd. versus Smt. Kulwant Kaur, Latest HLJ 2014 (HP) 174

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

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

The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another, AIR 2003 Supreme Court 4172

A.P.S.R.T.C. & another versus M. Ramadevi & others, 2008 AIR SCW 1213

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

For the appellant:	Mr.G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.
For the respondents:	Mr.Tek Chand Sharma, Advocate, for respondent No.1. Respondent No.2 ex parte.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

This appeal is directed against the judgment and award dated 8.6.2011, passed by the Motor Accident Claims Tribunal, Shimla, H.P. hereinafter referred to as "the Tribunal", for short, in MAC Petition No.22-S/2 of 2011/05, titled *Sh. Parveen versus Sh. Anup Thakur and another*, whereby compensation to the tune of Rs.4,90,000/- alongwith interest @ 8% per annum with costs assessed at Rs.5,000/- came to be awarded in favour of the claimant and insurer was saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Claimant and owner-cum-driver have not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to them.

3. The insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. The claimant, by the medium of claim petition, under Section 166 of the Motor Vehicles Act, for short "the Act" had invoked the jurisdiction of the Tribunal for the grant of compensation to the tune of Rs.19,24,950/-, as per the break-ups given in the claim petition, on account of the injuries suffered by him in a motor vehicle accident occurred on 30.7.2004, which was caused by Anup Thakur-respondent No. 1 in the claim petition, while driving vehicle No. HP-01-8456, rashly and negligently. In the said accident, right arm of the claimant had been crushed. He was taken to District Hospital Solan for immediate medical aid, was referred to IGMC Shimla and remained admitted there up to 3.8.2004. On the same date, i.e., on 3.8.2004, he was referred to PGI Chandigarh, and discharged on 11.8.2004. The petitioner is stated to have spent Rs.1,00,000/- on his medical treatment.

5. The claim petition was resisted by the respondents by the medium of the replies and following issues came to be framed:

(i) Whether the petitioner sustained injuries in a vehicular accident involving vehicle No. HP-01-8456 caused due to rash and negligent driving by respondent No.1? OPP.

(ii) If issue No. (i) is proved, to what amount of compensation the petitioner is entitled to and from whom? OPP

(iii) Whether the vehicle in question was being driven in violation of terms and conditions of insurance policy? OPR-2.

(iv) Whether the driver of the vehicle was not holding valid and effective driving licence? OPR-2.

(v) Relief.

6. The claimant led evidence and has examined Dr Ravinder Mokta as PW1, Sh. Bhim Chand Sharma, PW2, Shri Sandeep Kumar PW4 and claimant himself has stepped into the witness-box as PW3.

7. The Tribunal, after scanning the evidence, made the award dated 4.9.2008 in MAC Petition No. 118/S/2 of 2005, whereby compensation to the tune of Rs.4,90,000/- came to be awarded in favour of the claimant and insurer was saddled with the liability.

8. The appellant/insurer invoked the jurisdiction of this Court, by filing petition under Article 227 of the Constitution of India, which was registered as CMPMO No. 227 of 2009. The said petition was allowed vide judgment and order dated 9.3.2011, and following directions were passed.

> *"13. Consequently, the award is set aside and the matter is remanded to the learned Tribunal. The learned Tribunal shall decide the application filed by the insurance Company under Section 170 of the Act at the first instance. Thereafter, it shall give only one opportunity to the claimant to produce the Doctor since in this case the claimant had already taken a number of opportunities and had also taken dasti summons to produce the doctor. No application for examination of the doctor on commission shall be entertained and it shall be the responsibility of the claimant to serve and produce the doctor who issued the disability certificate. Only one opportunity in this behalf shall be given and in case the claimant fails to produce the doctor, the evidence of the claimant shall be closed. In case the doctor is examined, an opportunity to rebut the evidence shall be given to the respondents and to the insurance Company if it is permitted to contest the claim on al grounds."*

9. After remand, the claimant examined PW5 Rattan Chand, who produced the record relating to the disability certificate and PW6 Dr. B.K. Arya, Medical Specialist has proved the disability certificate Ext. PW1/A.

10. Thereafter, the learned Tribunal has passed the award dated 8.6.2011, granted the compensation as referred to supra, subject matter of the present appeal.

11. The learned counsel for the appellant argued that the Tribunal has fallen in an error in not allowing the appellant to lead evidence and prayed for the remand. The argument though is forceful and attractive, but is devoid of any force, for the following reasons.

12. This Court vide judgment dated 9th March, 2011, referred to supra had directed the Tribunal to examine the application under Section 170 of the Act filed by the insurer which was granted vide order dated 18.4.2011. Thus, the appellant/insurer was permitted to contest the claim petition on all grounds available to it, had neither led any evidence before the Tribunal at the first instance nor after remand.

13. The insurer had to discharge the onus on issues No. (iii) and (iv), has failed to discharge the same at the first instance. In terms of the earlier award, both the issues were decided against the insurer and also came to be decided against the insurer in terms of the impugned award, subject matter of this appeal. Both these issues relate to the terms and conditions of the insurance policy read with the mandate of Sections 147 and 149 of the Act, the defences available to the insurer. The insurer was to lead evidence, as per the mandate of Section 170 of the Act on all other grounds which were available to it.

14. The learned counsel for the appellant/insurer has not disputed the following.

(i) Factum of accident,

(ii) Rashness and negligence of the driver,

(iii) Disability suffered by the claimant.

15. This Court can examine the case at this stage and hear the parties on all grounds which are available, in terms of the mandate given under Section 170 of the Act.

16. Admittedly, there is no dispute viz-a-viz issue No. (i). Accordingly, the findings returned by the Tribunal on issue No. (i) are upheld.

17. Before I determine issue No. (ii), I deem it proper to determine issue No. (iii) & (iv). I have examined the pleadings, evidence and gone through the record. The insured has obtained insurance of the vehicle, in terms of the mandate of the Act, in order to protect the interest of the driver, third party and himself. The record does disclose that the insured/owner had obtained all the required documents as per the mandate of the Act.

18. While going through the entire record as it is, one comes to an inescapable conclusion that the insured has not committed any willful breach, in terms of the mandate of the Sections 147 and 149 of the Act, not to speak of violating the terms and conditions of the insurance policy.

19. The question of remand on the ground that the insurer has not been allowed the opportunity to lead evidence, cross-examine witnesses and medical certificate, does not arise as it will amount to dragging the claimant again to the protracted litigation which is against the aim and object of granting the compensation. The claimant has suffered permanent disability of 50% and is not in a position to work as driver, as discussed by the Tribunal. Having said so, the findings returned by the Tribunal on issue No. (iii) are upheld.

Issue No.(iv).

20. It was for the insurer to prove that the driver was not having a valid and effective driving licence, has not led any evidence. The driving licence Mark-R-1 is on record which does disclose that the driver was having a valid and effective driving licence. It will be a futile exercise to ask the Tribunal to provide one opportunity to the appellant to lead evidence because the driving licence is on the record which is valid and effective one.

21. The apex Court in case titled ***Rakesh Kumar & Etc. v. United India Insurance Company Ltd. and others. Etc. Etc***., reported in ***JT 2016 (6) SC 504***, has held that once the license was proved and marked in evidence without any objection by the Insurance Company, it has no right to raise any objection about its admissibility at a later stage. It is apt to reproduce paras 21 and 22 of the said judgment herein.

> *"21. In the light of foregoing reasons, we are of the considered opinion that the High court was not right in reversing the finding of the Tribunal. Indeed, the High Court should have taken note of these reasons which, in our view, were germane for deciding the issue of liability of the Insurance Company arising out of the accident.*
>
> *22. We, therefore, find no good ground to concur with the finding of the High Court. Thus while reversing the finding, we hold that the driver of the offending vehicle was holding a valid driving license (Exhibit-R1) at the time of accident and since the Insurance Company failed to prove otherwise, it was liable to pay the compensation awarded by the Tribunal and enhanced by the High Court."*

22. The Tribunal has rightly recorded the findings on issue No. (iv), are accordingly, upheld.

Issue No.(ii).

23. The claimant has proved that he was admitted in the hospital, i.e., in IGMC Shimla from 30.7.2004 upto 3.8.2004 and after 3.8.2004 till 11.8.2004 at PGI Chandigarh and has suffered 50% permanent disability. The Tribunal, after exercising guess work and assessment, has awarded compensation as follows:

(i) *Rs.11000/- under the head "medical expenses."*

(ii) *Rs.3,000/- under the head "travel expenses."*

(iii) *Rs.10,000/- under the head "attendant charges"*

(iv) *Rs.25,000/- on account of lay-off,*

(v) *Rs.25,000/- under the head "mental and physical pain", and*

(vi) *Rs.4,16,000/- under the head loss of future income, loss of amenities of life, loss of expectation of life, etc.= Total Rs.4,90,000/- along with costs assessed at Rs.5,000/-.*

24. The amount awarded by the Tribunal is meager. Virtually, the claimant has lost his right arm and is not in a position to work as driver in future, as discussed by the Tribunal in para 21 of the impugned award. The medical certificate issued by Dr. B.K. Arya is on record. The Tribunal has recorded the statement of the expert in para 17 of the award. It is apt to reproduce statement of PW6 Dr.B.K. Arya herein.

> *"The petitioner Parveen Kumar had been examined by me as a member of the Medical Board. He was found to have suffered crush injury right forearm with ankylosis elbow at 90 degree with claw hand with non functional limb with disuse atrophy and disability thereof of permanent character was 50% in relation to whole body. Dr. Ramesh Chauhan, Orthopedic surgeon had also been present and he had also examined petitioner Parveen Kumar. Disability certificate, copy Ext. PW-1/A had been signed by Dr. Ramesh Chauhan and myself. The Medical Superintendent had also signed the disability certificate. I have brought the original record of this disability certificate.*
>
> *Cross-examnation by Sh. Vipul Prabhakar, Advocate, on behalf of the respondent No.2.*
>
> *I had not medically treated this patient at any stage"*

25. It is beaten law of land that the compensation is to be awarded in an injury case under pecuniary and non-pecuniary heads by making guess work.

26. My this view is fortified by the judgments made by the Apex Court in the cases titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787,** and **Kavita versus Deepak and others,** reported in **2012 AIR SCW 4771**.

27. This Court has also laid down the same principle in a series of cases.

28. The age of the claimant was 24 years at the time of the accident. The multiplier applicable is "16" in view of the 2nd Schedule attached to the Act, read with ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***.

29. The appellant/insurer has, in fact, not cross-examined the doctor. The disability certificate stands proved. The permanent disability has affected the profession of the claimant as driver totally for the reason that he is not in a position to work as driver in future. The tribunal has assessed the income of the claimant at Rs.4,000/- per month though it is meager but claimant has not questioned the same, is reluctantly upheld.

30. Thus, the claimant has lost source of income to the tune of Rs.4,000/- per month. Though he has suffered 50% disability but it has permanently affected his earning capacity. Having said so, the claimant has lost source of dependency to the tune of Rs.4000/- x16x12= Rs.7,68,000/-.

31. The Apex Court in its latest decision in **Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252,** while discussing its earlier pronouncements, observed that in injury cases, the compensation would include not only the actual expenses incurred, but the compensation has to be assessed keeping in view the struggle which the injured has to face throughout his life due to the permanent disability and the amount likely to be incurred for future medical treatment, loss of amenities of life, pain and suffering to undergo for the entire life etc. It is apt to reproduce paragraphs 11 and 18 of the said decision hereunder:

> *"11. With regard to the pain, suffering and trauma which have been caused to the appellant due to his crushed hand, it is contended that the compensation awarded by the Tribunal was meagre and insufficient. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the courts to make a precise assessment of the pain and trauma suffered by a person whose arm got crushed and has suffered permanent disability due to the accident that occurred. The appellant will have to struggle and face different challenges as being handicapped permanently. Therefore, in all such cases, the Tribunals and the courts should make a broad estimate for the purpose of determining the amount of just and reasonable compensation under pecuniary loss. Admittedly, at the time of accident, the appellant was a young man of 33 years. For the rest of his life, the appellant will suffer from the trauma of not being able to do his normal work of his job as a driver. Therefore, it is submitted that to meet the ends of justice it would be just and proper to award him a sum of Rs.1,50,000/- towards pain, suffering and trauma caused to him and a further amount of Rs.1,50,000/- for the loss of amenities and enjoyment of life.*
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>
> *18. Further, we refer to the case of Rekha Jain & Anr. v. National Insurance Co. Ltd., 2013 8 SCC 389 wherein this Court examined catena of cases and principles to be borne in mind while granting compensation under the heads of (i) pain,*

suffering and (ii) loss of amenities and so on. Therefore, as per the principles laid down in the case of Rekha Jain & Anr. and considering the suffering undergone by the appellant herein, and it will persist in future also and therefore, we are of the view to grant Rs.1,50,000/- towards the pain, suffering and trauma which will be undergone by the appellant throughout his life. Further, as he is not in a position to move freely, we additionally award Rs.1,50,000/- towards loss of amenities & enjoyment of life and happiness."

32. In view of the ratio laid down by the apex Court in the judgment, *supra,* I am of the considered view that the claimant-injured is entitled to compensation to the tune of Rs.1,50,000/- under the head 'pain and sufferings' and Rs.1,50,000/- under the head 'loss of amenities of life'.

33. The question is-whether this Court can enhance compensation? The answer is in affirmative for the following reasons.

34. Keeping in view the object of granting of compensation and the legislature's wisdom read with the amendment made in the MV Act in the year 1994, it is for the Tribunal or the Appellate Court to assess the just compensation and is within its power to grant the compensation more than what is claimed and can enhance the same.

35. This Court in a case titled as **United India Insurance Company Ltd. versus Smt. Kulwant Kaur,** reported in **Latest HLJ 2014 (HP) 174,** held that the Tribunal as well as the Appellate Court is/are within the jurisdiction to enhance the compensation and grant more than what is claimed.

36. The same view was taken by the Apex Court in the case of **Nagappa versus Gurudayal Singh and others,** reported in **AIR 2003 Supreme Court 674.** It is apt to reproduce paras 7, 9 and 10 of the judgment herein:

"7. Firstly, under the provisions of Motor Vehicles Act, 1988, (hereinafter referred to as "the MV Act") there is no restriction that compensation could be awarded only up to the amount claimed by the claimant. In an appropriate case where from the evidence brought on record if Tribunal/Court considers that claimant is entitled to get more compensation than claimed, the Tribunal may pass such award. Only embargo is – it should be 'Just' compensation, that is to say, it should be neither arbitrary, fanciful nor unjustifiable from the evidence. This would be clear by reference to the relevant provisions of the M.V. Act. Section 166 provides that an application for compensation arising out of an accident involving the death of or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both, could be made (a) by the person who has sustained the injury; or (b) by the owner of the property; (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or (d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be. Under the proviso to sub-section (1), all the legal representatives of the deceased who have not joined as the claimants are to be impleaded as respondents to the application for compensation. Other important part of the said Section is sub-section (4) which provides that "the Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act." Hence, Claims Tribunal in appropriate case can treat the report forwarded to it as an application for compensation even though no such claim is made or no specified amount is claimed.

8. .....

9. It appears that due importance is not given to sub-section (4) of Section 166 which provides that the Tribunal shall treat any report of the accidents forwarded

to it under sub-section (6) of Section 158, as an application for compensation under this Act.

10. Thereafter, Section 168 empowers the Claims Tribunal to "make an award determining the amount of compensation which appears to it to be just". Therefore, only requirement for determining the compensation is that it must be 'just'. There is no other limitation or restriction on its power for awarding just compensation."

37. In the case titled as **State of Haryana and another versus Jasbir Kaur and others,** reported in **AIR 2003 Supreme Court 3696,** the Apex Court has discussed the expression 'just'. It is apt to reproduce para 7 of the judgment herein:

"7. It has to be kept in view that the Tribunal constituted under the Act as provided in S. 168 is required to make an award determining the amount of compensation which is to be in the real sense "damages" which in turn appears to it to be 'just and reasonable'. It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. But at the same time it has to be borne in mind that the compensation is not expected to be a windfall for the victim. Statutory provisions clearly indicate the compensation must be "just" and it cannot be a bonanza; nor a source of profit; but the same should not be a pittance. The Courts and Tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be "just" compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just" a wide discretion is vested on the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression "just" denotes equitability, fairness and reasonableness, and non-arbitrary. If it is not so it cannot be just. (See Helen C. Rebello v. Maharashtra State Road Transport Corporation (AIR 1998 SC 3191)."

38. The same view has been taken by the Apex Court in a case titled as **The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another,** reported in **AIR 2003 Supreme Court 4172**.

39. The Apex Court in a case titled as **A.P.S.R.T.C. & another versus M. Ramadevi & others,** reported in **2008 AIR SCW 1213,** held that the Appellate Court was within its jurisdiction and powers in enhancing the compensation despite the fact that the claimants had not questioned the adequacy of the compensation.

40. The Apex Court in the case titled as **Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr.,** reported in **2009 AIR SCW 3717,** laid down the same principle while discussing, in para 27 of the judgment, the ratio laid down in the judgments rendered in the cases titled as *Nagappa v. Gurudayal Singh & Ors, (2003) 2 SCC 274; Devki Nandan Bangur and Ors. versus State of Haryana and Ors. 1995 ACJ 1288; Syed Basheer Ahmed & Ors. versus Mohd. Jameel & Anr., (2009) 2 SCC 225; National Insurance Co. Ltd. versus Laxmi Narain Dhut, (2007) 3 SCC 700; Punjab State Electricity Board Ltd. versus Zora Singh and Others (2005) 6 SCC 776; A.P. SRTC versus STAT and State of Haryana & Ors. versus Shakuntla Devi, 2008 (13) SCALE 621.*

41. The amount awarded under four heads, i.e.,Rs.11000/- under the head "medical expenses" Rs.10,000/- under the head "attendant charges", Rs. 3000/- under the head "travel expenses" and Rs.25,000/- on account of lay-off, is maintained.

42. Viewed thus, the claimant is awarded compensation to the tune of *Rs.7,68,000/-*,+ *Rs.1,50,000/-*+*Rs.1,50,000/-*+ Rs.11000/-+ Rs.10,000/- + Rs.25,000/-+Rs.3000/-= ***Total Rs.11,17,000/-.***

43. The Tribunal has awarded interest @ 8% per annum. However, interest was to be awarded at rate of 7.5% per annum, for the following reasons.

44. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as *United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, reported in (2002) 6 SCC 281; Satosh Devi versus National Insurance Company Ltd. and others, reported in 2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others reported in (2012) 11 SCC 738; Smt. Savita versus Binder Singh & others, reported in 2014, AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn., reported in 2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, reported in (2015) 4 SCC 433, and Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, reported in (2015) 4 SCC 434,* and discussed by this Court in a batch of *FAOs, FAO No. 256 of 2010*, titled as *Oriental Insurance Company versus Smt. Indiro and others*, being the lead case, decided on 19.06.2015.

45. Accordingly, interest @7.5% per annum is awarded from the date of claim petition till realization of the amount.

46. The insurer is directed to deposit the enhanced amount alongwith interest @ 7.5% per annum, within eight weeks from today in the Registry. The Registry, on deposit, is directed to release the amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in his bank account, after proper verification.

47. The amount already deposited by the insurer in the Registry, be released in favour of the claimant, forthwith, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in his bank account, after proper verification.

48. Viewed thus, the appeal is disposed of along with pending applications, compensation is enhanced and the impugned award is modified as indicated hereinabove.

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

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

Saroj Devi widow of late Sh. Achhar Singh & others ....Revisionists/Plaintiffs

Versus

Gurinder Singh son of Smt. Surinder Kaur & another ....Non-Revisionists/Defendants

Civil Revision No. 59 of 2015
Order Reserved on 1st July 2016
Date of Order 30th September 2016

Code of Civil Procedure, 1908- Section 6 Rule 17- An application for amendment of the plaint was filed pleading that photostat copy of agreement of sale was found in a box where the deceased used to keep his documents- the deceased used to remain under the influence of liquor and could not produce photocopy at the time of filing of the civil suit- production of the photocopy will not change the nature of the suit- the application was dismissed by the trial Court- held, in revision that application has been filed by widow and minors who are rustic villagers – tracing of copy of agreement is a subsequent event and the Court can take notice of the same – proposed event is essential to avoid multiplicity of proceedings – no prejudice would be caused to the defendants by allowing application- revision allowed - order of trial Court set aside and application allowed subject to the payment of cost of Rs. 3,000/-. (Para- 12 to 18)

Cases referred:
M/s M.Laxmi & Company vs. Dr.Anant R.Deshpande and another, AIR 1973 SC 171
Ragu Thilak D. John vs. S.Rayappan and others, AIR 2001 SC 699
Fritiz T.M. Clement vs. Sudhakaran, AIR 2002 SC 1148
Harcharan vs. State of Haryana, AIR 1983 SC 43
Suraj Prakash Bhasin vs. Smt. Raj Rani, AIR 1981 SC 485
Nichhalbhai Vallabhai and others vs. Jaswantlal Zinabhai and others, AIR 1966 SC 997

For the Revisionists: Mr. K.S. Kanwar Advocate
For the Non-Revisionists: Mr. Ankush Dass Sood Sr. Advocate with Ms.Shweta Joolka Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present civil revision is filed against order dated 27.3.2015 passed by learned Civil Judge (Senior Division) Court No. 1 Paonta Sahib District Sirmaur(H.P.) in Civil suit No. 113/1 of 2008 whereby learned Trial Court dismissed application filed under Order VI Rule 17 CPC filed by Saroj widow of deceased Shri Achhar Singh and minor sons of deceased Achhar Singh namely Pankaj, Neeraj, Harpreet.

Brief facts of the case

2. Shri Achhar Singh deceased son of Shri Ranjit Singh filed civil suit for declaration to the effect that deceased plaintiff is owner in possession of suit land comprised in Khata/Khatauni No. 48/88 min Khasra No. 114 measuring 1-19 bighas situated in mauja Kishanpura Tehsil Paonta Sahib District Sirmaur H.P. and sale deed dated 24.5.2008 regarding suit land is null and void being fraudulent without consideration. It is pleaded that co-defendant No. 2 has executed sale deed in favour of co-defendant No.1 as general attorney dated 31.3.2008 which is also null and void and is fraudulent. It is pleaded that sale deed and general power of attorney documents are not binding upon rights of deceased plaintiff. It is pleaded that mutation No. 1009 dated 11.6.2008 attested on the basis of sale deed dated 24.5.2008 is also null and void and is not binding upon legal rights of deceased plaintiff. Consequential relief of permanent injunction also sought restraining defendants from interfering, dispossessing, alienating and encumbering the land measuring 19 biswas through their agents, servants or legal representatives. During pendency of civil suit Achhar Singh died and his LRs namely Smt. Saroj Devi widow and minor sons namely Pankaj aged 9 years, Neeraj aged 7 years, Harpreet aged 5 years brought on record as co-defendants on dated 27.5.2014. Newly impleaded LRs filed application under Order VI Rule 17 CPC for amendment of plaint on dated 24.3.2015. Learned Trial Court dismissed application filed under Order VI Rule 17 CPC on dated 27.3.2015. Feeling aggrieved against order dated 27.03.2015 widow of deceased and minor sons of deceased filed present revision petition.

3. Per contra written statement filed on behalf of defendants pleaded therein that suit is not maintainable and deceased plaintiff is estopped from filing the suit due to his own act conduct and acquiescence to file present suit. It is pleaded that plaintiff has no cause of action. It is pleaded that on 31.1.2008 a verbal agreement of sale was entered between deceased plaintiff and defendant No.1 for sale of 1-19 bighas of land in consideration amount of Rs.6,25,000/- (Rupees six lacs twenty five thousand). It is pleaded that on 31.1.2008 defendant No. 1 paid a sum of Rs. 25000/- (Rupees twenty five thousand) to deceased plaintiff vide cheque and thereafter on 31.1.2008 co-defendant No.1 paid another amount of Rs.275000/- (Rupess two lacs twenty five thousand) to deceased plaintiff at his residence in village Bhatanwali Tehsil Paonta Sahib. It is pleaded that after receiving Rs.three lacs as sale consideration amount from the defendant No.1 it was decided that plaintiff would execute a general power of attorney in favour of trusted person of co-defendant No.1. It is pleaded that thereafter plaintiff volunatarily executed general power of attorney in favour of sister of co-defendant No.1. It is pleaded that general power

of attorney was duly executed in accordance with law. It is admitted that co-defendants Nos. 1 and 2 are real brother and sister.

4. As per pleadings of parties following issues framed by learned Trial Court on 10.12.2009:-

1. Whether deceased plaintiff is co-owner in joint possession of the suit land measuring 1-19 bighas alongwith other co-sharers as alleged in para No. 1 of the plaint If so its effect? ....OPP
2. Whether GPA dated 31.3.2008 relied upon by defendant No.1 and alleged to have been executed in favour of defendant No. 2 is result of fraud and misrepresentation and without consideration as alleged? .....OPP
3. Whether sale deed dated 24.5.2008 is result of fraud and collusion inter se the defendants and without consideration and as such illegal, null and void and not binding on the rights of deceased plaintiff as alleged? ....OPP
4. Whether transaction of sale is unconscious and sham transaction as alleged?....OPP
5. Whether deceased plaintiff and co-defendants were having close relations and intimacy with each other and deceased plaintiff used to act as per the advice of co-defendant No.1 as alleged in para No. 3 of the plaint? ...OPP
6. Whether deceased plaintiff on dated 31.1.2008 entered into a verbal agreement of sale with co-defendant No.1 about the land measuring 1-19 bighas for Rs.625000/- (Rupees six lac twenty five thousand) as alleged? .....OPD
7. Whether co-defendant No. 1 paid Rs.25000/- (Rupees twenty five thousand) on 31.1.2008 as part payment of sale consideration to deceased plaintiff through cheque as alleged?....OPD
8. Whether co-defendant No.1 on 31.3.2008 paid Rs.275000/- (Rupees two lacs seventy five thousand) to deceased plaintiff as alleged in para 5 of written statement? .....OPD
9. Whether deceased plaintiff executed GPA after receiving Rs. three lacs from co-defendant No.1 in favour of defendant No.2 regarding the land measuring 1-19 bighas if so its effect? ....OPD
10. Whether sale deed dated 26.5.2008 has been executed by co-defendant No. 2 in favour of co-defendant No.1 after taking Rs.three lacs by deceased plaintiff from co-defendant No.1 as alleged if so its effect? ....OPD
11. Whether defendant No.1 is in possession of land measuring 0–19 bighas? ....OPD
12. Whether suit is not maintainable as alleged in para No. 6 of preliminary objections of written statement? ....OPD
13. Whether deceased plaintiff has got no cause of action? ....OPD
14. Whether deceased plaintiff is estopped from filing of suit? ....OPD
15. Whether deceased plaintiff has suppressed material facts from the knowledge of learned Court? ....OPD
16. Relief.

5. Thereafter learned Trial Court recorded evidence of parties and thereafter case was listed for arguments by learned Trial Court. On dated 14.5.2014 learned Advocate for the plaintiff informed learned Trial Court that plaintiff has died. Thereafter application under Order 22 Rule 3 CPC was filed and same was allowed by learned Trial Court on 27.5.2014 and (1) Saroj Devi widow (2) Master Pankaj son of Achhar Singh aged 9 years, (3) Master Neeraj son of Achhar Singh aged 7 years (4) Master Harpreet son of Achhar Singh aged 5 years were impleaded as legal representatives of deceased Achhar Singh in present civil suit as co-plaintiffs. Thereafter impleaded legal representatives of deceased filed application under Section 65 of Indian Evidence Act for permitting the legal representatives of deceased to lead secondary evidence to prove photostate copy of agreement of sale dated 31.3.2008 executed between deceased Achhar Singh and co-defendant No.1 Gurvinder Singh. Learned Trial Court on 13.10.2014 dismissed

application filed under Section 65 of Indian Evidence Act 1872. Thereafter Smt. Saroj Devi and others filed civil revision No. 178 of 2014 titled Saroj Devi and others vs. Gurvinder Singh and another before Hon'ble High Court and same was disposed of by Hon'ble High Court of H.P. on 24.2.2015 and dismissed the revision petition filed by Saroj Devi and others. Hon'ble High Court of H.P. further directed that it would be open to the revisionists Smt. Saroj Devi and others to file application before learned Trial Court to avail all remedies available under the provisions of Code of Civil Procedure.

7. Response on behalf of defendants filed pleaded therein that application is not maintainable. It is pleaded that civil suit is listed for arguments and proposed amendment is destructive plea. It is pleaded that if proposed amendment is allowed then entire nature of suit would be changed. It is pleaded that as per amendment under Order VI Rule 17 CPC w.e.f. 1.7.2002 application 6. Thereafter Smt. Saroj Devi and others filed application under Order VI Rule 17 CPC read with Section 151 CPC for amendment of plaint. There is recital in application filed under Order VI Rule 17 CPC that deceased Achhar Singh died on 11.4.2014 leaving behind his widow and minor children as his legal heirs. It is pleaded in application filed under Order VI Rule 17 CPC that new fact came to knowledge of legal representatives on 22.9.2014 when widow of Achhar Singh namely Saroj Devi found a photostate copy in box where deceased Achhar Singh used to keep documents. It is pleaded that as per agreement of sale dated 31.3.2008 executed between deceased Achhar Singh and Gurvinder Singh deceased Achhar Singh agreed to sell five biswas of land in sale consideration amount of Rs. 225000/- (Rupees two lacs twenty five thousand) on 31.3.2008. It is pleaded that agreement of sale relating to five biswas of land and general power of attorney in favour of co-defendant No. 2 who is sister of co-defendant No.1 were executed on same date i.e. 31.3.2008. It is pleaded that deceased plaintiff used to remain under the influence of liquor and he could not produce photostate copy of agreement of sale dated 31.3.2008 to his learned Advocate at the time of filing of suit. It is pleaded that legal representatives of deceased Achhar are illiterate, rustic villagers and Smt. Saroj Devi is widow of deceased Achhar and Pankaj, Neeraj and Harpreet aged 9, 7 and 5 years respectively are minors. It is pleaded that if copy of agreement of sale dated 31.3.2008 is permitted to be placed on record then same would not change the nature of suit and amendment is essential in the ends of justice and prayer for acceptance of application under Order VI Rule 17 CPC sought.

for amendment is not maintainable after commencement of trial. Pryaer for dismissal of application sought.

8. Learned Trial Court dismissed application filed under Order VI Rule 17 CPC by widow and minor sons of deceased Achhar Singh on 27.3.2015.

9. Feeling aggrieved against order of learned Trial Court Saroj Devi widow and minors Pankaj, Neeraj and Harpreet filed present revision petition.

10. Court heard learned Advocate appearing on behalf of parties and Court also perused entire record carefuly.

11. Following points arise for determination in civil revision petition:-

1. Whether revision petition filed by revisionists widow of deceased Achhar Singh and minor sons of deceased Achhar Singh is liable to be accepted as mentioned in memorandum of grounds of revision petition?

2. Relief.

Findings upon point No.1 with reasons

12. Submission of learned Advocate appearing on behalf of revisionists that proposed amendment could not be filed before commencement of trial because copy of agreement dated 31.3.2008 was found on 22.9.2014 after death of Achhar Singh in a box and keeping in view the fact that revisionists are widow and minors sons and are rustic villagers and on this ground proposed amendment be allowed in the ends of justice is accepted for the reasons hereinafter mentioned. It is proved on record that proposed amendment application is filed by widow who is

rustic villager and minors namely Master Pankaj aged 9 years, Master Neeraj aged 7 years and Master Harpreet aged 5 years. It is well settled law that Courts are under legal obligation to protect the interest of minors. Court is of the opinion that Court can take judicial notice of subsequent events in civil suit. Tracing of copy of agreement of sale dated 31.3.2008 qua 0-5 biswas of land on 22.9.2014 is a subsequent event. It is well settled law that Court can take judicial notice of subsequent event in civil judicial proceedings.

13. Submission of learned Advocate appearing on behalf of non-revisionists that proposed amendment is contradictory to original plaint and same should not be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. In present case it is proved on record that alleged general power of attorney in favour of co-defendant No.2 who is real sister of co-defendant No.1 was executed on 31.3.2008 and proposed agreement of sale was also executed on 31.3.2008 between deceased Achhar Singh and Gurvinder Singh. Court has carefully perused the contents of agreement dated 31.3.2008 executed between deceased Achhar Singh and co-defendant No. 1 Gurvinder Singh. There is recital in agreement dated 31.3.2008 that deceased Achhar Singh agreed to alienate five biswas of land in favour of Gurvinder Singh in consideration amount of Rs.225000/- (Rupees two lacs twenty five thousand) on 31.3.2008. There is document on record that similarly on 31.3.2008 general power of attorney was executed in favour of co-defendant No.2 who is real sister of co-defendant No.1. It is proved on record that co-defendants Nos. 1 and 2 are real brother and sister. It is proved on record that thereafter co-defendant No. 2 who is real sister of co-defendant No. 1 has executed sale deed on the basis of general power of attorney in favour of her brother i.e. co-defendant No.1 in consideration amount of Rs. three lacs relating to 19 biswas of land and sale deed executed by co-defendant No.2 in favour of co-defendant No.1 is in dispute in present civil suit.

14. In present case one fact is proved that Smt. Jasbir Kaur who is real sister of co-defendant No.1 Gurvinder Singh has executed sale deed in favour of her brother on the basis of general power of attorney. It is also proved on record that no consideratiopn amount of sale was paid before Sub Registrar and there is recital in sale deed that vendor has received full and final consideration amount of Rs.three lacs from vendee. In present case no receipt of consideration amount signed by Achhar Singh placed on record. Court is of the opinion that proposed amendment is not destructive to original pleadings and in view of issues framed by learned Trial Court. Court is of the opinion that proposed amendment is subsequent event and is essential in order to avoid multiplicity of judicial proceedings inter se parties. Court is of the opinion that opportunity would be granted to defendants to file amended written statement by learned Trial Court and due opportunities would be granted to defendants to adduce rebuttal evidence in accordance with law. It is well settled law that Court can take judicial notice of subsequent events. ***See AIR 1973 SC 171 title M/s M.Laxmi & Company vs. Dr.Anant R.Deshpande and another. See AIR 2001 SC 699 title Ragu Thilak D. John vs. S.Rayappan and others. AIR 2002 SC 1148 title Fritiz T.M. Clement vs. Sudhakaran. See AIR 1983 SC 43 title Harcharan vs. State of Haryana. See AIR 1981 SC 485 title Suraj Prakash Bhasin vs. Smt. Raj Rani. See AIR 1966 SC 997 title Nichhalbhai Vallabhai and others vs. Jaswantlal Zinabhai and others.***

15. Submission of learned Advocate appearing on behalf of non-revisionists that proposed amendment application is filed when case was listed for final arguments at belated stage and on this ground revision petition be dismissed is rejected being devoid of any force for reasons hereinafter mentioned. It is proved on record that co-revisionists No. 2 to 4 namely Master Pankaj aged 9 years, Master Neeraj aged 7 years and Master Harpreet aged 5 years are minors and it is well settled law that law of limitation is not applicable on minors and it is well settled law that law of limitation remains in abeyance upon minors. In view of the fact that co-revisionist No. 1 is widow of deceased Acchar Singh plaintiff and is rustic villager and in view of the fact that co-revisionists Nos. 2 to 4 namely Master Pankaj aged 9 years, Master Neeraj aged 7 years and Master Harpreet aged 5 years are minors it is not expedient in the ends of justice to decline the proposed amendment filed by minors simply on ground that proposed amendment was filed when civil suit was listed for final arguments.

16. Submission of learned Advocate appearing on behalf of non-revisionists that proposed amendment filed on the basis of photostate agreement dated 31.3.2008 and photostate document is not primary document and on this ground revision petition be dismissed is also rejected being devoid of any force for the reasons hereinafter mentioned. Hon'ble H.P. High Court in civil revision No. 178 of 2014 decided on 24.2.2015 held that it would be open to the revisionists to move the learned Trial Court to avail all remedies as available to them under the provisions of Code of Civil Procedure. Hon'ble H.P. High Court permitted the revisionists to avail all remedies available to them under Code of Civil Procedure. Remedy under Order VI Rule 17 CPC is available to revisionists under the Code of Civil Procedure. Even as per amended provisions of Order VI Rule 17 CPC amendment can be allowed after commencement of trial if Court comes to conclusion that inspite of due diligence the party could not raise the matter before commencement of trial. In present case revisionists could not raise the matter before commencement of trial because before commencement of trial revisionists namely Saroj Devi and minors namely Master Pankaj aged 9 years, Master Neeraj aged 7 years and Master Harpreet aged 5 years were not party in civil suit No. 113/1 of 2008 and revisionists were impleaded as co-party in civil suit after death of Achhar Singh who died on 11.4.2014. It is held that right to file application for amendment is accrued to revisionists when revisionists were impleaded as co-party on 27.5.2015 by learned Trial Court under Order XXII Rule 3 CPC. Revisionists filed application on 24.3.2015. It is held that no prejudice would be caused to defendants if proposed amendment is allowed and it is held that due opportunity would be granted to defendants to file amended written statement and to adduce rebuttal evidence. It is held that defendants could be compensated with costs for filing proposed amendment at the stage of arguments. In view of above stated facts it is held that proposed amendment is necessary for the purpose of determining the real question in controversy between the parties.

17. Submission of learned Advocate appearing on behalf of non-revisionists that Hon'ble High Court rejected civil revision No. 178 of 2014 on 24.2.2015 relating to secondary evidence qua agreement dated 31.3.2008 and on this ground present revision petition be also dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that Hon'ble High Court has rejected civil revision No. 178 of 2014 but specifically mentioned in order passed in CR No. 178 of 2014 that revisionists would be at liberty to avail all other remedies available to them under the provisions of Code of Civil Procedure. Hence it is held that Hon'ble High Court of H.P. had given liberty to revisionists to file another application before learned Trial Court under Code of Civil Procedure 1908. In view of the fact that Hon'ble High Court of H.P. vide order dated 24.2.2015 permitted the revisionists to file another application under the Code of Civil Procedure 1908. It is held that subsequent application filed under Order VI Rule 17 CPC is not barred in view of order passed in Civil revision No. 178 of 2014 by H.P. High Court. It is held that application filed under Section 65 of Indian Evidence Act 1872 and application filed under Order VI Rule 17 CPC are two distinct applications. Point No.1 is answered in affirmative.

Point No. 2 (Relief)

18. In view of findings upon point No.1 civil revision petition is allowed. Order of learned Trial Court dated 27.3.2015 is set aside. Proposed application filed under Order VI Rule 17 CPC is allowed in order to avoid multiplicity of judicial proceedings inter se parties and in view of the fact that co-revisionist Saroj Devi is illiterate rustic villager and is widow and in view of the fact that other co-revisionists Nos. 2 to 4 namely Master Pankaj aged 9 years, Master Neeraj aged 7 years and Master Harpreet aged 5 years are minors. As application filed at belated stage when civil suit was listed for arguments costs to the tune of Rs.3000/- (Rupees three thousand) is also imposed. Parties are directed to appear before learned Trial Court on ***24.10.2016.*** Observations will not effect the merits of case and will be strictly confined for disposal of present civil revision petition. Record of learned Trial Court be sent back forthwith along with certified copy of order. Revision petition is disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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