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Code of Civil Procedure, 1908- Order 18 Rule 17- An eviction petition was filed on the ground of arrears of rent and bona fide requirement for reconstruction, which cannot be carried out without vacating the building- the evidence of tenants was closed by the Rent Controller- a revision petition was filed and the order of the Rent Controller was upheld- an application for recalling the tenant as witness was filed, which was dismissed- held, in revision that once the evidence of the tenants was closed by the order of the Court, it was not permissible to lead any oral or documentary evidence- the order was affirmed by the High Court and has attained finality- more than eight opportunities were granted to the tenants to lead the evidence, which is more than three opportunities prescribed by the legislature – petition dismissed. (Para- 11 to 14) Title:Tilak Raj son of late Shri Joginder Nath Sood & another Vs. Rajinder Sood alias Rajan son of late Sh. Rameshwar Nath Sood (Civil Revision No. 83 of 2015) Page-1583

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Code of Criminal Procedure, 1973- Section 439- FIR was registered against the petitioners for the commission of offences punishable under Section 302, 382 and 323 read with Section 34 of I.P.C. – the accused had given beatings to A, who died subsequently- many facts have not been explained at this stage – the deceased had driven a motorcycle from Brahampukhar to Shimla, which was not possible, had he sustained grievous injuries – the petitioners are the local residents of the Bilaspur and there is no possibility of their fleeing away from justice- application allowed and petitioners ordered to be released on furnishing personal and surety bonds of Rs. 50,000/- each. (Para- 5 to 13) Title: Sanjeev Kumar @ Sanju Vs. State of H.P. Page-1721

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Code of Criminal procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 279 and 337 of I.P.C. and 187 of M.V. Act – it is claimed that matter has been compromised between the parties - held, that prosecution evidence has not commenced and the proceedings are at initial stage – no useful purpose will be served by keeping the proceedings pending in view of the compromise- hence, the petition allowed – FIR and subsequent proceedings ordered to be quashed. (Para- 3 to 7) Title: Shyam Singh Vs. State of H.P. & anr. Page-1139

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Section 302 and 506 of I.P.C.- challan was filed against the accused – Court framed charges against the accused – petition was filed for cancellation of FIR – held, that statement recorded under Section 161 Cr.P.C cannot be used for any purpose except contradiction – statements have to be appreciated after the conclusion of trial – police can file supplementary report after investigation- there is no requirement of consulting public prosecutor before filing the challan- the evidence is not required to be sifted at the time of taking cognizance and framing charges- petition dismissed. (Para-5 to 15) Title: Dalip Singh Himral @ Dainy Vs. State of HP and others Page-1675

Constitution of India, 1950- Article 226- A tender for transportation of milk was issued – the petitioner was the lowest tenderer but the tender was not awarded to him – respondents stated that RCs of the truck were not submitted, father of the petitioner is an accused in FIR involving pilferage of the milk and the writ petition is not maintainable in view of the arbitration clause- held, that arbitration clause by itself is not an absolute bar to the maintainability of the petition – the Court has to examine illegality and irregularity leading to the award of the contract – there is no condition in the tender which deals with the transit loss – a notice should have been issued to the petitioner prior to the rejection of his tender - the tender process ordered to be cancelled and fresh tender ordered to be issued. (Para-6 to 25) Title: Jarnail Singh Vs. State of H.P. and others (D.B.) Page-1680

Constitution of India, 1950- Article 226- Appellant is an ex-serviceman who got himself enrolled with the Sub Regional Employment Officer Ex-servicemen Employment Cell for the post of x-ray technician/Radiographer – seven persons were selected – appellant filed a writ petition, which was dismissed- he again filed a writ petition, which was dismissed –held, that appellant had not questioned the selection of private respondents and had not taken steps to get the writ petition restored- he is precluded from questioning the appointment in view of bar contained in Order 2 Rule 2 of C.P.C. –the petitioner was selected subsequently– he joined duties and thereafter resigned - his conduct is not above board – appeal dismissed. (Para-3 to 7) Title: Ex. Petty Officer No.114294-K Hari Pal Singh Vs. State of HP & others (D.B.) Page-1553

Constitution of India, 1950- Article 226- Petitioner and one G were appointed as Hockey Coaches – G was shown junior to the petitioner in the seniority list – petitioner and G were promoted to Grade-I, however, the pay of G was fixed more than the pay of petitioner- the petitioner filed a representation, which was rejected and original application was filed before the Tribunal, which was dismissed- held, that the petitioner had not exercised the option to have additional increment in accordance with the recommendation of 4th pay commission, whereas, such option was exercised by G- the petitioner was drawing less pay than his junior even on 1.7.1982, prior to promotion - representation and application were rightly rejected – writ petition dismissed. (Para-5 to 11) Title: Bhupinder Singh Vs. Sports Authority of India (D.B.) Page-1334

Constitution of India, 1950- Article 226- Petitioner applied for the award of Rajiv Gandhi Gramin L.P.G. Vitrak (R.G.G.L.V)- petitioner was informed that she had qualified for draw- she was informed subsequently that her candidature was rejected – she filed a representation, which was also rejected- held, in the writ petition that the aim of the scheme was to set up small size L.P.G. Distribution Agency to increase penetration and to cover remote and low potential areas - the report of the Commissioner shows that there is fair weather road to the land offered by the petitioner on which HRTC bus plies – this shows that the rejection of the land on the ground of lack of approach was not correct - the respondent was supposed to act fairly without any prejudice or mala fides – writ petition allowed and the order passed by respondent set aside- respondent directed to consider the case of the petitioner. (Para-12 to 24) Title: Jyoti Thakur Vs. Indian Oil Corporation Ltd & Ors. Page-1488

Constitution of India, 1950- Article 226- Petitioner applied for the post of T.G.T. and Language Teacher through School Management Committee on period basis – respondent no. 6 was appointed after the interview- petitioner challenged the appointment on the ground of favouritism - held, that respondent No. 6 was awarded 9.33 marks in interview, whereas, the petitioner was awarded 0.83 marks out of 10 marks – the petitioner is well qualified – her marks have been reduced from 4 to 2 by the President, S.M.C., whereas, the marks of respondent No. 6 have been increased from 7 to 9- 9 marks were awarded by the Headmaster to respondent No. 6, which were increased to 9½, whereas, 0 marks were awarded by him to the petitioner – S.D.M. awarded 9.5 marks to respondent No. 6 and only 0.5 marks to the petitioner- Selection Committee had acted arbitrarily and capriciously - it is difficult to believe that petitioner would have scored only 0, 0.5 and 2 marks while respondent No. 6 would have scored 9, 9½ and 9½ marks - the disparity in the marks shows that they were awarded only to select the respondent No. 6 – petition allowed and appointment of respondent No. 6 set aside. (Para-5 to 21) Title: Santosh Vs. The State of Himachal Pradesh and others Page-1633

Constitution of India, 1950- Article 226- Petitioner claimed that respondent No. 5, School is being run by the authorities in complete violation of the Right of Children to Free and Compulsory Education Act, 2009- school is being run in a residential accommodation and there are no qualified teachers to teach the students- students keep sitting on railings where space is very congested- school was shifted without any approval- school is being run without recognition and obtaining any affiliation from Himachal Pradesh Board of School Education- writ petition was also filed by the School against a direction to close it- both the writ petitions were consolidated- held, that school had shifted without obtaining any permission – it was recognized at a place 3.5 k.m. from the existing place - permission was granted to run school at R, whereas, it was shifted to D- if a new school is to be established, permission has to be sought under the Act and the authority should grant the permission after complying with the codal formalities – writ petition disposed of with a direction to the authorities to ensure that no school runs without completion of codal formalities. (Para-7 to 23) Title: Pushpinder Kumar Vs. State of H.P. and others (D.B.) Page-1619

Constitution of India, 1950- Article 226- Petitioner filed a public interest litigation regarding the service matter- held, that public interest litigation in service matter is not maintainable- petition

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Constitution of India, 1950- Article 226- Petitioner is a registered association of Honorary Commissioned Officers retired from the Army in different years- individual members of association were given and granted full power and authority to have, hold and enjoy the honorary rank with all and singular privileges- petitioner claimed that members of the association are being subjected to insult and harassment at the hands of Commissioned Officers, soldiers and also civil employees- petitioner claimed equivalent status as Commissioned Officers- held, that one of the members of the association had approached Armed Forces Tribunal for claiming similar reliefs- however, application was withdrawn - as per Armed Forces Tribunal Act, 2007, all matters relating to conditions of service of Army personnel need to be adjudicated upon by the Armed Forces Tribunal- matter raised before the High Court is a service matter and, therefore, the matter is to be adjudicated by Armed Forces Tribunal- writ petition is not maintainable- petition dismissed with liberty to approach the Armed Forces Tribunal. (Para-8 to 19) Title: Honorary Commissioned Officers Welfare Association of Himachal Pradesh Vs. The Union of India and others Page-1602

Constitution of India, 1950- Article 226- Petitioner scored 86.4% marks in 10+2 examination and thereafter took admission in B.Sc. (Physics) – respondent No. 1 started a scheme, which provided that the students securing position by virtue of their performance within 1% of the school board at 10+2 examination are entitled for scholarship of Rs. 80,000/-- petitioner claimed that she is entitled to the scholarship under the scheme but no scholarship was provided to her – respondent No. 1 stated that the student was supposed to apply directly through the web portal, which the petitioner had not done; therefore, she is not entitled for the scholarship- held that the petitioner could not get the scholarship due the negligence of the respondent No. 5 - direction issued to the respondent No. 5 to get the form filled and transmit it to respondent No. 1, who shall consider the same- respondent No. 5 also directed to pay cost of Rs. 10,000/- to the petitioner. (Para-9 to 15) Title: Tanuja Begum Vs. Union of India & others Page-1422

Constitution of India, 1950- Article 226- Petitioner was appointed as driver- his services were terminated after 11 years – Industrial Tribunal dismissed the reference – held, that the petitioner had repeatedly mis-conducted himself - the High Court will not interfere except where the penalty shocks the conscience of the Court – the penalty of termination cannot be said to be disproportionate considering the repeated misconduct of the petitioner – the petitioner was working as driver in a school where strict discipline is to be maintained – encouraging the petitioner and reinstating him in service will amount to subversion of the discipline, which is impermissible – petition dismissed. (Para-6 to 13) Title: Som Nath Vs. Handoor Education Society Page-1724

Constitution of India, 1950- Article 226- Petitioner was appointed as a lecturer – he was promoted as Principal in the year 1987- he sought voluntarily retirement, which was granted – the petitioner filed a writ petition seeking the benefit of higher pay scale, which was transferred to Tribunal – the Tribunal allowed the petition and directed the fixation of the pay on a higher scale – another application was filed, which was dismissed on the ground that the benefit had already been granted to the petitioner – he again filed an original application, which was transferred to the High Court and was allowed by Single Judge – held, in appeal that earlier dismissal was not challenged by the petitioner and the same had attained finality- identical reliefs have been sought and the present application is barred- the application was filed after 7 years of the retirement and is barred by delay and laches – writ Court had not gone into the question of delay – petition dismissed. (Para-12 to 18) Title: State of Himachal Pradesh and another Vs. Virendra Kumar (D.B.) Page-1366

Constitution of India, 1950- Article 226- Petitioner was appointed as Civil Judge (Junior Division)- he was ordered to be discharged from service during the probation period- it was contended that order of discharge is not simple but punitive based upon the complaint filed against him- held, that transitory character of probation means that the service is terminable at any time – the probationer, whose services have been terminated for unsuitability, cannot complain about such termination- a discreet inquiry was conducted into the complaint- however, the decision not to continue the petitioner on probation and his consequent discharge is neither stigmatic nor punitive – the inquiry was not a motive for discharge of the officer- the decision of the full Court should not be judicially reviewed unless the Court is convinced that some monstrous thing was taking place- simply because other view is possible, the decision cannot be judicially reviewed – petition dismissed. (Para-10 to 41) Title: Sunish Aggarwal Vs. State of HP & anr. Page-1404

Constitution of India, 1950- Article 226- Petitioners filed a suit under Section 58(3)(e) of H.P. Tenancy and Land Reforms Act, 1972, which was decreed – an appeal was filed before the Collector along with an application for condonation of delay- the application was dismissed and the appeal was also dismissed as barred by limitation – a revision petition was filed, which was allowed and the order of Collector was set aside- petitioners filed a writ petition against the order- the writ petition was allowed and the case was remanded to the Financial Commissioner (Appeals)- an appeal was filed, which was disposed of with a direction to decide the revision petition within six months- Financial Commissioner (appeals) allowed the revision- Another writ petition was filed, which was allowed - held in appeal, the fact that appellant has contested all the proceedings shows that her plea that she was not aware of the ex-parte proceedings is genuine – delay of 215 days cannot be made a ground to throw out the appeal– delay cannot be a sole ground to dismiss the claim– sufficient cause in Section 5 of Limitation Act should be given liberal interpretation-rules of interpretation are not meant to destroy the rights of the party - the delay of 215 days was not on account of any dilatory tactics – revisional Court had rightly condoned the delay- order of Writ Court set aside. (Para-8 to 28) Title: Bakhshish Kaur Sarkaria Vs. Murtoo Devi and others (D.B.) Page-1323

Constitution of India, 1950- Article 226- Petitioners were appointed as Field Assistants-cum-Operators- the petitioners contended that the duties performed by them are of skilled nature and cannot be equated with those performed by class-IV employees- however, they were regularized in the pay scale of class-IV employees – respondents stated that petitioners were appointed as class-IV employees on daily wages – they claimed the salary of class-III employees – their writ petitions were dismissed - held, that the petitioners are seeking pay parity on the analogy of pay scale of the Field Assistants working in other bodies – the petitioners have not given detail as to how they are entitled to pay scale and whether the duties and responsibilities discharged by them are similar to their counter parts- the petitioners were engaged on daily wage basis and were paid salary as such – they were regularized as class-IV employees- this was accepted by the petitioners for three years- the petitioners are caught by waiver, estoppel and acquiescence – a delayed writ petition should not be accepted – the writ petition was rightly dismissed- appeal dismissed. (Para-11 to 33) Title: Inderjeet Singh Vs. H.P. State Pollution Control Board Page-1388

Constitution of India, 1950- Article 226- Respondent No. 2 invited global e-tenders for procurement of various pulses – the petitioner submitted 16 bids and was declared L-1 in 10 bids – however, the tender was cancelled without assigning any reason- fresh bids were invited and the petitioner was again declared L-1 in second group –however, the tender was again cancelled – respondent replied that the tender was cancelled on the basis of downward trend in the prices – there was only one bidder for group 2 – hence, re-tendering was ordered by State Level Purchase Committee- held, that officials of the respondent were not impleaded by name nor any personal allegation was made against them- malafides have to be established on the basis of cogent evidence and not on the basis of vague and unsupported material – the petitioner had not questioned the order of cancellation of earlier tenders – the rates were lower in the second tender

– the State Level Committee had rightly concluded that group 2 be re-tendered – the Court will intervene in contractual matters only if no responsible authority could have reached at a decision – it was specifically provided that tender will be rejected in case the bids were less than three – the decision to cancel the tender was bonafide- petition dismissed. (Para- 8 to 28) Title: Sri Ram Food Industries Vs. State Of Himachal Pradesh And Another (D.B.) Page-1526

Constitution of India, 1950- Article 226- Respondents No. 1 and 2 issued an advertisement for allotment of petrol pump- petitioner submitted all the necessary papers- but his case was not considered- he filed objections but the objections were brushed aside – respondents submitted that selection of the land of respondent No. 3 was in accordance with the guidelines – the representation was duly investigated and the grievance regarding financial bid was rectified – held, that petitioner was initially ranked at serial No. 3, whereas, private respondent was ranked at serial No. 1- petitioner filed a complaint against this ranking, which was duly considered and the objections were disposed of – revised merit panel was prepared - the evaluation was corrected even before filing of the writ petition- the petitioner was given 91 marks on the basis of guidelines for the evaluation of the site- the reasons were duly explained in the report – there was no stipulation regarding the visibility of the site from the road- satisfaction regarding suitability of the land cannot be made subject matter of judicial review – petition dismissed. (Para- 9 to 31) Title: Ram Chander Pathania Vs. Hindustan Petroleum Corporation Ltd. and others Page-1749

Constitution of India, 1950- Article 226- The admission was granted to the petitioners after execution of the undertaking- respondent No. 1 has approached the State Authority for revision of admission and other ancillary fees – the matter is pending before State Authority- direction issued to the State Authority to examine the request of respondent No. 1 and to take the decision within 6 weeks after hearing it. (Para-2 to 4) Title: Arushi Thakur & others Vs. Maharishi Markandeshwar Private Medical College & others (D.B.) Page-1284

Constitution of India, 1950- Article 226- There is shortage of staff in IGMC- direction issued to take steps to fill up the vacancies in various medical colleges- further, direction issued to establish endocrinology super specialty, to make nephrology department workable to make available kidney transplant facilities and to construct super specialty block in IGMC. (Para-1 to 8) Title: Court on its own motion Vs. State of HP and others (D.B.) (CWPIL No. 12 of 2015) Page-1674

Constitution of India, 1950- Article 226- Writ petitioner participated in the auction proceedings initiated in terms of the order of the Court – sale certificate was issued in favour of the petitioner but entries were not made in the revenue record on the ground that permission under Section 118 of H.P. Tenancy and Land Reforms Act was not obtained – held, that Section 118 contains the word decree and other modes of alienation/transfer – a bonafide auction purchaser does not fall within this definition – sale becomes complete on its confirmation and there is no need for registration- it was not stated in the auction notice that there is requirement of compliance of Section 118 – it is the duty of the Court to provide protection to the auction purchaser-authorities have defeated the purpose of conducting auction- right of auction purchaser cannot be defeated by pressing any other law- sale becomes final on confirmation and the sale certificate does not require any registration- no person can be prejudiced by the act of the Court- land which is occupied as a site of any building or machinery does not fall within the definition of land under Tenancy and Land Reforms Act- in the present case also land was not let out for agricultural purposes or purposes subservient to agriculture – writ petition allowed. (Para-7 to 73) Title: Valley Iron & Steel Company Ltd. Vs. State of Himachal Pradesh and others (D.B.) Page-1639

Constitution of India, 1950- Article 227- P was washed away with high flow of water released by respondent No. 3 without any warning- held, that the incident had taken place due to rashness and negligence of the employee of respondent No. 3- the parents cannot be compensated for the loss sustained by them- however, the Court can make an interim order required in the facts and

circumstances of the case - interim compensation of Rs. 2 lacs awarded to be paid by respondent No. 3. (Para-6 to 15) Title: Court on its own motion Vs. State of H.P. and others (D.B.) (CWPIL No. 16 of 2016) Page-1382

Contempt of Courts Act, 1971- Section 12- It was stated that the respondent had gone outside the State and therefore, he was unable to appear before the Court - held, that it is not permissible for the contemnor to leave the jurisdiction of the Court, where contempt proceedings are pending without seeking exemption – Chief Secretary directed to ensure that all the Officers who have been arrayed as respondents in contempt petition remain present on the date fixed or otherwise they should seek exemption from the Court. (Para-2 and 3) Title: Pratibha Kaushik Vs. R.D. Dhiman and another (D.B.) Page-1358

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Factories Act, 1948- Section 92 and 106- A complaint was filed under Section 92 of Factories Act- the complaint was filed beyond the period of 90 days laid down in the statute- it was contended that the time spent in obtaining the sanction has to be excluded- held, that Section 106 does not provide that the time spent in obtaining the sanction has to be excluded – there is no requirement for the inspector to obtain sanction for the prosecution- the Court could not have taken the cognizance of the same- petition allowed and complaint quashed. (Para-2) Title: Neel Kant Saxena & others Vs. State of H.P. Page-1402

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H.P. Co-operative Societies Act, 1968- Section 72- Respondent No. 1 filed a reference petition pleading that he is founder- member of the society- he had sold his truck with prior intimation and understanding that on the purchase of a new truck, he would be given a new token number- however, the number was not given to him, although it was given to similarly situated persons – a reply was filed by the society that the respondent No.1 lost the membership with the sale of truck and token could not be granted – reference was allowed and direction was issued to allot new token to the respondent No. 1- appeal and revision were filed, which were dismissed- a writ petition was filed, which was allowed and the authority was directed to decide the case on merit – a fresh order dismissing the revision was filed- a writ petition was filed against the order, which was also dismissed- held, in appeal that as per bye- laws, a person remains a member till he remains the owner of the truck – however, bye-laws do not provide that sale of truck would amount to expulsion – no person can be expelled without complying with the bye laws- resolution could not have been passed in violation of the bye laws – the resolution was also not approved by the Registrar Co-operative Societies – the question of fact cannot be decided in exercise of the writ jurisdiction - the writ Court had passed the order on the basis of the material on record – appeal dismissed. (Para- 10 to 24) Title: Solan District Truck Operators Transport Cooperative Society Ltd. Vs. Harjinder Singh and others (D.B.) Page-1451

H.P. Urban Rent Control Act, 1987- Section 14- An eviction petition was filed pleading that the tenants had damaged the wall of the building and had joined it to another building – the tenants had materially impaired the value and utility of the building – the petition was allowed by the Rent Controller – an appeal was filed, which was dismissed- held in revision that the plea of the tenants that alteration was made by the landlord was not proved by evidence on record – carrying out structural alteration without the written consent of the landlord by carving out one passage materially impaired the value and utility of the building as two independent sets were converted into one unit – revision dismissed. (Para- 14 to 28) Title: Oriental Insurance Company Ltd. and another Vs. Dr. Gyan Prakash Page-1238

H.P. Urban Rent Control Act, 1987- Section 14- An eviction petition was filed on the ground of arrears of rent and premises being required bonafide for the purpose of housing the grand-

daughter of the petitioner- the petition was allowed by the Rent Controller – an appeal was filed, which was allowed- held, that Appellate Court had wrongly held that there was a requirement of corroboration of the testimony of the landlord – documents established the claim of the landlord- Appellate Authority had mis-appreciated the evidence- revision allowed and order of Appellate Authority set aside. (Para-5 to 10) Title: Krishan Dutt Verma Vs. Shyam Singh Page-1290

H.P. Urban Rent Control Act, 1987- Section 14- An eviction petition was filed on the ground of arrears of rent, the premises having become old and unsafe for human habitation and the premises required bonafide for the purpose of rebuilding and re-construction, which cannot be carried out without vacating the premises- the rent petition was allowed and the eviction was ordered on the grounds of arrears of rent and bonafide requirement for rebuilding and reconstruction – an appeal was filed, which was allowed and the petition was dismissed on the grounds of bonafide need for reconstruction- held, in revision that the condition of building is not proved to be dilapidated- however, rebuilding cannot be carried out without vacating the premises – the tenant has a right to re-entry and no prejudice would be caused to him – petition allowed and the order of Appellate Authority set aside. (Para-8 to 10) Title: Leela Devi Vs. Ashwani Kumar Page-1178

H.P. Urban Rent Control Act, 1987- Section 14- Landlord filed an eviction petition pleading that tenants are in arrears of rent, they have impaired value and utility of the premises, they have constructed new rooms on vacant land and have installed a saw machine, they have converted the premises into residential premises and the premises are bona fide required for the purpose of construction, which cannot be carried out without vacating the building – the petition was allowed on the ground of bona fide reconstruction - appeal and cross-objections were filed, which were dismissed by the Appellate Authority – held, in revision, other co-owners are necessary parties for effectual and complete adjudication of the eviction petition- if some of the co-owners are permitted to raise construction, then the rights of other co-owners will be adversely affected – revision petition allowed and case remanded to the trial Court with the direction to implead the other co-owners and to decide the matter afresh. (Para- 12 to 17) Title: Jasvinder Singh son of Shri Pritam Singh & others Vs. Kedar Nath son of late Shri Khushi Ram & others Page-1396

H.P. Urban Rent Control Act, 1987- Section 14- Landlord sought eviction of the tenant on the ground of bonafide requirement for personal use – Rent Controller allowed the eviction petition- an appeal was filed, which was dismissed- held in revision that there was no provision for eviction of the tenant in the original Act, however, Supreme Court has applied the provision of amended Act to the pending cases – therefore, this amendment will be applicable to the present case as well- personal requirement includes the requirement of family as well - the choice of accommodation should be left to the landlord as he is the best person to see his needs – brother of the landlord is not a necessary party- petition dismissed. (Para-12 to 18) Title: Hari Singh son of Munshi Ram Vs. Devender Pratap son of Karam Singh Page-1740

'I'

Income Tax Act, 1961- Section 127(1) and 127(4)- Petitioner contended that its case was transferred from I.T.O., Parwanoo to I.T.O., Una and ex-parte assessment order was illegally passed – respondents stated that show cause notice was issued but no reply was filed – held, that petitioner had already filed a statutory appeal against the order of assessment – a writ petition cannot be filed when alternative remedy is available – if a party has two remedies and it chooses one of them, it cannot avail the other one – writ petition cannot be filed, when alternative remedy is available – petition dismissed. (Para- 5 to 17) Title: M/S Dev Bhumi Industries Vs. The Commissioner of Income Tax and others (D.B.) Page-1447

Indian Evidence Act, 1872- Section 45- Accused filed an application for comparison of admitted handwriting of the complainant with the detail of the amount mentioned in the dishonoured

cheque – the application was dismissed by the trial Court- held, that the accused had taken a defence that blank cheque was issued by him- the defence can be established by comparison of the handwriting of the complainant with the handwriting on the cheque – dismissal of the application caused serious prejudice to the accused – petition allowed and the admitted handwriting ordered to be sent for comparison with the disputed handwriting. (Para- 3 and 4) Title: Nishal Mahajan Vs. Chander Bhan Singh Page-1298

Indian Forest Act, 1927- Section 52- An FIR was registered for transporting the timber in a truck – proceedings for confiscation were initiated, which resulted in the confiscation of the vehicle – the present petitioner was convicted by the trial Court for the commission of offence punishable under Section 42 of Indian Forest Act – he preferred an appeal, which was dismissed- a revision against the order of dismissal was preferred, which was also dismissed- held in revision that the conviction of the petitioner has attained finality – the petitioner cannot be permitted to say after his conviction that he was not transporting the timber or that timber was being transported without his knowledge or without his connivance- petition dismissed. (Para-6 to 9) Title: Satya Parkash Vs. State of Himachal Pradesh and another Page-1764

Indian Penal Code, 1860- Section 279 and 337- Accused hit the brother of the informant by driving the scooter in a high speed – accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that the Court has limited power to re-appreciate the evidence- the Court can interfere to prevent the abuse of the process, miscarriage of justice or to correct irregularities committed by the Courts below – statements of the informant and injured were sufficient to prove rashness and negligence – there is no infirmity in the judgment of the Court and accused was rightly convicted- however, considering the time elapsed from the incident, the benefit of Probation of Offenders Act granted to the accused- report of the Probation Officer called. (Para-14 to 23)Title: Nand Kishore Vs. State of Himachal Pradesh Page-1341

Indian Penal Code, 1860- Section 279 and 337- Accused was driving a bus in a rash and negligent manner – bus hit the car and the occupants of the car sustained injuries- the accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that Court has limited power to appreciate the evidence in exercise of revisional jurisdiction- prosecution witnesses consistently stated that bus was driven towards wrong side in high speed leaving no space for the car due to which the occupants of the car sustained injuries- testimonies of prosecution witnesses were not shaken in the cross-examination- accused was rightly convicted by the trial Court- considering the time lapsed since the incident, benefit of Probation of Offenders Act granted to the accused. (Para-10 to 27) Title: Raghubir Singh Vs. State of Himachal Pradesh Page-1103

Indian Penal Code, 1860- Section 279 and 337- Informant was driving a motorcycle – a scooter being driven by the accused at a high speed hit a lady due to which she suffered injuries – the accused was tried and acquitted by the trial Court- held, in appeal that there are contradictions in the statements of prosecution witnesses- lots of people had gathered at the spot but none was joined in the investigation – link evidence is missing- prosecution has failed to prove its case beyond reasonable doubt - the accused was rightly acquitted by the trial Court- appeal dismissed. (Para-7 to 13) Title: State of Himachal Pradesh Vs. Vishal Page-1361

Indian Penal Code, 1860- Section 279- Informant was driving a jeep- a bus being driven by the accused came at a high speed- informant stopped the jeep on the left side of the road but the bus hit the jeep- the jeep suffered damages – the accident had taken place due to the negligence of the accused- the accused was tried and acquitted by the trial Court- held, in appeal that no skid marks were visible in the photographs – the jeep was not dragged and the version that bus being driven with high speed hit the jeep becomes doubtful – there are contradictions and improvements in the statements of prosecution witnesses- the trial Court had taken a reasonable

view while acquitting the accused- appeal dismissed. (Para-7 to 13) Title: State of Himachal Pradesh Vs. Jai Chand Page-1309

Indian Penal Code, 1860- Section 279, 337 and 304-A- A scooter being driven by the accused at high speed hit the deceased on the wrong side – wife of the accused and his child also sustained injuries in the accident- the accused was tried and convicted by the trial Court – an appeal was preferred, which was dismissed – held, in revision that Court has limited power to appreciate the evidence in exercise of revisional jurisdiction- it was not disputed that scooter was being driven by the accused at the relevant time – it was also not disputed that deceased had sustained injuries in the accident, which caused his death – prosecution version was proved by the statements of PW-1 to PW-3 – there was nothing in their cross examination to doubt their testimonies – defence version was not probable- benefit of Probation of Offenders Act cannot be granted to a person convicted of rash and negligent driving- however, considering the time lapse, the sentence modified to 15 days. (Para-8 to 25) Title: Subhash Chand Vs. State of H.P. Page-1312

Indian Penal Code, 1860- Section 279, 337 and 304-A- An information was given to the police that S was driving the vehicle at a high speed and the vehicle had met with an accident- S died due to the injuries sustained in the accident- investigation revealed that accused was driving the vehicle and had given a wrong information that vehicle was being driven by S- accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed – the plea of the accused that S was driving the vehicle was falsified by the evidence- accused admitted in his statement recorded under Section 313 Cr.P.C that he was driving the vehicle – PW-6 who was travelling in the vehicle also deposed this fact – no mechanical defect was found in the vehicle- the road was wide at the place of incident and no explanation for the accident was given – the trial Court had rightly found the accused guilty- appeal dismissed. (Para-7 to 15) Title: Rajesh Dogra Vs. State of Himachal Pradesh Page-1571

Indian Penal Code, 1860- Section 279, 337, 338 and 304-A- Accused was driving a truck, which hit the motorcycle- Y succumbed to the injuries and PW-1 sustained injuries in the accident – the accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that accident had taken place on national highway where two vehicles could have easily crossed the road- the truck was being driven towards the right side of the road, which led to the accident- motorcyclist had tried to save himself by applying the brakes which is evident from the skid marks, whereas, the driver of the truck had not tried to do so, which proves negligence on the part of the driver – the prosecution case was proved beyond reasonable doubt and accused was rightly convicted- revision dismissed. (Para-11 to 21) Title: Amerjeet Singh Vs. State of Himachal Pradesh Page-1666

Indian Penal Code, 1860- Section 279, 337, 338 and 304-A- Accused were driving different buses – accused No.1 signalled accused No. 2 to take pass – bus hit the rock in the process of overtaking causing injury to the passengers- the accused No. 2 was held guilty by the trial Court- an appeal was preferred, which was dismissed - held, in revision that Court has limited power to appreciate the evidence in exercise of revisional jurisdiction – it was not disputed that accused was driving the bus – according to prosecution, accused No. 1 did not leave sufficient space for overtaking but the accused No. 2 tried to overtake the bus causing the accident- evidence shows that buses were in competition with each other and accused No. 1 was not allowing accused No. 2 to overtake but gave a pass near 'P' – accused No. 2 made an attempt to overtake another bus and caused accident – prosecution version is proved by statement of PW-1 duly corroborated by the statement of accused and the mechanical report – accused No. 2 was negligent in overtaking the bus when there was insufficient space – he was rightly convicted by the trial Court - however, considering the facts of the case, the sentence modified to a period of three months only. (Para-7 to 27) Title: Khem Chand Vs. State of H.P. Page-1110

Indian Penal Code, 1860- Section 302- Accused murdered the deceased and stole his belongings- he was tried and acquitted by the trial Court- held in appeal that police suspected the involvement of several persons, who were also interrogated – accused had no animosity with the deceased – it was not established on what basis the accused was arrested – the deceased had consumed alcohol to the extent of 268.24 mg % and possibility of sustaining injuries by way of fall cannot be ruled out- Medical officer specifically stated that deceased was very drunk and he might have marked in co-ordination of thoughts, speech and action, staggering reeling gait with tendency to lurch and fall – stick was not connected to the accused – disclosure statement was also not proved – the recovery of torn business identity card was not connected to the accused as no finger prints were detected on the same – the circumstances do not point to the guilt of the accused- trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-6 to 20) Title: State of H.P. Vs. Rajesh Singh (D.B) Page-1778

Indian Penal Code, 1860- Section 302 and 396 read with Section 120B- **Indian Arms Act, 1959**- Section 25- Dead body of deceased R and D were found – their hands and mouths were tied and their throats were slit with a knife lying at the spot – the accused were arrested and they confessed to the commission of crime – disclosure statements were made – it was found on investigation that all the accused travelled in a taxi from Delhi to Solan, where they spent a night in a hotel – they committed the murder of the deceased, committed dacoity and sold the gold ornaments – the ornaments were sold at Delhi- the accused were tried and convicted by the Trial Court- held in appeal that testimonies of prosecution witnesses are contradicting each other on material points, which make their testimonies doubtful – the case is based on circumstantial evidence and the circumstances should lead unerringly to the guilt of the accused- material witnesses were not examined – accused were not known to each other – the possibility of the innocence of the accused cannot be ruled out- finger prints of the accused did not match the finger prints lifted by the police from the scene of the crime – the call record of the mobile of the deceased R was not placed on record- independent witnesses to the recovery were not examined – the manager of the hotel admitted that he could not identify the guests staying in the hotel – the genesis of the prosecution story regarding theft of ornaments from the body of the deceased R is extremely doubtful – no doors were opened – disclosure statement does not inspire confidence- PW-10 resiled from his earlier statement recorded by Magistrate - sufficient time was not given by Magistrate to the witness- circumstances do not establish the guilt of the accused conclusively- appeal allowed and accused acquitted. (Para-10 to 78) Title: Wakar Chaudhary Vs. State of Himachal Pradesh (D.B.) Page-1466

Indian Penal Code, 1860- Section 306 and 498-A read with Section 34- Accused A was married to deceased – accused A developed illicit relation with S, his sister-in-law- the deceased used to object to the same, on which she was beaten - the deceased committed suicide by consuming poison- accused A was convicted, while other accused were acquitted by the trial Court- held, in appeal that death had taken place within 7 years – no dowry demand was made by the accused – no complaint was made regarding the illicit relationship – the harassment should be with the view to demand dowry- the evidence that the deceased was subjected to beating is not supported by medical record – therefore, the version that accused had subjected the deceased to cruelty has not been established beyond reasonable doubt- appeal allowed and accused acquitted of the charged offence. (Para-7 to 44) Title: Ajay Kumar Vs. State of H.P. Page-1427

Indian Penal Code, 1860- Section 306- Deceased committed suicide by consuming poison - she left a suicide note implicating the accused- accused was tried and acquitted by the trial Court- held, that the suicide note mentioned that accused used to harass her and block her way - the deceased used to come to meet the deceased during the night time – the deceased walked into the police station and disclosed that she had consumed poison – she had not disclosed in the police station that she was harassed by the accused due to which she had consumed poison, rather she had disclosed that she was upset because of family problems – the handwriting expert was not examined and it could not be inferred that the note was written by the deceased- it was not

established that accused used to ask the deceased to commit suicide – the trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-6 to 28) Title: State of Himachal Pradesh Vs. Dharamveer @ Kaku (D.B.) Page-1533

Indian Penal Code, 1860- Section 307 and 506 read with Section 34- **Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act, 1989-** Section 3(2)- Accused inflicted a blow with knife on the person of PW-7 with an intent to cause injury which could have caused death – accused S made a disclosure statement which led to the recovery of weapon of offence- accused S was convicted by the trial Court, while other accused were acquitted- held, in appeal that prosecution witnesses had improved upon their version and stated the facts not disclosed to the police- victim had also made major improvements, exaggeration and embellishment in his version – motive of the crime was not proved – the victim was not found under the influence of liquor as was suggested by the prosecution- however, the ocular version regarding the involvement of accused S was satisfactory – it was corroborated by medical evidence and the recovery of weapon- the accused S was rightly convicted by the trial Court- appeals dismissed. (Para-8 to 28) Title: Sanjeev Kumar Vs. State of Himachal Pradesh (D.B.) Page-1302

Indian Penal Code, 1860- Section 325 read with Section 34- Informant saw N constructing a wall on a public path- he asked N not to do so , when the informant was returning to his home, accused restrained him from proceedings further – accused No. 2 started quarreling with the informant – the present petitioner inflicted a blow on the head of the informant by a wooden plank – Court found the accused guilty – an appeal was preferred, which was dismissed- held, in revision that Court has limited power to appreciate the evidence in exercise of revisional jurisdiction- prosecution version was proved by PW-1 and PW-2- their testimonies were not shaken in cross-examination – Medical Officer had found injuries on the person of the informant – defence version was not proved – the accused was rightly held guilty by the Courts- however, considering the time period, sentence modified and accused directed to pay compensation of Rs. 20,000/- in lieu of the sentence imposed by the trial Court. (Para-8 to 25) Title: Devinder Kumar Vs. State of Himachal Pradesh Page-1147

Indian Penal Code, 1860- Section 332, 504 and 506 read with Section 34- Informant and other police officials were returning after investigating a case under Section 283 of I.P.C. - accused caught hold of the informant and started quarreling with them- accused also gave beatings to the informant and other police officials – the informant party came to the police post but the accused followed them- they obstructed the police officials in discharge of their officials duties- accused were tried and acquitted by the trial Court- aggrieved from the order, present appeal was filed- held, that it was not mentioned in Ex.PW-1/A that any offence punishable under Section 283 of I.P.C. was committed by accused No. 1 - hence, the genesis of the prosecution version was made doubtful- the uniforms of the police officials were not damaged but their stitching became loose, which will not lead to an inference of the commission of offence by the accused- accused were rightly acquitted by the trial Court- appeal dismissed. (Para-9 to 13) Title: State of H.P. Vs. Om Prakash & Ors. Page-1141

Indian Penal Code, 1860- Section 353 and 332- PW-1 and PW-3 found illegal mining – they demanded M Form Book – when they were returning, the accused came from behind and assaulted them with a stick – the accused was tried and acquitted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that Court has limited power to appreciate the evidence in exercise of revisional jurisdiction- the statements of prosecution witnesses are full of contradictions, omissions, improvements and inconsistencies- the stick with which injuries were caused was not recovered and was not shown to the Doctor- trial Court had taken a reasonable view while acquitting the accused- revision dismissed. (Para-9 to 22) Title: State of H.P. Vs. Sarwan Singh Page- 1079

Indian Penal Code, 1860- Section 376- Accused caught hold of the prosecutrix, took her to a nearby bathroom and raped her – the accused was tried and convicted by the trial Court- held, in appeal that the place of incident was heavily populated the prosecutrix had not raised any cries- the report was written by B – the prosecutrix was married and the presence of semen stain will not help the prosecution – the trial Court had not properly appreciated the evidence- appeal allowed – accused acquitted. (Para-10 to 13) Title: Raman Kumar alias Kala Vs. State of H.P. Page-1251

Indian Penal Code, 1860- Section 379- **Indian Forest Act, 1927**- Section 41 and 42- Accused were found sitting in a tractor, which was carrying 8 slippers of different sizes of Devdar in the trolley – the petitioner/accused was convicted of the commission of offence punishable under Section 41 and 42 of Indian Forest Act while other accused were acquitted – an appeal was filed by petitioner/accused, which was dismissed- held, in revision that the prosecution version was duly proved by the testimonies of prosecution witnesses- it was duly established that accused was driving the tractor, which was carrying 8 slippers- no permit was produced by the accused- he was rightly convicted by the trial Court- however, considering the time lapsed since the incident, the benefit of Probation of Offenders Act granted to the accused. (Para-8 to 23) Title: Nota Ram Vs. State of Himachal Pradesh Page-1693

Indian Penal Code, 1860- Section 409, 420, 467, 471 and 120-B- **Prevention of Corruption Act, 1988-** Section 52- Accused No. 3 was posted as Chowkidar and was working under the control of accused No. 1 for receiving and supplying material- accused No. 2 was also working in the same store- the accused made a fictitious entry in the stock register showing the dispatch of the 40 bitumen drums worth Rs. 14,000/- - the accused were tried and acquitted by the trial Court- held in appeal that the confession of accused No. 2 was not brought on record – the shortage was not reported immediately – entrustment of bitumen drums was not established – owner and driver of the truck in which bitumen drums were sent were not examined - the trial Court had rightly held that the prosecution version was not proved beyond reasonable doubt- appeal dismissed. (Para-13 to 38) Title: State of H.P. Vs. Narinder Paul Sooden (since deceased) & others Page-1771

Indian Penal Code, 1860- Section 436 read with Section 34- Accused had set the shop on fire causing loss of Rs.1 lac to the informant – the accused were tried and acquitted by the trial Court- held in appeal that there was delay in lodging the FIR – there was no murmur till 3 A.M. that accused had set the shop on fire- the trial Court had rightly appreciated the evidence- appeal dismissed. (Para-7 to 23) Title: Ram Dev Vs. Dhameshwar Sharma & others (D.B.) Page-1629

Indian Penal Code, 1860- Section 458 and 307 read with Section 34- Accused S entered the house of the informant and assaulted him with a sword – accused R kept vigil – incident was witnessed by PW-6, who cried for help on which PW-7 and PW-8 arrived at the spot –accused were tried and acquitted by the trial Court- held, in appeal that the genesis of the prosecution version is doubtful as the informant was posted on a temporary duty at Kangra temple at the time of incident, the matter was not reported directly to the police, although, informant is a police officer – a complaint was also lodged by the accused against the informant – motive was not proved - the witnesses had improved upon their earlier versions – the recovery was not established – the trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para- 10 to 22) Title: State of Himachal Pradesh Vs. Satnam Singh & another Page-1576

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased was married to accused No. 1- accused No. 2 was her mother-in-law- the accused started harassing the deceased on the pretext that defective articles were given in dowry – she disclosed the incidents to her parents – she consumed poison subsequently-the accused were tried and acquitted by the trial Court- held in appeal that harassment of the woman should be to coerce her to meet

unlawful demand of dowry- solitary instance of harassment is not sufficient and there should be series of circumstances- the deceased had consumed poison within 7 years of marriage – mother, sister and aunt of the deceased admitted that no demand of dowry was made at the time of marriage – no complaint was made regarding the harassment of the deceased – father of the deceased admitted that no money was paid to the deceased by him – it was not shown as to what defect was pointed by the accused in the articles supplied in dowry – the reason for suicide was not established by the prosecution and the accused were rightly acquitted by the trial Court- appeal dismissed. (Para-11 to 25) Title: State of Himachal Pradesh Vs. Bhupinder Kumar & anr. (D.B.) Page-1458

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- The deceased was married to the accused S- accused J was her mother-in-law- accused started torturing the deceased – a complaint was also made to ex-vice president – informant received a phone call from the deceased that accused S had beaten her under the influence of liquor and accused were asking her to leave the matrimonial home- subsequently, the deceased committed suicide by consuming poison – accused were tried and acquitted by the trial Court- held, in appeal that it was not proved that there was any dowry demand - accused J was residing separately – no complaint was lodged before the police- the deceased was not treated medically for her injuries- no external injury was found on the body of the deceased- accused S was not at home when the deceased had consumed poison- the evidence led by the prosecution merely casts suspicion and does not prove the prosecution version – trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-19 to 32) Title: State of Himachal Pradesh Vs. Sardeep Kumar and another (D.B.) Page-1275

Indian Penal Code, 1860- Section 498-A, 306 and 304-B read with Section 34- The marriage between deceased and accused No. 1 was solemnized – accused No. 2 is mother of accused No.1, while accused No. 3 and 4 are brother and sister of accused No. 1- all the accused started harassing the deceased – they demanded Rs. 60,000/- for purchasing the vehicle, which was paid by mother of the deceased but the ill treatment continued – she was beaten – she left to attend her duties and subsequently her dead body was found in the canal- the accused were tried and acquitted by the trial Court- held, in appeal that the marriage was solemnized in the year 2003- suicide was committed in the year 2008 within 7 years of the marriage – marriage between brother and Nanad of the deceased was solemnized in the year 2005, which shows that relations between two families were cordial – the prosecution version regarding holding of Panchayat was also not established – no injury was found on the person of the deceased, which falsifies the version that deceased was beaten – the trial Court had taken a reasonable view while acquitting the accused – appeal dismissed. (Para-11 to 17) Title: State of Himachal Pradesh Vs. Subhash Chand and others (D.B.) Page-1166

Indian Penal Code, 1860- Section 500- Accused levelled allegations of adultery against the complainant and his sister S- these allegations tarnished the reputation of the complainant amongst the general public- the complaint was dismissed by the trial Court- held, in appeal that the complainant had filed a civil suit earlier, which was dismissed on the ground that S was living in adultery- no appeal was filed- the complainant had named D and K as witnesses but they were not examined and adverse inference has to be drawn against the complainant – the trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-5 to 10) Title: Ganga Ram Vs. Dalip Singh Page-1285

Indian Succession Act, 1925- Section 63- 'G' was owner of the property who died leaving behind plaintiff and defendants as his legal heirs -defendant No. 1 produced a Will stated to have been executed by G – plaintiff pleaded that Will is not a genuine Will and is not binding on the rights of parties- the suit was decreed by the trial Court- an appeal was preferred, which was allowed- held, in second appeal that the execution of the Will was proved- cross-examination of the plaintiff corroborated the contents of the Will- the fact that scribe had not put his signature on

the Will is insignificant as there is no statutory requirement for the same - the execution of the Will was proved by the marginal witnesses –registration of the Will raises a presumption regarding the due execution- plaintiff had failed to lead evidence to rebut the presumption- the Appellate Court had rightly set aside the judgment of the trial Court- appeal dismissed. (Para-8 to 10) Title: Hans Raj Vs. Suneet Singh and others Page-1172

Indian Succession Act, 1925- Section 63- Plaintiffs filed a civil suit pleading that the deceased had executed a Will in their favour and the Will set up by the defendant is false, factious and fabricated- mutation attested on the basis of the same are illegal, null and void- the suit was decreed by the trial Court- an appeal was filed, which was dismissed- held in second appeal that the testimonies of defendant's witnesses in support of the Will propounded by him were contradictory to each other – the execution of the Will propounded by the plaintiffs was duly proved – appeal dismissed. (Para-9 to 13) Title: Savitri Devi Vs. Surender Pal & another Page-1258

Industrial Disputes Act, 1947- Section 25- Petitioner was engaged on daily wage basis – her services were terminated without complying with the provisions of Section 25-G and F of Industrial Disputes Act- the respondent No. 2 failed to make the reference on the ground of delay- respondent No. 2 directed to decide the reference within 6 weeks after hearing the parties in view of the judgment of the Supreme Court in **Prabhakar versus Joint Director Sericulture Department and another** reported in **AIR 2016 SC 2984**. (Para-3 to 5) Title: Parveen Vs. State of HP and others (D.B.) Page-1748

Industrial Disputes Act, 1947- Section 25- Petitioners were engaged on daily wages- their services were terminated without complying with the provisions of Industrial Disputes Act- a reference was sought but was declined on the ground of delay- held, that the petitioners sought the reference after 8-12 years – the reference was sought only after the judgment of the High Court, which shows that petitioners are fence sitters – the delay takes away the equity and will not help a person who approaches the Court after the delay- writ petition dismissed. (Para-5 to 23) Title: Bego Devi Vs. State of HP and others (D.B.) Page-1730

Industrial Disputes Act, 1947- Section 33 (c)(2)- The respondent was engaged as daily paid casual labourer- his services were terminated – a reference was made to Industrial Tribunal-cum-Labour Court who directed the reinstatement of the services with seniority – he was not permitted to join for want of approval from Competent Authority- he was allowed to join his duties on 10.8.2011 after getting the approval – he approached the Tribunal by filing an application, which was allowed and an order for payment of the full wages of the period when workman was not allowed to join was passed – held, that proceedings under Section 33 (c)(2) are in the nature of the execution – the award had already been passed and the petitioners had no option but to implement the same in letter and spirit – petition dismissed. (Para-4 to 14) Title: State of H.P. and another Vs. Natter Singh (D.B.) Page-1562

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Land Acquisition Act, 1894- Section 18- Land of the claimants was acquired for defence purposes – Land Acquisition Collector determined different rates for different types of land – a reference petition was filed and District Judge enhanced the market value to Rs. 60,000/- per bigha irrespective of classification of land- held, in appeal that District Judge had relied upon the judgment of the High Court to grant compensation at uniform rate – the purpose of acquisition is the same and therefore, the assessment at uniform rate is just and expedient- appeal dismissed. (Para-6 to 10) Title: Union of India Vs. Chatur Singh & Ors. Page-1282

Limitation Act, 1963- Section 5- An application for condonation of delay of 80 days was filed, which was dismissed – held, that the applicant had met with an accident after the

pronouncement of the judgment – mere absence of medical certificate should not have led to the dismissal of the application – the delay cannot be used to defeat the claim of a person undergoing hardship - accident can happen with any person – petition allowed. (Para- 7 to 15) Title: Sahi Ram Arya and another Vs. Sushil Bansal Page-1524

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Motor Vehicles Act, 1988- Section 149- Claimants specifically pleaded that deceased was travelling in the vehicle along with fruits- owner filed a reply pleading that the deceased was travelling in the vehicle – rest of the averments were denied – the Tribunal held that deceased was travelling as owner of goods and not as a gratuitous passenger- held, in appeal that it was for the insurer to plead and prove that driver was not having a valid and effective driving licence and that owner had committed breach of the terms and conditions of the insurance policy- no evidence was led to prove these facts – the Tribunal had rightly saddled the insurer with liability – however, rate of interest was wrongly granted at 9% per annum, which is reduced to 7.5% per annum from the date of filing of the claim petition. (Para-14 to 22) Title: National Insurance Co. Ltd. Vs. Pushpa Devi and others Page-1230

Motor Vehicles Act, 1988- Section 149- Deceased was a third party and the Tribunal had rightly directed the insurer to satisfy the award with a right to recovery. (Para-4) Title: National Insurance Company Ltd. Vs. Ashwani Kumar & others Page-1815

Motor Vehicles Act, 1988- Section 149- Deceased was travelling in the vehicle for bringing new tyres – the onus to prove that deceased was a gratuitous passenger was upon the insurer who had not led any evidence to discharge the same- therefore, the insurer was rightly held liable to indemnify the insured. (Para-10 and 11) Title: ICICI Lombard General Insurance Co. Ltd. Vs. Kalawati & others Page-1287

Motor Vehicles Act, 1988- Section 149- Driver had a valid and effective driving licence – it was not proved on record that vehicle was being driven in violation of the terms and conditions of the policy- the insurer was rightly held liable in these circumstances- appeal dismissed. (Para-14) Title: United India Insurance Company Limited Vs. Satinder Kaur alias Surinder Kaur and others Page-1818

Motor Vehicles Act, 1988- Section 149- Driver was competent to drive light motor vehicle – he was driving a tractor, which falls in the definition of light motor vehicle- however, the licence had expired on 31.3.2002 and was renewed w.e.f. 27.11.2002 – accident had taken place on 22.11.2002 – thus, driver did not have a valid licence on the date of accident- owner had committed the breach of the terms and conditions of the policy – hence, owner saddled with liability- insurer directed to satisfy the award with the right to recovery. (Para- 6 to 12) Title: United India Insurance Company Ltd. Vs. Romesh Chand and others Page-1828

Motor Vehicles Act, 1988- Section 149- Injured was 23 years of age at the time of accident and was working as I.T. Engineer with M/s Ambuja Cement, Darlaghat- he sustained injuries and suffered 84% disability of the right arm- the Tribunal had held that insured had committed breach of terms and conditions of the policy and had rightly granted right of recovery to the insurer- these findings were also not questioned by the driver and insured- a third party cannot be left in lurch due to breach by the insured – appeal dismissed. (Para-12 to 29) Title: Bajaj Allianz General Insurance Company Limited Vs. Aman and others Page-1211

Motor Vehicles Act, 1988- Section 149- Insurance policy shows that the seating capacity of the vehicle was 4- thus, the risk of deceased was covered- insurer had failed to lead any evidence that the deceased was travelling as gratuitous passenger and there was breach of terms and

conditions of the policy by insured- appeal dismissed. (Para- 4 to 7) Title: Oriental Insurance Company Limited Vs. Kanta Devi and others Page-1237

Motor Vehicles Act, 1988- Section 149- It is for the insurer to plead and prove that insured had committed willful breach of the terms and conditions of the policy – mere plea is not sufficient to exonerate the insurer – no evidence was led to prove the breach of the terms and conditions of the policy and insurer was rightly saddled with liability- appeal dismissed. (Para-4 to 9) Title: The New India Assurance Co. Ltd. Vs. Rajshwari and Anr. Page-1707

Motor Vehicles Act, 1988- Section 149- It was for the insurer to plead and prove that vehicle was being driven in contravention of the terms and conditions of the insurance policy- owner/ insured did not lead any evidence to prove this fact – the Tribunal had rightly saddled the insurer with liability – appeal dismissed. (Para-7 to 11) Title: Bajaj Allianz General Insurance Company Limited Vs. Phool Chand and others Page-1217

Motor Vehicles Act, 1988- Section 149- It was specifically pleaded in the claim petition that deceased were travelling in the vehicle as owners of goods- this plea was upheld by the Tribunal- insurer had not led any evidence to rebut this fact- the insurer was rightly held liable to pay the compensation. (Para-5 and 7) Title: National Insurance Company Limited Vs. Reena Devi & others Page-1514

Motor Vehicles Act, 1988- Section 149- MACT held that insurer was liable to pay the compensation – High Court had already held in FAO No.187 of 2009 titled National Insurance Company Ltd. Versus Sunita Devi decided on 17.4.2012 that insurer is liable to pay the compensation – in view of this judgment, appeal is dismissed. (Para-2 to 4) Title: National Insurance Company Ltd. Vs. Gayatri & others Page-1516

Motor Vehicles Act, 1988- Section 149- Seating capacity of the tractor was only one person- claimants pleaded that deceased was travelling in the tractor after loading saria – driver and owner evasively denied this fact – owner stated in the appeal that the tractor had hit the deceased- owner is liable for the act of the driver by virtue of master servant liability – insurer was rightly exonerated by the trial Court. (Para-9 to 15) Title: Ajmer Singh Vs. Vyasa Devi and others Page-1208

Motor Vehicles Act, 1988- Section 149- Tractor met with an accident - unladen and laden weight of the vehicle was 2065 kg. and 3065 kg. respectively- thus, it falls within the definition of light motor vehicle – the driver possessed a valid licence to drive light motor vehicle and there was no breach of the terms and conditions of the policy – insurer had not led any evidence to prove the breach of the policy – appeal allowed and insurer saddled with liability. (Para-5 to 15) Title: MBD Printographics Pvt. Ltd. Vs. Satya Devi and Others Page-1689

Motor Vehicles Act, 1988- Section 149- Vehicle was not insured at the time of the accident and therefore, respondent No. 1 and 2 were rightly saddled with liability- appeal dismissed. (para-1 to 6) Title: Jyoti Parkash Vs. Dalip Singh and others Page-1687

Motor Vehicles Act, 1988- Section 163-A and 167- It was pleaded in the claim petition that deceased was driver of the vehicle- his income was Rs. 3,300/- per month and falls within the income slab of Rs. 40,000/- per annum – the claim petition was maintainable – the legal representatives have an option to file the claim petition before the Tribunal or before Employees Compensation Commissioner- the amount awarded by the Tribunal is not excessive but falls within the parameters of Motor Vehicles Act- appeal dismissed. (Para-6 and 8 to 18) Title: National Insurance Company Limited Vs. Reena Devi & others Page-1514

Motor Vehicles Act, 1988- Section 166- An award was passed by the Tribunal, which was upheld in appeal, therefore, it is ordered that the impugned award will be governed by the

decision in the appeal and the judgment shall form the part of this judgment as well. (Para-2 and 3) Title: Veena Devi Vs. Rajesh Kumar & others Page-1831

Motor Vehicles Act, 1988- Section 166- An FIR was registered against the claimant – he was tried and convicted by the Criminal Court- Tribunal had rightly held that accident was caused by the rash and negligent driving of the claimant- a person who causes the accident cannot claim compensation for the same - appeal dismissed. (Para-3 to 5) Title: Anudeep Sharma Vs. Himachal Roadways Transport Corporation Page-1787

Motor Vehicles Act, 1988- Section 166- Claimant had suffered 10% permanent disability and had suffered loss of income- he is a tailor and income of Rs. 3,000/- per month cannot be said to be excessive- age of the claimant is between 23 to 26 years and multiplier of '18' is reasonable- medical expenses of Rs. 25,000/- are just and reasonable – no amount was paid towards future loss of amentias and Rs. 25,000/- awarded under this head – total compensation of Rs. 1,14,800/- + 25,000/- awarded along with interest @ 7.5% per annum. (Para-10 and 11) Title: Yogesh Sharma Vs. Jyoti and others Page-1551

Motor Vehicles Act, 1988- Section 166- Claimants pleaded in the claim petition that L was driving the tractor at the time of the accident- L and his father pleaded that deceased was driving the tractor at the time of accident- it was mentioned in the FIR that L was driving the vehicle – the contents of the FIR are to be accepted as correct as it was lodged soon after the accident – the owners pleaded that they had sold the vehicle to father of L, which is corroborated by oral evidence, application for release and hire purchase agreement- the person who is in actual possession and the control of the vehicle has to satisfy the liability- Tribunal had wrongly saddled the registered owner with liability- award modified. (Para-14 to 28) Title: Lakhwinder Singh Vs. Seema Devi and others Page-1502

Motor Vehicles Act, 1988- Section 166- Claimants pleaded that deceased was a contractor and was earning Rs. 20,000/- per month- no evidence was produced in support of the same- even if, he is treated to be a labourer, his income cannot be less than Rs. 4,500/- per month- 1/3rd was to be deducted towards his personal expenses and the loss of the dependency would be Rs. 3,000/- per month- age of the deceased was 54 years and multiplier of 11 is applicable- claimants are entitled to Rs. 3,000 x 12 x 11= Rs. 3,96,000/- under the head 'loss of income/dependency' – claimants are also entitled to Rs.10,000/- each under the heads 'loss of consortium', 'loss of estate', 'loss of love and affection' and 'funeral expenses'- thus, claimants are entitled to Rs. 4,36,000/- with interest @ 7.5% per annum from the date of the claim petition till realization. (Para-6 to 11) Title: Kubja Devi and others Vs. Amrita Devi and othersPage-1688

Motor Vehicles Act, 1988- Section 166- Claimants pleaded that the deceased was earning Rs.8,000/- per month from all sources but failed to prove this fact- the Tribunal had rightly held the income of the deceased was Rs.3,000/- per month, however, the Tribunal fell into error in deducting 1/4th from the income of the deceased – claimants are six in number and 1/5th was to be deducted towards personal expenses- monthly loss of dependency will be Rs. 2,400/- - the deceased was 32 years of age at the time of accident and multiplier of '16' will be applicable- thus, claimants are entitled to Rs. 2400 x 12 x 16= Rs. 4,60,800/- under the head 'source of dependency'- claimants are also entitled to Rs. 10,000/- each under the heads 'loss of love and affection' , 'loss of estate' , 'loss of consortium' and 'funeral expenses'- thus, claimants are entitled to Rs. 4,60,800 + 40,000= Rs. 5,08,00/- along with interest. (Para-17 to 21) Title: Ajmer Singh Vs. Vyasa Devi and others Page-1208

Motor Vehicles Act, 1988- Section 166- Compensation of Rs.14,31,162/- was awarded along with interest @ 7.5% per annum from the date of filing of claim petition till realization – claimant had claimed compensation of Rs.10 lacs- therefore, only an amount of Rs. 10 lacs was to be

awarded – cost of Rs. 1 lac was also imposed. (Para-4 to 7) Title: Virender Kumar alias Virender Singh Vs. Puneet Patial & another Page-1713

Motor Vehicles Act, 1988- Section 166- Deceased was 27 years – multiplier of 16 is applicable – the income of the deceased was not less than Rs. 7,000/- per month and Tribunal had wrongly held that income of the deceased was Rs. 5,000/- per month - claimants are 4 in number- 1/4th amount is to be deducted and the loss of dependency is Rs. 5,300/- per month and the claimants are entitled to Rs. 5300 x 12 x 16= Rs. 10,17,600/- under the head 'loss of dependency'- claimants are entitled to Rs. 10,000/- each under the heads 'loss of love and affection', 'loss of estate', 'funeral expenses' and 'loss of consortium'- thus, claimants are entitled to Rs. 10,57,600/- with interest @ 7.5% per annum. (Para-5 to 8) Title: Anjana Devi and others Vs. Badri Prasad and another Page-1672

Motor Vehicles Act, 1988- Section 166- Deceased was 65 years of age at the time of accident- his wife has been deprived of her source of income as well as matrimonial home- the deceased was shopkeeper and agriculturist – his income cannot be less than Rs. 6,000/- per month- 1/3rd has to be deducted towards personal expenses and the loss of the dependency is Rs. 4,000/- per month – multiplier of 5 is just and the claimant is entitled to compensation of Rs. 4,000 x 12 x 5= Rs. 2,40,000/- under the head ' Loss of income' – claimant is also entitled to Rs. 10,000/- each under the head 'loss of consortium', 'loss of love and affection', 'loss of estate' and 'funeral expenses'- thus, the claimant is entitled to Rs. 2,80,000/- with interest @ 7.5% per annum from the date of claim petition till realization- the vehicle was insured and therefore, insurer is liable to indemnify the owner. (Para- 20 to 28) Title: Mansho Devi Vs. Meera Devi and others Page-1509

Motor Vehicles Act, 1988- Section 166- Deceased was an advocate by profession – his monthly income cannot be less than Rs. 30,000/- - 1/3rd income was to be deducted towards personal expenses- loss of dependency will be Rs. 20,000/- per month- age of the deceased was 42 years – multiplier of 13 is applicable- claimants are entitled to Rs. 20,000 x 12 x 13= Rs. 31,20,000/- under the head loss of dependency- claimants are also entitled to Rs. 10,000/- each under the heads loss of estate, loss of love and affection, loss of consortium and funeral expenses- thus, total amount of Rs. 31,60,000/- awarded along with interest @ 7.5% per annum from the date of filing of claim petition till realization. (Para-13 to 18) Title: The New India Assurance Co. Ltd. Vs. Ruma Kaushik and others Page-1816

Motor Vehicles Act, 1988- Section 166- Deceased was carpenter by the profession- he was also growing and selling the vegetables – the income of Rs. 4400/- per month cannot be said to be excessive- after making deduction, claimants have lost source of dependency of Rs.3,300/- per month- multiplier of 13 is applicable – the interest was wrongly allowed @ 9% per annum and should have been awarded @ 7.5% per annum- rate of interest reduced to 7.5% per annum from the date of claim petition till realization. (Para-11 to 15) Title: The HDFC ERGO General Insurance Co. Vs. Shrimati Progri Devi and others Page-1705

Motor Vehicles Act, 1988- Section 166- Deceased was earning Rs. 5,000/- per month and was getting Rs. 100 per day as daily allowance - it can be safely held by guess work that the monthly income of the deceased could not be less than Rs. 4,000/- per month- deceased was 23 years old at the time of accident- he was bachelor and 50% of the amount is to be deducted towards personal expenses- thus, claimants have lost Rs.2,000/- per month as 'loss of dependency' – considering the age of the deceased, multiplier of 15 is applicable - thus, claimants are entitled to Rs. 2,000 x 12 x 15= Rs. 3,60,000/- under the head 'loss of dependency' – claimants have spent Rs. 15,800/- on travelling and thus are entitled to Rs. 15,800/- under the head 'travelling expenses'- rate of interest was awarded @8% per annum, which is excessive and is reduced to 7.5% per annum- total compensation of Rs.3,60,000 +15,800= Rs.3,75,800/- awarded along with interest @ 7.5% per annum. (Para-11 to 20) Title: Hema Devi & others Vs. Lajji Ram Thakur & another Page-1485

Motor Vehicles Act, 1988- Section 166- Injured remained admitted in the hospital for a pretty long time – the injured had suffered 100% permanent disability and is bed ridden – the claimant was agriculturist and his income cannot be less than Rs. 5,000/- per month- he will not be in a position to earn anything in view of the disability – his age was 32 years at the time of the accident and multiplier of 15 has to be applied- thus, claimant is entitled to Rs. 5,000 X 12 X 15= Rs. 9,00,000/- as loss of income- MACT had awarded attendant charges for 18 months, which is not proper as the attendant would be required throughout the life- taking the minimum wages into consideration, Rs. 3,000/- per month awarded towards attendant charges and compensation of Rs. 3000 x 12x 15= Rs. 5,40,000/- awarded towards attendant charges- Rs.1 lac awarded for future treatment- Rs. 1,50,000/- awarded under the head pain and suffering and Rs. 1,50,000/- awarded under the head loss of amenities of life – Rs. 30,000/- awarded for wheel chair – total compensation of Rs. 20,28,341/- awarded with interest @7.5% per annum from the date of filing of the claim petition till realization. (Para- 13 to 27) Title: Kishori Lal Vs. Tulsi Ram and others Page-1804

Motor Vehicles Act, 1988- Section 166- It was stated on behalf of respondents No. 1 and 2 that they are ready to settle the matter by paying Rs. 1,25,000/- in lump sum in addition to the amount already awarded- in view of this, the award is modified by providing that claimant is entitled to Rs. 2,70,800/- with interest @ 7.5% per annum + Rs. 1,25,000/- in lump sum. (Para- 1 to 4) Title: Om Parkash Vs. H.R.T.C. and others Page-1701

Motor Vehicles Act, 1988- Section 166- MACT awarded compensation in favour of the claimants –A, co-owner and his son V were held liable - it was contended that vehicle was in possession of V and he was responsible for the accident- thus, he should be saddled with liability- held, that A and deceased P were co-owners of the vehicle – the Tribunal had rightly saddled them with liability- V is son of deceased P and is his legal representatives- hence, he was rightly held liable in the capacity of legal representative. (Para- 3 to 6) Title: Anant Ram Vs. Karam Dev and others Page-1671

Motor Vehicles Act, 1988- Section 166- MACT awarded the compensation and saddled the insured, owner of the van, with liability- it was contended that in another claim petition the accident was held to be the result of rash and negligent driving of the bus – appeal was preferred and the award was upheld- held, that in view of the decision in the other claim petition, the order of the Tribunal modified and claimants are held entitled to the claim amount from the insurer of the bus – the Tribunal had wrongly awarded the interest @ 6% per annum , which is modified to 7.5% per annum. (Para- 3 to 13) Title: Rafia Ram Vs. Rakhi and others Page-1521

Motor Vehicles Act, 1988- Section 166- MACT held the claimant entitled to Rs. 70,729/- along with interest @ 7.5% per annum – the claimant remained admitted in zonal hospital and thereafter in PGI, Chandigarh- MACT had fallen in error in awarding Rs. 28,729/- for the medical expenses – compensation was also to be granted for future expenses- an amount of Rs. 10,000/- awarded under the head future expenses – taking the monthly income of the claimant as Rs. 8,000/- per month and the fact that he was unable to work for two months, compensation of Rs. 15,000/- awarded under the head loss of income, Rs. 20,000/- awarded under the head transportation and attendant charges, Rs. 50,000/- each awarded under the head loss of amenities of life and pain and suffering- compensation of Rs. 1,60,000/- awarded with interest @ 7.5% per annum. (Para-7 to 10) Title: Amrit Pal Singh Vs. Geeta Devi and others Page-1783

Motor Vehicles Act, 1988- Section 166- T was the registered owner of the vehicle- he executed an affidavit in favour of T stating that he had sold the vehicle to P and had no objection for transferring the vehicle in the name of P – P also executed an affidavit admitting the purchase – held, that a person who is in possession and control of the vehicle is liable to satisfy the award, therefore, P saddled with liability and T exonerated – appeal allowed. (Para- 9 to 14) Title: Tilak Raj Sood Vs. Rajmati & others Page-1710

Motor Vehicles Act, 1988- Section 166- the income of the deceased cannot be less than Rs.6,000/- per month – claimants are 6 in number and 1/4th amount is to be deducted towards personal expenses – thus, the claimants have suffered loss of dependency of Rs. 4,500/- per month –the deceased was 51 years of age and multiplier of 10 is applicable – claimants are entitled to Rs. 4,500 x12 x 10= Rs. 5,40,000/- 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 estate, funeral expenses and loss of consortium – thus, claimants are entitled to Rs. 5,40,000/- + 40,000= Rs.5,80,000/- with interest @ 7.5% per annum. (Para- 5 to 12) Title: Anita Devi and others Vs. Rakesh Chona and another Page-1785

Motor Vehicles Act, 1988- Section 166- The owner claimed that she was minor at the time of accident- certificate of matriculation examination was placed on record, which shows that she was minor at the time of the accident – Section 2(30) provides that the guardian of the minor has to be treated as minor – hence, B was rightly treated to be the owner- his risk was not covered in terms of the policy and legal representatives cannot file claim petition for his death. (Para-14 to 18) Title: Krishna and others Vs. National Insurance Company and others Page-1808

Motor Vehicles Act, 1988- Section 166- Tribunal held that rashness and the negligence of the driver was not proved – held, that the judgment in the criminal Court cannot be relied upon to determine the rashness and the negligence- the Tribunal had considered the evidence and had rightly held that rashness and negligence was not proved- appeal dismissed. (Para- 7 to 11) Title: Mohan Singh Vs. Sukhwinder Kumar and others Page-1512

Motor Vehicles Act, 1988- Section 166- Tribunal held that S was driving the vehicle in a rash and negligent manner, which had caused the accident- driver did not question the said findings – held, that insurer cannot question this finding without seeking permission under Section 170 of M.V. Act – the driving licence was proved on record and no breach of terms and conditions was established- insurer cannot question the adequacy of compensation- however, the compensation was on lower side – appeal dismissed. (Para-9 to 29) Title: Oriental Insurance Co. Ltd. Vs. Pushpa Devi and others Page-1517

Motor Vehicles Act, 1988- Section 166-Deceased was a house wife- her monthly income was rightly held to be not less than Rs. 4500/- per month after deducting 1/3rd towards her personal expenses – the claimants have lost source of dependency of Rs.3,000/- per month- the age of the deceased was 50 years at the time of accident and multiplier of 13 was rightly applied- however, interest was wrongly awarded @ 9% per annum from the date of filing of the claim petition and is reduced to 7.5% per annum. (Para- 15 to 18) Title: Oriental Insurance Company Vs. Krishan Singh Shyam & others Page-1702

Motor Vehicles Act, 1988- Section 167- Deceased was working as conductor with the vehicle – claimants have legal right to claim compensation in terms of Workmen Compensation Act as the deceased was an employee of the insured – legal representatives have an option to file the claim petition either before Workmen Compensation Commissioner or before MACT. (Para-34 to 38) Title: Krishna and others Vs. National Insurance Company and others Page-1808

Motor Vehicles Act, 1988- Section 167- Tribunal dismissed the claim petition on the ground that the claimants ought to have resorted to the proceedings under Workmen Compensation Act- held, that Tribunal had fallen in error in dismissing the claim petition on this ground- the claimants had an option either to invoke the jurisdiction under Workmen Compensation Act or to file the petition under the Motor Vehicles Act - compensation of Rs. 4 lacs awarded in lump sum. (Para-3 to 6) Title: Mansa Devi Vs. Regional Manager, HRTC and others Page-1226

Motor Vehicles Act, 1988- Section 173- Insurer filed an appeal to question the adequacy of compensation- held, that the insurer can contest the claim petition only if it has obtained

permission under Section 170 of Motor Vehicles Act- in case, the permission has not been sought and granted, insurer is precluded from questioning the award on adequacy of compensation or any other grounds – no application for seeking permission under Section 170 was filed- hence, the appeal is not maintainable – appeal dismissed. (Para-7 to 18) Title: National Insurance Co. Ltd. Vs. Nemwati and others Page-1227

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N.D.P.S. Act, 1985- Section 18, 20 and 29- Accused were found in possession of 5.290 kg. charas and 920 grams opium –accused M died during the course of the proceedings and accused O was acquitted – held, in appeal that accused O is a driver with HRTC – it was alleged that he is supplier of drugs but the basis of this allegation was not proved - mobile phones were not connected to the accused O- accused M was running a Dhaba, which is open to the public and mere presence in the same will not make a person liable- there are over writings in the documents which have not been explained – the accused was rightly acquitted in these circumstances - however, the order of confiscation could not have been passed without recording specific findings that the currency notes were used for sale or purchase of drugs – case remanded for determination of this fact. (Para-11 to 24) Title: State of H.P. Vs. Om Prakash (D.B.) (Cr.Appeal No. 164 of 2011) Page-1183

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 100 grams of charas – he was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held in revision that 100 grams of charas is more than small quantity; therefore, the case was triable by the Special Court – the trial of the accused was vitiated – revision accepted- case remanded to the Special Court for a fresh decision in accordance with law. (Para-4 to 7) Title: Om Prakash Vs. State of H.P. (Cr. Revision No.208 of 2008)Page-1204

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 895 grams charas – he was tried and acquitted by the trial Court- held, in appeal that there was tampering with the arrest memo and no explanation was given for the same- testimonies of prosecution witnesses are contradicting each other on material points – it was mentioned in the seizure memo that offence punishable under Section 20 of N.D.P.S. Act was made out against the accused, which was not possible as the contraband was not recovered till the preparation of the seizure memo- the trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-9 to 21) Title: State of Himachal Pradesh Vs. Guddu Ram (D.B.) Page-1565

N.D.P.S. Act, 1985- Section 20- Accused were found in possession of 200 grams charas- they were tried and acquitted by the trial Court on the basis of the judgment of High Court in **State of H.P. Versus Mazar Hussain, 2012 (1) Drugs Cases (Narcotics) 415**, which relied upon the judgment of High Court in **Sunil Versus State of H.P., 2010 (1) Shimla Law Cases 192**- the judgment in Sunil has been overruled in **State of H.P. Versus Mehboob Khan, 2013 (3) Him.L.R. 1834 (F.B.)** – hence, the judgment of trial Court set aside and the case remanded to the trial Court with a direction to decide the same afresh. (Para-9 to 11) Title: State of Himachal Pradesh Vs. Randhir & others (D.B.) Page-1270

N.D.P.S. Act, 1985- Section 20- Accused were found in possession of 825 grams charas- they were tried and acquitted by the trial Court on the basis of the judgment of High Court in **State of H.P. Versus Mazar Hussain, 2012 (1) Drugs Cases (Narcotics) 415**, which relied upon the judgment of High Court in **Sunil Versus State of H.P., 2010 (1) Shimla Law Cases 192**- the judgment in Sunil has been overruled in **State of H.P. Versus Mehboob Khan, 2013 (3) Him.L.R. 1834 (F.B.)** – hence, the judgment of trial Court set aside and the case remanded to the trial Court with a direction to decide the same afresh. (Para-8 to 10) Title: State of Himachal Pradesh Vs. Raman Kumar (D.B.) Page-1265

Negotiable Instruments Act, 1881- Section 138- Accused issued a cheque of Rs. 5 lacs in discharge of his liability which was dishonoured- the accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held in revision that the defence version was not established – accused had not disputed his signatures on the cheque – he had failed to rebut the presumption under Negotiable Instruments Act- he was rightly convicted- revision dismissed. (Para-11 to 15) Title: Chaman Lal s/o Sh. Budh Ram Mahat Vs. Budhi Singh s/o late Sh. Nanak Chand Page-1794

Negotiable Instruments Act, 1881- Section 138- Two posted dated cheques of Rs. 9 lacs were issued by the accused towards the liability – the cheques were dishonoured- the accused was tried and convicted by the trial Court- an appeal was preferred, which was allowed- held, in revision that Court has limited power to appreciate the evidence in exercise of revisional jurisdiction- according to complainant, intimation of dishonour was received on 21.9.2005- there is overwriting in the memo of dishonour -the manager was not examined to prove this fact – record shows that memo of dishonour was issued on 6.9.2005 and was received on the same day – the notice was to be issued within 30 days but was issued on 19.10.2005 beyond the period of 30 days- appeal was rightly accepted- revision dismissed. (Para- 7 to 14) Title: Kartar Chand Vs. Jagdish Chand and Anr. Page-1084

'P'

Partition Act, 1893- Section 4- Plaintiffs filed a civil suit seeking partition of the joint property – the suit was opposed by pleading that the suit was bad for partial partition – held, that a co-owner can file a suit for partition at any point of time – the property situated at Hoshiarpur cannot be partitioned by the Courts in Shimla- suit decreed and preliminary decree of partition passed. (Para-8 to 22) Title: Davinder Parmar wd/o late Sh.Balbir Singh and another Vs. Kulbir Singh s/o late Sh.Avtar Singh & Others Page-1436

Prevention of Food Adulteration Act, 1954- Section 16(1)(a)(i)- Accused was found to be selling adulterated milk as it was containing 8.24% of 'milk solids-not-fat' as against the minimum requirement of 9% - he was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that the Food Inspector deposed that before taking the sample, milk was stirred from right to left and it was shaken upward and downward – proper stirring of milk is required to make it representative – Food Inspector did not state as to what method was adopted by him to ensure the churning/stirring of the entire milk - use of the rod or ladle was not established – Food Inspector was duty bound to ensure that milk sample was homogenous and representative of the entire milk – it is not possible to take non fatty solids from milk without reducing or affecting the fat contents – the prosecution version was not proved beyond reasonable doubt and the accused was wrongly convicted by the Courts- Revision allowed and judgment of the trial as upheld by the Appellate Court set aside. (Para- 10 to 23) Title: Abdul Gani Vs. State of H.P. and another Page-1192

Punjab Excise Act, 1914- Section 61(1)(a)- Accused was found in possession of 144 bottles of Patiala Orange- the accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that Court has limited power to appreciate the evidence in exercise of revisional jurisdiction- 12 bottles were sent for analysis and therefore, the prosecution has proved that 12 bottles were containing liquor- accused was carrying 6 bottles beyond permissible limit and the appeal is maintainable under Section 378 (1)(a) of Cr.P.C –there are contradictions in the statements of prosecution witnesses- no FIR number was put upon the 12 boxes stated to have been recovered which makes the story of recovery doubtful – the prosecution case was not proved beyond reasonable doubt- accused acquitted. (Para-9 to 25) Title: Dev Raj Vs. State of H.P and others Page-1095

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Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989- Section 3 (1) (x)- Accused abused the informant and threatened to kill him in case of taking water from Bawari- the accused were tried and acquitted by the trial Court- held in appeal that an officer not below the rank of Deputy Superintendent of Police can alone investigate into an offence as per Rule 7- the violation of this rule vitiates the trial – in the present case, investigation was partly conducted by an Inspector – further, PW-1 was hearing impaired and therefore was unable to identify the voices - his testimony will not implicate the accused - there was enmity between the informant and the accused- the trial Court had rightly acquitted the accused- appeal dismissed. (Para-9 to 13) Title: State of H.P. Vs. Chamaru Ram and another Page-1306

Specific Relief Act, 1963- Section 5- Plaintiff claimed that he is owner in possession of the suit land – defendant got entered his name as Kabiz and raised construction over a portion of the suit land – the defendant pleaded adverse possession – suit was decreed by the trial Court- an appeal was filed, which was dismissed- held, in appeal that defendant had applied for cement permit in the year 1983- the predecessor of the plaintiff was recorded to be owner of the suit land- there is no period of limitation for filing the suit on the basis of title – long possession is not equivalent to adverse possession – further, the plea of adverse possession was dropped by his counsel – the Court had rightly decreed the suit – appeal dismissed. (Para-8 to 14) Title: Raj Dulari and Ors. Vs. Rajinder Singh Page-1088

Specific Relief Act, 1963- Section 5- Plaintiff filed a civil suit for seeking possession pleading that defendants had raised construction over the land of the plaintiff despite objections – the suit was decreed by the trial Court – an appeal was filed, which was dismissed- held in second appeal that Local Commissioner had found encroachment over the suit land- the report was not challenged by the defendants and Court had rightly relied upon the same – the plea of adverse possession was not proved and suit was rightly decreed- appeal dismissed. (Para- 11 to 20) Title: Bishan Dass Vs. Charan Dass and others Page-1788

Specific Relief Act, 1963- Section 5- Plaintiff filed a civil suit for possession pleading that defendant No. 1 had forcibly raised construction over the land owned by plaintiff - defendants No. 2 and 3 had put the shuttering material on the part of the suit land- the suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that defendants had taken the plea of adverse possession but this plea was not established- mere possession how so ever long is not equal to the adverse possession- earlier suit for injunction was filed and cause of action in the two suits is not identical – appeal dismissed. (Para-10 to 16) Title: Naresh Kumar and others Vs. Chuni Lal Page-1541

Specific Relief Act, 1963- Section 5- Plaintiff filed a suit for possession pleading that he is exclusive owner in possession of the suit land- the defendants had raised construction of three storeyed building and in the process encroached upon the suit land- defendants denied the encroachment- the suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held in second appeal that ownership of the plaintiff was corroborated by the revenue record- defendants claimed that construction was raised on the acquired land – however, the award pronounced by Land Acquisition Collector qua the suit land was not brought on record- further, it was not established that money was paid to the predecessor of the plaintiff- the presumption of correctness was not rebutted- report of the Local Commissioner established the encroachment- the suit was rightly decreed by the Courts- appeal dismissed. (Para-9 to 14) Title: Union of India and another Vs. Bhagat Ram Chauhan Page-1373

Specific Relief Act, 1963- Section 5 and 38- Plaintiff pleaded that he is owner in possession of the suit land- the defendant extended his construction towards the suit land – hence, he filed a suit for seeking possession and injunction- the suit was partly decreed by the trial Court- an

appeal was filed, which was dismissed- held, in second appeal that ownership of the plaintiff was duly proved- demarcation was conducted, in which encroachment was detected – defendant also admitted his possession but claimed adverse possession – the plea of adverse possession was not proved satisfactorily- the suit was rightly decreed by the trial Court- appeal dismissed. (Para-10 to 22) Title: Nand Lal Vs. Mitter Dev (since deceased) through his LRs. Page-1347

Specific Relief Act, 1963- Section 20- Predecessor-in-interest of the defendants executed a agreement/sale deed selling 39 kanals 15 marlas of land – however, khasra No.1335 and 1336 were wrongly shown in possession of R as tenant at Will – it was further agreed that land of equal quantity and kind would be given to the plaintiff in case of loss of possession of these khasra numbers – tenant became owner on the commencement of H.P. Tenancy and Land Reforms Act- hence, the suit was filed for granting land as agreed in the deed – the suit was decreed by the trial Court – an appeal was preferred, which was accepted- held, in second appeal that the possession of the entire land was delivered to the plaintiff and vendor had performed his part of the agreement- the plaintiff had not taken any steps to get the record corrected- the suit was filed after 22 years of conferment of proprietary rights- plaintiff was aware of the tenancy and there is no justification for compensating the plaintiff for the loss of the land- the Appellate Court had rightly dismissed the suit- appeal dismissed. (Para-8 to 16) Title: Hansi Devi and Ors. Vs. Raj Kumari and Ors. Page-1121

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs filed a civil suit pleading that M was tenant of the suit land and proprietary rights were conferred upon him – he created tenancy in favour of defendants No. 2 and 3 and predecessor-in-interest of defendants No. 4 and 5- daughters of M sold the suit land to K- defendants No. 2 to 5 were conferred proprietary right- they sold their share in favour of the plaintiffs- the land was ordered to be vested in favour of State of H.P., which is wrong – the suit was decreed by the trial Court- an appeal was preferred and the order was partly modified – held in second appeal that M was recorded to be a non-occupancy tenant- proprietary rights were conferred upon him- he inducted K, C and M as tenants within three years of the conferment of proprietary right, which is in violation of Section 113 of H.P. Tenancy and Land Reforms Act- however, no proceedings were initiated and the mutation was attested- proprietary rights were conferred upon the tenants – Appellate Court held that Civil Court does not have jurisdiction in view of Section 115 of H.P. Tenancy and Land Reforms Act- the tenants had participated in the proceedings before the Collector and no grievance can be raised on this ground- Appellate Court had rightly delivered the judgment- appeal dismissed. (Para-7 to 9) Title: Sanjay Sood and another Vs. State of H.P. and others Page-1360

Specific Relief Act, 1963- Section 34- **H.P. Land Revenue Act, 1954-** Section 163-A- Proceedings were initiated against the plaintiff for encroaching upon the government land, which resulted in the ejectment of the plaintiff- an appeal was filed, which was dismissed- a civil suit was filed pleading that no opportunity of hearing was given – the suit was decreed by the trial Court- an appeal was preferred, which was allowed- held, in second appeal that plaintiff had appeared before Assistant Collector 1st Grade and had sought time to file the reply- this prayer was rejected and order of ejectment was passed without recording the statement of Patwari, Kanungo or any other person – the trial Court had rightly held that the procedure prescribed under the Act was not followed- the Court had rightly confined itself to the procedure adopted by the revenue authorities- the authorities had failed to act in conformity with the basic procedure of law – the Appellate Court had wrongly allowed the appeal – appeal allowed- Assistant Collector 1st Grade directed to decide the matter within six months. (Para-16 to 24) Title: Het Ram Vs. State of Himchal Pradesh Page-1127

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for permanent prohibitory injunction – no relief for declaration and restoration of possession was sought – plaintiff had filed an application before High Court to institute the suit for possession separately- the application

was allowed- the possession of the defendant was not disputed- plaintiffs omitted to consolidate all causes of action- petition allowed. (Para-3 to 9) Title: Satya Pal Vs. Union of India & others Page-1254

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for declaration that they were owners in possession of the suit land and entries in the revenue record are incorrect - a plea was taken that the suit was barred under Section 57 of H.P. Holdings (Consolidation and Prevention of Fragmentation) Act, 1971 – the objection was upheld by the trial Court and plaint was ordered to be returned for presentation before the appropriate court- an appeal was filed, which was dismissed – held, in second appeal that the plaintiffs had earlier initiated the proceedings before the Consolidation Authorities- they had taken the same pleas, before the authorities which were taken by them in the civil suit – no procedural irregularity was pointed out – the jurisdiction of the civil Court is barred under Section 57 of the Act – the Court had rightly ordered the return of the plaint – appeal dismissed. (Para- 12 to 14) Title: Mohinder Singh and others Vs. Nikku Ram Page-1199

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for declaration that they were owners in possession of the suit land, auction of the suit land and sale certificate in favour of the defendant No. 1 is illegal- defendant No. 2 had taken an exparte decree against N, predecessor of the plaintiffs, N had died and his LRs were not impleaded in the execution – the sale was not valid – defendant No. 1 contested the suit pleading that it was not maintainable in view of Order 21 Rule 90- the suit was dismissed by the trial Court- an appeal was preferred, which was partly allowed- held, in second appeal that plaintiffs had not approached the Civil Court for setting aside the auction of the suit land in execution petition- plaintiffs are the legal heirs of the judgment debtor - no application to set aside the sale was filed before the Executing Court- all questions relating to execution are to be decided by the executing Court- the suit is hit by Section 47 of Code of Civil Procedure- once the suit was not maintainable, no relief could have been granted by the Court- the Court has to see the justiciability only when there is maintainability – appeal allowed- judgment of the Appellate Court set aside. (Para-22 to 34) Title: Surinder Kaur Vs. Manjit Singh and others Page-1413

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that defendant had executed a sale deed in their favour for a consideration of Rs. 2,000/-- possession was also delivered to the plaintiffs- subsequently, defendant filed an application for partition and it was found that defendant is recorded to be the owner of half share, which is not correct- the suit was dismissed by the trial Court- an appeal was filed, which was also dismissed- held, in second appeal that defendant had admitted the sale of entire land to the plaintiffs but he subsequently clarified that he had sold only half share to the plaintiffs- it was never represented by defendant to the plaintiffs that defendant could sell half share of his sister- therefore, provisions of Section 43 of Transfer of Property Act are not available to the plaintiffs – appeal dismissed. (Para-9 to 11) Title: Vijay Kumar & others Vs. Anant Ram alias Nantu Page-1320

Specific Relief Act, 1963- Section 34- Separate suits seeking declaration and injunction were filed by the parties claiming ownership/possession over the suit land –the trial Court held that suit land was in exclusive possession of B at the time of filing of the suit – the plea of J that he is in possession and mortgage was never redeemed was negated- separate appeals were preferred, which were dismissed- held, in second appeal that the Courts had not taken into consideration the documents Ex.P7 and P10 on the ground that these were prepared on the basis of settlement, which was set aside by the Hon'ble High Court - however, the judgment of Hon'ble High Court was set aside by Hon'ble Supreme Court and the settlement operation was upheld- hence, the case remanded to the trial Court for fresh adjudication after taking into consideration Ex.P7 and P10. (Para-22 to 37) Title: Jai Krishan Vs. Bhagwan Chand & Ors. Page-1555

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for declaration and injunction pleading that revenue entries showing his share as 5/23 measuring 10 marlas is illegal and the plaintiffs are owners in possession of the suit land to the extent of 44/46 shares- sale deed stated to have been executed by the plaintiffs for the consideration of Rs. 16,500/- is null and void and a result of misrepresentation – suit was dismissed by the trial Court- an appeal was preferred, which was also dismissed- held in second appeal that the execution of the sale deed was duly proved by the evidence of the defendant – Sub-registrar proved that sale deed was read over and explained to the parties – it was duly established that sale deed was executed voluntarily – the High Court has limited power to interfere with the concurrent findings of facts – appeal dismissed. (Para-10 to 24) Title: Kamaljeet and others Vs. Dharam Dass Page-1799

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for seeking an injunction pleading that he is co-owner in possession and defendant has no right over the same- defendant started collecting construction material and digging foundation in the suit land forcibly- the suit was dismissed by the trial Court- an appeal was preferred, which was dismissed- held in second appeal that villagers are recorded to be in joint possession of the suit land since 1913-14 - witnesses of the defendant and documents proved the possession of the defendant - the entries were wrongly changed in favour of the plaintiff – suit was rightly dismissed by the trial Court- appeal dismissed. (Para-12 to 17) Title: Shiam Parshad Vs. Kashmir Singh & Ors. Page-1766

Specific Relief Act, 1963- Section 38- Plaintiff filed civil suit pleading that he is owner in possession of the suit land and defendants are interfering with the same – the suit was decreed by the trial Court- an appeal was filed, which was allowed – held in second appeal that a decree was passed by Civil Judge (Junior Division) Court No. 2 declaring the plaintiff therein and defendant S in the present suit to be owner in possession of the suit land- the judgment will have an overriding affect – revenue entries declaring the plaintiff as owner in possession are wrong and will confer no right over the suit land- the suit was rightly dismissed by the Appellate Court- appeal dismissed. (Para-8 to 16) Title: Tholu (deceased) through LR's Vs. Sukh Ram and others Page- 1714

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that the suit land belonged to the extent of half share to 'H', father of defendants No. 1 and 2 and husband of defendant No. 3- he had sold the same for consideration of Rs. 350/- to T, father of plaintiff and other persons – suit land was inherited by the plaintiff and others- it was allotted to C, daughter of T in a family settlement- remaining half share was obtained by the plaintiff in an oral exchange- the entries were wrongly recorded in favour of defendants- hence, the suit was filed- suit was dismissed by the trial Court- an appeal was preferred, which was allowed- held, in second appeal that, even if the sale deed was not reflected in the revenue record, it does not extinguish the rights of the purchaser – mutation does not confer any title – the version of the plaintiff was corroborated by revenue record- Appellate Court had rightly appreciated the evidence- appeal dismissed. (Para-11 to 14) Title: Prem Chand & Ors. Vs. Ameshwar Singh & Ors. Page-1299

Specific Relief Act, 1963- Section 38- Plaintiffs sought an injunction pleading that parties are joint owners of the suit land – the defendant collected construction material for raising construction without getting the same partitioned- the defendant pleaded that suit land was partitioned in a family partition- plaintiff had also raised construction over the same – the suit was decreed by the trial Court- an appeal was preferred, which was allowed- held, in second appeal that exclusive possession of the defendant was proved over the portion where the construction was being raised - plinth was laid in the year 1995 and the construction work also started in the month of March, 2005- plaintiffs have nothing to do with the portion over which the construction is being raised – the Appellate Court had rightly appreciated the evidence- appeal dismissed. (Para-10 and 11) Title: Lachhman and others Vs. Nag Ram Page-1292

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Workmen Compensation Act, 1923- Section 2 and 4- The claim petition was dismissed on the ground that claimant had failed to prove the relationship with the deceased- held, that one of the claimants was major and could not have been a dependent upon the deceased- however, the other claimant was minor and unmarried girl- she has to be treated as a dependent on her brother – the salary of the deceased was Rs. 3,000/- per month- he was also getting daily allowance of Rs. 100/- - thus, his salary will be Rs. 6,000/- - in view of Section 4, explanation II monthly income cannot be taken more than Rs. 4,000/- – 50% of the wages has to be taken into consideration applying the relevant factor- compensation of Rs. 2000 x 218.47= Rs. 4,36,940/- is payable- insured is liable to pay this compensation along with interest @ 12% per annum. (Para-3 to 7) Title: Kumari Reena & another Vs. Heera Nand & another Page-1223

Workmen Compensation Act, 1923- Section 4- 'M', husband of the claimant died in an accident- the petition was allowed and compensation was awarded subject to the production of legal heirs certificate- the award was challenged and the matter was remanded- petition was dismissed after remand- held, that claimant was married to S- Gram Panchayat had intimated this fact to the insurer- she is recorded to be wife of S in Gram Panchayat – claimant being a Nepali could not have solemnized marriage according to Hindu rite and custom – marriage was not validly registered under Special Marriage Act- the claim petition was rightly dismissed- appeal dismissed. (Para-8 to 14) Title: Najro Devi Vs. M/s Bhawani Transport & Another Page-1180

Workmen Compensation Act, 1923- Section 4- Claimant sustained injuries during the course of employment – the claim petition was dismissed by the Commissioner on the ground of maintainability- held, that a workman insured under Employees State Insurance Act, 1948 is entitled to receive compensation only under the scheme prepared under the Act – no plea was taken that the case of the claimant was covered under the scheme – claimant is a workman - his salary was Rs. 5400/- per month at the time of accident- he sustained 20% disability over right thigh and 10% disability over the knee – the salary has to be restricted to Rs. 4,000/- per month in terms of Section 44 of the Act – taking into consideration 20% disability, the loss of earning capacity will be Rs. 800/- per month- the age of the claimant was 29 years at the time of accident and relevant factor will be 209.92- thus, the compensation of Rs. 800 x 209.92= Rs.1,67,936/- will be payable together with interest @ 12% per annum- employer will be liable to pay penalty of 25% i.e. Rs. 41,984/-. (Para- 5 to 7) Title: Rajinder Kumar Vs. Mehak Chemicals (P) Ltd. and others Page-1163

Workmen Compensation Act, 1923- Section 4- Claimant was employed by respondent No. 2 on a monthly wages of Rs. 5,000/- per month for performing drilling work in the construction of the road – a big stone rolled down from the upper side of the hill and caused serious injury to the claimant as a result of which claimant sustained 100% disability- the Commissioner allowed the petition – the respondent No. 2 holds a valid insurance cover insuring the liability for two drill men- the claimant was a drill man and therefore, the insurer is liable to indemnify the respondent No. 2 for the compensation payable to the claimant - average monthly wages of the claimant is Rs. 2700/- per month- 60% of the same is Rs.1,620/-- loss of earning capacity is 100%- therefore, compensation of Rs. 1620 x 215.28= Rs. 3,48,754/- is payable - in addition to this interest @ 9% per annum w.e.f. 17.3.2006 Rs. 1,04,741/- is payable and total amount of compensation of Rs. 4,53,495/- is payable- the liability to pay the interest is that of the insured and not of the insurer. (Para-4 to 10) Title: Oriental Insurance Company Limited Vs. Gopal Chand & another Page-1234

Workmen Compensation Act, 1923- Section 4- Claimant was employed as a driver in a bus – the bus met with an accident- claimant sustained injuries in his chest, back and legs- he remained hospitalized for more than one month – Commissioner awarded compensation of Rs. 80,770/- along with interest @ 12% per annum – held, in appeal that the salary of the claimant

was Rs. 4,500/- per month – his age was 43 plus- the income was to be restricted to Rs. 4,000/- as per the Act- the claimant had sustained 25% permanent disability but he cannot drive the vehicle on long routes - even while driving the vehicle, he may feel pain in his body- thus, there was total loss of income –the relevant factor will be 60% of the monthly wages- factor of 175.54 will be applicable – therefore, claimant will be entitled to Rs. 2,400 x 175= Rs. 4,20,000/- with interest @ 12% per annum- petition allowed and compensation enhanced. (Para-2 to 6) Title: Manoj Kumar Vs. Khel Chand Negi & anr. Page-1296

Workmen Compensation Act, 1923- Section 4- Claimant was loading the truck- he fell down and sustained injuries – claim petition was dismissed after holding that injuries were not sustained during the course of his employment – held, that the incident was not reported to the police or insurer- no explanation was given for this fact- claimant had not sought medical help on the same day- no x-ray was conducted – person issuing the disability certificate had not examined the claimant – the petition was rightly dismissed- appeal dismissed. (Para- 7 to 11) Title: Sucha Ram Vs. Rajinder Singh & Another Page-1144

Workmen Compensation Act, 1923- Section 4- Deceased was taking the machineries to N.J.P.C. – he died by the fall of the tree when he had parked his vehicle and had come outside- the claim petition was allowed by the Commissioner- held, that employment and death were not disputed – the vehicle was insured – a plea was taken that the claim petition was filed after the period of limitation but no such plea was taken in the reply and is deemed to have been waived especially when Commissioner is empowered to condone the delay on the proof of sufficient cause- appeal dismissed. (Para- 4 to 7) Title: New India Assurance Company Vs. Nayajudin & another Page-1355

Workmen Compensation Act, 1923- Section 4- Income of the deceased was taken as Rs. 3,550/- per month and compensation was awarded accordingly- held, that the monthly wages was to be taken as Rs. 2,000/- only, even if the same was above Rs. 2,000/- - the deceased was 25 years of age - taking 50 % of the monthly wages of the deceased as Rs. 1,000/- and applying the relevant factor of 216.91, the compensation of Rs. 2,16,910/- will be payable with interest @ 12% per annum- appeal allowed. (Para-8 to 12) Title: Oriental Insurance Company Ltd. Vs. Meena Ram & Others Page-1134

Workmen Compensation Act, 1923- Section 4- M, Son of the claimant was travelling in a pickup which met with an accident- driver and M died in the accident – M was working as a labourer/cleaner and was getting salary of Rs. 4,000/- per month – the claim petition was allowed and compensation of Rs. 4,48,000/- was awarded- held, in appeal that plea taken by the insurer/appellant, the deceased was travelling in the vehicle as unauthorized passenger is not supported by evidence – Investigating Officer also admitted in cross-examination that it was found on the basis of investigation that M was working as cleaner and was doing loading/unloading work- the evidence was appreciated in its right perspective - liability to pay interest is that of insurer and insured could not have been held liable for the same – the penalty is to be paid by the insured – award modified accordingly. (Para-11 to 14) Title: Oriental Insurance Company Vs. Padmo Devi & anr. Page-1136

Workmen Compensation Act, 1923- Section 4- The claim petition was dismissed and liberty was granted to institute a fresh claim petition against the original registered owner- held, that Commissioner had mis-appreciated the evidence – it was proved by the suggestion of the Counsel of the Insurer that deceased was employed as a driver on a monthly sum of Rs. 2,000/- transfer of ownership of the vehicle was not reported to Registration and Licencing Authority and therefore the employer of the deceased cannot be treated to be the registered owner – insurer is not liable to indemnify him- appeal allowed and compensation of Rs. 2000 x 213.57 = Rs. 4,27,140/- awarded to be payable by respondent No. 4. (Para-2 to 8) Title: Soma Devi Vs. Kumari Bharti & others Page-1261

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

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

Cr. Revision No. 216 of 2008
Date of Decision: 22.8.2016

Indian Penal Code, 1860- Section 353 and 332- PW-1 and PW-3 found illegal mining – they demanded M Form Book – when they were returning, the accused came from behind and assaulted them with a stick – the accused was tried and acquitted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that Court has limited power to appreciate the evidence in exercise of revisional jurisdiction- the statements of prosecution witnesses are full of contradictions, omissions, improvements and inconsistencies- the stick with which injuries were caused was not recovered and was not shown to the Doctor- trial Court had taken a reasonable view while acquitting the accused- revision dismissed. (Para-9 to 22)

Cases referred:
State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452
Krishnan and another Vs. Krishnaveni and another, (1997) 4 Supreme Court Case 241
State of UP versus Ghambhir Singh, AIR 2005 (92) SCC 2440
Pawan Kumar and Kamal Bhardwaj versus State of H.P., latest HLJ 2008 (HP) 1150

For the petitioner: Mr. Rupinder Singh Thakur, Additional Advocate General, with Mr. Rajat Chauhan, Law Officer.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Present criminal revision petition filed under Sections 397 and 401 read with Section 482 of the Code of Criminal Procedure is directed against the judgment of acquittal dated 8.7.2008, rendered by the learned Sessions Judge, Hamirpur, H.P., in Criminal Appeal No. 46 of 2007, affirming the judgment of acquittal dated 30.5.2006 passed by the learned Judicial Magistrate, Ist Class, Court No.1, Hamirpur, HP, in Police Challan No. 44-II-1999.

2. Briefly stated facts as emerged from the record are that on 20th November, 1998, S/Sh. Gian Singh, Assistant Mining Inspector (PW3), and Ved Parkash, Mining Guard (PW1) had gone towards Dosarka area for inspection purpose on their official duty. They found unauthorized mining going on there. They inquired from the Munshi/Clerk of the contractor Saligram, namely Shiv Prasad to produce M-Form Book. As per the complainants (PW1 and 3), when they were returning with the M-Form Book, the accused-Sarwan Singh came from behind and assaulted them with 'danda' and caused injuries to them. Aforesaid officials filed the complaint Ext.PW1/A before the Mining Officer, Hamirpur, who in turn filed complaint Ext.PW8/A, enclosing therewith complaint Ext.PW1/A before the police on November 20, 1998. Police on the basis of aforesaid complaint, registered the FIR Ext.PW4/A. ASI OM Chand investigated the matter and prepared the site plan Ext.PW6/A after visiting the spot. He also took in possession receipt book Ext.PB from (PW1)Ved Prakash vide memo Ext.PW1/B. Record further reveals that aforesaid officials were medically examined. Police also procured their transfer orders Ext.PW7/A and Ext.PW7/B respectively, which was produced by PW1 Ved Prakash to the Police vide memo Ext.PW7/C. Police after recording the statements of witnesses under Section 161Cr.PC prepared the challan and presented the same before the Court of learned Judicial

Magistrate, Ist Class, Court No.1, Hamirpur. Learned trial Court having been satisfied that prima facie case exists against the accused, framed charges under Sections 353 and 332IPC against the accused, to which he pleaded not guilty and claimed trial. Learned trial Court on the basis of material available on record adduced by the prosecution, acquitted the accused from the charges (supra).

3. Feeling aggrieved and dis-satisfied with the judgment passed by the learned trial Court, present petitioner-State filed Criminal Appeal before the Court of learned Sessions Judge, Hamirpur, H.P., however, the same was dismissed. Hence this criminal revision petition before this Court.

4. Mr. Rupinder Singh Thakur, learned Additional Advocate General duly assisted by Mr. Rajat Chauhan, Law Officer, representing the petitioner –State vehemently argued that the judgments passed by the courts below are wrong on facts as well as on law and as such, same deserves to be quashed and set-aside. Mr. Thakur vehemently argued that the impugned judgments are not based upon the correct appreciation of record and the same are based upon hypothetical reasoning, surmises and conjectures and as such, the same cannot be allowed to be sustained. Mr. Thakur with a view to substantiate the aforesaid plea, made this court to travel through the evidence adduced on record by the prosecution to demonstrate that courts below have not dealt with evidence in its right perspective, rather, set unrealistic standards to evaluate direct and cogent evidence. He contended that the learned Sessions Court has fallen in grave error while dismissing the appeal of the petitioner-State on the ground that original complaint has not been brought on file and its photocopy Ext.PW1/A is not admissible as the same has not been proved with the help of the original. Similarly, Mr. Thakur, stated that finding of courts below is illegal and wrong. FIR Ext.PW4/A was duly proved by PW4 Mehar Chand, the then SHO of P.S. Sujanpur, which was not rebutted at all by the defence. As per Mr. Thakur, PW3 Gian Singh, who was on checking very categorically and specifically, stated that he was attacked by the accused and obstructed while discharging his duties as public servant. While concluding his arguments Mr. Thakur, strenuously argued that PWs1 and 3 categorically stated that the accused assaulted them when they were discharging their official duties and as such, the judgments passed by the Courts below deserves to be quashed and set-aside.

5. Since despite repeated pass-overs, none came present on behalf of the respondent to impart instructions; this Court proceeded to decide the matter on the basis of material available on record as well as submissions made on behalf of the petitioner-State.

6. Before proceedings ahead to decide the matter on merits, this Court had an occasion to peruse the entire evidence available on record and this Court is of the view that courts below have dealt with each and every aspect of the matter meticulously and by no stretch of imagination, it can be said that impugned judgments are not based upon correct appreciation of evidence available on record. Though, Mr. Thakur, made a serious attempt to demonstrate that judgments are not based upon proper appreciation of evidence, rather same are based upon conjectures and surmises but Mr. Thakur, was unable to point out any material discrepancy, irregularity and illegality in particular to substantiate his argument and as such, this Court sees no reason to interfere with well reasoned judgments of the courts below while exercising its revisionary jurisdiction.

7. Reliance is placed upon the judgment passed by Hon'ble Apex Court in case ***State of Kerala*** *Vs.* ***Puttumana Illath Jathavedan Namboodiri*** (1999)2 Supreme Court Cases 452, wherein it has been held as under:-

> *"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 Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."

8. I have heard the learned Additional Advocate General appearing for the petitioner-State and gone carefully through the record.

9. True, it is that while exercising the power under Section 397 of Criminal Procedure Code, this Court has very limited power to re-appreciate the evidence available on record. But in the present case, where accused has been acquitted of charges leveled against him under Sections 353 and 332 of the Indian Penal Code, this Court solely with a view to ascertain that the judgments passed by both the Courts below are not perverse and same are based upon correct appreciation of evidence available on record, undertook an exercise to critically examine the evidence available on record to reach fair and just decision in the case.

10. 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*** *Vs.* ***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 herein below:-

"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."

11. In the present case prosecution with a view to prove its case, examined as many as eight witnesses. Learned trial Court also recorded the statement of the accused under Section 313 Cr.PC, wherein he denied all the allegations leveled against him but fact remains that he did not lead any evidence in his defence.

12. PW1 Ved Parkash, Mining Guard, stated that on 20th November, 1998, he along with PW3 Gian Singh, Mining Inspector had gone for inspection in the area. When they reached at the work site of Saligram, Contractor at about 11 AM, his Munshi/Clerk Shiv Prasad was present on the site and was filling in M-Form book. They took in possession the book. He further stated that when they reached at a place called Pukhar at about 11:30AM, the accused came and assaulted them, as a result of which, they sustained injuries. Accordingly PW3 Gian Singh filed an application Ext.PW1/A to the concerned officer and both the injured were medically examined.

13. In his cross-examination, PW1 admitted that incident took place on the 'Pucca' road and there are shops at a distance of about 5-7 minutes' walk from the site of the incident. He admitted that the wooden stick was 4 feet long and the accused was not an employee of the contractor Saligram. He in his cross-examination also admitted that there was no enmity between them and blood came out from the head of PW3Gian Singh but it did not fall on his

clothes. He denied that the accused was collecting 'Bajri' in his tractor from the 'Khad' and they were beating the accused rather, PW1 stated that he does not know who has written Ext.PW1/A.

14. PW3 Gian Singh stated that when he and PW1 Ved Prakash, while discharging official duty, were returning after collecting the receipt book from the said Munshi/Clerk, the accused came from their back and assaulted them with a 'danda'. Interestingly, in his cross-examination, PW3 stated that the incident took place for about 10 minutes and admitted that the accused is not an employee of the said Contractor. He also admitted that blood had fallen on his clothes and clothes were smeared with blood. PW3 also admitted that accused was collecting 'Bajri' from the 'Khad'. However, he denied the suggestion that he and PW1 were under intoxication and had a quarrel with Shiv Prasad (Munshi/Clerk of the Contractor). He also denied that they were demanding liquor from the accused.

15. PW2 and PW4 are formal witnesses, who only proved the receipt book Ext.PB vide memo Ext.PW1/B and FIR Ext.PW4/A.

16. PW5 Dr. Chaman Lal, who medically examined PW1 and PW3 found simple as well as grievous injures on their bodies. He also gave opinion vide MLCs Ext.PA and Ext.PW5/A, but fact remains that in his cross-examination, PW5 categorically admitted that injuries can be possibly caused due to fall also.

17. PW6 ASI Om Chand, Investigating Officer stated that he took into custody the receipt book from PW1Ved Parkash along with documents of their postings in the area and prepared the site plan Ext.PW6/A. However, in his cross-examination, he stated that he does not know if the aforesaid employees (PW1 and 3) had a quarrel with Munshi/Clerk of Saligram Contractor. He also admitted that he had enquired about the fact whether PW1 and PW3 were posted at the place of incident and he associated Shiv Dayal with the investigation. He also admitted that the stick could not be recovered during the investigation. PW6 also testified that he does not know whether there was fighting/scuffle between PW1 and PW3 with Shiv Prakash or Saligram. He admitted that during the investigation, it had emerged that Shiv Parkash was issuing the fake book but he did not take any action against him. He deposed that he has not associated any independent witness because there was no such witness present on the spot.

18. PW7 Kishori Lal, Assistant Mining Inspector, produced the record regarding appointment and transfer of the officials (PW1 and PW3). He in his cross-examination admitted that when any person moves from his office for inspection purpose, some entry or intimation to the office is given but fact remains that there is no such document available on record suggestive of the fact that there was any entry or intimation qua the making of alleged inspection by the complainants. PW8 Kishan Singh, Mining Officer, testified about the complaint Ext.PW8/A sent by him.

19. Conjoint reading of the aforesaid witnesses clearly suggests that there are lot of contradictions, omissions, improvements and inconsistencies and prosecution has miserably failed to prove the case beyond reasonable doubt by leading clear, cogent and convincing evidence. Moreover, in the present case, 'danda' with which alleged injuries were caused, was not recovered and shown to the doctor, who conducted medical examination of the injured and rendered MLCs. No doubt, PW5 Dr. Chaman Lal in his MLC has stated that PW1 and 3 have suffered simple and grievous injuries but in the present facts and circumstances of the case, where prosecution has miserably failed to prove the incident, medical evidence, if any, cannot be of any help to them. Careful perusal of statements of PW1 and PW3, who can be termed to be the eye witnesses to the incident itself suggests that they did not disclose true facts before the learned trial Court while making statements because bare perusal of the statements of these witnesses suggests that there are major contradictions qua the place as well as weapon allegedly used by the accused causing them injuries. Apart from above, both the material witnesses have contradicted while stating that after the incident, clothes of PW3 were smeared with blood. PW1 though stated that blood started oozing out from the head of PW3 but he nowhere stated that clothes of PW3 were smeared with the blood, whereas PW3 himself stated that his clothes were

smeared with blood after the incident. Apart from this, there is no document available on record suggestive of the fact that police at any point of time took in possession the clothes, if any, smeared with blood. Though by way of placing the complaint Ext.PW1/A, prosecution attempted to prove that immediately after the incident, matter was reported to the concerned officer but record reveals that only photostat copy of the complaint was placed on record, which could be proved on record with the original but fact remains that no original complaint was ever placed on record and as such, this Court sees no illegality and infirmity in the finding returned by the courts below that photostat copy being admissible, cannot be made the basis of punishment to the accused. Interestingly, in the present case, both the material witnesses themselves admitted in their cross-examination that they had no enmity, if any, with the accused and he had no motive whatsoever, to assault them. Apart from this, PWs 1 and 4 themselves admitted that accused was neither Munshi nor Clerk of Contractor of Saligram and as such, it is not understood that in what capacity, accused was present at the site of occurrence. PW1 and 3 have nowhere stated that aforesaid accused ever resisted to their demand of supplying them M-form book, rather, both the witnesses stated that when they asked for M-form book, the same was supplied to them and as such, it is not understood that why after half an hour, the accused, who had no connection with the contractor, would assault the complainant.

20. Though, there are a number of discrepancies noticed by this court while perusing the entire evidence on record but it appears that evidence discussed herein above is sufficient to hold that in given facts and circumstances, two views are possible in the present case and as such present respondent-accused is entitled to the benefit of doubt. In the present case, prosecution story does not appear to be plausible/ trustworthy and as such same cannot be relied upon. In this regard, I may refer to the judgment passed by the Hon'ble Apex Court reported in ***State of UP*** *versus* ***Ghambhir Singh***, *AIR 2005 (92) SCC 2440*, where Hon'ble Apex Court has held that if on the same evidence, two views are reasonably possible, the one in favour of the accused must be preferred. The relevant paragraph is reproduced as under:-

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

21. The Hon'ble Division Bench of this Court vide judgment reported in ***Pawan Kumar*** *and* ***Kamal Bhardwaj*** *versus* ***State of H.P****., latest* ***HLJ 2008 (HP) 1150*** has also concluded here-in-below:-

> *"25. Moreover, when the occurrence is admitted but there are two different versions of the incident, one put forth by the prosecution and the other by the defence and one of the two version is proved to be false, the second can safely be believed, unless the same is unnatural or inherently untrue.*
>
> *26. In the present case, as noticed hereinabove, the manner of occurrence, as pleaded by the defence, is not true. The manner of the occurrence testified by PW-*

11 Sandeep Rana is not unnatural nor is it intrinsically untrue, therefore, it has to be believed.

27.Sandeep Rana could not be said to have been established, even if the prosecution version were taken on its face value. It was pleaded that no serious injury had been caused to PW-11 Sandeep Rana and that all the injuries, according to the testimony of PW-21 Dr. Raj Kumar, which he noticed on the person of Sandeep Rana, at the time of his medical examination, were simple in nature.

22. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court as well as the High Court, this court sees no illegality and infirmity in the judgments passed by the courts below, which appears to be based upon the correct appreciation of evidence available on record. Hence, the instant criminal revision petition is dismissed being devoid of any merit.

****

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

Kartar Chand .....Petitioner.

Versus

Jagdish Chand and Anr. .....Respondents.

Cr. Revision No. 70 of 2009
Date of Decision: 23.8.2016

Negotiable Instruments Act, 1881- Section 138- Two posted dated cheques of Rs. 9 lacs were issued by the accused towards the liability – the cheques were dishonoured- the accused was tried and convicted by the trial Court- an appeal was preferred, which was allowed- held, in revision that Court has limited power to appreciate the evidence in exercise of revisional jurisdiction- according to complainant, intimation of dishonour was received on 21.9.2005- there is overwriting in the memo of dishonour -the manager was not examined to prove this fact – record shows that memo of dishonour was issued on 6.9.2005 and was received on the same day – the notice was to be issued within 30 days but was issued on 19.10.2005 beyond the period of 30 days- appeal was rightly accepted- revision dismissed. (Para- 7 to 14)

Cases referred:

State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452
Krishnan and another Vs. Krishnaveni and another, (1997) 4 Supreme Court Case 241

For the petitioner: Mr. Anand Sharma, Advocate with Mr. Jagannath, Advocate.

For the respondents: Mr. Ajay Sharma, Advocate, for respondent No.1.
Mr. Rupinder Singh Thakur, Additional Advocate General, with Mr. Rajat Chauhan, Law Officer, for respondent No.2 - State.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Present criminal revision petition filed under Section 397 of the Code of Criminal Procedure is directed against the judgment dated 7.3.2009, rendered by the learned Sessions Judge, Hamirpur, H.P., in Criminal Appeal No. 104 of 2008, setting-aside the judgment of conviction and sentence passed by the learned Judicial Magistrate, 1st Class, Barsar in Private Complaint No. 125-1 of 2005 dated 17.11.2008.

2. Briefly stated facts as emerged from the record are that the petitioner (in short 'the complainant') and respondent No. 1 (in the 'accused') were running the business of 'Boot' and

'Chapple' as whole sale and retail in the name and style of 'Lucky Boot House" at Bhota, Tehsil Barsar, District Hamirpur, H.P. as partners. It is further revealed from the complaint that the accused voluntarily relinquished the partnership/business and after settlement of accounts; a sum of Rs. 10 lacs was to be paid by him to the complainant. As per the complainant, the accused paid a sum of Rs. 1 lac in cash and for the remaining amount of Rs. 9 lacs, he issued two post dated cheques bearing Nos. 269556 and 269557 of the Punjab National Bank (in short 'the PNB'), Mair, District Hamirpur, HP, in favour of the complainant. But fact remains that when the complainant presented the cheque bearing No. 269557 (Ext.CW1/A) dated 15.8.2005, amounting to Rs. 7 lacs in his bank i.e. Kangra Central Cooperative Bank (in short "the Cooperative Bank"), Bijhar, the same was dishonored for 'insufficient funds' and the complainant was intimated about it. The complainant got legal notice issued to the accused calling upon him to make the payment of cheque good within a period of 15 days. Since, the accused failed to make the payment in terms of legal notice, the complainant was constrained to initiate proceedings under Section 138 of the Negotiable Instruments Act (in short the Act) against the accused. Learned Judicial Magistrate, Ist Class, Barsar, Hamirpur, H.P., put a notice of accusation to the accused, to which he pleaded not guilty and claimed trial. Learned trial court on the basis of evidence adduced on record found the accused guilty of having committed offence under Section 138 of the Act and accordingly, convicted and sentenced him to undergo simple imprisonment for a period of six months and to pay compensation to the tune of Rs. 7,50,000/-. Being aggrieved and dis-satisfied with the aforesaid judgment and order of conviction and sentence dated 17.11.2008 and 18.11.2008, respectively passed by the learned trial Court, the accused approached learned Sessions Judge, Hamirpur, by way of Criminal Appeal No. 104 of 2008, which was allowed vide judgment dated 7.3.2009. Hence this criminal revision petition before this Court by the petitioner-complainant.

3. Mr. Anand Sharma, Advocate, appearing for the petitioner-complainant, vehemently argued that the judgment passed by the learned Sessions judge is not sustainable as the same is not based upon the correct appreciation of the evidence available on record and same deserves to be quashed and set-aside. Mr. Sharma, further contended that the learned Sessions Judge wrongly arrived at the conclusion that the petitioner-complainant had not issued the notice to the accused within the prescribed time after receipt of memo from the concerned Bank. He with a view to substantiate his aforesaid argument, invited attention of this Court to the letter Ext.CW1/B to demonstrate that Cooperative Bank had sent letter dated 21.9.2005 to the petitioner-complainant intimating therein with regard to receipt of bounced cheque amounting to Rs. 7 lacs on account of 'insufficient funds' from PNB Mair. Since cheque was received by hand, by the complainant on 21.9.2005, legal notice dated 19.10.2005**,** which stands duly proved on record as Ext.CW1/G, was served well within stipulated period. Mr. Sharma forcefully contended that in terms of the amendment carried out in Section 138(b) of the Act 1881 on 06.02.03, notice was required to be sent to the drawer of the cheque within a period of 30 days from the date of receipt of information from the Bank regarding the returning of the cheque and as such, immediately after receipt of information from the Bank on 21.9.2005, the complainant got served legal notice dated 19.10.2005. He argued that bare perusal of the statement of CW3 Sanjay Negi, the official of the Cooperative Bank, clearly suggests that cutting/over righting in date was made by the Manager of the Bank, who after correcting the date from 6th September, 2005 to 21st September, 2007 appended his signature. Mr. Sharma, also invited attention of this Court to that portion of the statement of CW3, wherein he stated that the signature appended on the intimation letter encircled with red ink and marked as Mark-W and Y are of the Manager, which were also identified by him. Hence, finding of sessions judge deserves to be quashed and set aside being wrong and contrary to the facts of the record.

4. Mr. Ajay Sharma, Advocate duly assisted by Mr. Amit Jamwal, Advocate, representing respondent No.1-accused supported the judgment passed by the learned First Appellate Court and stated that the same is based on correct appreciation of the evidence available on record. He forcefully argued that bare perusal of the impugned judgment suggests that while accepting the appeal preferred by respondent No.1-accused, learned sessions judge

has very meticulously dealt with each and every aspect of the matter and as such, no interference, whatsoever, of this Court is warranted in the present facts and circumstances of the case. During arguments having been made by him, Mr. Ajay Sharma, invited attention of this Court to the statement of CW3 Sanjay Negi to demonstrate that the Bank had sent intimation qua the bouncing of cheque on 6th September, 2005, which was duly received by hand by the complainant on 6.9.2005 itself. He also invited attention of this Court to the extract of the register of entries (Mark-Z), which shows that the complainant had received intimation on 6.9.2005 by hand. Bare perusal of statements of CW3, documents Ext.CW1B and Mark-Z clearly suggests that the complainant had received intimation qua the bouncing of the cheque on 6.9.2005 and as such, notice dated 19.10.2005 Ext.CW1G, was sent beyond the period of limitation i.e. 30 days after the receipt of intimation from the Bank. While refuting the arguments having been made on behalf of the complainant, that the date on letter Ext.CW1/B was corrected by the Manager who appended his signatures. Mr. Ajay Sharma, contended that since the complainant failed to examine the Manager, who allegedly corrected the date from 6th to 25th September, 2015, aforesaid version put forth on behalf of the complainant, cannot be accepted on its face value. While concluding his arguments, Mr. Ajay Sharma, submitted that this Court has very limited powers while exercising revisionary jurisdiction under Section 397 of the Cr.PC, especially when it stands proved on record that court below has dealt with each and every aspect of the matter very meticulously and as such, prayed for dismissal of the present criminal revision petition.

5. Reliance is placed upon the judgment passed by Hon'ble Apex Court in case ***State of Kerala*** *Vs.* ***Puttumana Illath Jathavedan Namboodiri*** (1999)2 Supreme Court Cases 452, wherein it has been held as under:-

> *"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 Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."*

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

7. True, it is that while exercising the power under Section 397 of Criminal Procedure Code, this Court has very limited power to re-appreciate the evidence available on record. But this Court solely with a view to ascertain that the judgment passed by the Courts below is not perverse and the same is based upon correct appreciation of evidence available on record, undertook an exercise to critically examine the evidence available on record to reach fair and just decision in the case.

8. 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*** *Vs.* ***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 herein below:-

> *"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."

9. It is undisputed that cheque in question amounting to Rs. 7 lacs was issued in favour of the complainant, which was returned back on account of "insufficient funds". Since the accused failed to make the payment in terms of the legal notice Ext.CW1/G got issued upon him by the complainant, wherein he was advised to make payment good within a period of 15 days from the date of receipt of it, the complainant initiated proceedings under Section 138 of the Act before the learned trial Court. Learned trial Court on the basis of evidence adduced on record, convicted and sentenced the accused (as mentioned supra) under Section 138 of the Act. However, learned appellate Court accepted the appeal preferred by the accused. Perusal of the impugned judgment suggests that learned Sessions Judge non suited the complainant on the ground of maintainability since he failed to issue statutory notice within a stipulated period as prescribed under Section 138 (b) of the Act and as such, this Court, with a view to ascertain the genuineness and correctness of the impugned judgment, would be confining itself to the finding returned by the learned Sessions Judge qua the issuance of legal notice after receipt of intimation from the bank by the complainant to the accused.

10. Close scrutiny of documents available on record suggests that vide Ext.CW1/C, PNB, Mair, Hamirpur, HP, sent copy of memorandum to the Co-operative Bank, enclosing therewith cheque Ext.CW1/A with observation "insufficient funds". Further perusal of documents Ext.CW1/B placed on record by the complainant suggests that the Cooperative Bank, Dharamshala, intimated the complainant regarding the memorandum received from the PNB. Vide communication dated Ext.CW1/B, Cooperative Bank informed the petitioner that cheque No. 269557 dated 15.8.2005 dated amounting to Rs. 7 lacs drawn at PNB Mair, Hamirpur, is returned as per objection memo of PNB Mair, Hamirpur, HP. As per the complainant, aforesaid intimation was received by him by hand on 21.9.2005. Immediately thereafter, before expiry of statutory period of 30 days, he got the legal notice issued upon the accused asking him to make payment good.

11. During the arguments, this Court had an occasion to peruse the record of the courts below, careful perusal of document Ext.CW1/B clearly suggests that there is over righting as far as date is concerned. Though, perusal of Ext.CW1/B suggests that the Manager, Cooperative Bank has appended his signatures while carrying out correction of date from 6.9.2005 to 21.9.2005 i.e. Mark-Y on document Ext.CW1/B, but interestingly, the complainant has nowhere examined the Manager of the Cooperative Bank to prove that he after carrying out correction of date on the document Ext.CW1/B, appended his signatures on it. Though, CW3, i.e. official of the Bank, while deposing before the court below stated that signature encircled with red ink i.e. Mark-Y on document Ext.CW1/B is of the Manager, Cooperative Bank but he nowhere stated that aforesaid Manager had carried out correction, if any, in his presence on the said document. Rather, careful perusal of his statement suggests that letter Ext.CW1/B was issued to the complainant on 6th September, 2005 because he categorically stated in his statement that the complainant received the document Ext.CW1/B on 6.9.2005 as per entry made in the extract of the Register i.e. Mark-Z. This Court also perused the documents Mark-Z available on court case file, which clearly suggests that the complainant had received the document Ext.CW1/B from the Bank on 6.9.2005 and cheque bearing No. 269557 to the tune of Rs. 7 lacs was received by the complainant namely Kartar Chand from the Cooperative Bank on 6.9.2005. After perusing extract

of register of entries Mark-Z, this court is satisfied that document Ext.CW1/B was dated 6.9.2005 and same was received by hand by the complainant on 6th September, 2005.

12. Now adverting to another contention raised by the counsel representing the petitioner-complainant that Manager Cooperative Bank himself carried out correction of date on document Ext.CW1/B from 6.9.2005 to 21.9.2005 and appended his signature; this court is unable to accept the aforesaid contention put forth on behalf of the complainant solely for the reason that the Manager, who allegedly changed/corrected the date from 6.9.2005 to 21.9.2005, was nowhere examined by the complainant to prove that letter Ext.CW1/B was dated 21.9.2005. Since, the petitioner-complainant failed to examine the Manager of the Bank, who allegedly carried out correction on the document in question, this Court sees no illegality and infirmity in the impugned judgment passed by the learned Sessions Judge, where he concluded that controversy has been put to rest by CW3 Sanjay Negi, Junior Clerk of Cooperative Bank by specifically stating that cheque has been received back by the petitioner-complainant on 6.9.2005 by putting his signature on Ext.PW3/C. Had the petitioner-complainant examined the Manager of the said Bank to prove the correction, if any, this Court would have lent some credence to the statement of the complainant but in the absence of the statement, if any, of the Manager , qua the alleged correction, this court really finds it difficult to accept the aforesaid contention put forth on behalf of the petitioner-complainant. Once it stands proved on record that the intimation letter i.e. Ext.CW1/B from bank intimating therein dishonoring of the cheque was received by the complainant on 6.9.2005, the complainant was expected to get legal notice issued within 30 days in terms of the Section 138(b) to the accused asking/calling him to make the payment from the date of receipt of intimation dated 6.9.2005.

13. In the facts and circumstances, this Court does not see any reason to interfere with the well reasoned judgment passed by the learned sessions Judge, who has rightly concluded while accepting the appeal of the accused that cheque was returned to the complainant on 6.9.2005 as having been bounced with “insufficient funds”. Under Section 138 (b) of the Act, the complainant is/was required to issue notice to the accused intimating about the dishonoring of the cheque and calling him to make the payment of the amount within 30 days from the receipt of the notice. In the instant case, it stands duly proved on record that intimation from the Bank was received by the complainant from 6.9.2005, whereas he got legal notice issued on 19.10.2005 i.e. definitely after the statutory period of 30 days.

14. Consequently, in view of the aforesaid discussion, this court sees no illegality and infirmity in the judgment passed by the learned First Appellate Court, and as such, calls for no interference of this Court as the same is based upon the correct appreciation of evidence available on record. Hence, the instant criminal revision petition is dismissed being devoid of any merit.

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

Raj Dulari and Ors. .....Appellants.

Versus

Rajinder Singh .....Respondent.

RSA No.87 of 2005

Date of Decision: 23.8.2016

Specific Relief Act, 1963- Section 5- Plaintiff claimed that he is owner in possession of the suit land – defendant got entered his name as Kabiz and raised construction over a portion of the suit land – the defendant pleaded adverse possession – suit was decreed by the trial Court- an appeal was filed, which was dismissed- held, in appeal that defendant had applied for cement permit in the year 1983- the predecessor of the plaintiff was recorded to be owner of the suit land- there is no period of limitation for filing the suit on the basis of title – long possession is not equivalent to

adverse possession – further, the plea of adverse possession was dropped by his counsel – the Court had rightly decreed the suit – appeal dismissed. (Para-8 to 14)

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

For the Appellants: Mr. Dilip K. Sharma, Advocate.
For the respondent: Mr. Ajay Sharma, Advocate, for the respondent.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant regular second appeal filed under Section 100 of CPC is directed against the judgment and decree dated 4.12.2004, passed by the learned District Judge, Una, HP, in Civil Appeal No. 97/2003, affirming the judgment and decree dated 15.9.2003, passed by learned Sub Judge, Ist Class, Court No.II, Amb, District Una, HP, in Case No. 187/2000, whereby suit filed by the present respondent (hereinafter referred to as "the plaintiff") has been decreed for possession of the suit land by demolishing constructed area marked by letters A to G in site plan Ext.PW1/A.

2. Briefly stated facts as emerged from the record are that the Plaintiff filed suit for decree of possession in the Court of learned Sub Judge, Ist Class, Court No. II, Amb, District Una, HP, qua area measuring 0-00-65 Hects. bearing khewat No. 324 min, Khatauni No. 634, Khasra No.400 as per copy of Missal Hakiat for the year 1989 - 90 situated in Up Mohal Ghanari Brahminan Changan, Tehsil Amb, Distruct Una, H.P., (In short 'the suit land') by demolishing constructed area as shown yellow in colour marked by letters A to G. The plaintiff claimed that the suit land was owned and possessed by his father namely deceased Partap Singh along with other co-sharers and has been succeeded by him along with other brothers being sons and LRs of Devinder predeceased son of Partap Singh. Plaintiff claimed that defendant has no right, title and interest in the suit land and defendant in connivance with the lower revenue staff got entered his name in the revenue record as Kabiz through missal No. 270/88 of S.N. T. Gagret at his back and later on about 10 years' ago forcibly at his back raised construction over the portion marked by letters A to G in the site plan. Defendant was called many a times to admit the claim of the plaintiff but same was not admitted and a week ago, he refused to admit the claim of the plaintiff and thus, plaintiff was compelled to file the suit, whereas the defendant by way of written statement, while refuting the claim put forth on behalf of the plaintiff, took specific objections qua the maintainability, non-joinder of necessary party, estoppel, limitation and locus-standi. Defendant denied the case of the plaintiff in toto by stating that during settlement in the village, plaintiff's father with the active connivance of the settlement field staff got prepared the wrong record by increasing the Karukans of the adjoining land and procured wrong record of the ownership in his favour. Moreover, the defendant constructed a shop over the suit land in the year, 1980, in the presence of the plaintiff, who never objected qua the same till filing of the suit. Defendant claimed that since then, he had been continuously watching, seeing and allowing the alleged construction and business of the shop and hence, he is estopped by his own act and conduct to file the suit. However, defendant in written statement stated that in case, plaintiff succeeds in proving his title on the basis of wrong record prepared by the settlement field staff, in that eventuality, suit of the plaintiff is not maintainable as the same is time barred and has lost title as defendant since 1980 is coming in continuous and unobstructed possession with the knowledge of the plaintiff and as such, defendant claimed himself to have become owner by way of adverse possession. Defendant further averred that plaintiff in year, 1984 asserted his right in presence of the respectable persons of the area but since no steps were taken for the recovery of possession, he is not entitled for the possession of the suit land. In view of the aforesaid background, learned trial court framed seven issues. Learned court on the basis of pleadings as

well as evidence adduced on record decreed the suit of the plaintiff for possession of the suit land by demolishing the constructed area marked by letters A to G in site plan Ext.PW1A. Being aggrieved and dissatisfied with the aforesaid judgment and decree, defendant/appellant filed an appeal before the Court of learned District Judge, Una, who vide judgment and decree dated 4.12.2009 dismissed the appeal preferred on behalf of the present appellant/defendant, as a result of which, judgment and decree passed by the learned trial Court was upheld. Hence, present regular second appeal, before this Court.

3. This Court vide order dated 6.7.2005 admitted the present Appeal on Substantial questions of law framed at Sr. Nos. 1 and 2, which are reproduced herein below:-

1. Whether the Ld. Courts below have erred in law by not dismissing the suit of the plaintiff as being beyond limitation in view of oral evidence and documents Ex.D-1/A, DW-1/B and DW-4/A?

2. Whether the findings that the presumption of truth attached to Ext.P-1, Missal Haquit for the year 1988-89, stood rebutted is sustainable in the absence of any cogent and convincing evidence to the contrary?

4. Mr. Dilip K. Sharma, Advocate, appearing for the appellants, vehemently argued that the Impugned judgment and decrees passed by the courts below are against law and facts and as such, deserves to be quashed and set-aside. Mr. Sharma, vehemently argued that bare perusal of the impugned judgments and decrees clearly suggests that the Courts below have misconstrued and misapplied the provisions of the Code of Civil Procedure, Limitation Act and H.P. Land Revenue Act, as a result of which, great prejudice has been caused to the present appellant. It is further contended on behalf of the appellant that learned District Judge failed to consider the material fact that the learned trial Court had failed to frame complete and proper issues arising out of respective pleadings of the parties. He also stated that learned trial Court also failed to record separate findings on separate issues, which has prejudiced the case of the appellant/defendant. With a view to substantiate aforesaid arguments having been made by him, Mr. Sharma, invited attention of this Court to issue No. 6-A framed by the Court to demonstrate that learned trial Court failed to record any finding on issue No. 6-A on erroneous ground that counsel for the defendant had dropped plea of adverse possession. As per counsel representing the appellant, there was enough/sufficient evidence available on record to prove the plea of adverse possession and as such, finding returned by the learned trial Court qua issue No. 6-A deserves to be quashed and set aside being contrary to the evidence available on record. Mr. Sharma strenuously argued that courts below have fallen in grave error by upholding the finding of learned trial Court on issues No. 4 and 5 regarding estoppel and limitation. To substantiate his arguments, Mr. Sharma invited attention of this Court to the statement of PW3 Granthi Ram, who in his examination-in-chief stated that the shop of the appellant-defendant was 12 years' old. Similarly, PW2 admitted that shop of defendant was having an electricity connection. Mr. Sharma also invited attention of this Court to the statement of PW4 Sukhdev Singh, Official Witness from the Electricity Board, who deposed that electricity meter in the name of defendant-appellant Goverdhan Singh was installed on 23.5.1984. Mr. Sharma, forcefully contended that there was overwhelming evidence adduced on record by the present appellant, which could lead to a conclusion that the plaintiff-respondent failed to avail remedy, if any, within the prescribed period of limitation qua the suit for possession. He contended that finding returned by the Courts below qua the issue of limitation and estoppels is erroneous and unsustainable in the eye of law. Mr. Sharma further argued that the learned District Judge has fallen in grave error by upholding finding of learned trial Court on issue No. 1, wherein it came to conclusion that the plaintiff rebutted the presumption of truth attached to document Ext.P1 i.e. Missal Haquit for the year, 1988-89, wherein the defendant was shown to be Kabiz over the suit land. As per document having been placed on record by the plaintiff, no cogent and convincing evidence was brought on record by the plaintiff to rebut the presumption of truth attached to it and as such, finding of the trial Court that the revenue record is not clinching evidence to hold the existence of the shop over the suit land prior to 1988-89 is purely conjectural and unsustainable in the eye of law. While concluding his arguments, Mr. Sharma, contended that the courts below have

committed error in law by decreeing the suit for possession of the plaintiff of the suit land by demolishing the construction raised thereon without there being any expert evidence on record to the effect that the shop of the defendant was situated on the suit land. Hence, in the absence of any expert evidence, the suit was liable to be dismissed. In the aforesaid background, Mr. Sharma, prayed for setting aside and quashing of the judgment passed by the courts below.

5. Mr. Ajay Sharma, Advocate, representing the respondent supported the judgment passed by the Courts below. He forcefully argued that bare perusal of the judgment passed by both the courts below suggests that same are based upon the correct appreciation of evidence available on record and as such, no interference, whatsoever of this Court, is warranted in the facts and circumstances, where it stands duly proved on record that courts below, while accepting the suit filed by the plaintiff, has dealt with each and every aspect of the matter very meticulously. Mr. Ajay Sharma, also contended that this Court while exercising power under Section 100 CPC has very limited power to re-appreciate the evidence led on record by the respective parties, especially when both the courts below have returned concurrent findings of facts as well as law. To substantiate his aforesaid arguments, Mr. Ajay Sharma placed reliance on the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,* (2015)4 SCC 264.**

6. Mr. Ajay Sharma, apart from above, also contended that it stands duly proved on record that defendants carried out construction of the shop over the suit land after 1983. He was unable to prove on record by leading cogent and convincing evidence that he constructed the shop over the suit land prior to year, 1980 and there is no force, whatsoever, in the contention put forth by the counsel for the appellant that suit was beyond period of limitation. With a view to substantiate his aforesaid contention qua the limitation, Mr. Ajay Sharma, made this Court to travel through the evidence led on record by the defendant himself, where DW4 Sukhdev Singh, Senior Assistant Electricity Board, proved on record electricity bills along with its receipt and plan of shop. Defendant also placed on record affidavit Ext.DW1/A along with Application Ext.DW1/B, which shows that during year, 1983, defendant had applied for levy cement. With a view to substantiate his aforesaid argument, Mr. Ajay Sharma, also invited attention of this Court to the oral statement made by the defendant witness to demonstrate that even witnesses cited by the defendant were not able to prove that construction, if any, of the shop was carried out during the year 1980, and as such, claim put forth on behalf of the defendant in written statement that he had carried out construction of shop in 1980 was rightly not accepted by the courts below. Mr. Ajay Sharma, also invited attention of this Court to that portion of the statement of the defendant, wherein he claimed that with the passage of time, he has become owner by way of adverse possession. Defendant (DW-1) in his statement stated that in the year 1984, he asserted his right in the presence of respectable persons and no steps were taken towards the recovery of possession by the plaintiff, hence, he is not entitled for possession of suit land.

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

8. This Court would be taking up substantial question No.1 as referred above, for consideration at the first instance and solely with a view to explore answer to the same, would be referring to the documents Ext.DW1/A, Ext.DW1/B and Ext.DW4/A. Ext.DW1/A is an affidavit tendered in evidence by the defendant Goverdhan Dass. The contents of affidavit suggest that defendant on 16.2.1983 intended to construct residence cum shop on the suit land and in that regard, he applied for levy cement. In affidavit, he stated that if the levy cement is granted to him, he would not undertake any expansion on the said residential cum shop beyond 120 sq.meters for a period of five years from the day of completion of said house. Ext.DW1/B is application for cement permit, perusal of which suggests that vide application dated 16.2.1983 defendant applied for cement permit. Ext.DW4/A is the receipt issued by the HP State Electricity Board dated 9.4.1984 suggestive of the fact that Electricity Board had received an amount of Rs. 73/- for installation of electricity meter on 9.4.1984. While exhibiting aforesaid documents, defendant made an attempt to prove that he started construction of residential cum

shop on the suit land in year, 1983. The appellant defendant tendered in evidence affidavit Ext.DW1A as referred above, to suggest that that he laid foundation of the shop in 1980 and lintel was laid in the year, 1983. Careful perusal of recital made in the affidavit suggests that defendant applied for levy cement specifically undertaking therein that he would not undertake any expansion of residential cum shop beyond 120 sq.meters for a period 5 years from the date of completion of said house. It appears that by way of tendering aforesaid documents in evidence, defendant made an attempt to prove that shop in the suit land came into existence over the suit land in 1984 but plaintiff did not take any action to get the recovery of possession till filing of present suit dated 5.9.2000, meaning thereby, suit is completely time barred in terms of Article 64 of the Limitation Act, 1963. As per Article 64 of the Limitation Act, suit if any, for possession of immovable property based on previous possession and not on title, could be filed within a period of 12 years from the date of dispossession. It would be profitable to reproduce Article 64 of the Limitation Act, 1963, herein below:-

Article 64 of the Limitation Act, 1963

Description of suit	*Period of limitation*	*Time from which period begins to run*
64. For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed.	*Twelve years*	*The date of dispossession.*

Careful perusal of Article 64 supra, clearly suggests that suit for possession of immovable property based on previous possession and not on title can be filed within 12 years from the time of dispossession.

9. In the present case, as emerged from the plaint, the plaintiff filed suit under sections 5 and 38 of the Specific Relief Act and under Section 9 CPC for possession of area measuring 0-00-65 hects. bearing khewat No. 324 min, Khatauni No. 634 Khasra No. 400 as entered in Misal Hakiat situated in Up-Mohal Ghanari Brahminan Changan, Tehsil Amb, District Una, HP, by demolishing the construction as shown yellow in colour marked by letters A to G. The plaintiff in the plaint specifically stated that the land described herein above was previously owned and possessed by his father Partap Singh and after his death, he was succeeded by plaintiff being son and other brothers being sons and LRs of Devinder Singh i.e. predeceased son of Partap Singh. Ext.P1 is Misal Hakiat Bandobast for the year, 1988-89, perusal whereof clearly suggests that Partap Singh, predecessor-in-interest of the plaintiff was recorded as owner of the suit land, whereas defendants have been shown in possession of the land. Careful perusal of aforesaid document Ext.P1 clearly shows that predecessor–in-interest of the plaintiff stood recorded as owner of the suit land. Similarly, perusal of Ext.P3 i.e. for the year 1994-95 suggests that after the death of Partap Singh, who was recorded owner of the land in Ext.P1 Missal Hakiat for 1988-89, plaintiff Rajinder Singh along with other LRs of Partap Singh entered into the shoes of late Partap Singh. Careful perusal of Exts.P1 and P3 placed on record duly exhibited on record clearly suggest that the plaintiff is owner of the suit land after death of his father. In view of above, this Court sees no force in the contention put forth on behalf of the counsel representing the appellant-defendant that no suit for possession of immovable property could be entertained by the courts below after 12 years from the date of dispossession as provided under Article 64 of Limitation Act, 1963.

10. At the cost of repetition, it may be stated that Section 64 provides limitation of 12 years for filing suit for possession of immovable property based on previous possession and not on title. But in the instant case, the plaintiff by way of placing on record Exts.P1 and P3 has

successfully proved on record that they are owner of the suit land, which is sought to be recovered by filing of suit for recovery of possession. Since, the plaintiff filed suit for possession of immovable property on the basis of title, which stands duly proved in terms of Exts.1 and 3, plea of limitation as raised by appellant-defendant is not otherwise tenable and same has been rightly rejected by the courts below. Defendant by way of placing reliance by the Ext.DW1,A, DW1/B and DW4/A, as has been referred above, made an attempt to demonstrate that residential cum shop was constructed by him in the Year, 1983-84 on the suit land in the presence of plaintiff but no steps whatsoever, were taken by him to recover the possession by way of filing the suit. Though, in written statement, defendant specifically stated that he constructed the shop over the suit land in 1980 but the evidence tendered supra is suggestive of the fact that he raised construction of residential cum shop on the suit land in the year, 1983-84. Bare perusal of the exhibits clearly suggests that stand taken by him that he raised constructed shop in the year, 1983, is incorrect and contrary to the documentary evidence adduced on record and as such, was not rightly relied upon by the courts below.

11. Apart from above, defendant-appellant with a view to stand taken by him in the written statement, examined himself as DW1 and stated that suit land is comprised in khasra No. 3219, which was converted into khasra No. 400 during consolidation. He stated that on eastern side of the same is the land of Partap Singh comprised in khasra No. 3217 and towards west, is khalwara of Sant Ram. He also stated that on south is the road and towards north is his land, which comprises of khasra No. 3216. DW1 in his evidence, tendered by way of affidavit stated that he laid foundation of the shop in the year, 1980 and lintel was laid in 1983. He also stated that in the year, 1984, the plaintiff made claim upon the shop but he did not take any action till the filing of the present suit. The defendant also stated that he has become owner by way of adverse possession. At this stage, if the aforesaid statement of defendant is examined vis-à-vis stand taken by him in written statement, it clearly emerges that defendant was unable to state specific date, month time when plaintiff made claim upon the shop by way of adverse possession. Similarly, defendant in written statement stated that he raised construction over the shop in the year, 1980 in presence of plaintiff and since then, plaintiff never objected to such construction of the defendant and as such, he is in continuous and unobstructed possession with the knowledge of the plaintiff by way of adverse possession. On the other hand, defendant by way of placing on record document Ext.DW1/A made attempt to prove that he started the construction in the year, 1983-84, bare perusal of which clearly suggests that defendant appellant had applied for levy of cement in the year, 1983-84 and as such, it is not understood which of version put forth on behalf of the defendant is correct because in written statement, he claimed that he started construction of shop over the suit land in 1980, whereas in the documents referred supra, which were relied upon by him during trial, he attempted to prove that construction was started by him in 1984. Similarly, it emerged from the record that though, defendant appellant in written statement raised plea of acquiring title by way of adverse possession but plea of adverse possession contained in written statement was dropped by the counsel representing the appellant defendant Moreover, DW1 save and except making statement that he become owner by way of adverse possession has not been able to prove on record that in what manner he acquired the title by way of adverse possession. Though defendant stated that he is coming in continuous and unobstructed possession with the knowledge of the plaintiff but no cogent and convincing evidence was ever led on record by him to prove aforesaid factum of acquiring title by way of adverse possession. Since plea of adverse possession was dropped on behalf of the defendant, courts below rightly came to conclusion that defendant was not able to show his entitlement to the suit land by denying the title of the plaintiff.

12. Similarly, DW2 Manohar Lal on affidavit stated that he had done work as labourer in the year, 1983 on the shop while laying lintel of the shop in question. Though in his statement, he stated that when the lintel of the shop was being laid in 1983, foundation was already laid. Close scrutiny of aforesaid witness, DW2 Manohar Lal nowhere suggests that the shop was constructed in the year, 1980, rather, this witness categorically stated that he worked as labourer in 1983 while laying lintel of the said shop, meaning thereby, lintel, if any, was laid in

the year, 1983. Defendant also examined Sukhdev Singh, Senior Assistant Electricity Board along with Ranvir Singh Clerk. Aforesaid witness while proving document Ext.DW4/A categorically admitted in his cross-examination that there is no mention of khasra number over which, said shop is existing. Defendant by placing record Ext.DW4/A made an attempt to demonstrate that shop was already in existence in year, 1983-84. But admittedly, defendant nowhere led positive evidence on record to suggest that shop in which, electricity meter Ext.DW4/A was installed, existed over khasra No. 400 (old 3127). DW3 Sanjeev Kumar exhibited site plan and Ranvir Singh verified the signature Ext. DW1. But careful perusal of the aforesaid documents, as has been discussed in detail above, nowhere suggests that construction, if any, of shop was carried out in the year 1980, rather, aforesaid documents clearly suggests that construction on shop if any, started in the year, 1983-84. Plaintiff with a view to prove that cause of action accrued to him 10 years back from filing suit, examined PW1 Tarlok Chand, who categorically proved the site plan Ext.PW1/A. Plaintiff himself examined as PW2 and cross-examination of PW2 suggests that defendant himself put suggestion to the plaintiff that shop was raised about 10 years back, which suggestion was admitted by the plaintiff. Plaintiff in his cross examination specifically admitted that shop in question was raised about 10 years ago, whereas plaintiff by placing document Ext.PW1 was successful in proving that he being owner of the suit land is entitled for recovery of the possession of the suit land from defendant, who is a trespasser. Though, defendant in written statement as well as his statement stated that during settlement in village, plaintiff's father with active connivance of revenue staff got wrong revenue record prepared of adjoining land and procured ownership but this Court was unable to find out any evidence, be it ocular or documentary, led on record by the defendant corroborative of aforesaid stand taken by the defendant in the written statement. Similarly, defendant claimed that he constructed shop over the suit land in 1980 in the presence of plaintiff, who never objected about the same and claimed title on the basis of adverse possession but as has been discussed above, no evidence, whatsoever, was led on record to prove that the plaintiff acquired ownership by way of adverse possession, rather, careful perusal of the record suggests that at later point of time, defendant himself dropped the plea of adverse possession.

13. Now, adverting to substantial question No. 2 i.e. " *Whether the findings that the presumption of truth attached to Ext.P-1, Missal Haquit for the year 1988-89, stood rebutted is sustainable in the absence of any cogent and convincing evidence to the contrary?"* Careful perusal of the aforesaid question of law clearly suggests that same has been framed on the basis of finding returned by the trial Court, wherein learned trial Court while concluding that evidence led by defendant about construction of shop over the suit land since 1980 does not appear to be consistent cogent and convincing, observed that "presumption attached to document Ext.P-1 stands rebutted and it is held that suit shop was constructed by the defendant about ten years ago." It appears that aforesaid expression i.e. "presumption attached to document Ext.P-1 stands rebutted" is a typographical mistake because if Para-14 of the judgment passed by the learned trial Court is read in its entirety, intention of trial Court can be gathered whereby it intended to state that "presumption of truth attached to document Ext.P1 stands un-rebutted." Probably trial Court in view of the specific finding returned by it 'that evidence led by the defendant about construction of shop over the suit land since 1980 as averred in the written statement, does not appear to be consistent, cogent and convincing,' intended to conclude that "presumption of truth attached to document Ext.P-1 stands unrebutted". Had the learned court below come to conclusion that presumption attached to document stands rebutted, suit filed by the plaintiff could not be decreed in any circumstance. Because, entire case for recovery of possession filed under Sections 5 and 38 of Specific Relief Act filed by the plaintiff, was based upon Ext.P1, as discussed above, plaintiff placed reliance on Ext.P-1 to suggest that predecessor–in-interest of the present plaintiff was entered as owner of the suit land and after his death, he became owner of the suit land. At this stage, it is important to point out that defendants in written statement denied the ownership of plaintiff by stating that plaintiff's father with active connivance of revenue officials got the Karukans changed and got him recorded as owner qua the suit land. In the aforesaid background, plaintiff had only relied upon document Ext.P1 to demonstrate that he is the owner of the suit land. Otherwise also, close-scrutiny of the judgment passed by the

learned trial court nowhere suggests that it had intended to return the finding that presumption of truth attached to document Ex.P1 stands rebutted and as such, this Court has no hesitation to conclude that there has been some typographical mistake regarding aforesaid finding qua the presumption of truth attached to document Ext.P1 and as such, questions No.1 and 2 are answered accordingly.

14. 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 passed by the Hon'ble Apex Court in ***Laxmidevamma's case*** *supra***,** which reads as follows**:-**

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

15. Consequently, in view of the aforesaid discussion, this court sees no reason to interfere with the well reasoned judgments passed by the courts below as the same are based upon the correct appreciation of evidence available on record. Hence, the instant regular second appeal is dismissed being devoid of any merit.

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

Cr. Revision No.151 of 2006
a/w Cr.R. No. 8 of 2007
Date of Decision: 6.9.2016.

1. Cr. Revision No.151 of 2006

Dev Raj .....Petitioner.

Versus

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

2. Cr. Revision No.8 of 2007

Vivek Dutt and Anr. .....Petitioners.

Versus

State of H.P. and Anr. .....Respondents.

Punjab Excise Act, 1914- Section 61(1)(a)- Accused was found in possession of 144 bottles of Patiala Orange- the accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that Court has limited power to appreciate the evidence in exercise of revisional jurisdiction- 12 bottles were sent for analysis and therefore, the prosecution has proved that 12 bottles were containing liquor- accused was carrying 6 bottles beyond permissible limit and the appeal is maintainable under Section 378 (1)(a) of Cr.P.C –there are contradictions in the statements of prosecution witnesses- no FIR number was put upon the

12 boxes stated to have been recovered which makes the story of recovery doubtful – the prosecution case was not proved beyond reasonable doubt- accused acquitted. (Para-9 to 25)

Cases referred:
State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452
Krishnan and another Vs. Krishnaveni and another, (1997) 4 Supreme Court Case 241
State of HP v. Jagjit Singh, Latest HLJ 2008 (HP) 919
State of Rajasthan v. Gopal, 1998 (8) SCC 499
Nanha v. State of H.P., Latest HLJ 2011 (HP) 1195

For the petitioner(s):	Mr. Ashish Jamalta, Advocate vice counsel, for the petitioners, in both the petitions.
For the respondent(s):	Mr. Rupinder Singh Thakur, Additional Advocate General, with Mr. Rajat Chauhan, Law Officer, for the State. Mr. Ramakant Sharma, Advocate, for respondents No. 2 and 3, in Cr.R. No. 151 of 2006.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral).*

Since both these criminal revision petitions have been filed against the common judgment, this Court has taken them together for final disposal with the consent of the learned counsel for the parties.

2. Present criminal revision petitions filed under Sections 397/401 of the Cr.PC read with Section 482 of the Cr.PC, are directed against the judgment of conviction and sentence dated 2.12.2006, passed by learned Sessions Judge, Kangra at Dharamshala, in Criminal Appeal No. 24-G/X-2006, affirming the judgment dated 31.5.2006, passed by the learned Judicial Magistrate, 1st Class, Court No. 2, Dehra, District Kangra-HP, in Criminal Case No. 44-III/2004, whereby the accused-petitioners (in both the petitions), have been sentenced to undergo rigorous imprisonment for a period of six months and to pay fine of Rs. 500/- each, and in case of default, to undergo simple imprisonment for a period of one month, for the commission of offence punishable under Section 61 (1) (a) of the Punjab Excise Act, 1914, (In short "the Act"), as applicable to the State of Himachal Pradesh.

3. Briefly stated facts as emerged from the record are that on 27.5.2004, when ASI Geeta Parkash along with other police personnels, was on patrolling/checking duty at Dohag Dehrian National Highway, at about 1:30 am, they intercepted a vehicle coming from Ranital side. Though, driver of the vehicle tried to evade the barrier but was restrained by the police jeep. As per prosecution story, vehicle was bearing registration No. HP-01D-2537, wherein three persons including driver were sitting. The driver disclosed his name as Dev Raj, while the other co-accused told their names as Vivek Dutt and Darshan Singh. Police on checking of the vehicle, recovered cartons of the liquor lying in the rear of the vehicle, wherein 144 bottles of "Patiala Orange" 750 ml. each were found without any permit/licence. As per prosecution story, police after recovery of aforesaid bottles, separated 12 bottles, one from each carton for drawing samples for chemical test. Police sealed the drawn samples with seal 'J' and the sample of seal was also retained. Police while taking recovery of liquor into possession also impounded the aforesaid vehicle in the presence of witnesses namely Constable Rakesh Kumar and Constable Pardeep Kumar. After the aforesaid recovery, Rukka was prepared and sent to the Police Station Jawalamukhi for registration of FIR under the aforesaid Act and Endorsement qua the registration of FIR was made. Police also procured spot map and recorded the statement of witnesses under Section 161 of Cr.PC. After recovery of the contraband, case property was deposited with MHC Thakru Ram and thereafter, sample bottles and seal impressions were sent

through Constable Rakesh Kumar to the CTL Kandhaghat, from where chemical report vide Ext.PW5/D was received, wherein it was revealed that each sample of country liquor had 49.0% proof of alcohol strength. Police on the basis of material adduced by it, prepared challan and presented the same in the court of learned JMIC, Court No.2, Dehra, District Kangra, HP.

4. Learned trial Court after satisfying itself that prima facie case exists against the accused persons put a notice of accusation, to which they pleaded not guilty and claimed trial. Learned trial Court on the basis of evidence adduced on record by the prosecution, found the accused guilty of having committed offence under the Act and accordingly, convicted and sentenced the accused persons, description whereof, as already been given above.

5. The present petitioners-accused being aggrieved with the judgment of conviction passed by the learned trial Court, filed an appeal under Section 374 (2) of Cr.PC before the Court of learned Sessions Judge, Kangra at Dharamshala, HP, who vide judgment dated 2.12.2006, dismissed the appeal. Hence, this criminal revision petition before this Court.

6. Mr. Ashish Jamalta, learned counsel, representing the petitioners vehemently argued that the judgments passed by both the courts below are not sustainable and same deserve to be quashed and set-aside as the same are not based upon the correct appreciation of evidence available on record. Mr. Jamalta, contended that the courts below while passing the judgments have acted with material irregularities as is evident from the bare perusal of the impugned judgments. With a view to substantiate his aforesaid argument, Mr. Jamalta, invited attention of this Court to the judgment passed by the learned trial Court to demonstrate that evidence led by the prosecution has been not dealt with by the courts below in its right perspective, rather, court below has returned finding of conviction on mere conjectures and surmises and as such, great injustice has been caused to the petitioners who have been convicted under Section 61 (1) of the Act. He further contended that the courts below have miserably failed to appreciate that prosecution was not able to prove the most essential ingredient of the conscious possession of the alleged liquor from the accused. Similarly, he stated that there is no sufficient compliance of Section 104 of the Cr.PC because no independent witness was associated in accordance with law. He stated that it is an admitted case of the prosecution that they had prior knowledge that accused persons are carrying liquor in the vehicle and as such, they ought to have associated independent witnesses to prove the recovery of liquor, if any, from the conscious possession of the accused. Mr. Jamalta forcefully contended that bare perusal of the depositions made by the witnesses adduced on record by the prosecution itself suggests that there are major contradictions and same could not be accepted on its face value in the absence of some independent witnesses. It is also contended on behalf of the petitioners that the case of the prosecution is that based on some information, police intercepted the vehicle but there is nothing available on record, wherefrom it could be inferred that police intercepted the vehicle on the basis of some secret information. Mr. Jamalta, strenuously argued that though story of prosecution vis-à-vis recovery of liquor is itself un-believable because country liquor is never packed in cartons but only in kattas. Moreover, as per prosecution, only 12 bottles (one from each carton) were separated for chemical test, meaning thereby, only 12 bottles were sent for the analysis and as such recovery if any, of liquor can be said of 12 bottles only because none of other remaining bottles were sent/examined, hence, it can only be concluded that police had recovered only 12 bottles of country liquor from the possession of three persons and as such, no offence can be said to have been committed by the petitioners-accused. Mr. Jamalta vehemently argued that it was incumbent upon the police to get all the recovered bottles chemically analyzed to ascertain the nature of material packed in the bottles. Since 12 bottles were sent for chemical analysis, recovery, if any, made by police is only of 12 bottles and as such, no case is/can be made out against the accused and entire recovery is vitiated with the aforesaid omission of the police. In the aforesaid background, Mr. Jamalta prayed that the petitioners-accused deserve to be acquitted of the charges framed against them after setting aside and quashing the impugned judgments of conviction passed by the Courts below.

7. Per contra, Mr. Rupinder Singh Thakur, learned Additional Advocate General, duly assisted by Mr. Rajat Chauhan, Law Officer, appearing for respondent No.1-State vehemently argued that bare perusal of the judgments passed by the courts below suggests that same are based upon the correct appreciation of the evidence adduced on record by the prosecution and as such, same deserve to be upheld. Mr. Thakur, made an attempt to demonstrate that prosecution was able to prove beyond reasonable doubt that 144 bottles of the country liquor were recovered from the conscious possession of three persons at the time of interception of the vehicle. While refuting the contention put forth on behalf of the counsel representing the petition that entire recovery is vitiated since all bottles allegedly recovered from the possession of the petitioners accused were not sent for chemical analysis, Mr. Thakur argued that 12 bottles (one each from 12 cartons) separated for drawing samples were sufficient enough to prove the content and nature of the bottles and as such, there is no illegality whatsoever, committed by the police while sending only 12 bottles of the samples. As per Mr. Thakur, only purpose of drawing samples is to confirm the contents of alcohol contained in the bottles recovered by the police, which fact could be sufficiently proved by only sending of 12 bottles only. Since chemical analyst in its report specifically opined that it contained 49.0 % alcohol, which was sufficient for police to prove on record that accused were carrying 144 bottles of liquor without there being permit/licence. Similarly, Mr. Thakur stated that case of prosecution could not be brushed aside solely for the reason that no independent witness was associated by the police at the time of recovery because admittedly recovery, if any, was effected at very odd hours i.e. at 1:30 am. Mr. Thakur, stated that since vehicle was intercepted during the night between 26th May and 27 the May, 2004 by the police after laying naka near Dohag Dehrian, no independent witness/person could be associated and as such courts below rightly concluded that non-citing of independent witness is not fatal to the case of the prosecution. Mr. Thakur further stated that had the police waited for independent witnesses, present petitioners accused would have fled away with the contraband and as such, there is no force in the contention put forth on behalf of the accused. While praying for dismissal of the present petition, Mr. Thakur, vehemently argued that courts below have dealt with each and every aspect of the matter very meticulously and as such, no interference whatsoever, of this Court is warranted in the facts and circumstances of the case, especially when both the courts have returned concurrent findings. He further stated that this Court has very limited powers while exercising its revisionary powers under Section 397 of the Cr.PC to re-appreciate the evidence when it stands duly proved on record that the courts below have dealt with each and every aspect of the matter very meticulously. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in case ***State of Kerala*** *Vs.* ***Puttumana Illath Jathavedan Namboodiri*** (1999)2 Supreme Court Cases 452, wherein it has been held as under:-

> *"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 Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."*

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

9. True, it is that while exercising the power under Section 397 of Criminal Procedure Code, this Court has very limited power to re-appreciate the evidence available on record. But in the present case, where accused has been found guilty having committed offence under Section 61 (1) (a) of the Punjab Excise Act, as applicable to the State of HP, this Court

solely with a view to ascertain that the judgments passed by both the Courts below are not perverse and same are based upon correct appreciation of evidence available on record, undertook an exercise to critically examine the evidence available on record to reach fair and just decision in the case.

10. 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*** *Vs.* ***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 herein below:-

> *"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."*

11. In the present case, prosecution with a view to prove its case beyond reasonable doubt examined as many as five prosecution witnesses. Courts below also examined petitioners-accused under Section 313 of the Cr.PC, wherein they pleaded innocence and claimed trial. However, they did not lead any evidence in their defence.

12. During the proceedings of this case, this Court had an occasion to peruse entire evidence led on record, it clearly emerges that on 26/27.5.2004, police intercepted the vehicle bearing No. HP 01D-2537, wherein petitioners accused were found sitting with 12 cartons of country liquor. It is an admitted case of the prosecution that after recovery of aforesaid cartons of country liquor, 12 samples of bottles one each from 12 cartons were sealed along with specimen seal 'J' for sending the same to CTL Kandhaghat. Chemical examiner opined that samples contained 49.0 percent liquor strength. At this stage, it would be profitable to refer to the judgment passed by this Court in ***State of HP v. Jagjit Singh, Latest HLJ 2008 (HP) 919*** wherein this Court has observed in paras 6 and 7 as under:-

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

The aforesaid judgment clearly suggests that before convicting the accused for offence qua which, they were charged it was incumbent upon the prosecution to prove that they were in actual and conscious possession of the illicit liquor in excess of the prescribed limit. In the instant case, as emerged from the record that 12 cartons containing 12 bottles each were allegedly recovered from the conscious possession of the present petitioners-accused but interestingly, only one bottle each from 12 cartons was retained as sample and sent for opinion of chemical analyst. Now, if action of police in sending only 12 bottles and 144 bottles for chemical analysis/examination is tested in light of aforesaid judgment passed by the Co-ordinate Bench of this Court, it could be concluded that prosecution could only prove recovery of 12 bottles of country liquor from their possession, which is admittedly not an offence. In the aforesaid case, as discussed supra, 71 pouches were alleged to have been recovered from the accused but only one pouch was retained as sample and sent for analysis and accordingly, Court came to conclusion that prosecution could only prove that respondent accused was in a possession of one pouch of 180 m.l. of country liquor in their possession. If the aforesaid ratio laid down in Jagdish case (supra) is applied in the present case, it can be safely concluded that accused was not carrying liquor beyond permissible limit. If the story of prosecution is taken to be correct on its face value then in that event also, only recovery of 12 bottles is required to be taken into consideration, not 144 bottles.

13. Admittedly, in view of the recovery of 12 bottles accused may be considered carrying 6 bottles beyond permissible limit. Hence, no appeal, if any, was maintainable in terms of Section 378 1 (A) as far as the bailable offence is concerned, which reads as under:-

> *378. Appeal in case of acquittal-[(1) Save as otherwise provided in Sub-Section (2), and subject to the provisions of Sub-Sections (3) and (5),--*
>
> > *(a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;*
>
> *(2). If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946) or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, [the Central Government may, subject to the provisions of Sub-Section (3), also direct the Public Prosecutor to present an appeal—*
>
> > *(a) to the Court of Session, from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;*
> >
> > *(b) to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a) or an order of acquittal passed by the Court of Session in revision].*

14. At this stage, Mr. Thakur, stated that sending of one bottle from each box was sufficient to ascertain the content of other bottles recovered from the twelve boxes and entire recovery cannot be said to be vitiated on account of alleged omission, if any, on the part of the police. But this Court is unable to accept the aforesaid contention put forth on behalf of Mr. Thakur solely on the ground that police by sending 12 bottles one from each carton was only able to prove the contents of liquor in the 12 bottles only. Since Chemical Examiner in his report stated that each sample of the bottle was containing 49.0 percent liquor, recovery if any, can be said of bottles which were actually sent for chemical analysis.

15. Since all bottles were not sent for chemical analysis, it is not proved/established on record by the prosecution that remaining bottles were also containing liquor and as such, this Court has no hesitation to conclude that entire recovery allegedly effected by the police stands vitiated on account of aforesaid serious omission on the part of the police.

16. Interestingly in this case, material prosecution witnesses while deposing before the trial Court stated that the case property was taken into possession vide seizure memo Ext.PW4/B and one bottle from each carton was taken out as sample and seal after use was handed over to witness namely Sh. Pardeep. Similarly, this PW also stated that they identified bottles No. 1 to 32 and 31 to 42 but none of the PWs stated something qua the tag of FIR if any, on the boxes allegedly recovered from the car of the accused. None of them stated anything qua the tag of FIR on the case property, hence this Court is compelled to infer that after drawing samples from 12 bottles one each from each carton, remaining case property was sealed Ext.P1 to P142 but no tag of FIR was put on the same and as such identification, if any by the prosecution witnesses of the case property produced as Ext.P1 to Ext.P142 cannot be said to be in accordance with law. Since no FIR tag was put on alleged recovered contraband, it is not understood how PWs later on identified the same before the Court in the absence of tag of FIR on it.

17. Similarly, this Court though finds mention in the statement of PWs qua the seal-'J' with which, samples were sealed. Constable Ramesh Kumar PW4 categorically stated that one bottle from each carton was taken out as sample and seal after use was handed over to witness Partap but interestingly, there is no mention if any, qua the production of seal in the Court.

18. PW1 Head Constable Thakru Ram stated that ASI Geeta Parkash deposited with him the case property along with specimen seal impressions and he sent 12 samples of bottles with seal impression 'J' to CTL Kandhaghat through Constable Rakesh Kumar. PW4 constable, Rakesh categorically stated that seal after use was handed over to witness Pardeep but this Court is unable to lay its hand to any statement made by the aforesaid witness Pardeep, to whom seal after use was handed over as stated by PW4 Constable Rakesh Kumar.

19. PW5 I.O. Geeta Parkash, ASI, though stated in his statement that one bottle from each carton was taken out as sample and he sealed the sample with Seal "J" and thereafter sample bottles were deposited with MHC same night. He has not stated anything with regard to custody of seal after sealing the samples. Since it is an admitted case of the prosecution that seal –'J' after sealing samples was hand over to Pardeep, it was incumbent upon the prosecution to cite him as witness to prove the factum of sealing of samples, if any, with the seal having impression seal "J" but interestingly, Pardeep has been not cited as prosecution witness, hence, factum qua the sealing of samples by seal having impression "J" cannot be said to be proved in accordance with law. Both the courts below have overlooked the aforesaid glaring discrepancy in the case of proseuciton while recording the conviction against the present accused-petitioners. In the absence of seal, it cannot be said that prosecution was able to prove its case beyond reasonable doubt that present petitioner accused were found carrying illicit liquor.

20. Apart from above, it clearly emerges from the reading of the depositions made by the prosecution witnesses as has been discussed above, that no number of FIR was put/tagged upon the 12 boxes allegedly recovered from the possession of the accused, which itself makes the story of recovery doubtful. Moreover, it also emerge from the statement of prosecution witnesses that boxes of the liquor were not sealed and admittedly there is no mention of seal, if any, on the cartons of liquor allegedly recovered from the conscious possession of the accused.

21. Hence, this Court has no hesitation to conclude that story of prosecution qua the sealing of the sample is also doubtful and especially, in view of the statement of PW4, who stated that seal having impression "J" was handed over to Pardeep after its use. But seal was never produced before the Court. This very omission on the part of the prosecution has rendered story of prosecution unreliable and untrustworthy. The aforesaid omission on the part of the police not to seal the bulk case property at the time of alleged recovery, is not a minor discrepancy, rather, it has vitiated the entire recovery. Similarly as has been discussed in detail that there is a glaring discrepancy qua the withdrawing of samples by police after recovery.

22. In the present case, as has been mentioned earlier, police withdrawn 12 bottles one each from 12 cartons for sending the same for chemical analysis but no seal whatsoever, was produced in the court. Aforesaid glaring discrepancy has rendered the story of withdrawing

samples by police after recovery unreliable and could not be relied upon by the courts below while recording conviction of the present petitioners-accused in totality of facts and circumstances. Rather this Court after perusing the evidence led on record by the prosecution is compelled to conclude that the prosecution miserably failed to prove the recovery of liquor from the conscious possession of the accused. It clearly emerge from the depositions from all the material prosecution witnesses that neither there is any seal nor any tag of FIR on the case property coupled with the fact that the seal with which case property was sealed, was not produced in the Court. None production of sealing in the Court has rendered the story of prosecution untrustworthy and unreliable.

23. In this regard, reliance is placed on judgment rendered by the Hon'ble Apex Court in ***State of Rajasthan v. Gopal, 1998 (8) SCC 499,*** relevant paras of the aforesaid judgments is reproduced herein below:

> *"2. In passing the order of acquittal, the High Court has noted that the seizure of the narcotic substance was doubtful because the seal on the sample sent for chemical analysis could not be compared with the seal on the seized article kept in the Police Malkhana because the seal on the sample sent to analyst could not be produced in the Court for verification. Even the seal which was put on the seized article kept in the Police Malkhana could not be ascertained excepting the word "Ajmer". It may be stated here that since the said article had been seized on the railway platform according to the prosecution case, the seal of the Stationmaster had been used, but the Stationmaster was not examined to prove whether the seal put on the sized article and kept in the Police Malkhana really contained the seal of the Stationmaster."*

24. Reliance is also placed on judgment passed by our own High Court in ***Nanha v. State of H.P., Latest HLJ 2011 (HP) 1195.*** Paras No. 7 to 9 are extracted herein below:-

> *"7. Adverting to the points urged by learned counsel appearing for the appellant that the seal used has not been produced in court, we note that this Court in Criminal Appeal No. 308 of 1996, decided on October 21, 2009, State of H.P V. Tek Chand, reported in Latest HLJ 2010(HP)497,Holds-*
>
> > *"9 PW1 Hukam Chand , MHC, with whom the case property was deposited by PW 4 Ravinder Singh, also did not say that any specimen seal impression has been deposited along with parcel containing the samples and the bulk Charas. It is only PW2 HC Raj Sigh , who took over the charge of MHC from PW1 Hukam Chand, who stated that he sent one of the two samples along with sample seals to the Chemical Examiner, through Constable Mani Ram. Mani Ram who was examined as PW3, did not say that any specimen seal impressions were also carried by him along with the sample. He simply stated that he carried one sealed parcel which was handed over to him PW2 HC Raj Singh. On the docket with which the sample was sent to the Chemical Examiner i.e. Ext.PC, facsimiles of the seals used in sealing the parcels are not there. That means specimen impressions of the seals used in sealing the sample parcels, which was sent to the laboratory, were not available with the Chemical Examiner, for comparison with the seal impressions on the parcel containing sample . Therefore , the report Ext. PC cannot be said to have been sufficiently linked with the samples allegedly separated from the recovered stuff.*
>
> *8. Adverting to the facts on record, we find from Ext. PW-8 /A that the facsimile of the seal not having been affixed on this document. Further we also note that PW-5 Constable Yoginder Singh states;*
>
> > *".....All the parcels were sealed with seal 'D' initially. The seal 'S' was made of some metal. The seal has not been brought by me today as*

the same has been lost. No report qua missing of the seal was lodged by me with anyone .

9. The seal was in possession of the prosecution as established form the evidence of PW-7 Constable Ramesh Kumar, who says that he had deposited this in the Kandaghat Laboratory. What happened to the seal after that is not clear neither it is clear as to why the facsimile is not affixed on the NCB form."

25. Though this Court is of the view that statements of prosecution witnesses cannot be easily brushed aside solely on the ground that they are official witnesses and version put forth on behalf of the PWs cannot be solely rejected on the ground that no independent witness is associated at the time of occurrence/recovery but in the present facts and circumstances, this court sees force in the contention put forth on behalf of the counsel representing the petitioners-accused that statement given by PW3 could not be accepted on its face value by the courts below in the absence of independent witnesses. In view of glaring discrepancies as have been pointed above, this Court is of the view that omission on the part of the prosecution to associate independent witnesses at the time of alleged recovery was itself sufficient to render the story of prosecution untrustworthy and unreliable.

26. Consequently, in view of the aforesaid discussion, present petition is allowed and the judgments passed by both the courts below are quashed and set-aside and the petitioners-accused are acquitted of the charges framed against them. Bail bonds, if any, are discharged. The petition stands disposed of, so also pending applications, if any.

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

Raghubir Singh .....Petitioner.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Revision No. 255 of 2010
Date of Decision: 06.9.2016.

Indian Penal Code, 1860- Section 279 and 337- Accused was driving a bus in a rash and negligent manner – bus hit the car and the occupants of the car sustained injuries- the accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that Court has limited power to appreciate the evidence in exercise of revisional jurisdiction- prosecution witnesses consistently stated that bus was driven towards wrong side in high speed leaving no space for the car due to which the occupants of the car sustained injuries-testimonies of prosecution witnesses were not shaken in the cross-examination- accused was rightly convicted by the trial Court- considering the time lapsed since the incident, benefit of Probation of Offenders Act granted to the accused. (Para-10 to 27)

Cases referred:

State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452
Krishnan and another Vs. Krishnaveni and another, (1997) 4 Supreme Court Case 241
Yudhbir Singh versus State of Himachal Pradesh 1998(1)S.L.J. 58
Ramesh Kumar @ Babla versus State of Punjab 2016 AIR (SC) 2858,
Hari Kishan and State of Haryana versus Sukhbir Singh 1988 AIR (SC) 2127

For the petitioner: Mr. Vijay Chaudhary, Advocate.
For the respondent: Mr. Rupinder Singh Thakur, Additional Advocate General, with Rajat Chauhan, Law Officer.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Present criminal revision petition filed under Section 397 of the Code of Criminal Procedure is directed against the judgment dated 10.11.2010, rendered by the learned Sessions Judge, Chamba Division Chamba, H.P., in Criminal Appeal No. 8 of 2010, affirming/modifying the judgment and order dated 29.7.2010 and 31.7.2010, passed by learned Judicial Magistrate, Ist Class, Dalhousie, District Chamba, H.P., in Criminal Case No. 43-II of 2005, whereby present accused-petitioner is convicted and sentenced to undergo simple imprisonment for four months and to pay fine of Rs.1,000/- for having committed offence punishable under Section 279 IPC and to further undergo simple imprisonment for a period of three months and to pay a fine of Rs. 550/- for the offence committed under Section 337 IPC.

2. Briefly stated facts as emerged from the record are that on 20.6.2004, at about 4 pm, Tilak Raj was driving the Maruti Car bearing No. JK 02D-4342, while coming from Samba to Dalhousie. When he reached at place called Jarai Nainikhad on the road from Pathankot to Dalhousie, at about 4 pm, bus bearing registration No. HP-47-0378 came from opposite side which was being plied by the accused in rash and negligent manner and dashed the car, as a result of which, persons sitting in the car sustained injuries. The injuries were found to be simple. The complainant Tilak Raj made a statement under Section 154 Cr.PC, Ext.PW1/A with regard to the incident on the basis of which, FIR Ext.PW10 /A was registered at Police Station Dalhousie. The complainant Tilak Raj stated that on 20.6.2004, he along with his wife Suman, Son Jatin, daughter Isha, aged about 8 to 10 years and his friend Surender, his wife Anuradha and their two children were going from Samba to Dalhousie in the aforesaid Car. He stated that when they reached near Nainikhad at place Jarari at about 4.00pm, a HRTC bus bearing No. HP-47-0378 came in high speed and struck against his Car, as a result of which his wife, children and wife of his friend and their children sustained injuries. He further stated that accident took place due to rash and negligent driving of the petitioner-accused who was admittedly driving the bus of HRTC at that relevant time. HC Surjit Singh conducted investigation and prepared the site map PW12/A. Vehicles involved in the accident along with documents were taken into possession vide memo Ext.PW1/B and documents presented by the accused petitioner to the police are vide memo Ext.PW7/A. Police got injured persons medically examined at Swami Harigiri Hospital, Kakira vide application No. Ext.PW12/B. Police also got clicked photographs Ext.PW12/C1 to PW12/C7. Both the vehicles were got mechanically examined by the mechanical expert, who rendered his report vide Ext.PW8/A and 8/B. Police also recorded statements of witnesses under Section 161 Cr.PC. After completion of investigation police presented the challan against the present petitioner accused before the learned Judicial Magistrate, Ist Class, Dalhousie, District Chamba, H.P.

3. Learned trial Court below, on being satisfied that prima facie case exists against the accused framed charges against him under Sections 279 and 337 of the IPC and under Section 184 of Motor Vehicles Act, to which he pleaded not guilty and claimed trial.

4. Prosecution with a view to prove its case, examined as many as 12 witnesses. Learned trial Court below also recorded the statement of the accused under Section 313 Cr.PC, wherein he denied the case of the proseuciton in toto. However, he did not lead any evidence in his evidence.

5. Learned court below on the basis of evidence adduced on record by the prosecution as well as statement of the accused, found the present petitioner guilty of having committed offences under Sections 279 and 337 of IPC and accordingly, convicted and sentenced him, as per description given herein above.

6. Present petitioner being aggrieved and dissatisfied with the judgment of conviction passed by the learned trial Court, filed an appeal under Section 374 Cr.PC, before the learned Sessions judge Chamba, HP, which was dismissed vide judgment dated 10.11.2010.

However, learned sessions Judge, taking lenient view, modified the sentence awarded by the learned trial Court below and accordingly directed him to pay fine of Rs.5,000/- for the offence punishable under Section 279 IPC and fine of Rs. 5,00/- for offence punishable under Section 337 IPC. In the aforesaid background, the petitioner accused preferred the present criminal revision petition before this Court praying therein for quashing and setting aside the judgments passed by the courts below.

7. Mr. Vijay Chaudhary, counsel representing the petitioner vehement ally argued that the judgments passed by the both the courts below are not sustainable in the eye of law as same are not based upon the correct appreciation of evidence available on record and as such, same deserve to be quashed and set-aside. Mr. Chaudhary, strenuously argued that learned courts below miserably failed to take note of the fact that even in the FIR, there was no allegation regarding rashness, and negligence on the part of the petitioner and as such, therefore, these ingredients being pre-requisite for conviction for the offences for both the Sections 279 and 337 IPC, judgments passed by the courts below deserve to be quashed and set-aside. Mr. Chaudhary, further contended that both the courts below failed to take into consideration the fact that proseuciton witnesses nowhere in their statements before trial Court deposed that act of the petitioner was rash and negligent and as such, both the courts below wrongly recorded the judgment of conviction against the present petitioner and as such, same deserves to be quashed. He further contended courts below failed to take note of the fact that no evidence regarding the high speed of the bus at the relevant time was led on record by the PWs. He further stated that even if it assumed that bus was in high speed, same would not amount to rash and negligent unless there is a categorical statement made by the prosecution witness that bus was being driven rashly and negligently. He stated that since none of the prosecution witnesses have stated nothing with regard to the high speed as well as rash and negligent driving of the accused, learned trial Court has fallen in grave error while holding the petitioner guilty for having committed offences, as referred supra. With a view to substantiate his aforesaid statement, he invited attention of this Court to demonstrate that none of the PWs stated qua the aspect of high speed and rash and negligent driving done by the accused at that relevant time. He stated that it has come on record that bus was being driven in normal speed which was categorically stated by PW2 Sarwan Kumar, Conductor of the bus and PW4 Suman Kumari. PW2 clearly stated that he was sitting in front of the bus and the same was being driven at a very convenient and normal speed by the petitioner. PW4 also stated in her cross-examination that the bus was not being driven in high speed at that relevant time. Mr. Chaudhary stated that courts below miserably failed to take into consideration that at the time of accident, Maruti Car being driven by the complainant, was overloaded, whereas there were as many as eight occupants in the car at that relevant time and as such, adverse inference could have been drawn by the courts below by appreciating the evidence led on record by the prosecution. He stated that as per record maintained by the hospital, none of the occupant was less than ten years while four occupants were major being parents of the minor children and the minor children were aged between ten to thirteen years, which clearly proves that factum of heavy overloading. Judicial notice could be taken by the Court below that it was difficult for driver to control his vehicle while driving his car, rather, it could be safely inferred that driver of Maruti car was being driven negligently and rashly at that relevant time. In view of the above, Mr .Chaudhary, prayed that petition may be accepted after setting aside the judgments by the courts below.

8. Per contra, Mr. Rupinder Singh Thakur, learned Additional Advocate General, appearing on behalf of the respondent-State, supported the impugned judgments passed by the courts below. Mr. Rupinder Singh Thakur, vehemently argued that bare perusal of the impugned judgments suggests that same is based upon the correct appreciation of the evidence available on record and prosecution has been able to prove its case beyond reasonable doubt. Mr. Rupinder contended that in the given facts and circumstances of the case, no interference, whatsoever, of this Court, is warranted and this Court has very limited powers while exercising its revisionary powers under Section 397 of the Cr.PC to re-appreciate the evidence when it stands duly proved on record that the courts below have dealt with each and every aspect of the matter very

meticulously. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in case ***State of Kerala*** *Vs***. *Puttumana Illath Jathavedan Namboodiri*** (1999)2 Supreme Court Cases 452, wherein it has been held as under:-

> *"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 Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."*

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

10. True, it is that while exercising the power under Section 397 of Criminal Procedure Code, this Court has very limited power to re-appreciate the evidence available on record. But in the present case, where accused has been found guilty having committed offences under Sections 279, and 337 of the Indian Penal Code, this Court solely with a view to ascertain that the judgments passed by both the Courts below are not perverse and same are based upon correct appreciation of evidence available on record, undertook an exercise to critically examine the evidence available on record to reach fair and just decision in the case.

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

> *"8.The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order."*

12. During the proceedings of the case, this Court had a occasion to peruse the entire evidence, be it ocular or documentary, led on record by the prosecution as well as the respective parties, which clearly suggests that there is no illegality and infirmity in the judgment passed by the learned trial Court below, where on the basis of overwhelming evidence adduced on record, learned trial Court came to conclusion that the present petitioner-accused is guilty of having committed offence under Sections 279 and 337 IPC.

13. Close scrutiny of the evidence available on record clearly suggests that prosecution has been able to prove its case beyond reasonable doubt. PW1 Tilak Raj, the complainant stated that on 20.6.2004, he along with his wife, children and his friend Surinder Singh PW5 and his family, was coming from Samba to Dalhousie in Maruti Car. When they reached near Jarai at about 4:00 pm, a HRTC bus came in high speed and struck against his car on the wrong side, as a result of which, persons travelling in the Maruti Car sustained injuries. He categorically stated that accident took place due to fault of bus driver In his cross-examination, he admitted that he cannot identify the bus driver but self stated that he had seen the driver afterwards. PW1 admitted that they were eight persons in the car, out of them, four were children. He admitted that only four passengers can sit in a Maruti Car. He denied the suggestion that the bus was not in high speed and he also denied the suggestion that bus was not on wrong side and the accident took place as his car was over loaded and he was deposing falsely.

14. PW4 Suman, wife of the Complainant (PW1), who was also traveling in the car corroborated the version put forth by the PW1. She categorically stated that bus came from a wrong side and struck against the car, as a result of which they suffered injuries. She also identified the driver of the bus in the Court. In her cross-examination, PW4 denied the suggestion put to her that car was being driven in speed of 80 kmph. She specifically denied the suggestion that false case has been made against the petitioner-accused with a view to take benefit of insurance claim.

15. PW5 Surinder Singh, who was also traveling in the Car also corroborated the versions put forth on behalf of PW1 and PW4. He categorically stated that when they reached near Nainikhad at about 3/4:00pm, a Govt. bus came in high speed and struck against their car from the driver side and all the occupants sustained minor/simple injuries. In his cross examination, he categorically denied the suggestion that car was being driven in high speed. He denied the suggestion put to him by the defence that govt. bus was not in high speed. He also denied the suggestion put to him that they filed this case in order to avail the insurance claim. He also stated that there were 30-40 passengers in the bus. Aforesaid witness also denied the suggestion that bus driver was not driving the bus in high speed and bus driver was on his own side.

16. PW2 Sarwan Kumar, Conductor of the Bus, stated that they were on Bharmour-Pathankot route with bus in question. He further stated that when they reached near Nainikhad, they met with an accident. He stated that bus was being driven by the accused and at that relevant time, about 52 passengers were in the bus. He stated that he was sitting on the front seat of the bus and the vehicle was being driven conveniently by the driver. He also stated that bus was in normal speed. He showed ignorance regarding the occupants of the car.

17. PWs No. 3, 6, 7, 9, 10 and 11 are formal witnesses and may not be relevant while deciding this petition.

18. PW8 Tarsem, mechanically examined both the vehicles and proved on record mechanical reports Exts.PW8/A and PW8/B. He specifically stated that there was no mechanical fault in the bus as well as in the car.

19. PW12 Head Constable Surjeet Singh, the Investigating Officer, stated that on 20.6.2004, he along with officials was present at Nainikhad bazaar, wherein the complainant Tilak Raj made a statement Ext.PW1/A, on the basis of which, FIR was registered. In his cross-examination, he stated that bus was going from Chamba to Pathankot. He admitted that there was no date on the duty roster and expressed inability to say that in photographs Ext.PW12/C5, a truck was shown parked in front of the vehicle. He also stated that there are no tyre marks having been shown in the photographs Exts. PW12/C7, PW12/C6 and PW12/C3. He denied that accident did not take place due to the negligence of the accused.

20. Conjoint reading of aforesaid PWs clearly suggests that on 20.6.2004 the complainant and other occupants of the Car suffered minor/simple injuries due to the collusion

/accident with the bus. They unequivocally stated that bus being driven by the petitioner accused came on wrong side in high speed leaving no sufficient space for the car coming from the opposite side and hit the Car, as a result of which, occupants in the car suffered simple injuries

21. Minute perusal of the version put forth on behalf of PWs clearly suggests that all the PWs have been very very candid, specific and consistent and straightforward while narrating the sequence of event occurred at the time of accident. Perusal of cross-examination conducted on the prosecution witnesses clearly suggests that defence was not able to shatter their testimony which otherwise appears to be trustworthy. All the aforesaid PWs have stated that bus at that time was being driven rashly and negligently by the driver in high speed. Conductor of bus ,PW2 himself admitted the accident and stated that the bus was in normal speed but there is nothing in his statement, from where it could be inferred that at that relevant time, Maruti Car was on wrong side and was being driven in high speed. Similarly, there is no explanation on his part regarding cause of accident; rather, careful perusal of statement of PW2, nowhere suggests that driver of the bus was not at fault. If the version of PW2 is taken to be true, wherein he stated that at that time 52 passengers were sitting in the bus, it is not understood that why persons sitting in the bus were not cited as defence witnesses by the petitioner-accused to substantiate his contention/argument that bus was being driven at normal speed at that relevant time.

22. After carefully examining the entire evidence, this Court has no hesitation to conclude that prosecution has been able to prove its case beyond reasonable doubt. Perusal of the depositions made by PW1 Tilak Raj, PW2 Sarwan Kumar and PW5 Surinder Singh, leaves no doubt in the mind of the court that at that relevant time, bus was being driven in high speed, as a result of which, it dashed against the car on the wrong side of the road. At the cost of repetition, it may be stated that aforesaid PWs have corroborated the version of each other in their statements and in cross-examination, defence could not extract anything contrary to what they stated in their examination-in-chief. Whereas PW2 Swaran Kumar, who was conductor of the bus stated that he was sitting on the front seat of the bus but interestingly, he did not state anything qua the fault, if any, of the driver of the car. He simply stated that bus was in normal speed but he nowhere stated that there was no fault, if any, of the driver of the bus at the time of the alleged accident. Hence, this Court sees no illegality and infirmity in the judgment passed by the Courts below, whereby they came to conclusion that accident took place due to rash and negligent driving of the bus driver, and as such, present petition deserves to be dismissed being devoid of any merit.

23. Faced with this situation, learned counsel for the petitioner-accused prayed that accused may be given the benefit of probation under Section 4(b) of the Probation of Offenders Act, 1958 keeping in view his being first offender. Mr. Chaudhary, also stated that mitigating circumstance in this case is that approximately, more than 14 years have passed after happening of that incident and six years have been passed after passing of the judgment of conviction dated 29.7.2010. The accused petitioner has already suffered much agony during the pendency of the appeal in the court of learned Sessions Judge, Chamba Division Chamba (H.P.), as well as in High Court of Himachal Pradesh. In support of the aforesaid argument, learned counsel for the petitioner-accused also invited the attention of this Court to the judgment passed by this Hon'ble Court in ***Yudhbir Singh*** *versus* ***State of Himachal Pradesh 1998(1)S.L.J. 58***, wherein it has been held as under:

> *"9. The only mitigating circumstance that appears to be there is that the time gap of about six years between the date of occurrence as well as the date of decision of this revision petitioner. During this entire period sword of present case looming over the head of the petitioner was always there. That being so, this court is of the view that instead of sending the petitioner to jail as ordered by the courts below, he is given the benefit of Section 4 of the Probation of Offenders Act. Accordingly, it is ordered that he shall furnish personal bond in the sum of Rs. 5,000/- to the satisfaction of the trial Court within a period of four weeks from today to keep peace and to be of good behavior for a period of one year from the date of execution*

of the bond before the court below as well as not to commit any such offence. In addition to being given benefit of Section 4 of the Probation of Offenders Act, petitioner is further directed to pay a sum of Rs. 3,000/- each to PWs Baldev Singh and Dilbagh Singh injured as compensation. Shri R.K. Gautam submitted that this amount of compensation be deposited with the trial Court on or before 31.8.1997, who will thereafter pay the same to said persons."

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

"7. Accordingly the appeal is allowed in part by converting appellant's conviction under Section 307 IPC to one under Section 324 IPC. On the question of sentence, it is pertinent to note that the occurrence took place in 1997. In his statement under Section 313 of the code of Criminal Procedure the appellant gave his age in 2002 as 36 years. He claimed that he and others went to the place of occurrence on getting information that his brother Sanjay Kumar was assaulted by Ramesh Kumar (Complainant). He brought his brother to Police Station and lodged a report. As noticed by trial court, parties are involved in civil as well as criminal litigation from before. High Court has noted that appellant, as per custody certificate, is not involved in any other case. In such circumstances, it is not deemed necessary to send the appellant immediately to Jail custody after about 19 years of the occurrence when he appears to be 50 years of age and fully settled in life.

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

25. The reliance is also placed upon Hon'ble Apex Court judgment ***Hari Kishan and State of Haryana versus Sukhbir Singh 1988 AIR (SC) 2127***, wherein it has been held as under:

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

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

"357. Order to pay compensation:

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

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

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

Xxxxxxxxxxxxx

Xxxxxxxxxx

Xxxxxx

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation. Such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been sentenced.

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

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

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

26. In view of the aforesaid law as well as submissions having been made by Mr. Chaudhary, learned counsel appearing on behalf of the petitioner, after taking into consideration the facts and circumstances of the present case, I am of the considered opinion that the present petitioner-accused can be granted benefit of Section 4 of the Probation of Offenders Act, 1958 subject to payment of adequate compensation which would be determined after the receipt of the report of Probation Officer.

27. Accordingly, Registry is directed to call for the report of the Probation Officer, Chamba, District Chamba, H.P. within six weeks. Registry to list this matter on **12th December, 2016.**

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

Khem Chand ...Petitioner.

Versus

State of H.P. ...Respondent.

Cr. Revision No. 25 of 2010
Date of Decision: 9.9.2016

Indian Penal Code, 1860- Section 279, 337, 338 and 304-A- Accused were driving different buses – accused No.1 signalled accused No. 2 to take pass – bus hit the rock in the process of

overtaking causing injury to the passengers- the accused No. 2 was held guilty by the trial Court- an appeal was preferred, which was dismissed - held, in revision that Court has limited power to appreciate the evidence in exercise of revisional jurisdiction – it was not disputed that accused was driving the bus – according to prosecution, accused No. 1 did not leave sufficient space for overtaking but the accused No. 2 tried to overtake the bus causing the accident- evidence shows that buses were in competition with each other and accused No. 1 was not allowing accused No. 2 to overtake but gave a pass near 'P' – accused No. 2 made an attempt to overtake another bus and caused accident – prosecution version is proved by statement of PW-1 duly corroborated by the statement of accused and the mechanical report – accused No. 2 was negligent in overtaking the bus when there was insufficient space – he was rightly convicted by the trial Court - however, considering the facts of the case, the sentence modified to a period of three months only.

(Para-7 to 27)

Cases referred:

State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452
Krishnan and another Vs. Krishnaveni and another, (1997) 4 Supreme Court Case 241
Gurcharan Singh versus State of Himachal Pradesh 1990 (2) ACJ 598
Yudhbir Singh versus State of Himachal Pradesh 1998(1)S.L.J. 58
State of Punjab versus Saurabh Bakshi 2015 (5) SCC 182

For the petitioner: Mr. Lakshay Thakur, Advocate.
For the respondent: Mr. Rupinder Singh Thakur, Additional Advocate General, for the State.

The following judgment of the Court was delivered:

Sandeep Sharma, J. ***(Oral)***

Present criminal revision petition filed under Section 397 read with Section 401 of the Code of Criminal Procedure is directed against the judgment passed by ld. Sessions Judge, Mandi, HP, dated 24.12.2009 in criminal appeal No. 40 of 2006, affirming the judgment passed by the ld. Judicial Magistrate, Ist Class, Court No.1, Mandi, H.P., dated 28.9.2006, passed in Cr. Case No. 253-II/98(97), whereby the petitioner-accused has been convicted as under:-

> *"Under Section 279 of IPC, the petitioner-accused is sentenced to undergo simple imprisonment for three months and to pay a fine of Rs. 300, in default of payment of fine, to further undergo simple imprisonment for 15 days, and ;*
>
> *Under Section 337 of IPC to undergo three months' simple imprisonment and to pay a fine of Rs. 300/-, in default of payment of fine to further undergo simple imprisonment for 15 days and;*
>
> *Further sentenced under Section 338 of IPC to undergo simple imprisonment for 6 months and to pay a fine of Rs. 500/-, in default of payment of fine to further undergo simple imprisonment for one month and;*
>
> *Further sentenced under Section 304-A of IPC to undergo simple imprisonment for 1 year and to pay a fine of Rs. 500/- in default of payment of fine to further undergo simple imprisonment of one month."*

2. Briefly stated facts as emerged from the record are that the petitioner-accused (In short "accused No.2) was driving Bus No. HP-01-1643, whereas another bus bearing No. DL-1P-6566 was being driven by person namely Ranjit Singh (In short "accused No.1) on 17.6.1996. It also emerge from the record that when accused No.1 signaled accused No.2 to take pass from his bus, he in the process of overtaking bus No. DL-IP-6566, hit his bus against the rock on driver side, as a result of which, passengers travelling in that bus, sustained injuries and two of them died. Accordingly, police after having received information, reached at the spot and sent Rukka Ext.PW13/D to the police Station, on the basis of which, formal FIR was registered against the accused persons. During investigation, it revealed that on 17.6.1996, at about 7:30 a.m., bus

being driven by accused No.1 was on its way from Mandi to Manali and another bus was being followed/driven by accused No.2. Investigation further revealed that both the buses were being driven in high speed towards Manali and the drivers/accused were in competition and were trying to overtake each other but when they reached near Gurudwara at Jaral Pandoh, accused No.1 gave signal to accused No.2 to overtake his bus on a slight curve but he did not leave the sufficient space for another bus to move forward. Despite aforesaid, accused No.2-petitioner made an attempt to take pass from the bus of accused No.1, as a result of which, bus being driven by accused No.2 in rash and negligent manner, struck against the boulder/rock on the right side. Passengers traveling in the bus suffered injuries on their persons and two persons died. Police prepared spot map Ext.PW13/C and also got clicked photograph Ext.PW11/A to Ext.PW11/P, negatives whereof are Ext.PW11/A-1 to Ext.PW11/P-16. I.O. PW13 after seizing the bus being driven by Accused No.2 and documents thereof vide Fard Ext.PW2/A and also seized the offending bus being driven by accused No.1 vide separate Fard. I.O. after completion of codal formalities, also recorded the statements of witnesses under Section 161. I.O. also got the offending vehicle mechanically examined from PW10 and obtained report Ext.PW10/A and Ext.PW10/B. Similarly, injured persons were also got medically examined at Zonal Hospital Mandi and obtained MLCs. Injured persons Sonam Shering and Bimmi Chhabra succumbed to injuries in the hospital. PW12 filled up the form-25.35 Ext..PW-12/A and Ext.PW 12/A and Ext.PW12/B and got conducted the post mortem of the body of Bimmi Chhabra, PW4, vide his report Ext.PW4/A opined that she died due to extensive head injury similarly, the post mortem of the body of Sonam Shering was also conducted by PW13, who opined that she also died due to ante-mortem injuries. Police after completion of investigation came to conclusion that accused are guilty of having committed offences under Sections 279, 337, 338 , 304-A. At this stage, it may be noticed that accused No.1 was declared proclaimed offender. Thereafter learned trial Court after having satisfied that prima facie case exists against accused No.2 , put notice of accusation for committing the offence as mentioned above, however, accused No.2-petitioner pleaded not guilty and claimed trial. But fact remains that he did not lead any evidence in this defence. Learned trial Court on the basis of material available on record found accused No.2 i.e. present petitioner guilty and sentenced him as per detail already given above.

3. Feeling aggrieved and dis-satisfied with the judgment passed by the learned trial Court, present petitioner-accused preferred criminal appeal before the Court of learned Sessions Judge, Mandi, which was dismissed vide judgment dated 24.12.2009. Hence, this criminal revision petition before this Court by the petitioner-accused No.1.

4. Mr. Lakshay Thakur, Advocate, representing the petitioner-accused vehemently argued that the judgments passed by the learned courts below are not sustainable in the eye of law as the same are not based upon the correct appreciation of record. Mr. Thakur, contended that bare perusal of the impugned judgments suggests that courts below while passing the judgment have mis-construed and mis-interpreted the material placed on record as the impugned judgments are both against law and facts and as such, same deserves to be quashed and set-aside. He further contended that ld. Courts below have erred gravely in convicting the petitioner because there is not even an iota of evidence to connect the petitioner in the commission of crime and therefore, the conviction has resulted in mis-carriage of justice. With a view to substantiate his argument that court below has not dealt with statements made by the prosecution witnesses in its right perspective, Mr. Thakur, invited attention of this Court to the that part of the evidence, wherein it has come in the evidence of the prosecution witnesses that the petitioner-accused was not at fault. The accident took place on account of the negligence of Ranjit Singh-accused No.1, driver of the bus, who has been declared proclaimed offender. Mr. Thakur also contended that PW3 and PW5 have been turned hostile, whereas PW1 and 2 have admitted clearly that the fault was of Ranjit Singh i.e. accused No.1, hence, the impugned judgments are not sustainable in the eyes of law and are liable to be set-aside on this ground alone.

5. Per contra, Mr. Rupinder Singh Thakur, learned Additional Advocate General appearing on behalf of the respondent-State, supported the impugned judgments passed by the courts below. Mr. Rupinder Singh Thakur, vehemently argued that bare perusal of the impugned

judgments suggests that same is based upon the correct appreciation of the evidence available on record and prosecution has been able to prove its case beyond reasonable doubt. Mr. Rupinder contended that in the given facts and circumstances of the case, no interference, whatsoever, of this Court, is warranted and this Court has very limited powers while exercising its revisionary powers under Section 397 of the Cr.PC to re-appreciate the evidence when it stands duly proved on record that the courts below have dealt with each and every aspect of the matter very meticulously. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in case ***State of Kerala*** *Vs.* ***Puttumana Illath Jathavedan Namboodiri*** (1999)2 Supreme Court Cases 452, wherein it has been held as under:-

> *"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 Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."*

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

7. True, it is that while exercising the power under Section 397 of Criminal Procedure Code, this Court has very limited power to re-appreciate the evidence available on record. But in the present case, where accused has been found guilty having committed offences under Sections 279, 337, 338 , 304-A of the Indian Penal Code, this Court solely with a view to ascertain that the judgments passed by both the Courts below are not perverse and same are based upon correct appreciation of evidence available on record, undertook an exercise to critically examine the evidence available on record to reach fair and just decision in the case.

8. 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*** *Vs.* ***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 herein below:-

> *"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."*

9. Close scrutiny of the pleadings as well as statements having been made by the learned counsel for the parties clearly suggests that on 17.6.1996, bus bearing No. HP 01-1643

was being driven by accused No.2. Moreover, present petitioner accused in his statement recorded under Section 313 has not disputed the factum qua the vehicle being driven by him at that relevant time, rather, he has stated that accident occurred due to negligence of accused No.1-Ranjit Singh, who was driving vehicle No. DL-IP-6566. Since there is no dispute qua the alleged occurrence of accident as well as vehicle being driven by the present petitioner accused, this Court while examining the correctness and genuineness of the impugned judgments would only be dealing with the aspect of negligence, if any, on the part of the present petitioner accused, who was admittedly driving the bus bearing No. HP-01-1643 at the time of accident. In nutshell, case of the prosecution is that despite there being sufficient/wide road and plain road driver of bus bearing No. DL-IP-6566, did not allow the present petitioner accused to overtake his bus and as a result of which, accident took place at a place which was too narrow for over taking. However, it has been further stated that near Gurudwara at Pandoh, the driver of bus No. DL-IP-6566, gave signal to the accused for overtaking his bus on slight curve but he did not leave the sufficient space for the bus to move forward as a result of which, passengers of the bus sustained injuries and two persons lost their lives. Though aforesaid narration of the facts given by the prosecution is sufficient to conclude that present petitioner-accused was quite negligent while overtaking another bus driven by accused No.1. Because it has specifically come on record that both the buses were in competition with each other and accused No.1 was not allowing present petitioner accused to overtake his bus even on the wide road. Evidence adduced on record further reveals that thereafter at place called Pandoh near Gurudwara, accused No.1 gave signal to the accused to overtake his bus on a slight curve not leaving the sufficient space for the bus to overtake/move forward. But fact remains that despite there being no sufficient space, present petitioner accused made an attempt to overtake another bus, as a result of which, bus struck against the boulder/rock from the driver side. It also stands proved on record that due to aforesaid alleged rash and negligent act of present petitioner accused, several persons sustained injuries and two persons lost their lives.

10. In the present case, prosecution with a view to prove its case examined as many as 13 witnesses. It also emerged from the record that I.O. namely Tulsi Ram died during the pendency of the trial and as such, prosecution re-examined PW9 ASI Surender Pal to prove the documents proved by Tulsi Ram.

11. PW1 Vishal Chhabra categorically stated that on 16.6.1996 he boarded the 'Harison travels' bus to Manali from Delhi and in the next morning on 17th June, 1996, when they reached near Gurudwara at Pandoh, bus bearing No. DL-IP-6566 was being driven ahead of their bus driven by accused No.2. He categorically stated that both the buses were overtaking each other and were being driven at very high speed. PW1 categorically stated that the driver of his bus was overtaking another bus and in that process, another bus while over taking hit another bus and thereafter bus hit against the boulder and as a result of which, his wife died on the spot and he also sustained injuries. PW1 who was travelling in the bus, categorically stated that the bus in which he was traveling was being driven rashly and negligently by the driver. In his cross-examination, he categorically denied suggestion put to him that offending bus was being driven at normal speed and he was sleeping at the time of accident. However, in his cross examination, he categorically admitted that driver of another bus had given signal to overtake his vehicle but he further stated that there was no sufficient space for overtaking. This prosecution witness categorically denied in his cross examination that the accident took place due to rash and negligent act of the driver of the another bus.

12. Similarly, PW3 Praladh, who has also traveling in the bus stated that on 17.6.1996 he was traveling in the bus bearing No. HP-01-1643, and the accused (present in the Court) was driving the said bus. The accused was following the bus bearing No. DL-IP-6566. He further stated that driver of another bus gave him the signal for over taking and accused-present petitioner started over taking the bus and driver of another bus negotiated his bus towards their bus, as a result of which bus struck against the front side of the their bus. He stated that accident occurred due to negligence of accused No.1 (Ranjit Singh) and not by present petitioner accused. Prosecution declared this witness hostile. In his cross examination, PW3 specifically

denied that petitioner-accused was driving in high speed but admitted that accused was known to him and as such he was sitting in his bus. However, he denied that the accident took place due to rash and negligent driving of the accused-petitioner. In his cross examination, he admitted that driver of another bus Ranjit Singh failed to negotiate the bus and hit the front side of the offending bus and in order to save accident, the accused petitioner negotiated the bus towards the hill side. He also admitted that he had sustained injuries on his arm.

13. PW5 Gurdev Kumar, an eye witness did not support the case of the prosecution and as such, he was also declared hostile however in his cross examination, he denied that the offending vehicle was being taken into possession in his presence. In his cross examination , he also stated that accused person was known to him and accident did not take place due to his negligence, rather, same occurred due to rash and negligent driving of driver of bus bearing No. DL-IP-6566.

14. PW6 Manohar Lal stated that he reached at the spot immediately after the accident when Harison bus was parked at the distance of half furlong from Gurudwara and other bus near the Gurdwara and passangers present there were saying that the accident took place due to rash and negligent driving of the bus bearing DL-IP-6566. In his cross examination, he stated that accident did not take place due to rash and negligent driving of the present petitioner accused, who was well known to him.

15. Conjoint reading of prosecution witnesses PW3, 5 and 6 clearly suggests that they were interested witnesses because in their cross-examination they have admitted that they were known to the accused-petitioner. But PW3 Prehlad who was also travelling in the bus also stated that present petitioner-accused was following the bus bearing No. DL-IP-6566, which was also on its way to Manali. He also stated that driver of bus No. DL-IP-6566 gave accused No.2 signal for overtaking and when he started overtaking, the driver of another bus negotiated his bus towards their bus, as a result of which front side of the bus struck against the side of their bus. PW3 who was an eye witness though turned hostile, never denied the factum of accident, rather, took plea that accident occurred due to negligence of the driver of bus No. DL-IP-6566. Similarly, PW5 also did not support the case of the prosecution but he himself stated that he was present in shop at Pandoh, when accident took place. He categorically admitted in his cross examination that he was known to the accused and accident did not take place due to his negligence, rather, it had taken place due to rash and negligent driving of driver of another bus (DL-IP-6566). Similarly, PW6 Manohar Lal, who was not an eye witness also stated that people/passangers were saying that accident actually occurred due to rash and negligent driving of the driver of bus No. DL-IP-6566.

16. At this stage, it is not understood that when PW5 and PW6 were not present at the site of occurrence, how they could state that accident occurred due to rash and negligent driving of the driver of bus No. DL-IP-6566. Moreover, they categorically admitted in their cross examinations that they are known to the petitioner-accused. Similarly, PW3 though admitted the factum of accident and stated that he was known to present petitioner accused. In view of the above, this Court sees no infirmity and illegality in the judgments passed by the learned courts below, whereby they solely relying upon the statement of PW1 came to conclusion that accident occurred due to rash and negligent driving of the accused petitioner.

17. Close scrutiny of the statement of PW1 clearly suggests that on ill fated day, drivers of both the buses were trying to overtake each other and in this process, alleged incident occurred. He specifically stated that when accused No.2- petitioner was overtaking the bus, it struck against the rock on the right side. He categorically stated that petitioner-accused was trying to over take the bus in which he was traveling and accident was caused due to rash and negligent driving of the drivers of both the buses. In his cross examination, he specifically stated that accused was overtaking the bus. He also stated that road was not sufficiently wide. He further admitted that driver of the bus bearing No. DL-IP-6566, had given signal for overtaking but there was not sufficient wide road for overtaking, despite that accused made an attempt to overtake another bus. PW1 specifically denied the suggestion put to him that accident was

caused due to the negligent act of driver of DL-IP-6566. Careful perusal of aforesaid testimony of PW1, who also lost his wife in the accident, clearly suggests that at the time of accident both the drivers were negligently driving as they were trying to overtake each other and were in competition, but accident occurred due to sheer negligence of present petitioner-accused. Careful perusal of cross examination conducted on PW-1 nowhere suggests that defence at any point of time was able to shatter the testimony of this witness, who was admittedly not person of that local area from where present petitioner actually belonged. Moreover, in his cross examination no suggestion worth the name was put to this witness that he was falsely deposing against the petitioner accused. Similarly, no suggestion qua the motive, if any, to falsely implicate the petitioner was put to him. The cross examination as well as examination in chief conducted on this witness clearly suggests that the same is confidence inspiring and he has been very very consistent, specific and candid while narrating the sequence of event actually occurred at that time of accident. If statement of PW1 is read juxtaposing the stand taken by accused himself in his statement under Section 313, statement of PW1 itself stands corroborated as far as over taking of bus by petitioner accused is concerned. Petitioner accused himself in his statement under Section 313 admitted that at about 7:30AM, he was driving the bus HP-01-1643, which was on its way from Delhi to Manali. He also admitted that he was following another bus bearing DL No.IP-6566 being driven by Ranjit Singh (Accused No.1), who was also on its way to Manali. The petitioner also stated that bus struck against the boulder/rock. He further stated he was overtaking the another bus being driven by the accused Ranjit Singh and during that process, his bus struck against the boulder/rock, meaning thereby, an attempt was being made by the accused to overtake the bus. Though, PW3 has turned hostile but careful perusal of his cross examination also suggests that bus being driven by the accused was following bus bearing DL No. IP-6566 driven by Ranjit and as such, it can be safely inferred that accused petitioner struck the ill fated bus against the rock/boulder in the process of overtaking which was admittedly moving ahead of him. PW3 also stated that accused driver driving bus gave signal for overtaking and when he started overtaking another bus, it hit the front side of the bus. Since version of PW3 fully corroborates the statement of PW1 who also stated that accused No.1 had given signal to overtake but he further added that there was no sufficient space for overtaking meaning thereby in the process of overtaking, driver of the vehicle bearing No. DL-IP-6566 had given signal to present petitioner-accused to overtake, who without realizing that there is no sufficient space to overtake, made an attempt as a result of which bus struck against the boulder and rock from the right side. Similarly PWs 5 and 6 though did not support the case of prosecution and also admitted that both the buses were following each other and accident occurred due to rash and negligent driving of the bus driver of DL-IP-6566, hence this court after perusing the aforesaid prosecution witnesses especially statement of PW1, is fully convinced that at that relevant time, vehicle was being driven by the present petitioner accused in most rash and negligent manner, as a result of which, passengers suffered injuries and two of them lost their lives. PWs 3, 5 and 6 though admitted the factum of accident but denied that accident occurred due to rash and negligent driving but in view of their specific admission made in their cross examination that they were known to the present petitioner accused, this court really finds it difficult to accept the version put forth by them especially after seeing /perusing the candid, specific, and consistent statement given by PW1, who was admittedly not an interested witness.

18. Now at this stage, it would be fruitful to refer to the mechanical report given by PW10-Mechanic Prem Nath, who in his report Ext.PW10/B reported that driver side, front wind screen, glass, front driver window, seven windows of the body right side of the bus, backside glasses, inner body two seats, right side window top glass and left side door hinges were broken/damaged. He further stated that bus HP-01-1643, was overtaking the another bus at a very high speed and the accident appeared to have been taken by striking the bus with sthe stone on the right side of the hill and as a result of which, the bus was badly damaged from the right side and driver had not applied the break.

19. Careful perusal of aforesaid opinion given by the mechanic clearly suggests that no damage was caused to the bus bearing HP 01-1643 on the left side, rather, right side of the

bus i.e. driver side was totally damaged which clearly belies the stand taken by PW3 wherein he stated that in the process of overtaking, driver of DL-IP-6566 struck against the front side of their bus. Had bus bearing No. DL-IP-6566 struck against the left side of the bus HP-01-1643, damage would have been caused on the left side of the bus bearing No. HP-01-1643, whereas, as is clear from mechanical report, bus was badly damaged on the right side which was admittedly struck against the rock/boulder.

20. After perusing aforesaid mechanical report given by PW10, this Court is fully convinced that accident occurred due to rash and negligent driving of the present petitioner-accused No.2 who made an attempt to over take the bus from a very narrow space and in that process, his bus struck against the rock/boulder. Similarly, this Court had an occasion to see the photographs Ext.PW11/A to Ext.PW11/P, which makes it clear that bus had gone to extreme right side of the road after the accident, as is evident from the skid marks in the photographs. Further perusal of photographs also suggests that bus bearing No. HP-01-1643, after the accident, had covered long distance and went beyond bus bearing No. DL-IP-6566. Hence, this Court also has reason to infer that the accused was unable to stop the bus after striking which fact also finds mention in the statement rendered by PW10, who reported that driver never applied breaks, meaning thereby, at that relevant time, bus was being driven in high speed without caring for the consequence, which could follow. Similarly, statement of Ext.PW-13/C clearly corroborates the testimony of PW1, who candidly stated that after having signal from the driver of another bus, the petitioner-accused made an attempt to overtake though there was no sufficient space, as a result of which, accident occurred. It is undisputed that in the ill fated accident, two persons died. Hence, medical report adduced on record clearly corroborates the case of the prosecution that passengers sustained injuries due to rash and negligent driving of the accused-petitioner. Medical evidence further corroborates the prosecution case that injuries were also caused to PW1 and PW3 which was direct and proximate result of rash and negligent driving of the accused who was driving the bus HP-01-1643.

21. At this stage, learned counsel for the petitioner-accused placed reliance upon judgment of this Court reported in ***Gurcharan Singh*** *versus* ***State of Himachal Pradesh 1990 (2) ACJ 598,*** the relevant paragraphs of which are reproduced here-in-below:-

> "14. *Adverting to the facts of this case, it is in evidence that the truck in question was loaded with fertilizer weighing 90 quintals. Obviously, it cannot be said that the speed of the vehicle was very fast. Secondly, it is a State Highway and not a National Highway. Therefore, the speed on this account as well cannot be considered to be high.*
>
> *15. Coming to the statements of witnesses on this aspect, it has been stated that the truck was moving in high speed but it has not been said as to what that speed actually was. To say that a vehicle was moving in a high speed is neither a proper and legal evidence on high speed nor in any way indicates thereby the rashness on the part of the driver. The prosecution should have been exact on this aspect as speed of the vehicle is an essential point to be seen and proved in a case under Section 304-A of the Indian Penal Code. Further, there are no skid marks which eliminate the evidence of high speed of the vehicle. In addition to this, it has been stated by the witnesses that the vehicle stopped at a distance of 50 feet from the place of accident. This appears to be exaggerated. However, it is not a long distance looking to the two points; viz, the first impact of the accident and the last tyres of the vehicle and the total length of the body of the truck in question. If seen from these angles, the distance stated by the witnesses cannot be considered to be very long and thus an indication of high speed. The version of the petitioner that he blew the horn near about the place of curve which frightened the child, cannot be considered to be without substance. This can otherwise be reasonably inferred that the petitioner would have blown the horn on seeing the child on the road as it is in evidence that the child had come on the pucca portion of the road while there is no evidence as to whether the witnesses, more particularly, Ghanshyam, PW7,*

Chander Kanta, PW8, mother, and a few other witnesses were there at that particular time. Rather the depositions of these witnesses indicate that they were coming from some village lane which was joining the main road in question. Children of this age, usually crafty by temperament, move faster than the parents and are in advance of them while walking. This appears to have happened in the present case. Minute examination of the circumstances of this case and the evidence brought on the record, discloses that the deceased had reached the pucca portion of the road much before the arrival of his parents and the witnesses. That is why in their deposition they have said that the child had been run over by the truck. On the other hand, the petitioner has stated that horn by him and started crossing the road which could not be seen by him and the result was the accident and the death of the child. In case some pedestrians suddenly cross a road, the driver of the vehicle cannot save the pedestrian, however slow he may be driving the vehicle. In such a situation he cannot be held negligent; rather it appears that the parents of the child were negligent in not taking proper care of the child and allowed him to come alone to the road while they were somewhere behind and they could have rushed to pull back the child before the approaching vehicle came in contact with him as it is in their depositions that the truck driver was at a distance coming at a high speed and in case the child wanted to cross the road, it could do so within the time it reached at the place of the accident. How the accident has actually taken place, has not been clearly and comprehensively stated by any of the witnesses. They appear to have been prejudiced by the act of the driver. Their versions are, therefore, coloured by the ultimate act of the petitioner and the fact that the child had been finished."

22. True, it is that the Hon'ble High Court while passing aforesaid judgment has observed that *"prosecution should have been exact on this aspect as speed of the vehicle is an essential point to be seen and proved under Section 304-A of the Indian Penal Code"*. Definitely, there cannot be any quarrel with regard to the aforesaid observations made by the Court but now question arises as to what can be the method/mode for measuring the exact speed of the offending vehicle at the time of accident. Undisputedly, in the present case, offending vehicle after striking with rock stopped at some distance and automatically speedometer springs back to "Zero" and as such, no help at all can be taken from speedometer to ascertain the exact speed of the vehicle at the relevant time. To my mind, the eye witnesses of the accident can be the best persons to depose whether offending vehicle was in high speed or not. Apart from above, aspect of high speed can be gauzed from the side/direction of the offending vehicle being driven on the wrong side and certainly an inference of its being driven rashly and negligently on high speed can be drawn by perusing spot map, photographs and mechanical reports which may point towards the force/impact, as supporting evidence. But obviously, in the absence of some specific mode to gauze the speed, only eye witnesses to the accident can be the best persons to depose the high speed/actual speed of the vehicle.

23. Learned counsel for the petitioner-accused also prayed that the accused may be given the benefit of probation under Section 4(b) of the Probation of Offenders Act, 1958 keeping in view his age and his being first offender. He also stated that mitigating circumstance in this case is that more than 20 years have passed after occurrence of the accident dated 17.6.1996, and moreover, the accused was convicted by the learned trial Court vide judgment dated 28.9.2006, and he is suffering continuous mental agony during the pendency of the appeal in the court of learned Sessions Judge, Mandi, Himachal Pradesh, as well as in High Court of Himachal Pradesh. In support of the aforesaid arguments, Mr. Lakshay Thakur, also invited the attention of this Court to the judgment passed by this Hon'ble Court in ***Yudhbir Singh*** *versu***s State of Himachal Pradesh 1998(1)S.L.J. 58**, wherein it has been held as under:

9. The only mitigating circumstance that appears to be there is that the time gap of about six years between the date of occurrence as well as the date of decision of this revision petitioner. During this entire period sword of present case looming

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

24. This Court cannot lose sight of the stern observations made by the Hon'ble Apex Court in ***State of Punjab*** *versus* ***Saurabh Bakshi 2015 (5) SCC 182*** while dealing with the accident case, the Hon'ble Apex Court has taken serious view of reduction of sentences by the courts below. Their lordships in the aforesaid judgment in paras No. 1, 14, 24 and 25 have held as under;

"1. Long back, an eminent thinker and author, Sophocles, had to say:

"Law can never be enforced unless fear supports them."

Though the aforesaid statement was made centuries back, it has its pertinence, in a way, with the enormous vigour, in today's society. It is the duty of every right thinking citizen to show veneration to law so that an orderly, civilized and peaceful society emerges. It has to be borne in mind that law is averse to any kind of chaos. It is totally intolerant of anarchy. If any one defies law, he has to face the wrath of law, depending on the concept of proportionality that the law recognizes. It can never be forgotten that the purpose of criminal law legislated by the competent legislatures, subject to judicial scrutiny within constitutionally established parameters, is to protect the collective interest and save every individual that forms a constituent of the collective from unwarranted hazards. It is sometimes said in an egocentric and uncivilised manner that law cannot bind the individual actions which are perceived as flaws by the large body of people, but, the truth is and has to be that when the law withstands the test of the constitutional scrutiny in a democracy, the individual notions are to be ignored. At times certain crimes assume more accent and gravity depending on the nature and impact of the crime on the society. No court should ignore the same being swayed by passion of mercy. It is the obligation of the court to constantly remind itself that the right of the victim, and be it said, on certain occasions the person aggrieved as well as the society at large can be victims, never be marginalised. In this context one may recapitulate the saying of Justice Benjamin N. Cardizo "Justice, though due to the accused, is due to the accuser too". And, therefore, the requisite norm has to be the established principles laid down in precedents. It is neither to be guided by a sense of sentimentality nor to be governed by prejudices.

14. In this context, we may refer with profit to the decision in Balwinder Singh (supra) wherein the High Court had allowed the revision and reduced the quantum of sentence awarded by the Judicial Magistrate, First Class, for the offences punishable under Section 304A, 337, 279 of IPC by reducing the sentence of imprisonment already undergone that is 15 days. The court referred to the decision in Dalbir Singh v. State of Haryana and reproduced two paragraphs which we feel extremely necessary for reproduction:- (Balwinder Singh case, SCC pp. 186-87, para12)

"12...1. When automobiles have become death traps any leniency shown to drivers who are found guilty of rash driving would be at the risk of further escalation of road accidents. All those who are manning the steering of automobiles, particularly professional drivers, must be kept under constant reminders of their duty to adopt utmost care and also of the consequences befalling them in cases of dereliction. One of the most effective ways of keeping such drivers under mental vigil is to maintain a deterrent element in the sentencing sphere. Any latitude shown to them in that sphere would tempt them to make driving frivolous and a frolic.

13. Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal courts cannot treat the nature of the offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the Probation of Offenders Act. While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily cause any accident; or even if any accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the offence; and lastly, that even if he is convicted he would be dealt with leniently by the court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of the vehicle he cannot escape from a jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles." (Dalbir Singh case, SCC pp. 84—85 & 87, paras 1 &13)"

24. Needless to say, the principle of sentencing recognizes the corrective measures but there are occasions when the deterrence is an imperative necessity depending upon the facts of the case. In our opinion, it is a fit case where we are constrained to say that the High Court has been swayed away by the passion of mercy in applying the principle that payment of compensation is a factor for reduction of sentence to 24 days. It is absolutely in the realm of misplaced sympathy. It is, in a way mockery of justice. Because justice is "the crowning glory", "the sovereign mistress" and "queen of virtue" as Cicero had said. Such a crime blights not only the lives of the victims but of many others around them. It ultimately shatters the faith of the public in judicial system. In our view, the sentence of one year as imposed by the trial Magistrate which has been affirmed by the appellate court should be reduced to six months

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

25. After giving my thoughtful consideration to the law cited by Mr. Lakshay Thakur, learned counsel representing the petitioner-accused in the present case as well as observations

made by Hon'ble Apex Court in ***Saurabh Bakshi case (supra)***, I am of the view that present case is not fit case for granting the benefit of Section 4 of probation of Offenders Act, 1958. The Hon'ble Apex Court in the judgment cited above has deprecated the practice of courts in settling the matter by awarding compensation or releasing the accused by giving the benefit of Probation of Offenders Act, 1958. In the facts and circumstances of the present case, where there is overwhelming evidence to suggest that vehicle was driven by the accused in most rash and negligent manner, no leniency can be shown to the accused.

26. However, in the facts and circumstances of the case, it appears to the Court that sentence imposed by the court below is on little higher side and same deserves to be modified accordingly. Accordingly, sentences imposed by the courts below for the offences committed under Sections 279, 337, 338 and 304-A of Indian Penal Code are modified to three months only.

27. In view of the above, judgments passed by both the courts below are upheld. However, conviction/sentence imposed upon the accused is modified to the aforesaid extent only. Order dated 5.2.20010, passed by this Court, whereby sentence imposed by the court below was suspended, is hereby vacated and the petitioner-accused is directed to surrender himself before the learned trial Court forthwith to serve the sentence as awarded by this Court vide this Judgment. Petition stands disposed of along with pending applications, if any.

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

Hansi Devi and Ors. .....Appellants.

Versus

Raj Kumari and Ors. .....Respondents.

RSA No.213 of 2005
Reserved on 23.8.2016.
Date of Decision: 16 .9.2016

Specific Relief Act, 1963- Section 20- Predecessor-in-interest of the defendants executed a agreement/sale deed selling 39 kanals 15 marlas of land – however, khasra No.1335 and 1336 were wrongly shown in possession of R as tenant at Will – it was further agreed that land of equal quantity and kind would be given to the plaintiff in case of loss of possession of these khasra numbers – tenant became owner on the commencement of H.P. Tenancy and Land Reforms Act- hence, the suit was filed for granting land as agreed in the deed – the suit was decreed by the trial Court – an appeal was preferred, which was accepted- held, in second appeal that the possession of the entire land was delivered to the plaintiff and vendor had performed his part of the agreement- the plaintiff had not taken any steps to get the record corrected- the suit was filed after 22 years of conferment of proprietary rights- plaintiff was aware of the tenancy and there is no justification for compensating the plaintiff for the loss of the land- the Appellate Court had rightly dismissed the suit- appeal dismissed. (Para-8 to 16)

For the Appellants: Mr. Ajay Dhiman, Advocate.

For the respondents: Mr. Ajay Sharma, Advocate, for LRs No. 1 (i) to 1(ix) and respondent No 3.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant regular second appeal filed under Section 100 of CPC is directed against the judgment and decree dated 2.4.2004 (in short 'the impugned judgment'), passed by the learned District Judge, Una, HP, in Civil Appeal No. 70/2002, reversing the judgment dated

30.5.2002, passed by learned Sub Judge, Ist Class, Court No.1, Amb, District Una, HP, in Civil Suit No.40/1 of 1998.

2. Briefly stated facts as emerged from the record are that the appellant (hereinafter referred to as the 'plaintiff') and proforma defendants No. 4 and 5 filed suit for possession by way of specific performance of agreement/sale deed No. 270 dated 26.3.1975 (Ext.P-1), whereby predecessor-in-interest of present defendants sold 39 Kanals, 15 Marlas land denoted by khasra Nos. 1254, 1296, 1297, 1305, 1310, 1311, 1312, 1313, 1302, 1303, 1304, 1255, 1319, 1336 and 1335 situated in village Seri to the plaintiff, as entered in Jamabandi for the year, 1971-72. It also emerge from the record that in the aforesaid sale deed, khasra Nos. 1335 & 1336 were wrongly shown in cultivation of Roshan Lal, S/o Partapu and Smt. Prito, D/o Kailoo in the revenue record as tenant-at-will at the time of the sale deed. Vide aforesaid sale deed, late Partap Singh had agreed to give land of equal quantity and kind in village Seri to the plaintiff, in case vendee loses his title and possession over khasra Nos. 1335 and 1336. The tenants acquired proprietary rights qua these khasra Numbers on 24.7.1996. Plaintiff further averred in the plaint that deceased Partap Singh failed to take steps to get revenue corrected in favour of the plaintiff. Plaintiff claimed that the names of tenants continued to exist in the revenue record in respect of these two khasra number, as a result of which, tenants became owner of the aforesaid khasra numbers by way of operation of law as per mandate of Section 104 of HP Tenancy and Land Reforms Act. Consequent to aforesaid development, plaintiff and proforma defendants lost their title as well as possession and in these khasra numbers. Plaintiff averred in the plaint that defendants were repeatedly requested to take necessary steps for correction of revenue record as per stipulation in the sale deed but all in vain, as a result of which, plaintiff and proforma defendants were deprived of khasra Nos. 1335 and 1336. In the aforesaid background, plaintiff filed suit (as mentioned above) for decree of possession by way of specific performance of agreement/sale deed dated 26.3.1975, whereby predecessor-in-interest of defendants had agreed to give land of equal quantity and kind in village Seri in case vendee loses his title and possession of khasra Nos. 1335 and 1336. Defendants by way of written statement raised preliminary objections qua the limitation, estoppel, non-joinder and mis-joinder of necessary parties, cause of action and maintainability. Defendants also stated that plaintiff and proforma defendants are estopped by their own act and conduct to file the suit and as such, suit is not maintainable nor learned trial Court has jurisdiction to try the same. Defendants while admitting the execution of sale deed at the behest of predecessor–in-interest of defendants denied the contents of the same. Defendants specifically stated that the plaintiff as well as proforma defendants were put in possession of the entire land at the time of execution of sale deed, as a result of which, predecessor–in-interest of the defendants was divested of the title qua the property disclosed in the sale deed. Defendants further contended that the plaintiff and proforma defendants requested to get entries corrected in the revenue record after effecting of sale by the predecessor–in-interest of the defendants and as such, they cannot be punished for the wrongs having been committed by the plaintiffs. Defendants also stated that possession of the entire property was delivered to the plaintiff and proforma defendants after execution of sale deed and no steps were taken by the plaintiff for correction of revenue entries and defendants cannot be blamed for the lapse, if any. While praying for the dismissal of the suit defendants stated that neither defendants are required to execute sale deed in favour of the plaintiff and proforma defendants, nor delivery of possession can be ordered and decided qua the land vested in the tenants. In replication, plaintiff while re-appreciating the claim set up in the plaint, disputed the written statement in toto.

3. Learned trial Court on the basis of aforesaid pleadings and evidence, be it ocular or documentary adduced on record by the respective parties, framed issues and decreed the suit of the plaintiff to the effect that defendants will execute sale deed qua the suit land in favour of the plaintiff and proforma defendants in order to comply with the terms of the sale deed Ext.P1 having been agreed upon inter-se predecessor-in-interest of the defendants and plaintiff. Being aggrieved and dis-satisfied with the aforesaid judgment and decree dated 30.5.2002, passed by the learned trial Court, defendants filed an appeal before the learned District Judge, Una.

However, fact remains that the learned District Judge, vide judgment dated 2.4.2004, accepted the appeal preferred by the defendants and dismissed the suit filed by the plaintiff for specific performance of the agreement. Hence, this second appeal before this Court by the plaintiff.

4. This Court vide order dated 8.6.2005 admitted the present appeal on following substantial question of law:-

1. *Whether the learned District Judge misconstrued, mis-interpreted the pleadings and evidence of the parties.*
2. *Whether the learned Distt. Judge has mis-interpreted the material on record i.e. Ext.P-1.*
3. *Whether the learned court below has failed to appreciate the presumption of truth attached to the Ext.P-1 (Sale Deed).*

5. Mr. Ajay Dhiman, Advocate, appearing for the appellant vehemently argued that the impugned judgment and decree passed by the learned first Appellate Court is not sustainable in the eye of law as the same is not based upon the correct appreciation of evidence adduced on record by the respective parties. He contended that bare perusal of the impugned judgment suggests that learned Appellate Court misinterpreted and misconstrued the pleadings available on record and the judgment is purely based upon the conjectures and surmises and as such, same cannot be allowed to sustain. With a view to substantiate his aforesaid plea, Mr. Dhiman, made this Court to travel through the agreement/sale Deed Ext.P-1 entered inter-se the parties on 26.3.1998 to demonstrate that predecessor–in-interest of the defendants at the time of execution of aforesaid sale deed had specifically agreed that in case, the plaintiff is divested from land after conferment of rights on the tenants, he would compensate them by providing equal land in the same village. Mr. Dhiman, strenuously argued that it stands duly proved on record that the agreement/sale deed Ext.P1 was duly executed on 26.3.1998, by the predecessor–in-interest of the defendants and as such, learned First Appellate Court has fallen in grave error while dismissing the suit and upsetting the findings returned by the learned trial Court, wherein learned trial Court on the basis of evidence adduced on record had come to the conclusion that the defendants being LRs of the late Partap Singh, predecessor-in-interest, who had executed sale deed, are under obligation to provide land in terms of the agreement/sale deed. While concluding his arguments, Mr. Dhiman carried this Court through the evidence led on record by the respective parties, to demonstrate that there was ample evidence on record suggestive of the fact that sale deed Ext.P-1 was duly executed by the predecessor–in-interest of defendants, whereby he had agreed to compensate the land of equal quantity as discussed ibid. In the aforesaid background, Mr. Dhiman prayed that the present appeal may be allowed and the impugned judgment be quashed and set-aside.

6. Per contra, Mr. Ajay Sharma, Advocate, representing the defendants supported the judgment passed by the learned first appellate Court. He forcefully argued that bare perusal of the impugned judgment clearly suggests that the First Appellate Court while accepting the appeal preferred on behalf of the defendants has dealt with each and every aspect of the matter very meticulously, and as such, no interference, whatsoever, of this Court is warranted in the present facts and circumstances. Mr. Sharma, strenuously contended that the suit filed by the plaintiff was not legally maintainable, as it stood proved on record that late Partap Singh being original owner, had given possession of entire land to the plaintiff on the basis of sale deed Ext.P-1 dated 26.3.1975. As per Mr. Sharma, since late Partap Singh had handed over possession of the land sold in terms of the sale deed to the plaintiff, stipulation, if any, qua the handing over of the possession stood fulfilled and no suit whatsoever, at this belated stage, could be entertained by the court below and, as such, there is no illegality and infirmity in the impugned judgment, whereby judgment passed by the learned trial Court was quashed and set-aside. Mr. Sharma, forcefully contended that the suit filed by the plaintiff was patently time barred because tenants over the land had become owners of the suit land in the year, 1975 when the Act came into force. With a view to substantiate his aforesaid argument, Mr. Sharma invited attention of this Court to Section 104 of the Act to demonstrate that conferment of proprietary right under the Act was

automatic, meaning thereby, with the commencement of aforesaid Act, tenants over the suit land had become owners in the year, 1975 itself and admittedly, no steps whatsoever, were taken by the plaintiff to get the revenue record corrected, as a result of which, proprietary rights were conferred upon the tenants, who were admittedly in possession of the land at the time of execution of sale deed. While concluding his argument, Mr. Sharma invited attention of this Court to the sale deed to suggest that agreement/sale deed, if any, was entered upon by the plaintiff with open eyes fully knowing that land proposed to be sold is under tenancy. Mr. Sharma, also contended that bare perusal of recital made in the sale deed clearly suggests that plaintiff was made aware that land, which was proposed to be sold, may be given to the tenants by way of conferment of proprietary rights. In the aforesaid background, he prayed for the dismissal of the present appeal.

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

8. Careful perusal of the pleadings as well as submissions having been made on behalf of the counsel representing the parties, clearly suggests that there is no dispute at all qua the execution of sale deed Ext.P-1, whereby Partap Singh (predecessor–in-interest of defendants), being original owner sold the suit land to the plaintiff and proforma defendants and as such, this Court in view of this aforesaid aspect of the matter as well as substantial questions of law framed at the time of admission (reproduced supra) would be examining ocular as well as documentary evidence led on record by the respective parties to explore the answers to the substantial question of law.

9. During proceedings of the case, this Court had an occasion to peruse the sale deed Ext.P-1, perusal whereof suggests that vide sale, original owner partap Singh sold 39 kanals 15 marlas of land to the plaintiff for the consideration of Rs. 16,000/-. It also emerges from the record that at the time of aforesaid sale, Ext.P-1, two khasra Nos. 1335 and 1336 measuring 12 kanals, were under the tenancy of Shri Roshanl Lal and Smt. Prito. Aforesaid factum qua the tenancy of Shri Roshan and Prito, stands mentioned in para-2 of the plaint. It is also admitted case of the parties that after execution of the aforesaid sale deed, plaintiff along with proforma defendants were put in possession of the entire chunk of land including khasra Nos. 1335 and 1336, which were under the tenancy of Roshan Lal and Prito. Plaintiff also claimed in his plaint that proprietary rights were conferred upon the aforesaid tenants vide mutation No. 70 dated 24.7.2006, as a result of which, plaintiff as well as proforma defendants were dispossessed from that portion of land by the tenants. The plaintiff also claimed that they had approached the defendants and their predecessor–in-interest several times regarding the correction of entries but no application was ever moved in this regard. As per the plaintiff, correction, if any, in the records after conferment of proprietary rights qua the aforesaid khasra numbers in favour of Roshan Lal and Prito was to be made by the defendants in terms of the stipulation contained in the sale deed Ext.P-1. Admittedly, in the present case, vide sale deed, dated 26.3.1975, deceased Partap Singh (Original Owenr) had delivered possession of 39 kanals 15 marlas in favour of the plaintiff and proforma defendants. Aforesaid factum of delivery of possession vide sale deed Ext.P-1 has not been disputed by the plaintiff, meaning thereby, pursuant to sale deed, plaintiff was put in possession of the land described in the sale deed.

10. Now question which needs to be examined is whether stipulation mentioned in the sale deed that vendor would be responsible for handing over the tenancy of land in favour of the vendee if for any reason part of sold land goes out of the ownership of the vendee, is of any consequence, when it stands duly proved on record that pursuant to sale deed, plaintiff was put in possession of the entire sold land by late Partap Singh. Though perusal of sale deed Ext.P-1,suggests that original owner (predecessor–in-interest of defendants) had agreed that he would transfer equal land of same quality and nature from the same village to the plaintiff, if for any reason part of the sold land goes out of the ownership of the vendee including khasra No. 1335 and 1336, which were under the tenancy of tenants, meaning thereby, plaintiff was put into possession of entire sold land including aforesaid khasra numbers which were admittedly under tenancy of the tenants named above. It also emerges from the record that the plaintiff was

dispossessed only after conferment of proprietary rights vide mutation No. 70 dated 24.7.1996 upon the tenants. Though, this Court after seeing aforesaid aspect of the matter is of the view that the Partap Singh (predecessor–in-interest of present defendants) had performed his part in terms of the sale deed Ext.P-1, whereby he admittedly delivered the possession of 39 kanals 15 marlas of land, which he sold in favour of the plaintiff and proforma defendants but admittedly, in the present case, plaintiff was dispossessed of the land comprising of khasra Nos. 1335 and 1336 after conferment of proprietary rights of tenants on 24.7.1996. But there is nothing on record suggestive of the fact that plaintiff ever took any steps between 26.3.1975 till filing of present suit in the year, 1998 to get the revenue record corrected, especially, knowing fully well that land, which they had purchased from deceased Partap Singh, was under tenancy of Roshan Lal and Smt. Prito. Though, plaintiff had taken stand that it was the duty of defendant or his successor-in-interest to get the revenue record corrected in terms of stipulation contained in Ext.P1 (sale deed) but this Court, after seeing the recitals contained in the sale deed, is of the view that plaintiff failed to take steps, if any, for correction of revenue entries for almost 23 years and there is no document available on record to demonstrate that during this period, they ever made an attempt to persuade deceased Partap Singh or his successor-in-interest to get the revenue record corrected in terms of sale deed.

11. PW1-plaintiff himself stated that in the month of June, plaintiff was dispossessed from the suit land after conferment of proprietary rights in favour of the tenants in 1976. It has also come in his statement that request was made to the contesting defendants regarding the correction of entries in faovur of the plaintiff, but no action was taken. Similarly, plaintiff examined PW2 and PW3 to prove factum of execution of sale deed Ext.P-1, which nowhere suggests that they were able to prove that plaintiff at any point of time made an effort to persuade the deceased Partap Singh or his successors to get the revenue record corrected in terms of stipulation made in the sale deed, whereas defendant namely Hardyal Singh DW-1 stated that sale deed was effected by his father in favour of the plaintiff but he is not aware of the contents of the same. He also feigned ignorance as to whether deceased Roshan Lal and Prito Devi were tenants of 14 kanals of land, which were sold to the plaintiff and proforma defendants, however, he admitted that defendants were conferred proprietary rights.

12. Careful perusal of evidence led on record by the plaintiff nowhere suggests that an effort was ever made by the plaintiff after execution of sale deed in 1975 to persuade/compel deceased Partap Singh or his successors to get revenue entries corrected. Apart from above, proprietary rights were conferred upon the tenants namely Roshan Lal and Prito on 24.7.1996, whereas present suit was filed on 27.2.1998 and there is no evidence available on record suggestive of the fact that plaintiff took any steps for correction of revenue record being the original owner of the land comprising of khasra Nos. 1335 and 1336. Admittedly pursuant to sale deed Ext.P1, plaintiff had become owner of the khasra Nos. 1335 and 1336, which were under the tenancy of Roshan Lal and Prito Devi and steps, if any, for correction of revenue record could be taken by the original owner for correction of the revenue record. Perusal of Jamabandi for the year 1971-72 (Annexure P-6), suggests that tenants Roshan Lal and Prito were shown to be tenants of (old khasra No. 1336) new khasra No. 327 measuring 0-04-93 and old khasra No.1335 (new khasra Nos. 324,325,326 and 328 kita 4 measuring 0-48-64) respectively and plaintiff was fully aware that 14 kanals of land out of 39 kanals land, which was purchased by him vide sale deed Ext.P1, was under the tenancy of Roshan Lal and Prito. But despite that he failed to take any steps for almost 23 years. Moreover, as has been observed above, steps, if any for correction of revenue record as stipulated in sale deed Ext.P1 could be taken by the plaintiff, who, pursuant to the sale deed, had admittedly acquired the status of owner of the land bearing khasra Nos. 1335-1336, which were under tenancy.

13. Though perusal of the judgment passed by the both the Courts below suggests that aspect qua the binding effect, if any, of sale deed executed by predecessor-in-interest on the successor-in-interest, who executed sale deed, has been not gone into by the courts below but since, this Court had an occasion to peruse the sale deed Ext.P-1, and it is not understood how successor-in-interest of original owner could be held liable to execute sale deed qua the suit land

in favour of the plaintiff in terms of sale deed Ext.P1 admittedly, having been executed by late Partap Singh, successor-in-interest of present defendants in the absence of binding clause, if any. Perusal Ext.P1 also suggests that deceased Partap Singh had agreed that in case, for any reason, part of the sold land goes out of their ownership, he would transfer equivalent land of same quality and nature from the same village but close scrutiny of Ext.P1 nowhere provided that his successor would be bound by condition stipulated in Ext.P1.

14. In the instant case, plaintiff purchased land fully knowing that khasra No. 1335-1336 were under the tenancy of Roshan Lal and Prito. From the perusal of sale deed, it can also be presumed that plaintiff was aware that tenants (Roshan Lal and Prito) could be conferred proprietary rights qua the aforesaid two khasra numbers (Khasra Nos. 1335 and 1336) because otherwise, there was no occasion, whatsoever, for the original owner to make stipulation in the sale deed while making sale to the plaintiff that in case, for some reasons sold land goes out of the owner ship of the vendee, he would transfer the equivalent land (as mentioned supra).

15. Hence, this Court is of the view that plaintiff purchased khasra Nos. 1335 and 1336 knowing fully well that proprietary rights qua the same may be conferred upon the tenants and as such, at this belated stage, this court sees no justification for demand raised by the plaintiff that they may be compensated in terms of agreement/sale deed by the successors of deceased Partap Singh. At the cost of repetition, it may be stated that after 26.3.1975, plaintiff had acquired the status of owner of the suit property including khasra No. 1355 and 1366 (under the tenancy of Roshan Lal and Prito) and as such, application, if any, for correction of mutation No. 70 dated 24.7.1996, whereby proprietary rights were conferred by the Roshan Lal and Prito, could be moved by the plaintiff being owner and not by the successor-in-interest of late Partap Singh. Since late Partap Singh and his successors had lost title of ownership after execution of sale deed Ext.P1, after 26.3.1975, there was no occasion whatsoever, for them to move an application for correction of mutation No. 70 dated 24.7.1996, rather as has been observed above, there is no iota of evidence led on record by the plaintiff suggestive of the fact that at any point of time, he served any notice upon the previous owner Partap Singh or any of his LRs qua the correction of entries. Since petitioner was fully aware of the fact that land which he has purchased from Partap Singh can be further transferred in the name of tenants of Smt. Prito and Roshan Lal, after the conferment of the Act, it was expected from him to take steps immediately after the execution of sale deed on 26.3.1975 for correction of revenue record. Had the plaintiff initiated steps within time after conferment of proprietary rights on Roshan and Prito, there would have been no occasion for him to file the present suit. Since tenants became owner in the year 1974-75 under the provision of Act, 1972, in that eventuality, plaintiff was expected to file suit, if any, for enforcement of his rights in terms of sale deed Ext.P-1 within stipulated period as per Limitation Act. But in the instant case, as per own admission of the plaintiff, he kept mum for almost 23 years and as such, this Court sees no justification in accepting the suit of the present plaintiff at this belated stage. Apart from above, it is not also understood that how stipulation, if any, made in sale deed could be given effect in the absence of specific details if any, qua the land stipulated to be given to the plaintiff in lieu of khasra Nos. 1335 and 1336, which was admittedly entered in the names of Roshan Lal and Prito after commencement of Tenancy Act. Perusal of Sale deed nowhere suggests that which khasra Nos. were to be given to the plaintiff in case land given to plaintiff is reverted back to the tenants after conferment of proprietary rights. No decree for specific performance could be issued in absence of specific details of property, if any, and as such, this Court is unable to accept the contention put forth on behalf of the plaintiff. The substantial questions of law are answered accordingly.

16. Consequently, this Court after perusing the entire evidence available on record is of the view that there is no illegality and infirmity in the judgment passed by the learned first Appellate Court, rather perusal of impugned judgment suggests that same is based upon correct appreciation of the evidence available on record as well as law on the point. Hence, the instant regular second appeal is dismissed being devoid of any merit.

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

Het Ram ...Appellant.
Versus
State of Himchal Pradesh ...Respondent.

RSA No.330 of 2008
Date of Decision: 19th September, 2016

Specific Relief Act, 1963- Section 34- **H.P. Land Revenue Act, 1954-** Section 163-A- Proceedings were initiated against the plaintiff for encroaching upon the government land, which resulted in the ejectment of the plaintiff- an appeal was filed, which was dismissed- a civil suit was filed pleading that no opportunity of hearing was given – the suit was decreed by the trial Court- an appeal was preferred, which was allowed- held, in second appeal that plaintiff had appeared before Assistant Collector 1st Grade and had sought time to file the reply- this prayer was rejected and order of ejectment was passed without recording the statement of Patwari, Kanungo or any other person – the trial Court had rightly held that the procedure prescribed under the Act was not followed- the Court had rightly confined itself to the procedure adopted by the revenue authorities- the authorities had failed to act in conformity with the basic procedure of law – the Appellate Court had wrongly allowed the appeal – appeal allowed- Assistant Collector 1st Grade directed to decide the matter within six months. (Para-16 to 24)

Cases referred:
Firm of Illuri Subbayya Chetty and Sons Vs. State of Andhra Pradesh AIR 1964 SC 322
Dhulabhai v. State of Madhya Pradesh and another AIR 1969 SC 78
Bhanwar Lal and another v. Rajasthan Board of Muslim wakf and others(2014) 16 S.C.C.51
Babu Ram(deceased) and others v. Shri Pohlo Ram(deceased) and others AIR 1992 HP 8
Roshan Lal versus Krishan Dev Latest HLJ 2002(hp) 197
Jagannath versus Om Prakash 2008(1) Shim. LC 45
Rajasthan State Road Transport Corporation & anr vs. Bal Mukund Bairwa(2) 2009(4) SCC 299
Bhekhalu Devi Vs. Smt. Ram Ditti and others 2008(2) Shim.LC 412
M.P. Electricity Board, Jabalpur versus Vijaya Timber Co. 1997(1) Supreme Court Cases 68

For the Appellant Mr.R.S.Jamalta, Advocate.
For the Respondent: Mr.Rajat Chauhan, Law Officer.

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 2.5.2008, passed by learned Additional District Judge, Fast Track Court Shimla, District Shimla, H.P., reversing the judgment and decree dated 22.7.2006, passed by learned Civil Judge (Senior Division), Theog in Civil Suit No. 95-I of 2005, whereby suit filed by the plaintiff was decreed after setting-aside the order passed by A.C.1st Grade and Collector thereafter.

2. The brief facts of the case as emerged from the plaint are that the appellant/plaintiff being aggrieved with the passing of the order dated 4.5.2005, passed by the Assistant Collector 1st Grade, Theog in case No. 935/2003 and that of Collector, Sub Division, Theog dated 25.7.2005 in case No.16-VIII-2005, filed suit for declaration and injunction in the Court of learned Civil Judge(Senior Division) Theog, District Shimla H.P, praying therein that order dated 4.5.2005, passed by the Assistant Collector 1st Grade, Theog in case No.935/2003

and further upheld by the Collector Sub-Division, Theog vide order dated 22.7.2005 in case No.16-VIII-05, be declared wrong and illegal and defendant-State be restrained from ejecting the plaintiff from the suit land.

3. It emerge from the record that defendant-State initiated proceedings under Section 163 of the H.P. Land Revenue Act(hereinafter referred to as the 'Act') against the present appellant-plaintiff for alleged encroachment having been made by the present appellant-plaintiff on the Government land comprising khasra No.198, measuring 0-01-69 hectares, Khasra No.199, measuring 0-09-07 hectares and khasra No. 188/1,measuring 0-05-40 hectares, kita 3, area 0-16-16 hectares, situated in Chak Chhikhar, Tehsil Theog, District Shimla, HP. It also emerge from the record that the present appellant-plaintiff constructed house over khasra No.198. The Revenue staff, after being satisfied that the appellant-plaintiff encroached upon the Government land, initiated proceedings under Section 163 of the Act, before the Assistant Collector 1st Grade, Theog. The Assistant Collector 1st Grade, vide order dated 4.5.2005, passed order of ejectment against the appellant-plaintiff with regard to the suit land, as mentioned hereinabove.

4. The appellant-plaintiff, being aggrieved and dissatisfied with the ejectment order dated 4.5.2005, filed an appeal before the Collector Sub Division, Theog, which was also dismissed on 25.7.2005. In the aforesaid background, plaintiff filed suit, as referred hereinabove, alleging therein that ejectment order passed by the Assistant Collector 1st Grade, Theog is absolutely wrong and illegal since no opportunity of being heard was afforded to him in terms of Section 163 of the Act before passing of the ejectment order. Plaintiff claimed that pursuant to registration of the case, Assistant Collector 1st Grade, issued summons to the plaintiff, wherein, he was directed to appear before him on 19.3.2005. The plaintiff, pursuant to the aforesaid notices, put in appearance before the Assistant Collector 1st Grade, Theog and prayed time for filing reply. Accordingly, case was adjourned for 4.5.2005, for filing reply. The plaintiff had engaged counsel namely Sh. M.L.Chauhan, Advocate for 4.5.2005. but on 4.5.2005, Sh. M.L.Chauhan, Advocate was unable to appear before the Court on account of call of strike given by the Bar Association of India. However, plaintiff himself appeared before the Court of Assistant Collector 1st Grade and prayed for time for filing reply but learned Assistant Collector 1st Grade did not accede to the request of the plaintiff and without calling for reply, passed the ejectment order against the plaintiff that too without calling for records from the revenue authorities to ascertain the correctness and genuineness of the proceeding initiated by the Revenue authorities under Section 163 of the Act.

5. Defendant-State by way of written statement refuted the averments contained in the plaint by stating that the appellant-plaintiff has encroached upon the Government land, description whereof has been given hereinabove, and as such, he has no locus-standi to file the present suit. Moreover, the land in question is owned and possessed by the defendant-State. Defendant also claimed that the plaintiff unlawfully encroached upon the suit land by constructing a house as well as growing the crop on it. Defendant also stated in the written statement that the Revenue Field Staff visited the spot and reported the encroachment made by the plaintiff on the suit land and the Assistant Collector 1st Grade, after affording reasonable opportunity of being heard to him, passed the order of ejectment and as such, plaintiff has no right, title over the suit land and accordingly suit deserve to be dismissed with costs. Defendant also denied that the plaintiff had engaged Sh. M.L.Chauhan, Advocate for that very date because no Power of Attorney, whatsoever, authorizing Sh. M.L.Chauhan, Advocate was ever filed before the Assistant Collector 1st Grade, Theog. Defendant also denied that on 4.5.2005, the plaintiff appeared before the Assistant Collector 1st Grade and prayed for time to file reply. Defendant also stated that there was no need to record the statements of Kanungo and Patwari before passing of ejectment order, because it stood established on record that the plaintiff is encroacher, who encroached upon the suit land by constructing the house over the same. In the aforesaid background, the defendant-State prayed for the dismissal of the suit.

6. By way of replication, plaintiff while denying the allegations made in the written statement, re-affirmed and reasserted the stand taken in the plaint.

7. Learned trial Court on the basis of aforesaid pleadings, framed the following issues:-

"1. Whether the orders dated 4.5.2005 of A.C.1st Grade and dated 25.7.2005 of Collector, Theog, are wrong, illegal, as alleged? OPP.

2. Whether the plaintiff is entitled for the relief of injunction? OPP.

3. Whether the suit is not maintainable? OPD.

4. Whether the plaintiff has no locus standi? OPD.

5. Whether the plaintiff is estopped by his act and conduct? OPD.

6. Whether this court has no jurisdiction? OPD.

7. Whether the suit is time barred? OPD.

8. Relief.

8. The learned trial Court on the basis of the evidence adduced on record by the respective parties, quashed and set-aside the orders dated 4.5.2005 and 25.7.2005, passed by the Assistant Collector 1st Grade, and Collector Sub Division, Theog with respect to the suit land and decreed the suit of the plaintiff. Learned trial Court further restrained the defendant from ejecting the plaintiff from the suit land except in due course of law.

9. Feeling aggrieved and dissatisfied with the impugned judgment and decree dated 22.7.2006, passed by learned trial Court, respondent-State filed an appeal in the Court of learned Additional District Judge, Fast Track Court, Shimla, H.P. by way of Civil Appeal No.95/1 of 2005, however fact remains that learned Additional District Judge, Fast Track Court, Shimla vide judgment and decree dated 2.5.2008 accepted the appeal preferred by the respondent-State and quashed and set-aside the judgment and decree, dated 22.7.2006, passed by learned trial Court. In the aforesaid background, present appellant-plaintiff being aggrieved and dis-satisfied with the impugned judgment and decree, passed by learned lower Appellate Court, approached this Court by way of instant Regular Second Appeal, praying therein for quashing and setting-aside the judgment and decree dated 2.5.2008, passed by learned lower Appellate Court.

10. This Regular Second Appeal was admitted on the following substantial questions of law:-

"(1) Whether in the facts and circumstances of the case, the jurisdiction of the Civil Court is barred?"

11. Mr. Raman Jamalta, learned counsel representing the appellant, vehemently argued that the impugned judgment dated 2.5.2008, passed by learned lower Appellate Court is not sustainable as the same is not based upon the correct appreciation of the evidence adduced on record. Mr. Jamalta, further contended that bare perusal of the judgment and decree passed by lower Appellate Court, suggests that same is contrary to law as well as facts available on record and as such, same deserve to be quashed and set-aside. During the arguments, Mr. Jamalta, invited the attention of this Court to the impugned judgment to demonstrate that learned lower Appellate Court has not dealt with the evidence adduced on record by the plaintiff in its right perspective and passed the impugned judgment on the basis of conjectures and surmises and as such, same cannot be allowed to be sustain.

12. Mr. Jamalta, forcibly contended that learned lower Appellate Court while passing the impugned judgment has miserably failed to appreciate the actual controversy involved in the matter and as such, wrongly came to the conclusion that Civil Court had no jurisdiction to entertain the suit filed by the plaintiff. Mr. Jamalta, strenuously argued that bare perusal of order dated 4.5.2005, passed by the Assistant Collector 1st Grade, Theog, clearly suggests that no opportunity of being heard was afforded to the plaintiff before passing of the order of ejectment and as such, order of ejectment was passed in violation of principle of natural justice and Civil Court had powers to entertain the suit filed by the plaintiff for declaring the orders passed by the Assistant Collector 1st Grade and Collector null and void as the same were not passed after

affording due opportunity of hearing, as provided under Section 163 of the Act. Mr.Jamalta, also invited the attention of Court to Section 163 of the Act to demonstrate that no order, if any, could be passed by the authority concern without affording him/her opportunity of being heard. Mr. Jamalta, forcibly contended that in the present case, it stood proved on record that that on 4.5.2005, plaintiff himself appeared before the Assistant Collector, 1st Grade and prayed for time to file reply but the Assistant Collector 1st Grade instead of granting time, passed the order of ejectment against the plaintiff that too without recording the statements of the Kanungo and Patwari, which itself suggest that no proper procedure was followed by the authorities concerned at the time of passing ejectment order. Mr. Jamalta, contended that Civil Court had all the jurisdiction to see procedural irregularity, if any, committed by the revenue authorities while passing the ejectment order under Section 163 of the Act and as such, findings returned by the learned lower Appellate Court that the Civil Court had no jurisdiction is contrary to the law as well as facts on record.

13. Mr. Rajat Chauhan, learned Law officer, representing the respondent-State, supported the judgment passed by learned lower Appellate Court and sated that same is based upon the correct appreciation of evidence adduced on record as well as law and as such, no interference, whatsoever, of this Court is warranted in the present facts and circumstances of the case. Mr. Chauhan, vehemently argued that once it stands duly proved on record that the plaintiff is encroacher, who has constructed house over the Government land, no indulgence of this court is called for in the present case, rather plaintiff needs to be evicted from the Government land immediately. Mr. Chauhan, forcibly argued that in the grab of stay order obtained by the appellant-plaintiff from this Court, present appellant-plaintiff is continuing despite their being ejectment order dated 4.5.2005, passed by the Assistant Collector 1st Grade, Theog. While refuting the contention put forth on behalf of the plaintiff that Civil Court had jurisdiction to entertain the present suit, Mr. Chauhan, invited the attention of this Court to Section 173 of the Act to demonstrate that jurisdiction of Civil Court is completely barred under the Act, wherein complete mechanism has been provided to deal with the revenue matters.

14. Mr. Chauhan, also placed reliance on following judgments to substantiate his arguments that any ouster of jurisdiction should not be readily inferred by the Courts, rather Courts should lean in favour of such construction which would uphold jurisdiction of Civil Court. (See:- **Firm of Illuri Subbayya Chetty and Sons Vs. State of Andhra Pradesh AIR 1964 SC 322, Dhulabhai v. State of Madhya Pradesh and another AIR 1969 SC 78, Bhanwar Lal and another v. Rajasthan Board of Muslim wakf and others(2014) 16 S.C.C.51, Babu Ram(deceased) and others v. Shri Pohlo Ram(deceased) and others AIR 1992 HP 8, Roshan Lal versus Krishan Dev Latest HLJ 2002(hp) 197, Jagannath versus Om Prakash 2008(1) Shim. LC 45, Rajasthan State Road Transport Corporation and another vs. Bal Mukund Bairwa(2) 2009(4) SCC 299, Smt. Bhekhalu Devi Vs. Smt. Ram Ditti and others 2008(2) Shim.LC 412.**

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

16. In the present case, it clearly emerge that proceedings under Section 163 of the Act, was initiated against the appellant/plaintiff in the Court of Assistant Collector 1st Grade, Theog. Pursuant to aforesaid proceedings initiated in the Court of Assistant Collector 1st Grade, summons was issued to the plaintiff, who appeared before the Assistant Collector 1st Grade on 19.3.2005. On 19.3.2005, Assistant Collector 1st Grade granted time to the plaintiff for filing reply and adjourned the case for 4th May, 2005. On 4.5.2005, plaintiff appeared before the Court and prayed for further time for filing reply, but learned Assistant Collector 1st Grade rejected the prayer of plaintiff for time and passed the order of ejectment against the plaintiff, which was further upheld by the Collector, who rejected the appeal preferred by the plaintiff and upheld the order passed by the Assistant Collector 1st Grade, Theog.

17. During the proceedings of the case, this Court had an occasion to peruse the record of the case. Careful perusal of Ex. PW1/A, Ex.PW1/B, Ex.PW1/C and Ex.PW1/D, clearly

suggest that notices in proceedings under Section 163 of the Act, were served upon the plaintiff for the first time on 19th March, 2005, on which date, learned Assistant Collector 1st Grade granted time to the plaintiff to file reply on or before 4.5.2005. Similarly, perusal of Ex.P1/A i.e. order dated 4.5.2005, passed by the Assistant Collector 1st Grade, suggests that plaintiff appeared himself before the authority and prayed for time but the Assistant Collector 1st Grade, rejected the prayer of the plaintiff for granting time and passed the order of ejectment against the plaintiff without recording the statements of Patwari and Kaunungo and other concerned authority. Similarly, perusal of order dated 25.7.2005(Ex.PW1/D), passed by the Collector, Theog District Shimla in appeal No.16-VIII-2005 titled as Het Ram Vs. State of H.P under Section 14 of the Act, assailing therein order dated 4.5.2005, passed by the Assistant Collector 1st Grade, suggest that appeal was dismissed by the Collector on the ground that ample opportunity for filing reply as well as adducing evidence in his favour was afforded to the plaintiff and as such, there is no infirmity and illegality in the order passed by the Assistant Collector 1st Grade, Theog.

18. Careful perusal of Ex.PW1/A, clearly suggests that only one opportunity for filing reply was granted to the plaintiff before passing the order of ejectment and as such, this Court is of the view that findings returned by the Collector, Sub Division, Theog that plaintiff was afforded ample opportunity for bringing evidence in his favour is contrary to the facts as well as documents available on record. Learned trial Court while entertaining the suit for declaration and injunction filed by the plaintiff has rightly came to the conclusion that no proper procedure, as envisaged under Section 163-A of the Act, was followed by the authorities before passing the ejectment order. Section 163(a)of the Act, specifically provides for affording all reasonable opportunity to the encroacher before passing the order of ejectment. Once, Show Cause Notice is issued against the alleged encroacher, Revenue authorities are under obligation to afford proper opportunity to the alleged encroacher to lead evidence, if any, in his favour to demonstrate that he/she has not encroached the Government land. In the instant case, as clearly emerged from the record that only one opportunity of filing reply was afforded to the plaintiff on 19.3.2005 and thereafter on 4.5.2005, the Assistant Collector 1st Grade without looking into the genuineness of the prayer having been made on behalf of the plaintiff, passed ejectment order that too without recording the statements of revenue authorities at whose behest proceedings under Section 163 of the Act, were allegedly initiated against the plaintiff.

19. Careful perusal of the judgment and decree dated 22.7.2006, passed by learned trial Court, nowhere suggest that any findings qua the merits of the case with regard to encroachment, if any, by the plaintiff was returned by the Civil Court, rather Civil Court rightly restricted itself to return findings, if any, qua the procedural illegality, if any, committed by the revenue authorities while passing order under Section 163 of the Act. Since, in the present case, plaintiff filed suit for declaration to the effect that orders dated 4.5.2005 and 27.5.2005, passed by Assistant Collector 1st Grade and Collector, Theog be declared null and void on the ground that no proper procedure, as envisaged under Section 163-A of the Act, was followed before passing order of ejectment, this Court sees no illegality and infirmity in the judgment passed by learned trial Court while decreeing the suit filed by the plaintiff and declaring the orders dated 4.5.2005 and 25.7.2005, passed by the Assistant Collector 1st Grade and Collector, Theog wrong and illegal. Learned trial Court while decreeing the suit of the plaintiff restrained the defendant-State from ejecting the plaintiff from the suit land except in due course of law. Since, Court below restrained itself from passing any findings qua the merits of the case, this Court sees no force in the contention put forth on behalf of the learned Law Officer appearing for the respondent-State that Civil Court exceeded its jurisdiction by entertaining the Civil Suit, which was completely barred under Section 171 of the Act.

20. Admittedly, plaintiff under the Act had an alternative remedy of challenging the orders of Assistant Collector and Collector before the Divisional Commissioner but since statutory authorities, as referred above, failed to act in conformity with the basic procedure of provision, as envisaged under Section 163-A of the Act, plaintiff was not estopped from availing the remedy of filing the civil suit praying therein for declaring orders passed by the Assistant Collector 1st Grade and Collector null and void.

21. In view of the detailed discussion made hereinabove, this Court is unable to accept the reasoning given by learned lower appellate Court while accepting the appeal of the defendant-State that since plaintiff had an alternative remedy to agitate his dispute before the authorities by filing revision etc. in terms of the provisions contained under the Act, Civil Court had no jurisdiction. Undisputedly, jurisdiction of Civil Court to deal with such matters is expressly barred under Section 171 of the Act but as has been discussed in detailed, learned trial Court has restricted itself to return findings qua the procedural aspect. Learned trial Court has only concluded that while passing the impugned order, Assistant Collector 1st Grade failed to afford due opportunity of being heard to the plaintiff, as envisaged under Section 163(a) of the Act. Moreover, Hon'ble Apex Court has repeatedly held that exclusion of jurisdiction of Civil Court should not be readily inferred, rather Courts should lean in favour of such construction which would uphold jurisdiction of Civil Court. Perusal of the judgment passed by the learned trial Court, suggests that trial Court has rightly decided the issue of jurisdiction. In this regard, reliance is placed upon the judgment of Hon'ble Apex Court in **M.P. Electricity Board, Jabalpur versus Vijaya Timber** Co. 1997(1) Supreme Court Cases 68. The relevant para-9 of the judgment is reproduced as under:-

> "9. It is well settled that the exclusion of jurisdiction of civil court cannot be readily inferred and the normal rule is that civil courts have jurisdiction to try all the suits of a civil nature except those of which cognizance by them is either expressly or impliedly excluded.

22. The Hon'ble Apex Court in **Dhulabhai etc. Versus State of Madhya Pradesh and another, AIR 1969 Supreme Court 78:-**

> " The following principles regarding exclusion of jurisdiction of Civil Court may be laid down:-
>
> (1) Where the statute gives finality to the orders of the special tribunals the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil Court would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
>
> (2) Where there is an express bar of the jurisdiction of the Court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provide may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.
>
> (3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.
>
> (4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limited Act but it is not a compulsory remedy to replace a suit.
>
> (5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply: Case law discussed."

23. Similarly, Hon'ble Apex Court in **Bhanwar Lal and another v. Rajasthan Board of Muslim Wakf and others (2014)16 Supreme Court Cases 51;** reiterated that civil courts can try all civil suits except which are expressly or impliedly barred. In the aforesaid case, Hon'ble Apex Court again reiterated that any ouster of jurisdiction should not be readily inferred by Courts and Courts would lean in favour of such construction which would uphold jurisdiction of Civil Court, but if the party who claimed jurisdiction of Civil Court succeed in establishing that there is specific bar under particular Act, Civil Court may not have jurisdiction. The relevant para-26 of the judgment is reproduced as under:-

"26. It would also be profitable to refer to that part of the judgment where the Court gave guidance and the need for a particular approach which is required to deal with such cases. In this behalf the Court specified the modalities as under :-(Ramesh Gobindram v. Sugra Humayun MirzaWakf, (2010) 8 SCC 726)

"11. Before we take up the core issue whether the jurisdiction of a civil court to entertain and adjudicate upon disputes regarding eviction of (sic from) wakf property stands excluded under the Wakf Act, we may briefly outline the approach that the Courts have to adopt while dealing with such questions.

12. The well settled rule in this regard is that the civil courts have the jurisdiction to try all suits of civil nature except those entertainment whereof is expressly or impliedly barred. The jurisdiction of the civil courts to try the suits of civil nature is very expansive. Any statute which excludes such jurisdiction is, therefore, an exception to the general rule that all disputes shall be triable by a civil court. Any such exception cannot be readily inferred by the courts. The court would lean in favour of a construction that would uphold the retention of jurisdiction of the civil courts and shift the onus of proof to the party that asserts that the civil court's jurisdiction is ousted.

13. Even in cases, where the statute accords finality to the orders passed by the Tribunals, the court will have to see whether the Tribunal has the power to grant the reliefs which the civil courts would normally grant in suits filed before them. If the answer is in the negative, exclusion of the civil court's jurisdiction would not be ordinarily inferred. In Rajasthan SRTC Vs. Bal Mukund Bairwa(2)(2009) 4 SCC 299, a three Judge Bench of this Court observed:-

" There is a presumption that a civil Court has jurisdiction. Ouster of civil court's jurisdiction is not to be readily inferred. A person taking a plea contra must establish the same. Even in a case where the jurisdiction of a civil court is sought to be barred under a statute, the civil court can exercise its jurisdiction in respect of some matters particularly when the statutory authority or Tribunal acts without jurisdiction."

24. Consequently, in view of the aforesaid discussion made hereinabove, the judgment and decree passed by learned lower appellate Court is quashed and set-aside. However, keeping in view the fact that proceedings under Sections 163 of the H.P. Land Revenue Act, is pending for considerable time, it would be in the interest of justice, if concerned authority (Assistant Collector 1st Grade, Theog) is directed to conclude the same within the period of six months from the date of the judgment passed by this Court. An authenticated copy of this judgment, be sent to the Assistant Collector 1st Grade, Theog, for compliance.

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

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

Oriental Insurance Company Ltd. .....Appellant.

Versus

Meena Ram & Others .....Respondents.

FAO No. 453 of 2007.
Decided on: 19th September, 2016

Workmen Compensation Act, 1923- Section 4- Income of the deceased was taken as Rs. 3,550/- per month and compensation was awarded accordingly- held, that the monthly wages was to be taken as Rs. 2,000/- only, even if the same was above Rs. 2,000/- - the deceased was 25 years of age - taking 50 % of the monthly wages of the deceased as Rs. 1,000/- and applying the relevant factor of 216.91, the compensation of Rs. 2,16,910/- will be payable with interest @ 12% per annum- appeal allowed. (Para-8 to 12)

Case referred:
Kerala state Electricity Board & Another versus Valsala K. and Another, (1999) 8 SCC, 254

For the appellant	Mr. Ashwani K. Sharma, Senior Advocate with Mr. Ishan Thakur, Advocate.
For the Respondents :	Mr. R.S. Gautam, Advocate for respondents No.1 and 2. Mr. B.M. Chauhan, Advocate for respondent No.4. None for respondent No.3.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Order dated 25.5.2007 passed by learned Commissioner under Workmen Compensation Act, Nahan, District Sirmaur, H.P., in case No.7/2003 is under challenge in this appeal. Respondents No.1 and 2 herein are the claimants. Respondent No.3 is owner of the ill-fated bus bearing registration No.HP 16-1051 whereas the appellant herein is the insurer.

2. One Ravinder Kumar son of respondents-claimants was employed as driver by the third respondent with ill-fated bus bearing registration No.HP16-1051. On 13.10.1995, the bus met with an accident near village Garari, Sub-Tehsil Nohra, District Sirmaur. Deceased Ravinder Kumar, sustained grievous injuries in the accident and as a result thereof, he died later on.

3. The deceased at the time of his death in the accident was 25 years of age and allegedly getting Rs.3550/- per month as monthly wages including, Rs.35/- paid to him by way of daily allowance. Initially, it is The New India Assurance Company, respondent No.4 herein was impleaded as insurer in the petition. All respondents failed to put in appearance and as such were proceeded against exparte. Consequently, exparte award came to be passed on 27.3.2001 and a sum of Rs.2,15,280/- with interest @12% per annum from the date of accident was awarded. Respondent No.4, having come to know about the exparte award, preferred an application under Order 9 Rule 13 of the Code of Civil Procedure (wrongly mentioned as review petition) with a prayer to set aside the exparte award on the ground that the bus involved in the accident was not insured with it. During the course of proceedings in the application filed by

respondent No.4, it transpired that the vehicle was insured with Oriental Insurance Company, the appellant herein.

4. The owner of the bus respondent No.3 was summoned by learned Commissioner, who made the statement on oath on 12th January, 2004 that he is the owner of the ill-fated bus and that driver of the bus Shri Ravinder Kumar has died in the accident. He has further stated that the vehicle was insured with Oriental Insurance Company Limited, Solan Branch. The appellant as such was added as respondent No.2 in the claim petition. Exparte award dated 27.3.2001 was set aside. After impleading the appellant herein as one of the respondents and taking on record the version of the opposite party including the insurer respondent No.2, following issue were framed:-

1. Whether deceased Ravinder Kumar died in an accident which took place on 13.10.1995 at about 7.00 pm near village Garari, Sub-Tehsil Nohra, District Sirmaur, H.P., involving Bus No. HP16-1051 owned by respondent No.1? ...OPP
2. Whether deceased Ravinder Kumar was a workman under the employment of the respondent No.1 and died during the course of employment? ...OPP
3. Whether the claimants have no locus standi to file the present petitioner? ...OPR2
4. Whether the vehicle involved in the accident was being plied in violation of terms and conditions of the Insurance Policy? OPR2
5. Whether the claimants/petitioners are entitled to compensation, if so to what amount and from whom? ....OPP
6. Relief.

5. Learned Commissioner below, having gone through the pleadings of the parties and on appreciation of the evidence available on record has taken the age of deceased driver as 25 years at the time of accident whereas his monthly wages as Rs.3550/-. By taking his income for the purpose of determination of the compensation as Rs.1750 has applied the relevant factor i.e. 216.91 and awarded a sum of Rs.3,79,592/- as compensation to the claimants with interest at the rate of 12% per annum from 12.12.1995 i.e. after one month of the date of accident till the payment of the compensation is made to claimants. The penalty i.e. 10% of the awarded amount Rs.37,969/- was also imposed and ordered to be paid by the insured-respondent No.1.

6. Oriental Insurance Company, second respondent, has assailed the award in this Court on the grounds inter alia that the income of the deceased could have not been taken as Rs.3500/- per month and rather Rs.2000/- per month. In all 50% i.e. Rs.1000/- per month was required to be taken for assessing the compensation payable to the petitioners-claimants. Therefore, the amount of compensation, if any, payable comes to Rs.2,16,910/- and not Rs.3,79,592/-. Also that the interest from the date as awarded by learned Commissioner below could have not been awarded against respondent-insurer as the respondent-insurer was impleaded as party in the year 2004. Also that review of the exparte award dated 27.3.2001 was not legally permissible under Section 6 of the Act and the said award was wrongly set aside by learned Commissioner below.

7. The appeal has been admitted on the following substantial questions of law:

1. Whether the power of review of the Orders passed by the Commissioner granting compensation under Section 4(1)(a), (b) & (c) of Workmen's Compensation Act can be exercised under any circumstances?

2. Whether the impugned order which suffers from patent illegality in as much as time barred claim filed by the claimants was entertained, is sustainable in the eyes of law?

3. Whether learned Commissioner committed grave error in taking monthly wages of deceased at Rs.3500/- when the owner had categorically asserted that he paid wages amounting to Rs.2,000/- per month to his deceased driver?

8. Mr. Ashwani Sharma, learned Senior Advocate assisted by Mr. Ishan Thakur, Advocate has firstly argued on substantial question No.3. While placing reliance on the judgment

of the apex Court in ***Kerala state Electricity Board & Another*** versus ***Valsala K. and Another, (1999) 8 SCC, 254***, it has been urged that in the matter of conducting proceedings in the claim petition, the provisions in the Workmen Compensation Act in force on the date of accident were required to be taken into consideration. The submissions so made by Mr. Sharma, find support from the judgment supra. It takes this Court to the Workmen Compensation Act enforced on the date of accident. The accident had occurred on 13.10.1995, on that day Workmen Compensation Act, 1923, further amended by Act No. 30 of 1995 w.e.f. 15.9.1995 was inforce. Section 4(1) (a) of the Act reveals that in a case of death occurred in the accident, an amount equal to 50% of the monthly wages of the deceased workman multiplied by the relevant factor could have been awarded as compensation. The explanation below Section 4 of the Act further reveals that monthly wages was to be taken as Rs.2,000/- only irrespective of the same over and above Rs.2,000/-. Although the petitioners-claimants have claimed monthly wages of the deceased workman as Rs.3500/- per month yet the owner of the bus, respondent No.1, has come forward with the version that he was paying Rs.2000/- as wages to the deceased per month.

9. Any how, in view of the provisions contained under Section 4 of the Act at the relevant time, the monthly wages could have not been taken beyond Rs.2000/-. The deceased as per the evidence available on record was 25 years of age at that time. Therefore, taking 50% of his monthly wages i.e. Rs.1000/- and applying the relevant factor i.e. 216.91, the compensation payable in the case works out to Rs.2,16,910/- and not Rs.3,79,592/- as awarded by learned Commissioner below.

10. The appeal has not been admitted on any substantial question of law qua interest, therefore, the claimants are entitled to the interest at the rate of 12% per annum on the awarded amount i.e. Rs.2,16,910/- w.e.f. 12.12.1995.

11. Now if coming to first substantial question of law, as a matter of fact, the application filed under Order 9 Rule 13 CPC with a prayer to set aside the exparte award has been wrongly nomenclatured, as review petition. So there is no question of review of the exparte award dated 27.3.2001 by learned Commissioner below. The award rather was set aside and rightly so because The New India Assurance Company was not insurer of the bus. It is rather the Oriental Insurance Company, the appellant-second respondent, was insurer of the bus involved in the accident. Therefore, no such question of law arises for adjudication.

12. Now if coming to the second substantial question of law, no finding has been pressed qua this aspect of the matter.

13. In view of what has been said hereinabove, this appeal partly succeeds and the same is accordingly allowed. Consequently, the respondents-claimants are awarded a sum of Rs.2,16,910/- together with interest at the rate of 12% per annum, from 12.12.1995 till the deposit of the awarded amount. The appeal is accordingly disposed of.

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

FAO No. 274 of 2007 with FAO No. 434 of 2007
Date of decision: September 20, 2016.

1. FAO No. 274 of 2007	
Oriental Insurance Company	.....Appellant.
Versus	
Smt. Padmo Devi & anr.	.....Respondents.
2. FAO No. 434 of 2007	
Shri Subhash.	.....Appellant.
Versus	
Smt. Padmo Devi & anr.	.....Respondents.

Workmen Compensation Act, 1923- Section 4- M, Son of the claimant was travelling in a pickup which met with an accident- driver and M died in the accident – M was working as a labourer/cleaner and was getting salary of Rs. 4,000/- per month – the claim petition was allowed and compensation of Rs. 4,48,000/- was awarded- held, in appeal that plea taken by the insurer/appellant, the deceased was travelling in the vehicle as unauthorized passenger is not supported by evidence – Investigating Officer also admitted in cross-examination that it was found on the basis of investigation that M was working as cleaner and was doing loading/unloading work- the evidence was appreciated in its right perspective - liability to pay interest is that of insurer and insured could not have been held liable for the same – the penalty is to be paid by the insured – award modified accordingly. (Para-11 to 14)

Case referred:
Ved Prakash Garg vs. Premi Devi and others, AIR 1997 SC 3854

FAO No. 274 of 2007

For the appellant	Mr. Lalit K. Sharma, Advocate.
For the respondents	Mr. Rupinder Singh, Advocate with Ms. Shashi Kiran, Advocate, for respondent No. 1. Mr. B.C. Verma, Advocate, for respondent No. 2.

FAO No. 434 of 2007

For the appellant	Mr. B.C. Verma, Advocate.
For the respondents	Mr. Rupinder Singh, Advocate with Ms. Shashi Kiran, Advocate, for respondent No. 1. Mr. Lalit K. Sharma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

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

This judgment shall dispose of both appeals arising out of award dated 28.3.2007 passed by learned Commissioner under Workmen's Compensation Act, Rajgarh, District Sirmour in case No. 4 of 2005. The appellant in this appeal is Oriental Insurance Company Limited, hereinafter referred to as respondent No. 2-the Insurer, whereas in the connected one the owner of ill fated pick-up bearing No. HP-16-1349, hereinafter referred as respondent No. 1-insured. Learned Commissioner below has allowed the claim petition filed by respondent No. 1 (hereinafter referred to as the petitioner) and awarded a sum of Rs. 4,48,000/- as compensation against respondent No. 2 and a sum of 1,07,520/- towards interest payable on the awarded amount @12%. Besides a sum of Rs. 67,200/- has been awarded as penalty @ 15% of the amount of compensation i.e. Rs. 4,48,000/-. The amount of interest and penalty as imposed has to be paid by respondent No. 1, the insurer. Therefore, while respondent No. 2 aggrieved by the award to the tune of Rs. 4,48,000/- made by learned Commissioner against it, respondent No. 1-Insurer is aggrieved by the liability to pay interest @12% on the awarded amount and also the penalty amount i.e. Rs. 67,200/- awarded against him.

2. The challenge to the award by the Insurer-respondent No. 1 is on the sole ground that deceased Mangat Ram was not travelling in the ill fated pick-up in the capacity of a workman and rather a passenger. The complaint, therefore, is that there being breach of the insurance policy the insurer is not liable to indemnify the insurer in the matter of payment of compensation as awarded.

3. On the other hand the grouse of the Insurer-respondent No. 1 is that he is neither liable to pay the amount of interest @12% as awarded nor the penalty of Rs. 67200/- is imposed upon him.

4. Admittedly Mangat Ram is the son of petitioner-claimant Padmo Devi. On 20.4.2005 he was travelling in pick up bearing No. HP-16-1349. The vehicle met with an accident near Neri Pul under the jurisdiction of police Station, Rajgarh. Its driver Shri Balbir Singh and deceased Mangat Ram succumbed to the injuries they received in the accident.

5. The averments in the claim petition reveal that deceased was 20 years of age at the time of his death in the accident and he was working as cleaner/labourer. His wages have been claimed as Rs. 4000/- per month.

6. In reply to the petition filed on behalf of first respondent it has been admitted that deceased Mangat Ram was working as cleaner with the ill fated vehicle. His wages Rs. 4000/- per month has also been admitted as correct. The respondent No. 1-Insurer has however, contested the petition on the grounds, inter alia, that insurer-respondent No. 1 has never lodged any claim for the payment of compensation under Workmen Compensation Act and that as per the investigation got conducted through Shri Phool Prakash Bakshi an investigator though Mangat Ram was found to have died in the accident, however, he was travelling in the vehicle un-authorizedly. The vehicle allegedly was being used to carry passengers in violation of the terms and condition of the Insurance Policy. On merits, it is denied that deceased Mangat Ram was working as Cleaner or labourer and his wages was Rs. 4000/- per month.

7. On the pleadings of the parties, following issues were framed in this petition:

1. Whether the deceased Mangat Ram was a workman within the definition of "workman" under the Workmen's Compensation Act?.OPP
2. Whether the deceased died during the course of his employment with the respondent No. 1 Subhash? ...OPP

8. Both issues were answered in favour of the petitioner-claimant and consequently, she has been awarded the compensation as pointed out at the outset.

9. This appeal has been admitted on the following substantial question of law:

Whether in the face of Insurance Policy Ext. RW-1/A which does not cover the risk of any passenger and is specifically issued for Goods Carrying Vehicle the Commissioner can competent to award the amount of compensation against the appellant?

10. The connected appeal has been admitted on the following substantial questions of law:

(I) Whether in view of the fact that the factum of death of the deceased on 20.4.2005 came into the notice of the Insurance Company on 23.4.2005 when the owner of the vehicle was asked to perform necessary formalities in connection with payment of loss of vehicle and in connection with payment of amount of compensation, therefore, the appellant was not required to deposit any amount with the Commissioner?

(II) Whether the liability of payment of penalty as imposed upon the appellant is snot supported by reasons and the appellant was not required to make any deposit because no delay is attributable to him in informing the Insurance Company?

11. The substantial question of law as formulated in this appeal is proposed to be taken first for adjudication. The claim of the Insurer-respondent No. 2 that deceased Mangat Ram was travelling un-authorisedly and as such was a gratuitous passenger is not supported by cogent and reliable evidence. The lengthy cross-examination of respondent No. 1 while in the witness box as RW1 conducted on behalf of respondent No. 2 amply demonstrate that deceased Mangat Ram was engaged as Cleaner with ill fated pick-up and his wages Rs. 4000/- per month. The statement of RW1 in cross-examination, therefore, remained un-shattered. Even in reply to the petition also his stand is that the deceased was working as cleaner and his wages was Rs. 4000/- per month. The only witness RW2-3 ASI Chaman Lal who has conducted the

investigation of the case registered vide FIR Ext.PW1/A has admitted in his cross-examination conducted on behalf of the petitioner that in the investigation he conducted it transpired that deceased Mangat Ram was working as cleaner and was also doing loading/un-loading work. No doubt, RW2-1 V.S. Dadwal A.O. of respondent No. 2 has stated that deceased was travelling un-authorisedly in the ill fated vehicle, however, the statement so made by him based upon the report of Phool Prakash Bakshi investigator RW2-2. The testimony of RW2-1 is, therefore, not of much help to the case of the Insurer-respondent No. 2. If the statement of Phool Prakash Bakshi is seen the report Ext.RW2-2/A he made is not suggestive of as to who informed him that deceased Mangat Ram was travelling un-authorisedly in the ill fated pick up. The person if any he associated during the course of inquiry he has not maintained any record such as their statements and rather as per his own version in cross-examination he has not taken signature of any such person from whom he made the inquiry. In such a situation, much reliance cannot be placed on the testimony of this witness and also the report he submitted. Learned Commissioner below has, therefore, appreciated the evidence available on record in its right perspective while arriving at a conclusion that deceased Mangat Ram was travelling in the ill fated pick up in the capacity of workman and not un-authorisedly. The finding that said Mangat Ram has died during the course of his employment with the Insurer-respondent No. 1 are also legally sustainable. The claim of insured-respondent No. 2 is as such neither legally nor factually sustainable.

12. If coming to the substantial question of law as formulated in the connected appeal, the liability to pay the interest is that of the Insurer. Therefore, the interest @12% on the amount of compensation could have not been awarded against the insured-respondent No. 2. I can draw support in this regard from the judgment of Hon'ble Apex Court in ***Ved Prakash Garg*** vs. ***Premi Devi and others***, ***AIR 1997 SC 3854*** relied upon by this Court also in a recent judgment dated August 31, 2016, FAO(WCA) No. 160 of 2009, titled the Oriental Insurance Company Vs. Smt. Deno & ors. However, the amount of penalty i.e. Rs. 67,200/- is to be paid by the insured-respondent No. 1 in terms of the provisions contained under Section 4-A(3)(b) of the Act. The ratio of the judgment ibid in Ved Prakash's case supra can be applied in this case qua this aspect of the matter also. As per the ratio of the judgment of the Apex Court in Ved Prakash Case supra it is the Insurance Company liable to pay the compensation with interest thereon from the date of accident till the date of payment. Even the Apex Court has also held that the amount of penalty is payable by the insured and not by the insurer.

13. In view of what has been said hereinabove, this appeal fails and the same is accordingly dismissed. The connected appeal succeeds partly and the same is accordingly allowed. Consequently, the award under challenge is modified to the extent that amount of interest i.e. Rs. 1,07,520/- on the awarded amount @12% in terms of the award shall be payable by the Insurer-respondent No. 2. The Insurer-respondent No. 2 to deposit this amount within two months from today before learned Commissioner below. The amount of interest i.e. Rs. 1,07,520/- if already deposited by the insured before learned Commissioner below be refunded to him together with interest up to date by remitting in his account particulars whereof to be furnished by him before learned Commissioner below.

14. Both appeals stand disposed of. Pending application(s), if any, shall also stand disposed of.

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

Shyam Singh .....Petitioner

Versus

State of H.P. & anr. .....Respondents.

Cr.MMO No. 134 of 2016

Date of decision: September 20, 2016.

Code of Criminal procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 279 and 337 of I.P.C. and 187 of M.V. Act – it is claimed that matter has been compromised between the parties - held, that prosecution evidence has not commenced and the proceedings are at initial stage – no useful purpose will be served by keeping the proceedings pending in view of the compromise- hence, the petition allowed – FIR and subsequent proceedings ordered to be quashed. (Para- 3 to 7)

Cases referred:

Gian Singh Vs. State of Punjab and another, (2012) 10 Supreme Court Cases 30
Kulwinder Singh and others Vs. State of Punjab, 2007(3)RCR (Criminal) 1052
Narinder Singh and others vs. State of Punjab and another, (2014) 6 Supreme Court Cases 466
Mohar Singh vs. State of Rajasthan, (2015) 11 Supreme Court Cases 226

For the petitioner	:	Mr. Suresh Kumar Thakur, Advocate.
For the respondents	:	Mr. Virender Verma, Addl. AG, for respondent No. 1. Respondent No. 2 present in person.

The following judgment of the Court was delivered:

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

Petitioner is an accused in FIR No. 36 of 2015 registered under Sections 279, 337 of Indian penal Code and 187 of Motor Vehicles Act, Police Station New Shimla on 2.6.2015 at the instance of Jagdish Chand, respondent No. 2 herein.

2. Mr. Thakur, learned Counsel representing the accused-petitioner has informed this Court that the challan stand filed and the case is pending in the Court of learned Chief Judicial Magistrate, Shimla. Also that charge against the accused-petitioner has been framed recently i.e. after the institution of this petition in this Court. Mr. Thakur further submits that recording of prosecution evidence is not yet commenced. The criminal case pending against the accused-petitioner as such is at its initial stage.

3. It is seen that an offence punishable under Section 279 of the Indian Penal code is not compoundable under Section 320 of the Code of Criminal Procedure. The apex Court in ***Gian Singh*** Vs. ***State of Punjab and another, (2012) 10 Supreme Court Cases 30*** has however, held that the High Court in exercise of inherent powers vested in it under Section 482 of the Code of Criminal Procedure may quash FIR/criminal proceedings in a case where the offence allegedly committed by an accused though is not compoundable, however, the victim and accused have settled the differences amicably. The powers, of Court can be exercised sparingly and only in appropriate cases, having arisen out of civil, mercantile, commercial, financial, partnership or such other transactions of like nature including matrimonial or the case relating to dowry etc. in which the wrong basically is done to the victim. This judgment further reveals that the compounding of offence in a case of serious nature like rape, dacoity and corruption etc. having serious impact in the society is not permissible.

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

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

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

6. Be it stated that in a recent judgment title ***Mohar Singh*** vs. ***State of Rajasthan, (2015) 11 Supreme Court Cases 226*** the Apex Court though has refused to do so on the ground that the offence punishable under Section 307 of the Indian Penal Code is not compoundable, however, reduced the sentence awarded against the accused. In Mohar Singh's case the Hon'ble Apex Court has refused to grant the permission to compound the offence against the accused because in that case the accused was convicted after holding full trial not only by the trial Court but also by the High Court and it is such factor appear to have weighed with the Supreme Court while declining the permission to compound the offence as sought.

7. Now coming to the case in hand the complainant and accused-petitioner had compromised the dispute amicably. As in Narender Singh's case *supra* the prosecution evidence is not at all commenced in this case also so far. The proceedings as such are at its initial state. In the event of the witnesses if not come forward to support the prosecution case the chances of conviction of the accused-petitioner are bleak. Therefore, no useful propose is likely to be served to keep the proceedings pending in this case because in the given facts and circumstances to allow the proceedings to continue would amount to the abuse of process of Law. The petition as such is allowed. Consequently, FIR No. 36 of 2015 registered against the accused-petitioner in Police Station, New Shimla is hereby ordered to be quashed and the subsequent criminal proceedings pending disposal in the Court of learned Chief Judicial Magistrate, Shimla shall also stand quashed. The petition is accordingly disposed of.

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

State of H.P. .....Appellant.

Versus

Om Prakash & Ors. .....Respondents.

Cr. Appeal No. 222 of 2008

Date of Decision: 21st September, 2016.

Indian Penal Code, 1860- Section 332, 504 and 506 read with Section 34- Informant and other police officials were returning after investigating a case under Section 283 of I.P.C. - accused caught hold of the informant and started quarreling with them- accused also gave beatings to the informant and other police officials – the informant party came to the police post but the accused followed them- they obstructed the police officials in discharge of their officials duties- accused were tried and acquitted by the trial Court- aggrieved from the order, present appeal was filed- held, that it was not mentioned in Ex.PW-1/A that any offence punishable under Section 283 of I.P.C. was committed by accused No. 1 - hence, the genesis of the prosecution version was made doubtful- the uniforms of the police officials were not damaged but their stitching became loose, which will not lead to an inference of the commission of offence by the accused- accused were rightly acquitted by the trial Court- appeal dismissed. (Para-9 to 13)

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondents: Mr. B.C. Negi, Senior Advocate with Mr. Pranay Pratap Singh, 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 13.09.2007 in Criminal Case No. 67/2 of 2004, whereby, the latter Court acquitted the accused/respondents for offences punishable under Sections 332, 504 and 506 read with Section 34 of the Indian Penal Code.

2. The facts relevant to decide the instant case are that on 24.06.2003 at 7.25 p.m., H.C. Shiv Kumar along with C. Shusheel Kumar was coming back to Police Post, Lakkar Bazar after investigating case FIR No. 179 of 2003 under Section 283 IPC against Om Parkash son of Sh. Sohan Lal, Meghna Complex. In between police post and Meghna complex, accused Om Parkash, Sanjeev Kuthiala and Arun Sharma appeared on his way and wrongfully restrained him from proceeding towards Police Post Lakkar Bazar. Thereafter, all accused in furtherance of common intention of each other caught hold of complainant from his neck and when they were questioned by aforesaid complainant H.C. Shiv Kumar and C. Sushil Kumar, all accused started quarreling with them, administered beatings to them. Uniform of C. Susheel Kumar was also torn and all the accused criminally intimidated them that they would learn them as to how the Govt. service is done. H.C. Shiv Kumar and C. Susheel Kumar after saving themselves from the wraths of the accused came to Police Post Lakkar Bazar but all the accused chasing them again appeared at Police Post Lakkar Bazar. When they were questioned by MC. Krishan Singh, they again used force to cause obstruction in the discharge of official duties as public servant to H.C. Shiv Kumar, C. Susheel and M.C. Krishan Singh. Thereafter report No.17 was made by H.C. Shiv Kumar which was sent to Police Station where FIR Ex.PW7/A was registered. 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, 504, 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/respondents 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 qua findings of acquittal standing 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 entire genesis of the prosecution case is anvilled upon Ex.PW1/A embodying therewithin a narrative scribed by the Incharge of Police Post, Lakkar Bazar qua on 24.6.2003 at 5.10 p.m. H.C. Shiv Kumar and C. Susheel Kumar standing directed to proceed towards Lakkar Bazar, IGMC Bothwell, Longwood etc., for performing patrol duty, in sequel whereto the aforesaid police officials arrived at the relevant site of occurrence whereat an offence under Section 283 of the IPC is alleged to be committed by accused/respondent No.1 Om Prakash. Ex.PW1/B embodies therein the factum of alleged commission of offences under Sections 332, 504, 506 read with Section 34 of the IPC by accused/respondents, also therewithin an allusion is made to rapat No.13 comprised in Ex.PW1/A qua the latter holding therewithin information qua commission of an offence by accused/respondent No.1 under Section 283 of the IPC. However, Ex.PW1/A holds no narrative qua accused/respondent No.1 committing an offence punishable under Section 283 of the IPC. Consequently, the reference made in Ex.PW1/B qua Ex.PW1/A therewithin holding the aforesaid factum stands falsified. The effect of falsification hence ingraining Ex.PW1/B, falsification whereof embodied therein stands aroused from the trite factum aforesaid of the prosecution contriving a false rapat qua the commission of an offence under Section 283 of the IPC by accused/respondent No.1. Furthermore, the concomitant effect of the aforesaid falsity gripping Ex.PW1/B wherewithin a disclosure also exists qua commission of offences under Sections 332, 504, 506 read with Section 34 of the IPC by the accused, is of the aforesaid recitals embodied therewithin also suffering from a taint of falsity.

10. The Investigating Officer, at whose instance the apposite disclosures manifested in Ex.PW-1/A stood recorded has not testified in his examination-in-chief qua the police officials referred therein proceeding to the places mentioned therein for holding investigations qua commission of an offence under Section 283 of the IPC by accused/respondent No.1. His reticence qua the aforesaid factum benumbs the espousal of the prosecution qua the genesis of the occurrence embodied in Ex.PW1/B standing engendered by the police officials proceeding to the relevant site of occurrence for investigating commission of an offence under Section 283 of the IPC by accused/respondent No.1.

11. Be that as it may, the effect of a pervasive aura of falsity engulfing the prosecution version qua the genesis of the occurrence embodied in Ex.PW1/B, is, even if assumingly the relevant events embodied in Ex.PW1/B occurred at the relevant site of occurrence, yet veracity thereof, standing blunted. An incisive scanning of the testimony of Susheel Kumar, PW-3, uncovers the factum of his accompanying H.C. Shiv Kumar to the shop of accused/respondent No.1 on the relevant day at 5.00 p.m., whereupon the latter was asked to remove the articles which were kept by him outside his shop, whereupon the relevant thoroughfare stood obstructed, request whereof stood unacceded to by respondent No.1 leading to registration of a case against accused/respondent No.1 under Section 283 of the IPC. He proceeds to testify of when they were proceeding to return to the Police Post, the accused holding him besides H.C. Shiv Kumar from the neck and belabouring them. The testification of PW-3 qua the factum aforesaid would acquire truth only if the prosecution had adduced before the trial

Court the record with respect to registration of a case under Section 283 of the IPC, conspicuously when FIR No.179 of 2003 stood registered at the police station concerned wherewithin recitals stood encapsulated qua commission of an offence by accused/respondent No.1 under Section 283 of the IPC. However, the aforesaid FIR remains unadduced in evidence by the prosecution also obviously the relevant investigations carried thereupon by the Investigating Officer remain omitted to be placed on record. Furthermore, obviously the report as prepared by the Investigating Officer under Section 173 of the Cr.P.C. also remains unadduced in evidence. The effect of the aforesaid omissions qua adduction into evidence the aforesaid material by the prosecution is qua theirs pronouncing upon the factum of the prosecution contriving the factum of accused/respondent No.1 committing an offence under Section 283 of the IPC. Also it appears that the aforesaid contrivance stands employed by the prosecution to falsely portray the commission of offences by the accused/respondents under Sections 332, 504, 506 read with Section 34 of the Indian Penal Code. With this Court concluding qua the prosecution contriving the factum of the accused/respondent No.1 committing an offence under Section 283 of the IPC engenders an inference of the entire disclosures in Ex.PW1/B holding a taint of untruthfulness. Consequently, no credibility is to be imputed qua the recitals occurring neither in Ex.PW1/B nor to the testifications in corroboration thereto rendered by the police officials.

12. The learned Deputy Advocate General has contended of with the uniform of the police official concerned standing torn it was inappropriate for the learned trial Court to conclude of the recitals occurring in Ex.PW1/B carrying no iota of truth. However, the aforesaid submission falters, in the evident factum of the uniform of the police official concerned not holding any major damage rather its stitching begetting loosenings also with their hence being a possibility of the police official concerned contriving to beget the aforesaid loosenings qua the stitchings of the relevant uniform, whereupon the mere factum of the stitching of the relevant uniform getting loosened would not per se hold any leverage for an inference of the accused/respondents committing the offences to which they stood charged, tried and acquitted. In aftermath, when for reasons aforesaid the entire genesis of the prosecution case embodied in Ex.PW1/B suffers from a taint of falsity also when this Court has concluded of the testifications of the police officials in consonance therewith also likewise holding no iota of truth, the inevitable sequel therefrom is of even the injury which stood noticed by PW-4 to be occurring on the person of PW-3 being sequelable by fall, more so, when the former in his testification has pronounced qua the aforesaid factum.

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.

14. Consequently, there is no merit in the instant appeal and it is 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 DHARAM CHAND CHAUDHARY, *J.*

Sucha Ram ...Appellant.

Versus

Shri Rajinder Singh & Another ...Respondents.

FAO No. 375 of 2007.
Decided on: September 21, 2016.

Workmen Compensation Act, 1923- Section 4- Claimant was loading the truck- he fell down and sustained injuries – claim petition was dismissed after holding that injuries were not

sustained during the course of his employment – held, that the incident was not reported to the police or insurer- no explanation was given for this fact- claimant had not sought medical help on the same day- no x-ray was conducted – person issuing the disability certificate had not examined the claimant – the petition was rightly dismissed- appeal dismissed. (Para- 7 to 11)

For the appellant: Mr. Raman Sethi, Advocate.
For the respondent: Mr. Rajiv Jiwan, Advocate for respondent No.2.

The following judgment of the Court was delivered:

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

Appellant-claimant Sucha Ram is in appeal before this Court. The complaint is that learned Commissioner, under the Workmen Compensation Act, (SDM), Nalagarh, District Solan, vide order dated 30.3.2007 passed in a petition under Section 22 of the Act (case No.7/200), has erroneously denied the award of compensation to him.

2. The appellant-claimant himself is the driver of truck No.HP12-3693. Owner of the truck is none-else, but his son Rajinder Kumar, the first respondent. In the petition, it has been alleged that on 17.1.2005, after loading the truck in the premises of Gauntermenn Peiper India Ltd. Bharatgarh, while in the process of setting the tarpaulin right on load portion of the truck, he fell down and sustained injuries. He was given first medical aid at Rajpura. Later on, he went to CHC Nalagarh on 4.3.2005 for his treatment. According to the appellant-claimant, the injuries he received by way of fall from the truck have resulted in permanent disability and now there is complete loss of earning. While he has claimed his age as 48 years, the wages per month is stated to be Rs. 4,000/- in addition to Rs. 100/- as daily allowance. It is with these submissions he has filed the claim petition before the learned Commissioner below for award of just and reasonable compensation.

3. The first respondent has admitted the case as set out in the claim petition in toto. The petition, however, was resisted and contested by the insurer respondent No.2 on the grounds *inter-alia* that the appellant was not holding a valid and effective driving licence and also that had he been met with an accident, the insured-respondent No.1 should have given intimation in this regard to respondent No.2. The insured-respondent No.1 has not filed any claim petition and as such the accident allegedly occurred on 17.1.2005 is denied being wrong. It is pointed out that the appellant-claimant is father of the insured respondent No.1 and not driver of the truck. As per the prescription slip of a hospital at Nalagarh, the appellant got himself treated on 4.3.2005, whereas the injuries were allegedly sustained by him by way of fall on 17.1.2005. It is also denied that the monthly salary of the appellant was Rs. 4,000/- per month and daily allowance as Rs. 100/- per day.

4. On the pleadings of the parties, the following issues were framed:-

1. Whether the applicant is a workman under the definition of the WC Act? OPA
2. Whether the applicant sustained injuries during the course of his employment under respondent No.1? OPA
3. Whether the applicant is entitled for compensation, If yes to what extent and from whom? OPA
4. Whether the applicant was holding a valid and effective driving licence at the time of accident? OPR-2
5. Relief.

5. Learned Commissioner below on appreciation of the given facts and circumstances and also the evidence available on record has arrived at a conclusion that the appellant was working as driver with Truck No.HP12-3693, hence is a workman, however, he has

not sustained injuries during the course of his employment. The appellant as such was not entitled to the award of compensation.

6. The legality and validity of the impugned award has been questioned in the present appeal. The appeal has been admitted on the following substantial questions of law.

6. Whether the learned Commissioner (Workmen Compensation) has gravely erred by not giving due weightage to the pleadings and proof as well as the material available on record?

7. Whether the learned Commissioner (Workmen Compensation) has gravely erred by not relying upon the documents duly proved in accordance with law?

8. Whether lodging of FIR is a prerequisite for claiming compensation under the Workmen Compensation Act, 1923?

9. Whether the workmen while doing a part of his duty or anything incidental thereto met with an accident and sustained injuries would not mean that the accident has arisen out of and in the course of workmen's employment?

7. The findings that the appellant is a workman on issue No.1 have attained finality being not assailed any further by the insurer-respondent No.2. The substantial questions of law, on which the appeal has been admitted, pertain to the entitlement of the appellant to receive the compensation from the respondent. Admittedly, the incident, in which the appellant allegedly sustained injuries on 17.1.2005, has neither been reported to the Police nor to the insurer-respondent No.2. In view of the facts of this case when the appellant has not received injuries in the accident and rather by way of fall from top of the load portion of the truck while setting right the tarpaulin put thereon for protection of the goods loaded, hence in these circumstances, the matter was not required to be reported to the police. Respondent No.1 was, however, under an obligation to have reported the incident to the insurer respondent No.2 had the instance been taken in the manner as claimed in the petition. The said respondent has failed to explain such omissions on his part.

8. Interestingly enough, had the injury been sustained by the appellant in the manner as claimed in the petition being fractured by one of his arm, in normal course, he was required to visit the hospital to get the medical check up and got the fractured arm x-rayed. He, however, not went to hospital on that day though in the petition it has come that the first medical aid was obtained by him at Rajpura, however, in Government Hospital/ Private Hospital or from any other person including Vaid, nothing has come on record in this regard. His testimony that the treatment was taken from a local Vaid initially is also remained unsubstantiated because such Vaid has not been examined. In a situation when it is a family affair because the appellant is father of the owner of the truck, his statement that he got treatment from local Vaid, inspires no confidence. The prescription slip of Sub-Divisional Hospital, Nalagarh is Ex.PW-2/B. No doubt, the medical officer attended upon the appellant has diagnosed the fracture of humorous bone, however, there is no history that the fracture was sustained on 17.1.2005 by way of fall from the truck for want of further investigation. It was in fact fracture of humorous bone, could have only been ascertained by way of getting the x-ray conducted. Without such investigation, it cannot be said that the humorous bone of the arm of the appellant was fractured and that too in the incident of 17.1.2005. The disability certificate Ex.PW-1/B dated 3.4.2006 is also of no help to the appellant's case for the reason that PW-1, who issued the same has never examined the appellant medically immediately after the injury received by him and rather after a period over one year i.e. 3.4.2006. At the most, it can be said that PW-1 has examined the appellant to assess the disability and no inference can be drawn that such disability was the result of the injury sustained by way of fall on 17.1.2005. The oral evidence as has come on record by way of the own testimony of the appellant while in the witness-box as PW-2 and that of PW-3 Ajmer Singh for want of any cogent and reliable evidence showing that the appellant in fact had a fall on

17.1.2005 and received injury in his arm on that day. It is not safe to place reliance thereon and to conclude that the appellant got injured on 17.1.2005 during the course of his employment.

9. True it is that the insurer-respondent No.2 has felt satisfied only with the examination of its Assistant Manager, Sh. Arun Ahluwalia, RW-1 and placing on record the report of the investigator Mark-A. However, in view of the onus to prove that the applicant has sustained injuries during the course of employment and as such he is entitled to compensation, was upon the appellant and as he has failed to discharge the same, therefore, the failure of the insurer-respondent No.2 to examine the investigator to prove the report in accordance with law is also of no help to his case.

10. Having said so no substantial question of law arises for adjudication in this appeal what to speak of the questions of law as formulated hereinabove. The order passed by learned Commissioner below rather is legally sustainable and the contentions to the contrary are without any substance.

11. For all the reasons hereinabove, this appeal fails and the same is accordingly dismissed. Pending application(s), if any, shall also stands disposed of.

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

Devinder Kumar .....Petitioner.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Revision No. 122 of 2008
Date of Decision: 23.9.2016.

Indian Penal Code, 1860- Section 325 read with Section 34- Informant saw N constructing a wall on a public path- he asked N not to do so , when the informant was returning to his home, accused restrained him from proceedings further – accused No. 2 started quarreling with the informant – the present petitioner inflicted a blow on the head of the informant by a wooden plank – Court found the accused guilty – an appeal was preferred, which was dismissed- held, in revision that Court has limited power to appreciate the evidence in exercise of revisional jurisdiction- prosecution version was proved by PW-1 and PW-2- their testimonies were not shaken in cross-examination – Medical Officer had found injuries on the person of the informant – defence version was not proved – the accused was rightly held guilty by the Courts- however, considering the time period, sentence modified and accused directed to pay compensation of Rs. 20,000/- in lieu of the sentence imposed by the trial Court. (Para-8 to 25)

Cases referred:

State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452
Krishnan and another Vs. Krishnaveni and another, (1997) 4 Supreme Court Case 241
Yudhbir Singh versus State of Himachal Pradesh 1998(1)S.L.J. 58,
Ramesh Kumar @ Babla versus State of Punjab 2016 AIR (SC) 2858
Hari Kishan and State of Haryana versus Sukhbir Singh 1988 AIR (SC) 2127

For the petitioner: Mr. Vinod Gupta, Advocate.

For the respondent: Mr. Rupinder Singh Thakur, Additional Advocate General, with Rajat Chauhan, Law Officer.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Present criminal revision petition filed under Section 397 of the Code of Criminal Procedure is directed against the judgment dated 19.7.2008, rendered by the learned Sessions Judge, Mandi, HP, in Criminal Appeal No. 29 of 2007, affirming the judgment and order dated 15.9.2007 and 18.9.2007, passed by learned Judicial Magistrate, Ist Class, Court No. II, Mandi, District Mandi, H.P., in Police Challan No. 163-I/2002/III-II/2002, whereby present accused-petitioners were convicted and sentenced to undergo simple imprisonment for a period of six months and to pay fine of Rs. 1000/- for having committed offence punishable under Section 325 read with Section 34 of the IPC, and in default to undergo simple imprisonment for a period of fifteen days.

2. Being aggrieved and dissatisfied with the judgment of conviction passed by the learned trial Court, present petitioner along with co-accused filed an appeal under Section 374 of the Cr.PC before the learned Sessions Judge, Mandi , HP, however fact remains that learned Sessions judge vide judgment dated 19.7.2008 acquitted the co-accused Rajinder Kumar from the offence punishable under Section 325 read with Section 24 IPC by way of giving benefit of doubt. As far as present petitioner is concerned, the conviction and sentence passed by the learned trial was upheld by the learned Sessions Judge. In view of the aforesaid background, present petitioner accused filed the instant revision petition praying therein for quashing and setting aside of the judgment of conviction passed by the courts below.

3. Briefly stated facts necessary for adjudication of the case are that on 21st February, 2002 at about 9:00am, the complainant namely Govind Ram (PW1) had gone to his fields, wherein he observed that Nag Ram, who was having his house adjacent to his land, was constructing a wall of his house on the public path way. The complainant advised him not to construct his house on the path way and thereafter, he along with Sukh Ram and Sunder Lal started walking towards his house. In the meanwhile, present petitioner-accused came there and restrained him from proceeding further. As per prosecution story, Rajinder Kumar i.e. accused No.2 also started fighting with the complainant. Soon thereafter, his elder brother (present petitioner) appeared on the spot along with wooden plank and gave blow on the head of the complainant with the plank, as a result of which, he fell down and lost consciousness. Thereafter, injured was rushed to Zonal Hospital, Mandi, wherefrom, a telephonic information qua the incident was given to the police. Police on receipt of information, registered FIR and after investigation, presented the charge sheet against the accused in the competent court of law. Learned Judicial Magistrate, Ist Class, Court No.II, Mandi, District Mandi, H.P., after satisfying itself that a prima facie case exists against the accused, framed the charges under Sections 323, 325, 341 and 506 of the IPC, to which, accused persons pleaded not guilty and claimed trial. Learned trial Court, on the basis of evidence adduced on record by the prosecution, found the accused guilty of having committed offences under Sections 323, 325, 341 and 506 of the IPC and accordingly, convicted and sentenced them, description whereof, has already been given above.

4. Feeling aggrieved and dissatisfied with the judgment of conviction passed by the learned trial Court, accused, filed an appeal under Section 374 of the Cr.PC, before the learned Sessions Judge, Mandi, HP, whereby the same was dismissed vide judgment dated 19.7.2008. Hence, the present criminal revision petition before this Court.

5. Mr. Vinod Gupta, Advocate, representing the petitioner vehemently argued that the judgments passed by both the courts below are not sustainable in the eye of law as same are not based upon the correct appreciation of evidence available on record as well as law and facts and as such, same deserve to be quashed and set-aside. Mr. Gupta, strenuously argued that learned courts below miserably failed to appreciate the evidence on record and have come to wrong conclusions and injury caused to the complainant cannot be attributed to the petitioner, rather the same was caused by fall. Mr. Gupta, invited attention of this Court to the statement of

PW2 Sukh Ram, to demonstrate that there was enmity between the petitioner and the complainant solely with a view to escape his liability to pay Rs. 10,000/-, which he had borrowed from the father of the accused, falsely implicated the accused in the present case. Mr. Gupta vehemently contended that courts below have erred in not taking into consideration the FIR, which was the result of due deliberation and information was received in the Police Station at 12:45 pm as per Diary No. 9 Ext.PW6/A, wherein it was recorded that one Om Parkash reported that his brother has sustained injuries in a fight and then police went to the hospital and recorded the statement of the complainant. As per Mr. Gupta, MLC clearly reveals that one constable was already present in the hospital at 11:00am but when the complainant was admitted in the hospital, Om Parkash had no occasion to inform the police on telephone and as such, prosecution deliberately did not record the FIR on this information which constituted the offence, rather waited to record the statement of PW1 (complainant)under Section 154 Cr.PC after due deliberation and the delay in filing the FIR, makes entire case of the proseuciton doubtful and on this score alone, petitioner deserves to be acquitted. Mr. Gupta further contended that statement under Section 154 Cr.PC of the complainant cannot be relied upon as the same is hit by Section 162 Cr.PC being recorded during the course of the investigation. He vehemently argued that the learned courts below have erred in law in not considering the fact that there is nothing on record to connect the injuries sustained by the complainant with the accused, which fact is clear from the MLC showing nothing qua the time and when the injury was caused? Even the doctor was not sure that when the injury was caused, which fact has not been considered by the courts below and as such, the judgments passed by the courts below deserve to be quashed and set-aside. While concluding his arguments, Mr. Vinod Gupta, argued that courts below failed to consider the fact that had accused given blow on the head of the complainant, there would have been some external injuries on his person. Mr. Gupta, further argued that Sukh Ram i.e. PW2 is an interested witness who is the son of the real uncle (taya) of the complainant and prosecution intentionally not examined the sole independent witness i.e. Sunder Lal who was present on the spot. In view of the above, Mr. Gupta, prayed that petition may be accepted after setting aside the judgments by the courts below.

6. Per contra, Mr. Rupinder Singh Thakur, learned Additional Advocate General, duly assisted by Mr. Rajat Chauhan, Law Officer, appearing on behalf of the respondent-State, supported the impugned judgments passed by the courts below. Mr. Rupinder Singh Thakur, vehemently argued that bare perusal of the impugned judgments suggests that same are based upon the correct appreciation of the evidence available on record and prosecution has been able to prove its case beyond reasonable doubt. Mr. Rupinder contended that in the given facts and circumstances of the case, no interference, whatsoever, of this Court, is warranted and this Court has very limited powers while exercising its revisionary powers under Section 397 of the Cr.PC to re-appreciate the evidence, especially when it stands duly proved on record that the courts below have dealt with each and every aspect of the matter very meticulously. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in case ***State of Kerala*** *Vs.* ***Puttumana Illath Jathavedan Namboodiri*** (1999)2 Supreme Court Cases 452, wherein it has been held as under:-

> *"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 Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."*

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

8. True, it is that while exercising the power under Section 397 of Criminal Procedure Code, this Court has very limited power to re-appreciate the evidence available on record. But in the present case, where accused has been found guilty of having committed offences under Sections 341, 323, 325 and 506 read with 34 of the Indian Penal Code, this Court solely with a view to ascertain that the judgments passed by both the Courts below are not perverse and same are based upon correct appreciation of evidence available on record, undertook an exercise to critically examine the evidence available on record to reach fair and just decision in 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*** *Vs.* ***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 herein below:-

> *"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. During trial proceedings, prosecution with a view to prove its case beyond reasonable doubt examined as many as eight witnesses, whereas statement of the accused under Section 313 Cr.PC was also recorded by the court below, wherein both the accused denied the case of the prosecution in toto and claimed to be innocent. Accused also led evidence and examined two witnesses in their defence. As per prosecution, on the ill fated day, at about 9.00am, the complainant who was working in his fields was given blow of the wooden plank on his head by the accused, as a result of which, he sustained fracture of temporal bone.

11. Govind Ram PW1 (the complainant) deposed that on 21st February, 2002, accused Rajinder Kumar caught hold of him from his neck and started beating him. PW1 further stated that immediately thereafter, accused-petitioner came to the spot and inflicted injury with wooden plank on his head and the incident was witnessed by Sukh Ram and Sunder.

12. Sukh Ram (PW2) also stated that on 21st February, 2002, at about 9am, he after giving fodder to his cattle was coming to his house, in the meanwhile, he himself saw Rajinder Kumar, who had caught hold of the complainant from his neck and immediately thereafter another accused (present petitioner) came with wooden plank and inflicted injury upon the head of the complainant. He further stated that accused also threatened to kill the complainant. He also stood witness to the recovery of Danda Ext.P1, which was effected vide fard Ext.PW2/A. In his cross examination he feigned ignorance qua the suggestion put to him that the complainant had to repay the amount of Rs. 10,000/- to the father of the accused and accused, several times demanded the same. PW2 further admitted that he did not try to rescue Govind Ram and danda

Ext.P-1 was commonly found item. In his cross examination, PW2 categorically stated that threats were extended on the next date. However, he specifically denied the suggestion put to him that complainant suffered injury by falling on the stone.

13. Conjoint reading of the cross examination conducted on aforesaid prosecution witnesses (PW 1 and 2) clearly suggests that defence was not able to shatter their testimony, which was definitely reliable and trustworthy. Careful perusal of the statement made by these PWs in their examination-in-chief clearly suggests that both the witnesses have been very very candid, specific and straight forward while narrating the sequence of event actually occurred before the ill fated incident. Both PW1 and PW2 unequivocally stated that Rajinder Kumar caught hold of the neck of the complainant and another accused, who was carrying danda in his hand, gave blow on the head of the complainant, as a result of which, he suffered grievous injury on his head. Interestingly, no suggestion worth the name was put to these PWs qua motive, if any, to falsely implicate the accused in a false case. Though, defence by way of suggestion asked PW2 that the complainant had to return an amount of Rs. 10,000/- to the father of the accused but he in his cross-examination feigned ignorance about the aforesaid factum. At this stage, if aforesaid statements given by PW1 and PW2 are seen vis-à-vis medical evidence adduced on record by the prosecution, it clearly corroborates the version of the complainant i.e. PW1 and PW2. It has specifically come in medical evidence that on 21.2.2002 at about 11 am the complainant (PW1) was rushed to Zonal Hospital Mandi in injured condition, where he was found to have suffered grievous injury on his head.

14. PW3 Dr. Ajay Pathak, categorically stated that he examined injured and found no visible injury and referred the inured for x-ray and sought the opinion of the radiologist. The injured was admitted in the surgical ward. PW3 further stated that as per report of the Radiologist, the injured sustained fracture of temporal bone. PW4 Dr. L.D. Vaidya also stated that injured sustained fracture of temporal bone and the injury was grievous in nature.

15. Conjoint reading of aforesaid witnesses (PW3 and PW4), who examined the complainant after alleged incident, clearly corroborates the version put forth on behalf of the complainant as well as PW2 that the complainant was given beatings and blow on his head by wooden plank by the accused. PW3 categorically opined that injured sustained fracture on temporal bone, which injury is grievous in nature. PW4 (Radiologist) also stated that he took x-ray of the injured and perusal of the x-ray revealed fracture of temporal bone on the head of the injured.

16. PW5 and 6 are formal witnesses who may not be relevant at this stage, while deciding present petition.

17. Accused by way of leading evidence in their support also examined DW1 Sh. Nag and DW2 Netar Singh. DW1 stated that the complainant sustained injuries by fall on the stone. He also stated that accused persons were not present on the spot and they did not cause any injury to the complainant. He stated that complainant had to pay an amount of Rs. 10,000/- to the father of the petitioner-accused and he with a view to escape the liability filed this case against the petitioner. Similarly, DW2 Netar Singh also stated that the injured/complainant was liable to pay Rs. 10,000/- to the father of the petitioner-accused and with a view to escape the liability of the payment, false case has been registered against the petitioner. But interestingly, these aforesaid defence witnesses, nowhere stated that whether they were present at the time of alleged incident or not? Though these defence witnesses unequivocally stated that the complainant was not given beatings by the accused but interestingly, they are silent about their presence, if any, on the site at the time of the alleged incident. Since they did not state anything qua their presence or source from where they gathered this information that on the ill fated day, they saw the complainant suffering injury by falling on the stone, hence this Court is of the view that version put forth on behalf of DWs 1 and 2 was rightly not taken into consideration by the courts below while recording conviction against the present petitioner- accused being unreliable and untrustworthy.

18. Similarly, defence was not able to prove factum, if any, with regard to repayment of loan allegedly taken by the complainant from the father of the accused because father of the accused was never examined, who could be the best person to depose before the Court below that the complainant had to pay amount of Rs. 10,000/- to him.

19. After perusing the aforesaid evidence led on record by the defence, this Court has no hesitation to conclude that defence was not able to prove any motive for which, the complainant allegedly filed false complaint implicating the present petitioner accused as well as other co-accused. Learned first appellate Court while deciding the appeal preferred by both the accused came to conclusion that prosecution was not able to prove its case beyond reasonable doubt against the co-accused (Rajinder Kumar) and accordingly, acquitted him on the benefit of doubt. However, learned first appellate Court found the present petitioner guilty of having committed offence, as referred above.

20. This Court after examining the entire evidence led on record by the respective party, has no reason to differ with the judgments of conviction passed against the accused by the courts below because the prosecution has been successful to prove its case beyond reasonable doubt. The statements made by PW1 and 2, wherein they stated that the petitioner accused inflicted injuries on the head of the complainant, was sufficient to conclude that accused caused grievous injury to the complainant by inflicting blow of wooden plank on his head. The aforesaid prosecution witnesses have been very very candid, straightforward and specific while narrating the sequence of event, occurred at the time of the incident at the time of medical examination of the complainant. Though, accused by way of leading evidence DW1 and DW2 made an attempt to prove on record that the complainant had motive to falsely implicate them in a case but as has been discussed in detail, defence was not able to prove the innocence of the accused by leading cogent and convincing evidence and their version was rightly rejected by the court below. This Court sees no reason to differ with the well reasoned findings recorded by the courts below, wherein present petitioner-accused has been held guilty of having committed offences under Sections 341, 323, 325 and 506 read with Section 34 of the IPC.

21. Faced with this situation, learned counsel for the petitioner-accused also prayed that accused may be given the benefit of probation under Section 4(b) of the Probation of Offenders Act, 1958 keeping in view his being first offender. Mr. Gupta also stated that mitigating circumstance in this case is that approximately, more than 14 years have passed after happening of that incident and eight years have been passed after passing of the judgment of conviction dated 15.9.2007. The accused petitioner has already suffered much agony during the pendency of the appeal in the court of learned Sessions Judge, Mandi, as well as in High Court of Himachal Pradesh. In support of the aforesaid arguments, learned counsel for the petitioner-accused also invited the attention of this Court to the judgment passed by this Hon'ble Court in ***Yudhbir Singh*** *versus* ***State of Himachal Pradesh 1998(1)S.L.J. 58***, wherein it has been held as under:

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

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

> *"7. Accordingly the appeal is allowed in part by converting appellant's conviction under Section 307 IPC to one under Section 324 IPC. On the question of sentence, it is pertinent to note that the occurrence took place in 1997. In his statement under Section 313 of the code of Criminal Procedure the appellant gave his age in 2002 as 36 years. He claimed that he and others went to the place of occurrence on getting information that his brother Sanjay Kumar was assaulted by Ramesh Kumar (Complainant). He brought his brother to Police Station and lodged a report. As noticed by trial court, parties are involved in civil as well as criminal litigation from before. High Court has noted that appellant, as per custody certificate, is not involved in any other case. In such circumstances, it is not deemed necessary to send the appellant immediately to Jail custody after about 19 years of the occurrence when he appears to be 50 years of age and fully settled in life.*
>
> *8. In view of aforesaid, in our view the ends of justice would be met by granting benefit of Probation of Offenders Act to the appellant. We order accordingly and direct that the appellant be released on executing appropriate bond before the trial court to appear and receive sentence of rigorous imprisonment for 1 (one) year when called upon to do so and in the meantime to keep the peace and be of good behavior."*

23. The reliance is also placed upon Hon'ble Apex Court judgment ***Hari Kishan and State of Haryana versus Sukhbir Singh 1988 AIR (SC) 2127***, wherein it has been held as under:

> *"8. The question next to be considered is whether the accused are entitled to the benefit of probation of good conduct? We gave our anxious consideration to the contentions urged by counsel. We are of opinion that the High Court has not committed any error in this regard also. Many offenders are not dangerous criminals but are weak characters or who have surrendered to temptation or provocation. In placing such type of offenders, on probation, the Court encourages their own sense of responsibility for their future and protect them from the stigma and possible contamination of prison. In this case, the High Court has observed that there was no previous history of enmity between the parties and the occurrence was an outcome of a sudden flare up. These are not showing to be incorrect. We have already said that the accused had no intention to commit murder of any person. Therefore, the extension of benefit of the beneficial legislation applicable to the first offenders cannot be said to be inappropriate.*
>
> *9. This takes us to, the third questions which we have formulated earlier in this judgments. The High Court has directed each of the respondents to pay Rs.2500/- as compensation to Joginder. The High Court has not referred to any provision of law in support of the order of compensation. But that can be traced to section 357 Criminal Procedure Code Section 357, leaving aside the unnecessary, provides:-*
>
> *"357. Order to pay compensation:*
>
> *(1) When a court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-*
>
> *(a) in defraying the expenses properly incurred in the prosecution;*
>
> *(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is in the opinion of the Court, recoverable by such person in a civil Court;*
>
> *Xxxxxxxxxxxxx*
>
> *Xxxxxxxxxxx*
>
> *Xxxxxx*

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation. Such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been sentenced.

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

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

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

24. This Court after considering the aforesaid submissions having been made by learned counsel for the petitioner-accused, as well as law cited herein above, is not inclined to grant the benefit of probation in favour of the petitioner-accused because there is overwhelming evidence on record, as has been discussed in detail, to conclude that the complainant was given beatings by the petitioner-accused, as a result of which, he suffered fracture on temporal bone, which stands duly proved by the medical evidence adduced on record by the prosecution. However, this Court keeping in view the fact that incident had occurred on 21.2.2002 i.e. 14 years back, and thereafter matter remained pending before the learned appellate Court and thereafter in this Court, is of the view that the sentence imposed by the learned trial Court can be modified by awarding adequate compensation to the complainant, who admittedly suffered grievous injury caused by the present accused petitioner.

25. Consequently, in view of the detailed discussion made herein above, this Court while upholding the judgment of conviction recorded by the courts below modifies the sentence awarded by the Court below and direct the petitioner-accused to pay the compensation to the tune of Rs. 20,000/- to the complainant/victim in lieu of sentence imposed by the learned trial Court. Petitioner accused is directed to deposit aforesaid amount with the trial Court, within one month from the receipt of the copy of the judgment, failing which he would render himself liable to serve the sentence as imposed by the learned trial Court. Needless to say, on complainant's moving appropriate application, the learned trial Court would release the aforesaid amount of compensation.

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

Smt. Krishna Sharma ....Appellant-plaintiff.

Versus

Sh. Rajinder Kumar & Ors. ...Respondents-defendants.

RSA No. 399 of 2007
Date of Decision: 23.09.2016

Code of Civil Procedure, 1908- Section 100- Plaintiff filed a suit for recovery pleading that defendant No. 2 had agreed to buy the land for Rs. 3 lacs – an amount of Rs. 1,50,000/- was paid at the time of execution and registration and two post dated cheques were issued for the payment of remaining amount- cheques were dishonoured – the suit was decreed by the trial Court- an

appeal was filed, which was allowed- held, in second appeal that plaintiff had admitted in another suit that she had received the consideration- hence, her plea that amount was not paid to her is not acceptable – the Court had misread the evidence while decreeing the suit and Appellate Court had rightly reversed the decree- appeal dismissed. (Para-15 to 30)

Case referred:
Om Parkash vs. State of Himachal Pradesh, AIR 2001 H.P. 18

For the Appellant	:	Mr. Rajnish K. Lall, Advocate.
For the Respondents	:	Mr. Ramakant Sharma, Senior Advocate, with Mr. Basant Thakur, 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 dated 16.06.2007, passed by learned District Judge, Solan, H.P, in Civil Appeal No. 27-NL/13 of 2006, titled as Shri Rajinder Kumar & Anr. vs. Smt. Krishna Sharma, reversing the judgment and decree dated 24.01.2006, passed by learned Civil Judge (Senior Division), Nalagarh in Civil Suit No. 44/1 of 2003, titled as Smt. Krishna Sharma vs. Shri Rajinder Kumar & Anr., whereby suit of plaintiff for recovery Rs.1,80,000/- was dismissed.

2. Briefly stated facts, as emerge from the record, are that present appellant-plaintiff filed suit for recovery of an amount of Rs.1,80,000/- (i.e. Principal amount of Rs. 1,50,000/- plus interest @ 12% per annum calculated w.e.f. 4.6.2001 to 3.2.2003 and future interest from 4.2.2003 @ 12% per annum till the realization of decreetal amount alongwtih costs, expenses and charges etc., under Order VII, Rule 1 of the Civil Procedure Code.

3. Appellant-plaintiff further averred in the plaint that he was owner in possession of land measuring 8 bighas, 19 biswas bearing Khasra Nos. 21, 207/22, 88, 89 and 216/106 situated in the area of village Shahpur, Pargana Dharampur, Tehsil Nalagarh, H.P. Appellant-plaintiff further averred that respondent-defendant No. 2 approached her for sale of aforesaid land and he agreed to purchase the aforesaid land for a total sale consideration of Rs.3,00,000/-, but defendant No. 2 at the time of purchasing the said land expressed his inability to make complete payment of whole sale consideration of Rs.3,00,000/-, in cash. Accordingly, defendant No. 2 paid a sum of Rs. 1,50,000/- at the time of execution and registration of sale deed in his favour, in cash. However, defendant No. 1 in order to discharge the legal liability of payment of remaining amount of Rs.1,50,000/-, issued two post dated cheques i.e. (i) Cheque No. 478773, dated 30.5.2001 of Rs. 50,000/- and (ii) Cheque No. 478772, dated 4.6.2001 of Rs.1,00,000/- in favour of appellant-plaintiff, payable from his account No. 2566 at UCO Bank, Joghon, Tehsil Nalagarh, District Solan, H.P. Appellant-plaintiff further averred that since there was a good relation between them at that time, appellant-plaintiff believing aforesaid assurance of the respondents-defendants made statement before the Sub Registrar, Nalagarh at the time of execution and registration of sale deed of aforesaid land to admit the receipt of full and final sale consideration of aforesaid land before the Sub Registrar, Nalagarh. Accordingly, sale deed No. 529, dated 5.5.2001 with respect to aforesaid land was executed by appellant-plaintiff in favour of respondent-defendant No. 2, which was registered before Sub Registrar, Nalagarh. Thereafter, appellant-plaintiff being holder of the aforesaid cheques, deposited the same in his bank i.e. Jogindra Central Cooperative Bank Limited, Nalagarh for encashment after receiving oral intimation from respondent-defendant No. 1 that he has arranged sufficient funds in the aforesaid account to honour the cheques.

4. However, fact remains that vide memo dated 29.11.2001, bank returned the cheques to the appellant-plaintiff with remarks “insufficient funds”. Appellant-plaintiff claimed that respondents-defendants have taken undue benefit of the aforesaid land of appellant-plaintiff and have been getting and using the usufruct of aforesaid land of appellant-plaintiff for their own benefit and due to non payment of aforesaid amount of Rs.1,50,000/-, appellant-plaintiff has suffered damages, harassment and loss, as such, prayed for decree of the suit for recovery for an amount of Rs.1,80,000/-alongwith interest @ 12% per annum till realization of the decreetal amount alongwith costs, charges etc. Thereafter, appellant-plaintiff through her counsel got issued demand notice dated 22.12.2001 to make payment of cheques amount within 15 days from the receipt of notice. But respondents-defendants neither replied the said notice nor paid the cheques amount and started giving assurances that they will make the payment of aforesaid amount of cheques, in order to escape themselves from proceedings under Section 138 of Negotiable Instruments Act. Appellant-plaintiff claimed that, she kept waiting for payment of amount of aforesaid cheques by respondents-defendants, but till date respondents-defendants have not paid the aforesaid amount and period for filing criminal complaint under Section 138 of NIA has been elapsed and now on 16.2.2003, the respondents-defendants have lastly and irrevocably refused to make the payment of aforesaid cheques amount. Hence, she has filed the suit against defendants for recovery of Rs.1,80,000/-.

5. Respondents-defendants by way of written statement refuted the claim put-forth on behalf of appellant-plaintiff and admitted that respondent-defendant No. 2 purchased the land measuring 8 bighas and 19 biswas from appellant-plaintiff for a sale consideration of Rs.3,00,000/-, and respondent-defendant No. 2 paid the sale consideration of Rs.3,00,000/- to the appellant-plaintiff, as a result of which, sale deed No. 529, dated 5.5.2001 was duly executed and registered before the Sub Registrar, Nalagarh in favour of respondent-defendant No. 2 by appellant-plaintiff, as such, nothing remained due and to be paid to the appellant-plaintiff. Respondent-defendant No. 1 specifically denied the allegations of issuance of cheques, if any, in favour of appellant-plaintiff for discharge of any liability. Respondent-defendant No.1 specifically stated in the written statement that there was no liability on respondent-defendant No. 1 as the property had been purchased by defendant No. 2 after settling the bargain with the appellant-plaintiff and he never assured the appellant-plaintiff to make any payment as alleged. It is further stated in written statement that at one point of time respondent-defendant No. 2 had a talk with respondent-defendant No. 1 that he is willing to purchase the remaining land of the appellant-plaintiff as she has earlier sold land to him and she showed her willingness that let the sale deed in favour of respondent-defendant No.1, but respondent-defendant No. 1 explained the position that if the sale deed is to be executed in his name then he will make the payment through cheque and gave the cheques to his father (respondent-defendant No.2) by signing the same but lateron it was told that appellant-plaintiff did not agree for the same as she insisted that sale deed will be in favour of defendant No. 2 as earlier also sale deed is in his favour. Respondents-defendants further stated that thereafter aforesaid sale deed No. 529, dated 5.5.2001, was executed by the appellant-plaintiff in favour of respondent-defendant No. 2 and now he has disclosed that the above cheques are not with him, it is either lost or left in the house of the appellant-plaintiff as he has been visiting her house time and again in connection with the above transaction, which was not be materialized. Respondents-defendants claimed that cheques had fallen into the hands of the appellant-plaintiff and with dishonest intention she wants to utilize the same against the respondents-defendants. Respondents-defendants further stated that appellant-plaintiff is estopped by his act and conduct to claim any money by this concocted story because after sale deed mutation was entered by the Revenue Officer, same was contested by Shri Ramesh Chander etc. alleging to be legal heirs of Ram Rakha, wherein, they challenged that succession of the property of deceased Ram Rakha in favour of the appellant-plaintiff is illegal, void and Mutation No. 125 and 163 are illegal because Ist Class heir of Ram Rakha are alive and in these mutations the appellant-plaintiff had appeared and never objected that she had not received the sale consideration and further in appeal before the Collector, appellant-plaintiff did not raise any objection. Respondents-defendants specifically stated that now a civil suit bearing No. 195/1 of 2001 stand filed by Ramesh Chander etc. against the appellant-plaintiff (defendant No. 1 therein),

challenging the sale deed, which is pending before the learned Sub Judge Ist Class, Nalagarh, wherein, appellant-plaintiff had admitted that she had received full consideration from defendant No. 2 -Shankar Lal, hence, she is estopped by his act, conduct and acquiescence and cheques, if any, are without consideration and the defendants are not liable for any liability as alleged. In the aforesaid background, respondents-defendants prayed for dismissal of the suit.

6. Learned trial Court on the basis of aforesaid pleadings, framed following issues:-

"1.Whether the plaintiff is entitled to the recovery of amount as prayed alongwith interest and cost?...OPP

2. Whether the plaintiff is estopped to file the present suit by her acts, conducts and acquiescence? ...OPP

3. Whether the suit is not maintainable?...OPD

4. Relief."

7. Learned trial Court on the basis of pleadings as well as evidence adduced on record by the respective parties decreed the suit of the appellant-plaintiff for recovery of Rs.1,80,000/- and for further interest @ 12% per annum from the date of filing of suit till its realization.

8. Being aggrieved and dis-satisfied with the impugned judgment passed by learned trial Court filed an appeal under Section 96 of the Civil Procedure Code before learned District Judge, Solan, which came to be registered as Civil Appeal No. 27-NL/13 of 2006. However, fact remains that learned District Judge vide judgment dated 16.6.2007 accepted the appeal and set aside the judgment and decree dated 24.1.2006 passed by learned trial Court.

9. In the aforesaid background, appellant-plaintiff filed instant Regular Second Appeal under Section 100 of the Code of Civil Procedure praying therein for setting aside and quashing of judgment and decree dated 16.6.2007 passed by learned District & Sessions, Judge, Solan.

10. This Court vide order dated 11.9.2007 admitted the present appeal on following substantial questions of law:-

"1.Whether the findings of the Court below are perverse based on misreading of oral and documentary evidence, wrong assumptions by misconstruing the pleadings of the parties and the documentary evidence particularly Exhibit PW1/A, PW1/B, P1, P2, P3 and P7 to P8 as also the documents Exhibit D1 to D4.

2.Whether the presumption attached to the cheques which was for consideration could be said to be rebutted and the plaintiff was precluded from leading the evidence under Section 92 of the Evidence Act and the conclusions drawn by the Court below against the appellant are sustainable in law.

3. Whether the judgment is contrary to the provisions of Order 20 Rule 5 of the Code of Civil Procedure and the law declared in AIR 2001 H.P. 18 Om Parkash vs. State of H.P.

11. Mr. Rajnish K. Lall, counsel representing the appellant-plaintiff vehemently argued that impugned judgment and decree of learned First Appellate Court, whereby he reversed the well reasoned judgment of learned trial Court, deserves to be quashed and set aside being contrary to law and facts of the case. Mr. Lall further argued that bare perusal of judgment of learned trial Court, whereby, suit of the appellant-plaintiff was decreed for a sum of Rs. 1,80,000/- alongwith further interest from the date of filing of suit, is based upon the correct appreciation of evidence, led on record by the respective parties. Whereas, learned District Judge while wrongly placing reliance upon judgment and decree passed by learned Sub Judge, Ist Class, Nalagarh in Civil Suit No. 195/1 of 2001, reversed the same, as such, deserves to be quashed and set aside. During arguments, Mr. Lall invited the attention of this Court to Exts.

PW1/A, PW1/B, P1, P2, P3, P7 and P8 and also to the documents Exts. D1 to D4 to demonstrate that learned First Appellate Court while reversing the findings of learned trial Court, which was based upon correct appreciation of evidence, has misread and misconstrued the oral as well as documentary evidence led on record by the appellant-plaintiff. Mr. Lall while referring to Exts.P1 and P2 i.e. cheques contended that learned First Appellate Court has fallen in grave error while concluding that presumption attached to the cheques Exts. P1 and P2 has been rebutted, as such, it cannot be said that same were paid for consideration. As per Mr. Lall, careful scrutiny of evidence led on record by the appellant-plaintiff clearly suggests that defendants had issued two cheques amounting to Rs. 1,50,000/- in favour of appellant-plaintiff for balance sale consideration and appellant-plaintiff was made to agree to the factum of sale consideration being received at the time of execution and registration of the sale deed, as such, learned First Appellate Court wrongly arrived to the conclusion that as per Section 92 of the Indian Evidence Act no evidence could be adduced against the **terms and conditions** of documents which has been reduced into writing, especially, the documents which is, by law, required to be registered. Mr. Lall also invited the attention of this Court to the statements of PW1 to PW4 to demonstrate that appellant-plaintiff was successful in establishing that defendants had not been paid the remaining sale consideration, as such, same could not be ignored or accepted in preference to the evidence of the defendants DW1 and DW2, which were wholly unreliable and otherwise also could not be relied upon.

12. Mr. Lall while concluding his arguments, forcefully contended that learned trial Court had rightly allowed the suit of the appellant-plaintiff for recovery because it had the advantage of showing the demneours of the witnesses and accordingly had rightly appreciated the evidence led on record by the appellant-plaintiff, whereas, learned First Appellate Court merely drawing wrong inferences and assumptions set aside the judgment of learned trial Court, which was admittedly based upon the correct appreciation of the evidence adduced on record by the respective parties to the lis. Mr. Lall also contended that lower Appellate Court, which is a Court of fact ought to have examined the evidence on merit and return findings on each issue separately and having failed to do so, the judgment and decree is vitiated and no judgment in the eyes of law in view of Order 20 Rule 5 CPC. He also invited the attention of this Court to **AIR 2001 H.P. 18 Om Parkash vs. State of Himachal Pradesh**. In the aforesaid submissions, Mr. Lall prayed for acceptance of the appeal by setting aside impugned judgment passed by learned First Appellate Court.

13. Mr. Ramakant Sharma, Senior Advocate, duly assisted by Mr. Basant Thakur, Advocate, strenuously argued that there is no illegality and infirmity in the judgment passed by learned First Appellate Court and the same is based upon correct appreciation of evidence as well as law led on record by the respective parties, as such, there is no scope of interference by this Court in the present case. Mr. Sharma contended that bare perusal of impugned judgment dated 16.6.2007 passed by learned First Appellate Court clearly suggests that it has dealt with each and every aspect of the matter very meticulously. By no stretch of imagination, it can be said that learned First Appellate Court has mis-read and mis-interpreted the evidence led on record by the respective parties. Mr. Sharma further contended that rather perusal of judgment passed by learned trial Court clearly depicts that it has miserably failed to appreciate the evidence led on record in its right perspective and, as such, arrived at wrong conclusion. Mr. Sharma forcefully contended that documentary evidence led on record by the respondents-defendants was sufficient to conclude that appellant-plaintiff had received total amount of sale consideration in terms of sale deed No. 529 dated 5.5.2001, which was registered with the Sub Registrar, Nalagarh. While referring to para 6 of the written statement Ext. PW1/A filed by the appellant-plaintiff (defendant therein) in Civil Suit No. 195/1 of 2001, titled Ramesh Chander & Ors. vs. Shri Shankar Lal & Anr., wherein present appellant–plaintiff was defendant No. 2, stated that learned trial Court failed to acknowledge specific admission made on record by the appellant-plaintiff that she being absolute owner in possession of the property sold the same to defendant No. 1 Shankar Lal (defendant No. 2 in Civil Suit No. 44/1 of 2003). Similarly, Mr. Sharma invited the attention of the Court to the judgment and decree passed by Sub Judge, Nalagarh, District

Solan, H.P. In Civil Suit No. 195/1 of 2001, titled as Ramesh Chander & Ors. Vs. Shanakr Lal and Anr. to demonstrate that learned trial Court vide judgment dated 12.6.2003 decreed the suit of plaintiffs declaring them owners of the suit land and mutation No. 125, dated 24.12.1994 and mutation No. 163, dated 20.11.1999 were also held to be not binding on the plaintiffs. Similarly, sale deed No. 1259, dated 3.11.1999 and sale deed No. 529, dated 5.5.2001 executed by defendant No. 2 (Smt. Krishna Sharma-appellant/plaintiff herein) in favour of defendant No. 1-Shankar Lal (respondent-defendant No.2 in C.S No. 44/1 of 2003) was also not held binding on the rights of the plaintiffs. Mr. Sharma forcefully contended that once Sale deed No. 529, dated 5.5.2001 executed by appellant-plaintiff in favour of defendant No. 1 was held to be not binding, no decree for recovery of an amount of Rs.1,80,000/- could be passed by learned trial Court below against the respondents-defendants. While concluding his arguments, Mr. Sharma contended that there is no error apparent in the judgment passed by learned First Appellate Court, rather the same is based upon correct analysis of the evidence, be it ocular or documentary, available on record. Hence, present appeal deserves to be rejected.

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

15. Now, in view of the aforesaid pleadings, evidence available on record and submissions having been made on behalf of the parties, this Court would be making an attempt to explore the answer to substantial questions of law as reproduced hereinabove.

16. Since, this Court while examining the substantial questions of law, may have to refer entire evidence led on record by the respective parties, it intends to take all the substantial questions of law together for consideration.

17. It clearly emerges from the record that dispute is with regard to payment of full consideration of the sale amount by the respondents-defendants. Appellant-plaintiff by way of suit for recovery claimed that she being owner in possession of land as described hereinabove sold the same to defendant No. 2 for the total consideration of Rs. 3,00,000/-. As per appellant-plaintiff, defendant No. 2, at the time of purchasing land, expressed his inability to make the payment of whole consideration of Rs. 3,00,000/- in cash and accordingly paid an amount of Rs. 1,50,000/- before execution and registration of sale deed and in order to discharge legal liability of payment of remaining amount of Rs.1,50,000/-, issued two post dated cheques, as mentioned hereinabove, for an amount of Rs.1,00,000/- and Rs.50,000/- respectively, in her favour payable at UCO Bank, Joghon, Tehsil Nalagarh, District Solan. Since, the aforesaid cheques were dishonoured, appellant-plaintiff was compelled to issue legal notice to the respondents-defendants advising them to make payment good in terms of cheques as referred hereinabove. But fact remains that no payment qua cheques were made good, hence, appellant-plaintiff filed civil suit for recovery.

18. Respondents-defendants refuting the claim put-forth on behalf of appellant-plaintiff in the plaint, admitted that defendant No. 2 purchased the land from appellant-plaintiff measuring 8 bighas and 19 biswas for a total sale consideration of Rs.3,00,000/- and respondent-defendant No. 2 paid entire sale consideration of Rs.3,00,000/- to the appellant-plaintiff and accordingly sale deed was registered on 5.5.2001. As per respondents-defendants nothing was to be paid after execution of sale deed, as being claimed by the appellant-plaintiff. Respondents-defendants specifically denied that they had issued cheques in favour of the appellant-plaintiff to discharge any liability. However, respondents-defendants in written statement also stated that at one point of time the defendant No. 2 in the house had talked with defendant No. 1 that he was purchasing the remaining land of the plaintiff as she had earlier sold land to him and accordingly defendant No. 2 showed his willingness that let this sale deed be in favour of defendant No. 1 but defendant No. 1 stated that if the sale deed is executed in his favour, then he will make the payment through cheque and in this process he gave two cheques to his father defendant No. 2 but that idea could not be materialized. After that sale deed was executed by appellant-plaintiff in favour of defendant No. 2, after receiving full consideration amount but now defendant No. 2 has disclosed that cheques were not with him and stated to

have lost or left in the house of appellant-plaintiff as he had been visiting her house time and again. Defendants also stated that cheques fallen in the hands of appellant-plaintiff who with dishonest intention utilized the same against the defendants by way of filing the present suit.

19. Defendants with a view to substantiate that full amount of sale consideration stand received by appellant-plaintiff, stated that one Ramesh Chander had filed civil suit No. 195/1 of 2001, wherein appellant-plaintiff (defendant No. 2 in that suit) admitted that she received full consideration from defendant No. 2 –Shankar Lal (defendant No. 1 in that suit), as such, present suit for recovery deserves to be dismissed.

20. Learned trial Court while examining the evidence made available on record by the respective parties came to the conclusion that appellant-plaintiff were given two cheques for remaining payment of Rs.1,50,000/- by the respondents-defendants and there is statutory presumption that cheque is always issued for consideration and in discharge of legal liability, hence, plaintiff cannot be estopped to make good amount of cheques which got bounced by way of filing present suit. Learned trial Court below while referring to pleadings in Civil Suit No. 195/1 of 2001 observed that averments made by appellant-plaintiff (defendant No.2 therein) is to be considered in a manner that appellant-plaintiff were given cheques of remaining payment of Rs.1,50,000/- by the respondents-defendants.

21. This Court solely with a view to examine the correctness and genuineness of the aforesaid findings returned by the learned trial Court as far as admission made by appellant-plaintiff (defendant No.2 therein) in written statement in Civil Suit No. 195/1 of 2001 perused Ext. PW1/B. Perusal of EX.PW1/B suggests that one Ramesh Chander had filed suit for declaration to the effect that they are absolute owner in possession of landed property comprised in Khata/Khatauni No. 50/55-56 Kitas 8 measuring 18 bighas and 4 Biswas situated in Moza Shahpur Hadbast No. 171, Pargana Dharampur, Tehsil Nalagarh, District Solan, H.P. and defendants have no right, title and interest in or over the said land, wherein, Smt. Kirshna Sharma present appellant-plaintiff was defendant No. 2 and respondent-defendant No. 2-Shankar Lal was defendant No. 1 therein. By way of aforesaid suit, plaintiffs also sought declaration that sale deed No. 1259, dated 3.11.1999 and sale deed No. 529, dated 5.5.2001 executed by defendant No. 2 - Smt. Krishna Sharma in favour of defendant No. 1-Shankar Lal, registered in the office of Sub Registrar, Nalagarh and Mutation No. 163 in favour of defendant No. 1-Shankar Lal, dated 20.11.1999 are wrong, illegal, null and void *ab initio,* which do not confer right, title and interest on the defendants. Pursuant to filing of aforesaid suit as referred herein-in-above, defendant No. 2 therein-Smt. Krishna Sharma (appellant-plaintiff herein) filed written statement wherein in para 6 she stated as under:-

> "6.That this para of the plaint as alleged are wrong and denied. The defendant No. 2 being absolute owner in possession of the property sold the same to defendant No. 1 by registered valid sale deed after receiving the consideration and the defendant No. 1 after due enquiry from the record and ascertaining the factual position purchased the same from defendant No. 2 for consideration, hence, the defendant No. 1 is bonafide purchaser for consideration and the plaintiffs have no right to challenge the same as the defendant No. 1 is in possession as owner at the spot."

22. Careful perusal of aforesaid reply filed by present appellant-plaintiff in Civil Suit No. 195/1 of 2001 clearly suggests that she categorically admitted in that civil suit that being absolute owner in possession of the property sold it to defendant No. 1-Shankar Lal by registering valid sale deed after receiving the consideration and defendant No. 1 after due inquiry purchased the same from her for a sale consideration of Rs.3,00,000/-, hence, defendant No. 1 is bonafide purchaser.

23. This Court after perusing the aforesaid reply filed by defendant - Smt. Krishna Sharma (appellant-plaintiff) is of the view that learned trial Court below failed to appreciate the best piece of evidence led on record by appellant-plaintiff (defendant therein) to demonstrate that

appellant-plaintiff had actually received full and final payment of Rs.3,00,000/- as a sale consideration for sale of land as described in the suit. Since, appellant-plaintiff specifically stated in her plaint that defendants had issued two cheques amounting to Rs.1,50,000/-,defendants solely with a view to prove that entire payment was made to plaintiff in terms of sale consideration as agreed upon by the parties rightly placed reliance upon Ext. PW1/A i.e. reply filed by defendants in Civil Suit No. 195/1 of 2001, specifically admitting therein that she being absolute owner in possession of the property sold the same to defendant No. 1 by valid sale deed and, as such, this Court sees considerable force in the contention put-forth on behalf of respondents-defendants that learned trial Court below failed to appreciate the evidence led on record by the respondents-defendants in its right perspective. Learned trial Court below failed to appreciate that since appellant-plaintiff claimed an amount of Rs. 1,80,000/- on account of cheques allegedly issued in her favour by the defendants for discharging of liability of remaining payment of Rs.1,50,000/-, respondents-defendants rightly adduced on record evidence in the shape of written statement Ext.PW1/A (in civil suit No. 195/1 of 2006), wherein, plaintiff admitted that she received entire payment of sale consideration from Shankar Lal (defendant) to demonstrate that nothing was payable to the appellant-plaintiff as far as sale consideration is concerned. Respondents-defendants by way of placing reliance upon PW1/A rightly made an attempt to demonstrate that there was no question of issuance of any cheque in favour of appellant-plaintiff since they had already made entire payment of Rs.3,00,000/- as admitted by appellant-plaintiff (defendant No. 2 therein) in her written statement in Civil Suit No. 195/1 of 2001. Since, plaintiff had filed suit for recovery on the strength of two cheques amounting to Rs.1,50,000/- allegedly issued by defendants, onus was upon her to prove that aforesaid cheques were issued by defendants with a view to discharge legal liability for payment of remaining amount of Rs.1,50,000/-. Though, in the present case, appellant-plaintiff by leading cogent and convincing evidence on record was able to prove that cheques were issued by defendants but no evidence worth the name was led on record to prove that aforesaid cheques were issued by respondents-defendants to discharge their liability for payment of remaining amount of Rs.1,50,000/-, whereas, defendants by placing on record Ex.PW1/A were able to prove beyond reasonable doubt that entire amount of Rs.3,00,000/- was received by appellant-plaintiff as a total full consideration amount from respondents-defendants at the time of execution of sale deed No. 529, dated 5.5.2001.

24. Hence, in view of the above, this Court is of the view that learned trial Court has failed to appreciate the evidence led on record in its right perspective and wrongly came to the conclusion that there can be no question of estoppel against the statutory right accrued in favour of the appellant-plaintiff on account of bouncing of the cheques. At this stage, it may be observed that learned trial Court below while decreeing the suit of the appellant-plaintiff on the strength of two cheques allegedly issued by respondents-defendants wrongly applied the principles of law, which are usually valid in proceedings/trial under Section 138 of Negotiable Instrument Act. In the present proceedings, as has been discussed in detail, onus was upon the appellant-plaintiff to demonstrate that cheques were issued by defendants for discharge of liability of remaining balance amount. Appellant-plaintiff was unable to prove that cheques, if any, were issued by defendants for discharge of liability of remaining payment of Rs.1,50,000/-,hence, this Court has no hesitation to conclude that there is no illegality and infirmity in the impugned judgment passed by the learned First Appellate Court, as far as this aspect of the matter is concerned.

25. Similarly, perusal of Ext. D1 i.e. judgment dated 12.6.2003, passed in Civil Suit No. 195-1/2001 clearly suggests that learned trial Court while decreeing the suit of the plaintiff (Ramesh Chander) declared them owner of the suit land and apart from that sale deed No. 529, dated 5.5.2001 executed by defendant No. 2 (appellant-plaintiff herein) in favour of defendant No. 1 (respondent-defendant No. 2 herein) was held not binding on the right of the plaintiffs, meaning thereby, the sale by the appellant-plaintiff in favour of defendant was not found to be bonafide transaction as far as sale deed No. 529, dated 5.5.2001 is concerned. Rather, if the effect of judgment Ex.D1, dated 12.6.2003 is seen, respondent-defendant No. 2 is entitled to get back the amount, which he allegedly paid to appellant-plaintiff at the time of execution of sale deed.

Moreover, judgment and decree dated 12.6.2003 (Ext.D1) was passed by learned trial Court, before the passing of the judgment and decree dated 24.1.2006 passed by learned trial Court in Civil Suit No. 44/1 of 2003 i.e. subject matter of the present case. Even during proceedings of the present case, counsel representing the appellant-plaintiff was unable to refute the aforesaid position as noted down by this Court hereinabove.

26. If the matter is viewed from another angle, it clearly emerges that with the passing of judgment and decree dated 12.6.2003 (Ext.D1), sale pursuant to sale deed No. 1259 dated 3.11.1999 and sale deed No. 529, dated 5.5.2001 having been declared void, wherein,

appellant- plaintiff (defendant No. 2 in CS No. 195/1 of 2001) have been ordered to be delivered the possession of the rightful owners, as a result of which, defendants herein not only lost their ownership possession, rather respondents-defendants at this stage can be asked to pay balance amount of sale consideration as having claimed by the appellant-plaintiff in the present suit. In terms of judgment and decree dated 12.6.2003 respondents-defendants are entitled to refund of total amount of sale consideration as admittedly received by appellant-plaintiff from defendant No. 2. Since sale by the appellant-plaintiff in favour of respondent-defendant No. 2 has been found to be bona fide transaction in Civil Suit No. 195/1 of 2001, respondent-defendant No. 2 is definitely to get back the amount which he had allegedly paid to the appellant-plaintiff at the time of execution of sale deed.

27. In view of the above, this Court has no hesitation to conclude that learned trial Court below while decreeing the suit of the plaintiff mis-read and misinterpreted the evidence adduced on record by the respective parties, which ultimately resulted into grave injury to the respondents-defendants. Hence, this Court sees no illegality and infirmity in the judgment passed by learned First Appellate Court while accepting the appeal preferred by the respondents-defendants.

28. This Court while examining the substantial questions of law, as has been referred hereinabove, also perused evidence i.e.Ext. P1, P2, P3, P4, P5,P6, P7 and P8 and also Ext. D1 to D4. Ext.P1 and P2 i.e. cheques allegedly issued by the respondents-defendants in favour of appellant-plaintiff. Since, appellant-plaintiff, as has been discussed in detail, failed to prove that cheques were issued by respondents-defendants with a view to discharge their liability to pay remaining balance amount towards sale consideration, it cannot be said that learned First Appellate Court below misread and misinterpreted the same. Similarly, Ex.P3(Sale Deed), perusal whereof clearly suggests that appellant-plaintiff had received total amount of sale consideration of Rs.3,00,000/- from the respondents-defendants at the time of execution of sale deed No.529, dated 5.5.2001 duly registered with the Sub Registrar. Ext. P4 and Ext.P5 being memos issued by bank while returning the cheques with endorsement 'insufficient funds".Ex.P6 i.e. legal notice issued by appellant-plaintiff to the respondents-defendants making demand for payment of Rs.1,50,000/-. Ex. P7 and Ext.P8 are postal receipts to demonstrate that legal notice was got issued by the appellant-plaintiff. Ext.P9 is statement of current account placed on record by the appellant-plaintiff to demonstrate that cheques were presented and same were returned. Perusal of these Exts. P4, P5, P6, P7, P8 and P9 suggest that they have no relevance in the teeth of specific findings returned by the learned First Appellate Court that appellant -plaintiff was unable to prove on record that cheques, which were allegedly issued by respondents-defendants, were towards discharge of their liability to make balance payment towards sale consideration and hence those were not of much help to the appellant-plaintiff to prove her case. This Court also perused Ext. D1 to Ext. D4. Ext. D1 is a copy of judgment and decree passed by Sub Judge, Nalagarh, District Solan in Civil Suit No. 195/1 of 2001, wherein, Smt. Krishna Sharma (defedant No. 2 herein) by way of written statement Ex. PW1/A categorically admitted that she being absolute owner of the land sold the same to Shri Shankar Lal (defendant No. 1 therein) after receipt of full amount of consideration. Perusal of Ext. D1 also suggests that suit filed by the plaintiffs (Ramesh Chander & Ors.) was decreed by holding them to be owner of the suit land and Mutation No. 125, dated 24.12.1994 and Mutation No. 163, dated 20.11.1999 and order of concerned revenue officer were also not held binding upon the plaintiffs therein. But most

importantly sale deed No. 529, dated 5.5.2001, executed by defendant No. 2 (appellant-plaintiff herein) in favour of defendant No. 1 (defendant No. 2 herein) was held not binding on the right of the plaintiffs, meaning thereby, sale deed No. 529, dated 5.5.2001 executed by appellant-plaintiff herein in favour of respondents-defendants was declared null and void. Since, aforesaid sale deed was declared null and void in the Civil Suit No. 195/1 of 2001, learned First Appellate Court rightly came to the conclusion that appellant-plaintiff is estopped from claiming this amount in terms of sale deed as referred hereinabove.

29. Careful perusal of aforesaid exhibits, as referred hereinabove, no where suggests that learned trial Court while accepting the appeal preferred on behalf of defendants mis-read and mis-interpreted the oral as well as documentary evidence adduced on record by the respective parties. Rather, careful perusal of documents as has been discussed hereinabove, clearly suggests that learned trial Court miserably failed to appreciate the evidence led on record in its right perspective and wrongly decreed the suit of the appellant-plaintiff. Since presumptions attached to the cheque is concerned, it may be reiterated that though appellant-plaintiff was successful in proving that cheques were issued by defendants, but as has been discussed in detail, onus was upon appellant-plaintiff to prove that cheques Exts. P1 and P2 were allegedly issued by defendants to discharge their legal liability for payment of remaining amount of Rs. 1,50,000/-. Since, this Court has came to the conclusion that respondents-defendants were able to prove by leading cogent and convincing evidence that appellant-plaintiff had received full and final payment at the time of execution of sale deed, this Court is unable to accept the contention put-forth on behalf of appellant-plaintiff that cheques Ex.P1 and Ext.P2 were issued by defendants discharging their liability to pay remaining amount of Rs.1,50,000/-. Moreover, learned trial Court while decreeing the suit filed by the appellant-plaintiff applied the principles which were applicable in proceedings under Section 138 of Negotiable Instruments Act, as such, impugned judgment was rightly set aside by the learned First Appellate Court.

30. After perusal of the entire evidence led on record, this Court is unable to accept the contention put-forth on behalf of appellant-plaintiff that judgment and decree vitiated in the eyes of law since learned First Appellate Court failed to render findings on each issue separately as required under Order 20 Rule 5 of the Civil Procedure Code, because, close scrutiny of evidence available on record clearly suggests that learned First Appellate Court has dealt with each and every aspect of the matter very meticulously and has returned findings on each issue while accepting the appeal preferred on behalf of the respondents-defendants. Hence, in view of the detailed discussed made hereinabove, this Court sees no merit in the contention put-forth on behalf of appellate-plaintiff and, as such, substantial questions of law are answered accordingly.

31. Consequently, in view of the detailed discussion made hereinabove, this Court sees no force in the present appeal, as such, the same is dismissed and judgment passed by learned First Appellate Court is upheld.

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

Rajinder Kumar .....Appellant.

Versus

Mehak Chemicals (P) Ltd. and others. .....Respondents.

FAO No. 307 of 2007

Date of decision: 23rd September, 2016

Workmen Compensation Act, 1923- Section 4- Claimant sustained injuries during the course of employment – the claim petition was dismissed by the Commissioner on the ground of maintainability- held, that a workman insured under Employees State Insurance Act, 1948 is entitled to receive compensation only under the scheme prepared under the Act – no plea was taken that the case of the claimant was covered under the scheme – claimant is a workman - his

salary was Rs. 5400/- per month at the time of accident- he sustained 20% disability over right thigh and 10% disability over the knee – the salary has to be restricted to Rs. 4,000/- per month in terms of Section 44 of the Act – taking into consideration 20% disability, the loss of earning capacity will be Rs. 800/- per month- the age of the claimant was 29 years at the time of accident and relevant factor will be 209.92- thus, the compensation of Rs. 800 x 209.92= Rs.1,67,936/- will be payable together with interest @ 12% per annum- employer will be liable to pay penalty of 25% i.e. Rs. 41,984/-. (Para- 5 to 7)

Case referred:
Shivalik Steel and Alloys (P) Limited Vs. Workmen's Compensation Commissioner and others, 2000 ACJ 944

For the appellant: Mr. Sanjeev Bhushan, Senior Advocate with Ms. Abhilasha Kaundal, Advocate.
For the respondents: Ex-parte.

The following judgment of the Court was delivered:

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

Petitioner-claimant is in appeal before this Court. He is aggrieved by an order passed on 07.02.2005 by Sub Divisional Officer (Civil), Una exercising the powers of Commissioner under the Workmen Compensation Act, whereby the application for award of compensation on account of injuries he received during the course of employment has been dismissed.

2. In reply to the application, it is denied that the petitioner was shift incharge or drawing salary as alleged in the petition. He allegedly did not receive any injury during the course of his employment. The application as such, was sought to be dismissed. The insurer, the 3rd respondent has also denied the claim as laid by the petitioner for award of compensation on the ground that neither he nor the employer, respondents No. 1 and 2 have supplied the documents required for processing the claim so laid in terms of insurance policy. The information regarding the petitioner having received injuries was allegedly given by the employer, respondents No. 1 and 2 after two weeks.

3. The rejoinder to the reply filed by the respondents was also filed. The Commissioner below has framed the following issues:

1. Whether the applicant was under the employment of respondent No. 1 and 2 at the relevant time as alleged. ….OPA.
2. What was the salary of applicant at the time of accident and at what rate he is entitled. …OPA.
3. Whether the applicant suffered injuries during the course of employment as alleged. …OPA.
4. Whether the applicant is entitled to any compensation if so to what amount and from whom. ..OPA.
5. Relief.

4. The petitioner in order to prove his claim has examined Dr. Pawan Kumar PW-1, Head Constable Onkar Singh PW-2 and Shri Kaman Singh Thakur, Manager of respondent No. 1 as PW-3. He himself has stepped in the witness box as PW-4. The employer of respondents No. 1 and 2 and the insurer, respondent No. 3, however, have not produced any evidence.

5. The perusal of impugned order reveals that learned Commissioner below while taking into consideration the provisions contained under Section 53 of the Employees State

Insurance Act, 1948 and the submissions made on behalf of the insurer, respondent No. 3 in this regard has dismissed the application on the ground of maintainability, irrespective of there being no objection to this effect raised either by the employer or the insurer, respondent No. 3. Even no such issue was also framed. The Commissioner, no doubt, has placed reliance on the judgment of a Division Bench of this Court in ***Shivalik Steel and Alloys (P) Limited*** Vs. ***Workmen's Compensation Commissioner and others, 2000 ACJ 944*** to arrive at a conclusion that Section 53 of the Act ibid disentitles the petitioner from receiving or claiming compensation under the Workmen Compensation Act or any other law for the time being in force.

6. Be it stated that in view of specific and express provisions contained under Section 53 of the Employees State Insurance Act, 1948, a workman of an industrial unit insured under the Employees State Insurance Act in the event of having received injury during the course of employment, is entitled to seek compensation only under the scheme formulated for the workman on the establishment of such industrial unit under the act ibid. However, in order to infer that the industrial unit is covered by a scheme formulated under the act there must be some proof such as the copy of scheme etc., on record. In the case in hand, respondents No. 1 and 2, the employer and the insurer, respondent No. 3 have not raised any plea in this regard during the course of proceedings in the application. It is at the fag end, that too, during the course of arguments, learned counsel representing the insurer seems to have raised the issue of non-maintainability of the application under the Workmen Compensation Act in view of barred under Section 53 of the Employees State Insurance Act. Learned Commissioner below has believed the plea so raised as gospel truth and without caring to hold any inquiry qua existence of any such scheme, under the Employees Compensation Act for the employees of respondent No. 1, Industrial unit has dismissed the application mechanically and in a cursory manner. Had there been any scheme under the Act formulated by the employer and the contribution being made thereunder, the employer or for that matter, the insurer, respondent No. 3 should have produced the same on record of the application. The poor workman is concerned with the compensation. It is immaterial for him as to whether the same is given under the so called scheme formulated by the employer or under the insurance policy. Therefore, irrespective of the law laid down by our own High Court in *Shivalik Steel and Alloys (P) Limited* supra, the application could have not been dismissed for the reason that the said judgment is distinguishable on facts.

7. As noticed hereinabove, it is established on record that the petitioner is a workman within the meaning of Workman Compensation Act. It is admitted so by PW-3, the Manager of respondent No. 1. Not only this but this witness has also admitted that the wages of the petitioner at the relevant time was Rs. 5400/- per month. He received injury on his person during the course of employment also stands established from the testimony of PW-3 and also that of the doctor PW-1. The accident has occurred on 14.04.2000 around 5.45 a.m on account of the injury received by the petitioner on his proximal phalanx middle finger which got fractured and proximal phalanx ring finger left side got burnt. The proximal phalanx middle finger had to be amputated. The disability as per the medical certificate Ext. PW-1/A is to the extent of over left thigh and leg 20% and right knee about 10%. The present, therefore, is a case where the petitioner as workman has received injury during the course of his employment. The compensation for want of any scheme and for that matter any evidence that the industrial unit of respondent No. 1 was covered under the scheme formulated within the meaning of provisions contained under the Employees State Insurance Act should have not been dismissed and rather processed for the purpose of assessment of compensation. The petitioner workman admittedly was drawing his salary @ Rs. 5400/- per month. The same in terms of Section 44 has to be restricted to Rs. 4,000/- per month. Taking into consideration the disability 20%, the loss of earning capacity would be Rs. 800/- per month. The age of the petitioner workman at the time of accident was 29 years. The relevant factor, therefore, would be 209.92. The total compensation if works out would be Rs. 800X209.92=1,67,936/- This amount is payable as compensation to the petitioner together with interest @12% per annum from the date of accident till the same is deposited in the Registry of this Court by the insurer i.e. respondent No. 3. Besides, on the amount of Rs. 1,67,936/- the insured, respondent No. 1 who failed to pay the compensation

within one month of the accident is liable to penalty i.e. 25% of the award amount Rs. 1,67,936/- which comes to (1,67,936X25/100)= 41,984/-.

8. The appeal stands disposed of accordingly, so also the pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Cr. Appeal No. 221 of 2010 with
Cr. Appeal No. 37 of 2010
Decided on: 23rd September, 2016

Cr. Appeal No. 221 of 2010

State of Himachal Pradesh .....Appellant

Versus

Subhash Chand and others .....Respondents.

Cr. Appeal No. 37 of 2010

Balvinder Singh .....Appellant

Versus

Subhash Chand and others .....Respondents.

Indian Penal Code, 1860- Section 498-A, 306 and 304-B read with Section 34- The marriage between deceased and accused No. 1 was solemnized – accused No. 2 is mother of accused No.1, while accused No. 3 and 4 are brother and sister of accused No. 1- all the accused started harassing the deceased – they demanded Rs. 60,000/- for purchasing the vehicle, which was paid by mother of the deceased but the ill treatment continued – she was beaten – she left to attend her duties and subsequently her dead body was found in the canal- the accused were tried and acquitted by the trial Court- held, in appeal that the marriage was solemnized in the year 2003- suicide was committed in the year 2008 within 7 years of the marriage – marriage between brother and Nanad of the deceased was solemnized in the year 2005, which shows that relations between two families were cordial – the prosecution version regarding holding of Panchayat was also not established – no injury was found on the person of the deceased, which falsifies the version that deceased was beaten – the trial Court had taken a reasonable view while acquitting the accused – appeal dismissed. (Para-11 to 17)

Cases referred:

State of H.P. V. Pradeep Singh and another, Latest HLJ 2013(HP) 1431

For the appellant: Mr. D.S. Nainta and Mr. Virender Verma, Addl. A.G for the appellant in Cr. Appeal No. 221 of 2010 and for respondent No. 5 in Cr. Appeal No. 37 of 2010.

Mr. H.S. Rana, Advocate for the appellant in Cr. Appeal No. 37 of 2010.

For the respondents: Mr. Ramesh Sharma, Advocate for the respondents in Cr. Appeal No. 221 of 2010 and for respondents No. 1 to 4 in Cr. Appeal No. 37 of 2010.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

This judgment shall dispose of both appeals arising out of the judgment dated 30.10.2009 passed by learned Additional Sessions Judge, Una in Sessions Case No. 6/2009, whereby all the accused have been acquitted of the charge under Sections 498-A, 304-B, 306

read with Section 34 of the Indian Penal Code framed against each of them. While the present appeal has been filed by the State (prosecution), the connected one has been preferred by Balwinder Singh, PW-1 brother of deceased Krishna on the grounds *inter-alia* that learned trial Court has gone wrong while acquitting the accused of the charge framed against each of them because the evidence produced by the prosecution is stated to be not appreciated in its right perspective and the findings to the contrary have been based on hypothesis, surmises and conjectures. It is pointed out that unimpeachable evidence as has come on record by way of testimony of Balwinder Singh PW-1, Smt. Taro Devi PW-2 and Gurbhag Singh PW-10 corroborated by the testimony of Shri Hari Chand PW-3, the Pradhan of village Gochar and Sh. Sukhdev PW-4, the Mediator, having settled the marriage of deceased with accused Subnash Chand has erroneously been ignored and brushed aside. The testimony of Smt. Swarani Devi PW-8 who was posted as Helper in Anganwari Centre at village Mukrer on 27.10.2008 when deceased who had been working as Anganwari Worker in the Centre came to duty was not looking well and she left the centre leaving behind her belongings including purse there is also ignored. It is canvassed that deceased was driven to such a stage that she left the matrimonial house and her dead-body was recovered from the canal of Kotla Power House. It is pointed out that the witnesses had no enmity with the accused persons and as such there is no reason of their deposing falsely against them. The complainant PW-1 who claims himself to be the victim of the occurrence has also challenged the impugned judgment on more or less similar grounds. Additionally, that the demand of Rs. 60,000/- by accused Subhash Chand and payment thereof coupled with the evidence on record that accused persons started treating deceased with cruelty immediately after the marriage i.e. 5-6 months. It was a case where the suicide has been committed by the deceased and it is the accused who abetted the commission of suicide by her.

2. Now if coming to the factual matrix, late Shri Ram Lal was married to PW-2 Taro Devi. They belong to village Gochar, Tehsil Anandpur Sahib under Police Station, Nurpur Bedi, District Ropar (Punjab). Three issues i.e. two male and one female were born to the couple. They are PW-1 Balwinder Singh, PW-10 Gurbhag Singh and deceased Krishna Devi. With the intervention of PW-4 Sukhdev, marriage of Krishna Devi (since dead) was solemnized with accused Subhash Chand (hereinafter referred to as 'accused No. 1'). The remaining accused Kashmira Devi (hereinafter referred to as 'accused No. 2') is the mother of accused No. 1, whereas Kamal Dev and Kesho Devi (hereinafter referred as 'accused No. 3 and 4' respectively) are brother and sister-in-law ('Bhabi' of principal accused, accused No. 1 Subhash Chand).

3. The allegations against the accused persons are that after 5-6 months of marriage of deceased with accused No. 1, they started treating her with cruelty at the pretext of bringing insufficient dowry. On this, accused No. 1 was called by the complainant party to there place at village Gochar and reprimanded as to why deceased was being tortured by them in presence of respectable persons residing there. He confessed his guilt and assured to mend his behaviour and also that there will be no maltreatment and harassment of the deceased in future, but of no avail as the said accused irrespective of the assurance so given had demanded a sum of Rs. 60,000/- through deceased from the complainant to purchase a vehicle. The amount so demanded by him was also paid by PW-2, the mother of deceased. The maltreatment and harassment of deceased, however, did not stop as the accused persons continued in torturing and treating her with cruelty at the pretext that her parents had given insufficient dowry to her. She was being coerced having not begotten a male child and given birth to three female children. She was beaten with 'Thappi' (a cricket bat like wooden article meant for washing cloth). During the night intervening, 26/27.10.2008 i.e. in the morning on 27.10.2008, she went to attend her duties in Anganwari Centre, Makrer. The deceased was not looking well as Smt. Swarani Devi, PW-8, the Anganwari Helper felt. The deceased left the centre without saying anything to PW-8 and living behind her purse there. When she did not turn up till 28.10.2008, her father-in-law had lodged the report Ex. PW-16/D in police station Bananga that his daughter-in-law Smt. Krishna Devi is missing from the house. The intimation was given to complainant party. PW-1 went to the house of accused at village Chnagar Mukreri, Tehsil Bangana, District Una along with other villagers where he came to know that his sister had left the matrimonial home on

27.10.2008 after being tortured by the accused persons. She was searched everywhere, however could not be traced out. On 1.11.2008, one Ashok Kumar belonging to village Lamlehari had given information to the police of police station Bangana that dead body of Krishna Devi missing from her house was lying in the canal of Kotla Power House. The information so received was reduced into writing in rapat Rojnamcha Ex.PW-16/C. On receipt of such information, the I.O. PW-18 ASI Manoj Kumar, accompanied by HHC Gurpiara rushed to the spot. It is he who had recorded the statement Ex.PW-1/B of the complainant PW-1 on the basis whereof F.I.R. Ex.PW-16/A was recorded in Police Station Bangna, District, Una, H.P. The dead body was taken out from the canal. The inquest papers Ex.PW-15/B and PW-15/C were prepared. The application Ex.PW15/A was moved to the Medical Officer, Civil Hospital Anadndpur Sahib for getting the post mortem of the dead body conducted. The post mortem was conducted by PW-15, Dr. Sandeep Singh. The post mortem report is Ex.PW15/D. In the opinion of PW-15, the cause of death was drowning in water. After the postmortem, the dead body was handed over to PW-1, brother of deceased vide memo Ex.PW-1/A. The map of canal of Kotla Power House Ex.PW-17/A was prepared. The map of the house of the accused Ex.PW-17/B and that Ex.PW-17/C of the place from where the deceased jumped into the canal were also prepared. The dead body was photographed vide photographs Ex.P-1 to P-9. Accused Subhash Chand has made a disclosure statement Ex.PW-14/A and got recovered 'Thappi', the sketch whereof is Ex.PW-7/B, in the presence of the witnesses. The report Ex.PW-14/A was received from the Chemical Examiner.

4. The Investing Agency on the completion of investigation has filed the challan against all the accused. Learned trial Court having gone through the challan and documents annexed therewith found a *prima-facie* case having been made out against each of the accused under Sections 498-A, 304-B, 306 read with Section 34 of the Indian Penal Code. They all were charged accordingly. The accused, however, pleaded not guilty to the charge so framed against them and as they claimed trial, therefore, the trial Court proceeded to record the prosecution evidence.

5. The material prosecution witnesses are Sh. Balwinder Singh the complainant, PW-1, the brother of deceased, Smt. Taro Devi, PW-2, the mother of deceased, Sh. Hari Chand, PW-3, the then Pardhan of Village Gochar, Sh. Sukhdev, PW-4, who had settled the marriage of the deceased with accused Subhash Chand, whereas, that of Shindo, the sister of the said accused with PW-10, Gurbhag Singh, the brother of deceased Krishna Devi. Smt. Swarani Devi, PW-8 is helper of Anganwari Centre, Mukrer. The remaining prosecution witnesses are formal as they remained associated during the course of the investigation in one way or the other.

6. The accused in their statements recorded under Section 313 of the Code of Criminal Procedure have denied all incriminating circumstances appearing in the prosecution evidence against them either being wrong or for want of knowledge. Accused Kesho Devi in her defence has pleaded that she and her husband accused Banta Ram had nothing to do with the present case as they both were residing separately from the principal accused Subhash Chand. They however, not intended to produce any evidence in their defence.

7. Learned trial Court on appreciation of the given facts and circumstances and also the evidence available on record, however, concluded that the prosecution has failed to prove its case against the accused persons beyond all reasonable doubts and consequently, they all have been acquitted of the charge framed against each of them.

8. Learned Additional Advocate General has argued with all vehemence that prosecution evidence as has come on record by way of testimony of PW-1, PW-2, PW-3 and PW-4 amply demonstrate that it is the accused who had been torturing and harassing the deceased not only physically but mentally also and this was the only cause of commission of suicide by her in the matrimonial home within four years of her marriage with accused Subhash Chand. Learned Additional Advocate General has thus urged that it is the accused who has abetted the commission of suicide by her. Therefore, all the accused persons have been sought to be convicted.

9. Mr. H.S. Rana, learned counsel appearing on behalf of the complainant-victim of the occurrence, (appellant in connected appeal) while supporting the arguments addressed on behalf of the respondent-state has urged that the deceased his sister Krishna Devi has died in an unnatural death and it is the accused alone who had abetted the commission of suicide by her.

10. On the other hand, Shri Ramesh Sharma, learned defence counsel while repelling the submissions made on behalf of the prosecution and also on that of the complainant has urged that the ingredients of commission of offence punishable under Section 498-A, 304-B and 306 of the Indian Penal Code are not at all established and rather according to Mr. Sharma the evidence available on record reveals that the relations of the two families were cordial and it is for this reason Smt. Shindo, the sister of accused Subhash Chand was married to the brother of deceased and she according to him is living happily in the matrimonial home. It is pointed out that the cause of commission of suicide by the deceased would be depression on account of she having given birth to three female children. Otherwise no apparent reason seems to be there due to which the deceased was forced to take such a drastic step.

11. A Division Bench of this Court in ***State of H.P.*** V. ***Pradeep Singh and another, Latest HLJ 2013(HP) 1431***, after placing reliance on the law down by the Apex Court by way of various judicial pronouncements has discussed in detail as to under what circumstances, it can be believed that the deceased was being tortured by her in-laws at the pretext of bringing insufficient dowry and what are the relevant factors to infer the abetment of commission of suicide by a married woman in the matrimonial home. This judgment reads as follows:

> ***"10.*** At the outset it is desirable to discuss as to what constitutes the commission of an offence punishable under Sections 498-A and 306 of the Indian Penal Code. A bare reading of Section 498-A reveals that ***sine qua non*** to establish the said offence is subjecting to cruelty the wife by her husband or relative with a view to coerce her or any person related to her to meet any unlawful demand for any property or valuable security or willful conduct of the husband of such woman or a relative, of such a nature as is likely to drive her to commit suicide or to cause grave injury or danger to life, limb or health.
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> ***11.*** The ***Apex Court in Manju Ram Kalita versus State of Assam (2009) 13 Supreme Court Cases 330*** has held as under:
>
> > **"21.** "*Cruelty*" for the purpose of Section 498-A IPC is to be established in the context of Section 498-A IPC as it may be different from other statutory provisions. It is to be determined/ inferred by considering the conduct of the man, weighing the gravity or seriousness of his acts and to find out as to whether it is likely to drive the woman to commit suicide, etc. It is to be established that the woman has been subjected to cruelty continuously/ persistently or at least in close proximity of time of lodging the complaint. Petty quarrels cannot be termed as "cruelty" to attract the provisions of Section 498-A IPC. Causing mental torture to the extent that it becomes unbearable may be termed as cruelty."
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> ***12.*** So far as the commission of offence punishable under Section 306 of the Indian Penal Code is concerned, the prosecution is required to prove beyond all reasonable doubt that some person has committed suicide as a result of abetment by the accused.
>
> ***13.*** In the case in hand, the deceased had committed suicide on 25.5.2008 in her matrimonial home at village Nau-Shehra, District Kangra, H.P. One of the ingredients of the commission of offence under Section 498-A IPC, therefore, stands proved. The prosecution, however, is further required to prove that it is the accused alone who had abetted the commission of suicide by the deceased.
>
> ***14.*** Abetment has been defined under Section 107 of the Indian Penal Code. Its simple meaning is that a person abets the doing of a thing who firstly instigates

any person to do a thing, or secondly, engages with one or more other person or persons in any conspiracy for doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to doing of that thing, or intentionally aids, by any act or illegal omission, the doing of that thing can be said to have abetted the doing of that thing.

15. Now if coming to the case in hand, whether it is the accused alone, who instigated the deceased to commit suicide within the meaning of Section 107 IPC, has to be seen from the evidence available on record. It is worthwhile to mention here that in a case of this nature, torture and harassment ordinarily is meted out to the victim in the four walls of the house and such cases mostly depend upon the circumstantial evidence. In the absence of direct evidence, the legislature in its wisdom has enacted Section 113-A of the Indian Evidence Act which provides that if a married woman commits suicide within the period of seven years from the date of marriage and there are allegations that she did so because of being subjected to cruelty either by her husband or relatives of her husband or by both. Having regard to all other circumstances, the Court can presume that she has committed suicide on being abetted by her husband or by such relatives of her husband. The ***Apex Court in Wazir Chand and another versus State of Haryana (1989) 1 Supreme Court Cases 244*** has held that if any person instigates any other person to commit suicide and as a result of such instigation, the other person commits suicide, the person causing the instigation is liable to be punished under Section 306 of the Indian Penal Code."

12. Besides, under what circumstances the presumption as envisaged under Section 113-A of the Evidence Act can be drawn against an offender in a case of this nature, we can draw support in this regard also from the judgment in *Pradeep Singh's* case cited supra, which reads as follows:

"16. In a case of suicidal death, the onus to prove that suicide was abetted by the accused alone is on the prosecution and to raise the presumption under Section 113-A of the Evidence Act, one of the ingredients that the deceased was subjected to cruelty is required to be proved first by the prosecution."

13. The prosecution in order to infer the commission of such an offence is required to plead and prove beyond all reasonable doubt that a married woman has died otherwise then under normal circumstances within seven years of her marriage. Additionally, soon after her marriage, she was subjected to cruelty or harassment by her husband or his relations in connection with demand for dowry. Whether the prosecution has been able in the case in hand to prove its case within the legal parameters discussed hereinabove needs reappraisal of the given facts and circumstances and also the evidence available on record.

14. As per facts, which are not in dispute, the deceased was married to accused Subhash Chand in the year 2003. She has committed suicide and died in an unnatural death on 1.11.2008 i.e. within seven years of her marriage with the said accused. In order to prove that the accused persons have started treating the deceased with cruelty in connection with demand for dowry, the prosecution has placed reliance on Ext. PW-1/B, the statement under Section 154 of the Code of Criminal Procedure made by the complainant PW-1 before the police and on the basis whereof FIR Ext. PW-16/A has been recorded. The contents of this document that all the accused started treating the deceased with cruelty after 5-6 months of marriage at the pretext that sufficient dowry was not brought by her at the time of her marriage and that she was being tortured on account of having given birth to three female issues and not begotten a male issue, though finds corroboration from the testimony of PW-1 Balwinder Singh brother of deceased, Smt. Taro Devi, PW-2 her mother, Sh. Sukhdev PW-4, the so called Mediator having settled the marriage of deceased with accused Subhash Chand and Sh. Gurbhag Singh, PW-10, another brother of the deceased, however, it is difficult to believe this part of the prosecution case as true and correct for the reason that PW-10, the brother of deceased was engaged with her 'Nanad'

Shindo within one year of her marriage with accused Subhash Chand. Not only this but as per own case of the prosecution, marriage of PW-10 Gurbhag Singh and Shindo was solemnized in the year 2005. Such evidence amply demonstrates that the relations between two families were so cordial that complainant party has solemnized marriage of PW-10 with Shindo, sister of accused No. 1 Subhash Chand and accused No. 3 Kamal Dev, whereas, daughter of accused No. 2 Kashmiro and Nanad (sister-in-law) of accused No. 4. Had the accused persons started torturing the deceased after 5-6 months of her marriage with accused Subhash Chand, there was no occasion for the complainant party to have solemnized the marriage of Shindo with brother of the deceased, Gurbhag Singh. The accused party would also have not preferred to settle the marriage of Shindo with Gurbhag Singh PW-10. Not only this but Shindo as per own case of the prosecution is leading happy married life at the place of her in-laws i.e. the complainant party. Therefore, the evidence as has come on record by way of testimony of PW-1, PW-2, PW-4 and PW-10 that accused started torturing the deceased with cruelty immediately after 5-6 months of her marriage at the pretext of demand for dowry and that the meetings of Panchayats were being convened after an interval of 5-6 months cannot be believed to be true for the reason that had it been so, by the time the marriage of Shindo settled with PW-10, the Panchayats would have met twice or thrice and as such, the relations between the parties would have become strained. In such a situation, there was no occasion to the parties on both sides to have agreed for the marriage of PW-10 with Shindo. The evidence to this effect, therefore, has been fabricated and engineered, most probably to implicate the accused persons falsely in this case. True it is that as per version of PW-1 and that of his mother PW-2 as well as brother PW-10, accused Subhash Chand had demanded a sum of Rs. 60,000/- from them to purchase a vehicle. The said amount was paid by them to the said accused, however, even if it is believed that Rs. 60,000/- was paid by PW-2 to her in-laws accused Subhash Chand, there is no iota of evidence to infer that the said accused has demanded the amount in question in dowry. The said amount rather may have been paid by him to his mother-in-law PW-2 for construction of 'Verandha' of her house before the marriage of his sister Shindo with PW-10 as pleaded by them in their defence and emerges from the trend of cross-examination of the prosecution witnesses conducted by learned defence counsel. Above all, the son-in-law if in need of money may raise loan from his in-laws. Therefore, the payment, if any, of Rs. 60,000/- if taken by accused Subhash Chand from his mother-in-law, PW-2, cannot be said to be in order to satisfy their demand for dowry. Irrespective of the above observations, it is not known as to when this amount was paid to accused Subhash Chand because as per version of PW-2, it was paid somewhere in 2006, whereas, as per that of PW-10 somewhere in April-May, 2004. Such contradictory version casts a serious doubt qua the payment of this amount to accused Subhash Chand. If coming to the version of PW-3 Hari Chand, ex-Pradhan of Village Gochar, the Panchayat was called to resolve the dispute between the couple i.e. deceased and accused Subhash Chand two years before the unfortunate incident i.e. somewhere in 2006. His testimony, therefore, belies the evidence as has come on record by way of testimony of PW-1, PW-2, PW-4 and PW-10 that the accused started torturing the deceased after about 5-6 months of her marriage and the Panchayat was called to resolve the dispute. The story regarding calling of local Panchayat seems to have been fabricated and engineered to falsely implicate the accused persons in the commission of alleged offence because PW-10 Gurbhag Singh has nowhere stated that the Panchayats were called at any point of time. Rather, as per his version, it is accused Subhash Chand, who once was called by them to their house to resolve the dispute between the couple. On one occasion, he along his maternal uncle Gurmel had gone to the house of accused to resolve the dispute. The recovery of 'Thappi', consequent upon the disclosure made by accused Subhash Chand has been vigorously relied upon by the prosecution to prove that immediately before the commission of suicide by the deceased, she was beaten by the said accused with 'Thappi'. Such evidence seems to have been created to prove the involvement of the accused in the commission of offence punishable under Section 304-B of the Indian Penal Code, however, unsuccessfully because in the opinion of doctor PW-15, no mark of injuries were there on the body of the deceased. Had the beatings been given with an object like 'Thappi', the mark of injuries on the body of deceased were bound to occur. Therefore, on this score also, the prosecution case falls to the ground. The re-appraisal of the

evidence in the manner as aforesaid leads to the only conclusion that the deceased has neither been tortured nor harassed in connection with demand for dowry by either of the accused nor they abetted the commission of suicide by her. The plea in their defence that on account of having given birth to three female children, she used to remain under stress, strain and depression also and that it is for this reason she committed suicide, appears to be nearer to the factual position. It is not always necessary that suicide is committed by a married woman only on account of she being subjected to cruelty by her husband and his relatives because sometime it is the temperament and approach of a person to various issues come across in his/her life also persuade him/her to take such a drastic step. When cogent and reliable evidence to substantiate that the deceased has committed suicide only on account of being tortured by the accused persons, the possibility of she having taken such a drastic step on account of being under stress, strain and depression, cannot be ruled-out.

15. True it is that this incident has taken away the life of a young woman aged 28 years within seven years of her marriage with accused Subhash Chand. The presumption under Section 113-A of the Indian Evidence Act, however, cannot be drawn in this case because the prosecution has failed to discharge the initial onus upon it that deceased has committed suicide only on account of her harassment by the accused. Presumption under Section 113-B of the Evidence Act cannot also be drawn in this case because it is not proved that the accused used to demand dowry from the deceased and had been torturing her mentally as well as physically in connection with their demand for dowry.

16. As a matter of fact, the present is a case where nothing suggesting that the deceased was being tortured or harassed by the accused persons in connection with demand of dowry or otherwise or that the degree of cruelty was so high that she could not make comparison between life and death and rather in such a state of mind, chosen the pangs of death has come on record. True it is that in normal circumstances, no person is expected to take such a drastic step to do away with his/her life, that too, without there being any cause, however, present is not a case where it can be said that the accused persons had abetted the commission of suicide by the deceased.

17. In view of what has been said hereinabove, both the appeals fail and the same are accordingly dismissed. The personal bonds furnished by all the accused persons shall stand cancelled and the sureties discharged.

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

Hans Raj ..Appellant/Plaintiff.

Versus

Suneet Singh and others. ..Respondents/Defendants

RSA No. 303 of 2005.
Reserved on : 20/09/2016
Date of decision: 27/09/2016

Indian Succession Act, 1925- Section 63- 'G' was owner of the property who died leaving behind plaintiff and defendants as his legal heirs -defendant No. 1 produced a Will stated to have been executed by G – plaintiff pleaded that Will is not a genuine Will and is not binding on the rights of parties- the suit was decreed by the trial Court- an appeal was preferred, which was allowed- held, in second appeal that the execution of the Will was proved- cross-examination of the plaintiff corroborated the contents of the Will- the fact that scribe had not put his signature on the Will is insignificant as there is no statutory requirement for the same - the execution of the Will was proved by the marginal witnesses –registration of the Will raises a presumption

regarding the due execution- plaintiff had failed to lead evidence to rebut the presumption- the Appellate Court had rightly set aside the judgment of the trial Court- appeal dismissed.

(Para-8 to 10)

For the appellant: Mr. Anand Sharma, Advocate.
For the respondents: Mr. N.K.Sood, Sr. Advocate with
Mr. Aman Sood, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

This appeal stands directed against the impugned judgement of the learned Additional District Judge, Fast Track Court, Chamba, Himachal Pradesh, whereby it allowed the appeal preferred before it by the defendants/respondents herein and set aside the judgment and decree, rendered on 27.04.2004 by the trial Court.

2. The facts necessary for rendering a decision on the instant appeal are that Gian Chand predecessor in interest of the parties was owner in possession of the suit property i.e. land comprising Khata Khatauni No. 54/58, Khasra Nos. 725, 730, 732, 733, 734, 735, 736, 769, 770, 772 and 1357/1321-1322 measuring 4-16 bighas and two houses situated in Khasra No. 1092, khata Khatauni No. 124 min/139 Abadi-Deh, situated at Mauza Sherpur, Pargana Sherpur, Tehsil Dalhousie, District Chamba, H.P. Late Gian Chand expired on 6.11.2000 leaving behind the plaintiff and defendants as his legal heirs. After the death of said Gian Chand, defendant No.1 reported the matter to the Patwari concerned and produced a Will allegedly executed by late Gian Chand and A.C 2nd Grade without summoning the plaintiff and proforma defendants attested the mutation of the estate of late Gian Chand on 7.6.2002 vide mutation No. 571. This mutation is against the law and rules. It has been averred that late Gian Chand was a chronic patient of Asthma for the last four years and was under the influence of defendant No.1. He was not in fit mental state to understand his good and bad and was not in proper senses to execute a Will. The plaintiff has started his business in Gujrat and in his absence late Gian Chand was under the complete control of defendant No.1. The alleged will is not a genuine will and is not binding upon the rights of the plaintiff and proforma defendants. Therefore, it has been prayed that this suit be decreed for declaration to the effect that the plaintiff is one of the legal heir of late Gian Chand and is owner in possession of 1/5th share of the suit property. The Will dated 2.5.2000 is a fake document and not executed by late Gian Chand out of his free will. It has also been prayed that this mutation No. 571 of 7.6.2002 be declared null and void. It has further been prayed that defendant No.1 be restrained permanently from alienating the suit property.

3. The defendant No.1 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 disputed property belongs to him as per valid Will of 2.5.2000. It has been denied that late Gian Chand was a chronic patient of Asthama and was having feeble mind and under his influence. It has been denied that Gian Chand was not in proper state of mind to understand his good and bad. It has been submitted that the plaintiff was settled at Gujrat and never bothered the parents and stopped visiting the family at home. The father and mother of the plaintiff are being looked after by him, since long, therefore, out of his love and affection Gian Chand executed a valid and genuine will in his favour. Therefore, dismissal of the suit is sought.

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 struck following issues inter-se the parties at contest:-

1. Whether plaintiff has become owner in possession of the suit property, as alleged? OPP.

2. Whether Will executed by late Gian Chand dated 2.5.2000 is genuine one, as alleged? OPD.

3. Whether Will executed by late Gian Chand dated 2.5.2000 is result of undue influence and liable to be set-aside, as alleged? OPP.

4. Whether mutation No. 571 dated 7.6.2002 sanctioned on the basis of Will dated 2.5.2000 is null and void and liable to be set-aside, as alleged? OPP.

5. Whether plaintiff is entitled to relief of permanent prohibitory injunction, as prayed for? OPP.

6. Whether the suit in the present form is not maintainable, as alleged? OPD.

7. Whether plaintiff is estopped from filing the present suit, as alleged? OPD.

8. Whether the plaintiff has no cause of action to file the present suit, as alleged? OPD.

9. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court allowed the suit of the plaintiff yet the learned First Appellate Court allowed the appeal preferred therefrom before it by the defendant.

7. Now the plaintiff/appellant herein has instituted before this Court the instant Regular Second Appeal wherein he assails the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 28.06.2005, this Court admitted the appeal on the hereinafter extracted substantial question of law:-

> "Whether the deceased late Shri Gian Chand could have willed away the property in which property the plaintiff-appellant had invested more than Rs.3.00 lakhs?"

Substantial question of law.

8. The deceased testator under his testamentary disposition, comprised in Ext.DW-2/A, bestowed upon the legatees thereunder, legatees whereof are the contesting parties hereat, his estate in the manner delineated therein. The grouse which stands ventilated by the plaintiff against the devise made by his deceased father qua his estate under his testamentary disposition comprised in Ext.DW-2/A stands hinged upon the factum of his deceased father devising qua the defendants his land measuring 4.16 bighas besides a newly constructed three storeyed house alongwith a cow shed at Mohal Sherpur whereas in gross disproportion thereof his inequitably devising qua him an old house situated at Drum**.** He contends of the predominant reason for the deceased testator inequitably distributing his estate inter-se him and the defendant Suneet Singh occurred on account of the defendant dominating the Will of deceased testator arising from the factum of his staying with him. He also contends of the deceased testator at the relevant stage not holding the relevant befitting mental capacity to execute Ext.DW-2/A. He hence impeaches it besides espouses of the aforesaid facet ingraining the execution of Ext.DW-2/A with suspicion whereupon no reliance is imputable. He also proceeds to contend of with the scribe of Ext.DW-2/A not appending his signatures thereon hence enfeebles the factum of its standing validly and duly executed by the deceased testator. Moreover, the factum of recitals occurring at clause 7 in Ext.DW-2/A standing scored off also imbues it with a pervasive infirmity. The initial submission addressed before this Court by the learned counsel for the plaintiff qua Ext.DW-2/A holding a recital therewithin whereby the deceased testator in the manner delineated therein inequitably devised his estate qua his legatees who are the contesting parties hereat whereupon he contends qua its constituting an entrenched besides a pervasive/suspicious circumstance rendering its

execution by the deceased testator being construable to ensue from his volition standing dominated by the defendant with a concomitant effect qua Ext.DW-2/A being not his volitional disposition. However, the aforesaid submission addressed before this Court by the learned counsel for the plaintiff warrants its standing discounted given the deceased testator propounding in Ext.DW-2/A the predominant reason for his inequitably devising his estate amongst his legatees, reason whereof stands enunciated therein to spur from his receiving compensation amount of Rs.60,000/- for acquisition of his land wherefrom he disbursed Rs.50,000/- to the plaintiff with a condition that he shall invest it in a joint business held with the plaintiff. The deceased testator has also propounded therein of the plaintiff launching a construction company at Angleshwar in Gujarat also his rearing handsome monetary dividends therefrom whereas his in transgression of the condition whereupon he had disbursed Rs.50,000/- to him, his not admitting the defendant as a partner in J.K.Construction Company, contrarily his appropriating the entire earnings reared by him from the aforesaid construction company established by him in Gujarat whereupon the deceased testator for erasing the effect of the purported ouster of the defendant by the plaintiff from the earnings of the construction company aforesaid besides for mitigating the losses suffered by the defendant on his standing excluded by the plaintiff from the earnings of J & K Construction company established by him from a sum of Rs.50,000/- disbursed to him by the deceased testator hence stood stirred to proceed to make a devise qua the defendant in the manner as delineated therein. The aforesaid reason propounded in Ext.DW-2/A by the deceased testator to devise in the manner embodied therewithin his estate amongst his legatees palpably stands on a pedestal of truth given the acquiescence made by the plaintiff in his testifiation of his deceased father disbursing to him a sum of Rs.50,000/-. He in his cross-examination echoes qua his taking the defendant alongwith him to Gujarat whereat he concedes to keep him till 1997. His cross-examination also unveils qua his therein echoing qua his not admitting the defendant as a partner in the construction company raised by him in Gujarat. The effect of the aforesaid echoings made by the plaintiff in his testificaton is of theirs begetting concurrence with the apposite recitals embodied in Ext.DW-2/A whereupon the deceased testator stood constrained to make qua his estate a devise qua his legatees in the manner delineated therein. Also the echoings aforesaid blunt the effect of the suggestion put to the contesting defendant during the course of his standing subjected to cross-examination by the counsel for the plaintiff wherewithin echoings occur qua on the contesting defendant exiting the relevant construction company in 1997 the plaintiff settling accounts qua his share therein also smother the effect of echoings therein of the defendant by omitting to serve notice qua the factum of the plaintiff not settling the relevant accounts qua his share in J.K.Construction Company his purportedly acquiescing to his receiving from the plaintiff the profits earned from the business of J.K. Construction Company contrarily thereupon the plaintiff holds no leverage to espouse herebefore qua the defendant standing estopped to validate the apposite pronouncements made in Ext.DW-2/A qua the plaintiff grabbing the entire share of the profits reared from the business of J.K.Construction Company, significantly when they constituted the prima donna motivating factor for the deceased testator to make the devise in the manner enshrined in Ext.DW-2/A. Also the effect of the aforesaid echoings held in the aforesaid suggestions put by the counsel for the plaintiff while holding the defendant to cross-examination, is of the plaintiff faintly besides vainingly acquiescing to the factum of his in an unregistered partnership firm nomenclatured as J.K.Construction Company orally admitting the defendant as a partner upto 1997 whereafter he without settling his accounts qua his unscribed share therein, compelled his exit therefrom. The speciousness of the aforesaid concert of the learned counsel for the plaintiff while holding the defendant to cross-examination to hence unearth elicitations from him qua his settling his accounts qua his unscribed share in the business of J.K. Construction Company per se stands generated for merely vainly diminishing the virtue of truth propounded by the deceased testator in Ext.DW-2/A for his devising his estate amongst the legatees named therein in the manner enumerated therein also its effect, if any, stands smothered by his acquiescing in his cross-examination qua his not admitting the defendant as a partner in J. K. Construction company. Cumulatively, also the effect of the aforesaid inference is of his contriving an untenable ground for stripping the tenacity of the recitals occurring in Ext.DW-2/A

whereupon the deceased testator stood prodded to oust the plaintiff from his estate except qua an old house at Drum. In aftermath, it appears of the deceased testator for mitigating losses suffered by the defendant in the joint business, which he held with the plaintiff in J.K.Construction company, he stood actuated to devise qua him his estate in the manner enumerated therein also hence the deceased testator in making a devise qua his estate with a pronounced proclivity towards the defendant Suneet Singh does not obviously render Ext.DW-2/A to suffer from any inherent falsity also it hence cannot be concluded of the deceased testator while in executing Ext.DW-2/A, his free volition standing influenced or dominated by the defendant. Contrarily it is to be concluded of Ext.DW-2/A standing volitionally besides consciously executed by the deceased testator.

9. The scribe of Ext.DW-2/A not appending his signature thereon is wholly insignificant, as non occurrence therein of signatures of its scribe stands not constituted in the apposite statutory provisions to be a relevant statutory parameter for adjudging the trite factum qua its valid and due execution, contrarily the factum of the relevant testamentary disposition standing proven to be validly and duly executed would occur only on satiation standing begotten of the mandate of Section 63 of the Indian Succession Act, (hereinafter referred to as 'the Act'), which stands extracted hereinafter:-

> "63. Execution of unprivileged wills
>
> .-Every testator, not being soldier employed in an expedition or engaged in actual warfare, 1*[or an airman so employed or engaged,] or a mariner at sea, shall execute his will according to the following rules:--
>
> (a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.
>
> (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.
>
> (c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or as 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."

Significantly, when in consonance therewith when an attesting witness thereto pronounces in his testification qua the deceased testator after understanding its contents embossing in his presence his signatures thereon whereafter he in his presence proceeded to also append his signatures thereon would beget the sequel qua hence the aforesaid apposite pronouncement of a marginal witness to a testamentary disposition begetting satiation of the statutory tenets engrafted in Section 63 of the Act. A circumspect incisive scanning of the testimony of DW-2 a marginal witness to Ext.DW-2/A unveils qua his making apposite pronouncements qua satiation standing begotten of the mandate of the apposite statutory provisions engrafted in Section 63 of the Act. Heightened momentum qua Ext.DW-2/A standing clinchingly proven by a marginal witness thereto to be validly and duly executed by the deceased testator emanates from DW-2 unequivocally echoing in his testification qua Ext.DW-2/A standing scribed by an Advocate at the behest of the deceased testator whereat the deceased testator stood possessed of an enlivened befitting mental capacity to volitionally execute it. He has also graphically communicated therein of the deceased testator after its contents standing readover and explained to him by its scribe contents whereof on standing comprehended by him his thereafter appending his signatures thereon whereafter he and the other marginal witnesses thereto likewise in his presence embossed their respective signatures thereon. The aforesaid testification of a marginal witness to Ext.DW-2/A vividly portrays of the deceased testator with an awakened conscious mind voluntarily executing Ext.DW-2/A also portrays of satiation standing begotten of the statutory

tenets ingrained in Section 63 of the Act. The apposite pronouncements made by DW-2 qua satiation standing begotten qua the statutory tenets ingrained in Section 63 of the Act thereupon Ext.DW-2/A warrants its standing, concluded to be clinchingly proven to be validly and duly executed by the deceased testator significantly when the testifications qua the facet aforesaid do not suffer any erosion on DW-2 standing subjected to cross-examination by the learned counsel for the plaintiff, palpably when there occurs no apposite suggestion put therein by the learned counsel for the plaintiff while holding him to cross-examination wherewithin bespeakings stand encapsulated qua the deceased testator neither in his presence nor in the presence of the other marginal witness thereto signaturing Ext.DW-2/A nor any suggestion occurs therewithin manifestive of the plaintiff contesting the factum of the marginal witnesses to Ext.DW-2/A not in the presence of the deceased testator appending their respective signatures thereon nor obviously no response in affirmation thereto stands displayed therein. Consequently, the effect of the aforesaid omissions on the part of the learned counsel for the plaintiff while holding DW-2 to cross-examination is of the plaintiff acquiescing to the factum of the deceased testator appending his signatures on Ext.DW-2/A in the presence of DW-2 also the latter besides the other marginal witness thereto respectively in the presence of the deceased testator embossing their respective signatures thereon. In sequel, the befitting conclusion is of the testimony of DW-2 holding concurrence with the statutory tenets enjoined to be accomplished for Ext.DW-2/A being construable to be proven to be validly and duly executed. Consequently, the apt conclusion therefrom is of Ext.DW-2/A standing clinchingly proven to be validly and duly executed by the deceased testator. The learned counsel for the plaintiff has contended of with occurrence in Ext.DW-2/A qua scoring off of recital number 7 therein renders it to be construable to be a suspicious circumstance. The aforesaid submission holds no vigour significantly when the scribe of Ext.DW-2/A records a signatured endorsement therein qua the relevant scoring off, occurring at his instances besides at the behest of the deceased testator. Since Ext.DW-2/A stood thereafter presented for registration, renders, the occurrence of an endorsement therein qua the legalization of the relevant scoring off, of the relevant clause therein, endorsement whereof holds the signatures of the scribe of Ext.DW-2/A besides when its making precedes its standing registered also when in succession thereto, it stood accepted for registration by the Sub Registrar concerned to naturally acquires immense legitimacy besides validation. As a sequitur obviously the relevant scoring off holds concurrence with the relevant endorsement made by its scribe qua its scoring off occurring at the behest of the deceased testator. Ext.DW-2/A is a registered document. Registration of Ext.DW-2/A foists qua it a presumption of validly besides a presumption of truth qua its valid and due execution by the deceased testator. The presumption aforesaid qua Ext.DW-2/A holding truth also qua its hence standing validly and duly executed by the deceased testator stands enhanced by the factum of occurrence of signatures of the deceased on the reverse of the pages of Ext.DW-2/A whereon the apposite recitals stand scribed also gets enhanced from occurrence thereon of seals of the relevant registering authority besides occurrence of signatures thereon of the registering authority. Preponderantly with the Sub Registrar appending his signatures on the endorsements occurring therein displaying qua the deceased testator in his presence proceeding to signature it whereat he stood identified by one Sansarchand, gives heightened momentum to a conclusion of it holding a portrayal of the Sub Registrar concerned holding satisfaction qua the apposite mental capacity of the deceased testator to execute Ext.DW-2/A also his satisfying himself qua his identity. As a sequitur, with the plaintiff not adducing evidence for erasing the presumption of truth foisted to a registered testamentary disposition, secures a firm conclusion from this Court qua its unflinchingly standing proven to be validly and duly executed.

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 plaintiff. Decree sheet be prepared accordingly. Records be sent back forthwith. Pending applications, if any, also disposed of. No costs.

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

Leela Devi .....Petitioner
Versus
Ashwani Kumar .....Respondent

Civil Revision No. 233 of 2007
Decided on: 27th September, 2016

H.P. Urban Rent Control Act, 1987- Section 14- An eviction petition was filed on the ground of arrears of rent, the premises having become old and unsafe for human habitation and the premises required bonafide for the purpose of rebuilding and re-construction, which cannot be carried out without vacating the premises- the rent petition was allowed and the eviction was ordered on the grounds of arrears of rent and bonafide requirement for rebuilding and reconstruction – an appeal was filed, which was allowed and the petition was dismissed on the grounds of bonafide need for reconstruction- held, in revision that the condition of building is not proved to be dilapidated- however, rebuilding cannot be carried out without vacating the premises – the tenant has a right to re-entry and no prejudice would be caused to him – petition allowed and the order of Appellate Authority set aside. (Para-8 to 10)

For the petitioner: Mr. Ajay Sharma, Advocate.
For the respondent: *Ex-parte*.

The following judgment of the Court was delivered:

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

Petitioner-landlady has challenged the judgment passed by learned Appellate Authority (II), Una in Rent Appeal No. 3/06, whereby while partly allowing the appeal filed by the respondent-tenant has quashed his order of eviction passed by learned Rent Controller on the ground of the building is bonafidely required by her for rebuilding and reconstruction. The eviction of the respondent-tenant on the grounds of arrears of rent has, however, been upheld.

2. Admittedly, the respondent was inducted as tenant by the petitioner-landlady in one of the shops shown in red colour in the site plan Ext. P-2 she constructed over the land measuring 18-00 square decimeter comprised in Khewat No. 80min, Khatauni No. 150 and Khasra No. 1404 situated in up-mohal Indira Nagar and Mauza Gagret, Tehsil Amb, District Una, H.P. The rent as agreed upon was Rs. 700/- per month. The respondent-tenant failed to pay the rent to the petitioner-landlady and the petition for his eviction was filed at the stage when he was in arrears of rent amounting to Rs. 39,900/-. As per further case of the petitioner-landlady, the demised premises being old and in dilapidated condition is having roof of old tiles hence, became unsafe for human habitation and that on the already filled up foundations, it is not possible to raise further construction on the first floor and as such the same was bonafidely required for rebuilding and re-construction so that the building could be put to best and beneficial use.

3. The respondent-tenant when put to notice has contested the petition. It is denied that the rent was Rs. 300/- per month. The rent up till July, 2002 was paid to the petitioner-landlady. It is denied that the shop was in dilapidated condition and also unfit for human living.

4. Rejoinder was filed and on the pleadings of the parties, following issues were framed:

1. Whether the respondent is in arrears of rent, if so, to what extent? OPP.
2. Whether the demised premises are bonafide required by petitioner for reconstruction and rebuilding? OPP.

3. Whether the respondent has impaired the value of the premises in question?OPP.

4. Whether petition is bad for non-joinder of parties? OPR.

5. Whether petitioner is estopped by her act or conduct to file petition? OPR.

6. Relief.

5. Learned Rent Controller on appreciation of the evidence, while answering issues No. 1 and 2 in affirmative, has concluded that the respondent is in arrears of rent and that the demised premises are bonafidely required by the petitioner for reconstruction and rebuilding. The remaining issues, however, were answered in negative. Consequently, in view of the findings on all the issues, learned Rent Controller has ordered the eviction of the respondent-tenant on the ground of arrears of rent and also the demised premises were bonafidely required for the purpose of rebuilding and reconstruction.

6. Learned Appellate Authority has, however, reversed the findings on issue No. 2 and concluded that the petitioner-landlady has failed to make out a case that the building is in dilapidated condition and that the same is bonafidely required for the purpose of rebuilding and reconstruction. It is the legality and validity of this part of the impugned judgment which is questioned in the present appeal.

7. It is worth mentioning that the respondent-tenant has opted for not putting appearance in this petition and was ordered to be proceeded against ex-parte.

8. On hearing, Mr. Ajay Sharma, learned counsel for the petitioner-landlady and also going through the evidence available on record as well as the provisions contained under Section 14(3) (c) of the H.P. Urban Rent Control Act, it would not be improper to conclude that it is not always necessary that the eviction of a tenant can only be ordered when the building is in dilapidated condition or unsafe or unfit for human habitation and rather the tenant can also be evicted therefrom if the landlord is otherwise able to satisfy the conscious of the Court that the rebuilding and reconstruction is required for making substantial additions or alterations and to put the demised premises to best use of it by doing so and also that such building or rebuilding or additions or alterations cannot be carried out without the building or demised premises is got vacated.

9. True it is that cogent and reliable evidence is not forthcoming that the building in which the demised premises are situated is in dilapidated condition or unsafe for human habitation. The fact, however, remains that the petitioner-landlady has made out a case for eviction of the respondent-tenant as it is not possible to raise the construction of first floor on the existing structure. As noticed supra, the rebuilding and reconstruction is necessitated to make out provision of additional accommodation in the building so that the landlord can put the same to best and beneficial use of the land belonging to him or the building constructed thereon. There was another tenant namely Sunil Kumar. The evidence reveals that said Sunil Kumar in an eviction petition filed against him for his eviction on the same grounds had agreed to vacate the shop with him on rent in the building in question in the year 2003. The petitioner-landlady could not reconstruct the building in question because of the respondent-tenant in possession of one of the shops i.e. demised premises in existence therein. In view of the reasons hereinabove, in the considered opinion of this Court, the eviction of the respondent-tenant from the demised premises is required because the petitioner-landlady has made out a case for reconstruction of the same so that she can put her property to best and beneficial use. No prejudice is likely to be caused thereby because as per provisions under the Act itself, he has the right of re-induction in that much area presently in his possession as tenant in the building being constructed by the petitioner-landlady, of course on payment of rent to be settled taking into consideration the rent of similar space prevalent in the market.

10. Therefore, the impugned judgment to the extent of denying the eviction of the respondent-tenant on the ground of the building is bonafidely required for reconstruction and rebuilding is quashed and set aside and the order passed by learned Rent Controller is upheld.

11. The petition is accordingly allowed and stands disposed of, so also the pending application(s), if any.

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

Najro Devi ...Appellant.
Versus
M/s Bhawani Transport & Another ...Respondents.

FAO No. 263 of 2007.
Decided on: September 27, 2016.

Workmen Compensation Act, 1923- Section 4- 'M', husband of the claimant died in an accident- the petition was allowed and compensation was awarded subject to the production of legal heirs certificate- the award was challenged and the matter was remanded- petition was dismissed after remand- held, that claimant was married to S- Gram Panchayat had intimated this fact to the insurer- she is recorded to be wife of S in Gram Panchayat – claimant being a Nepali could not have solemnized marriage according to Hindu rite and custom – marriage was not validly registered under Special Marriage Act- the claim petition was rightly dismissed- appeal dismissed. (Para-8 to 14)

For the appellant: Mrs. Anita Jalota, Advocate vice Mr. M.L. Sharma, Advocate.
For the respondents: Mr. Deepak Bhasin, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. *(Oral)*

Appellant-claimant Najro Devi is in appeal before this Court. She claimed herself to be the wife of Man Bahadur, a workman on the establishment of M/s Bhawani Transport, Village Sataun, Sub Tehsil Kamaru, District Sirmaur, H.P., the first respondent. On the fateful day i.e. 6.7.1997, he was driving a truck bearing registration No.WB-71-0254, which met with an accident near Tibetan Colony, Tilordhar and died on the spot itself.

2. The petitioner, who has claimed to have solemnized marriage with deceased Man Bahadur on 26.8.1996 at Paonta Sahib, has filed a petitioner under Section 22 of the Workmen's Compensation Act for award of compensation to the tune of Rs. 3,00,000/-. Learned Commissioner below vide award dated 5.2.2004 annexed to the present appeal has awarded a sum of Rs. 1,01,670/- with interest @ 9% per annum w.e.f. 6.7.1997 to the petitioner with a stipulation to release the same to her on production of Legal Heirs Certificate or Dependent Certificate or Succession Certificate. The insurer respondent No.2, however, brought the award so passed in favour of the petitioner to this Court in CMPMO No.199 of 2004. The same was decided vide judgment dated 7.3.2006 with the following observations:

> "..... In the present case even though the Commissioner had framed issue No.3 yet, perhaps because of ignorance of law on this part or the lack of understanding of correct legal position by him he skirted and avoided to return a finding on Issue No.3 and instead deferred it by making the above quoted observations about respondent No.1 obtaining "Legal Heirs Certificate/Dependent Certificate/Succession Certificate". Since respondent No.3 has now admitted about such a lapse on his part, I do not wish to proceed against him. Based on his own admission as well as based on the result of the aforesaid discussion, this petition is disposed of by making the following order:-
>
> 1. The mater is remanded to respondent No.3.

2. Respondent No.3, in the light of the aforesaid observations is directed to decide issue No.3 and return a positive finding with respect thereto. If in the course of such decision it occurs to respondent No.3 or to the parties that there is either insufficient evidence or that some material on record has to be brought, respondent No.3 either sue motu or at the instance of the parties or any one of them may bring on record additional material as and by way of aid to deciding Issue No.3.

3. If the finding on Issue No.3 goes in favour of respondent No.1, the amount deposited by the petitioner with the Commissioner shall be disbursed to respondent No.1.

4. If, however, the finding on issue No.3 goes against respondent No.1, this amount shall be returned to the petitioner because the only consequence, the only natural corollary of such finding on Issue No.3 would mean that despite the Commissioner's finding on other Issues, the claim application filed by respondent No.1 would be liable to be dismissed on the ground of her not being a dependent of the deceased workman.

The matter on remand is fixed before the Commissioner on 17th April, 2006. All the parties through their learned counsel are directed to appear before the Commissioner on that date. The Commissioner shall proceed to dispose of the matter in the light of the aforesaid observations very very expeditiously and in any event before 31st July, 2006."

3. Learned Commissioner below on remand of the claim petition has returned the finding on issue No.3 against the petitioner and as a result thereof, the petition has been dismissed vide impugned award dated 26.12.2006

4. The legality and validity of the impugned award has been questioned on the grounds inter alia that the documentary evidence produced by the petitioner has been misappreciated and misinterpreted. Cogent and reliable evidence as has come on record by way of affidavits Ex.PA and Ex.PB and also the Certificate Ex. PC issued by the Registration Officer as per the provisions of Special Marriage Act showing the petitioner to be the legally wedded wife of deceased workman has erroneously been discarded. The evidence as has come on record by way of testimony of RW-2 that the petitioner has solemnized marriage with Man Bahadur after the death of her previous husband Singha Ram has also erroneously been ignored.

5. The appeal has been admitted on the following substantial questions of law:-

1. Whether the ld. Workman Commissioner wrongly returned the finding on issue No.3 when there is ample evidence on record with regard to the marriage of deceased Mn Bahadur and appellant?

2. Whether marriage with the Nepali, the provisions of Special Marriage Act were applicable?

6. Ms. Anita Jalota, Advocate learned counsel representing the petitioner has invited the attention of this Court to the certificate Ex.P2/B and also the affidavits Ex.PA and PB as well as the certificate Ex.PC and urged that such documentary evidence available on record establishes satisfactorily the factum of the petitioner being legally wedded wife of deceased Man Bahadur. The attention of this Court has also been drawn to the oral evidence as has come on record by way of the testimony of Sunil Mittal Advocate, PW-1 and Mr. Mohan Singh Chauhan, Secretary, Gram Panchayat, Kanrau, PW-2. Therefore, according to Ms. Anita Jalota, learned counsel, in view of the cogent and reliable evidence available on record the petition could have not been dismissed.

7. On the other hand, Mr. Deepak Bhasin, learned counsel representing the insurer respondent No.2 has strenuously contended that there is no iota of evidence to show that the

petitioner and deceased Man Bahadur has solemnized marriage strictly as per law. It is pointed out that Man Bahadur, was a Nepali National and Najro, the petitioner is also a Nepali National. In India they could have solemnized valid marriage only under the Special Marriage Act, 1954. However, no evidence has come on record that they were legally wedded husband and wife. The petitioner, according to Mr. Bhasin, is not entitled to the award of compensation.

8. The question of law as formulated have to be adjudicated upon in the light of the given facts and circumstances and also the evidence available on record as well as the submissions made by learned counsel representing the parties on both sides. Both questions of law are being taken up together for adjudication in order to avoid the repetition of evidence and conflicting findings.

9. Petitioner admittedly was married to one Singha Ram, again a Nepali National. The local Gram Panchayat i.e. Kamrau in Tehsil Paonta Sahib, District Sirmaur, has informed the insurer through its Assistant Branch Manager RW-1 that the petitioner is widow of one Singha Ram. RW-2 Bahadur Singh, the then Pradhan Gram Panchayat, Kamarau has stated that Najro is known to him and that she was married to one Singha Ram. She was registered as wife of Singha Ram in the Panchayat record. Two daughters Anita and Sushila were born to Nazaro from the lions of said Shri Singha Ram. The certificate Ex.DW-2/A to this effect has been proved by RW-2 Bahadur Singh. According to him, Najro has not solemnized marriage with anyone-else.

10. True it is that reliance on behalf of the petitioner has been placed on her own affidavit Ex.PB and that of her deceased husband Man Bahadur Ex.PA. Last para of the affidavit Ex.PB reveals that the marriage was solemnized as per Hindu rites and customs in the Temple of Lord Shiva. The petitioner and said Man Bahadur could have not solemnized marriage under Hindu Marriage Act or the Succession Act, being Nepali. Even if it is believed that the marriage was solemnized as per Hindu rites and customs, it was required to be registered in terms of the provisions contained under the Special Marriage Act 1954 because the petitioner and deceased Man Bahadur were not Indian National and rather Nepalis. The Act ibid has been enacted by the British Government in India with sole object to enable a person in India and all Indian Nationals in Foreign Countries irrespective of faith they profess in the matter of marriage to solemnize the marriage and get the same registered under the Act.

11. The petitioner and Man Bahadur being foreigners could have solemnized the marriage in India, however, their marriage have termed valid had the declaration been made by them within the meaning of 3rd schedule to the Act. For registration of their marriage in the manner as provided in 4th schedule, no doubt, as per the affidavit Ex.PA, deceased Man Bahadur was unmarried and aged 32 years whereas as per Ex.PB, the petitioner has declared herself to be a widow, aged 30 years, however, the declaration so made by them is not signed by three witnesses as required under Section 11 of the Act read with schedule 3. Not only this, but there is no proof that they get the marriage registered in terms of Section 13 read with 4th schedule because the certificate in the form as given in 4th schedule has not been produced in evidence. The certificate was required to be signed by the Marriage Officer designated under the Act, besides, the Bridegroom and Bride.

12. Not only this, but before registration of the marriage in the manner as aforesaid notice of not less than 30 days in terms of Section 5 of the Act was required to be issued by the Marriage Officer and it is thereafter, after hearing the objections, if any, the order qua registration of a valid marriage could have been passed. No such evidence has, however, come on record. The order Ex.PC of Sub Divisional Magistrate, Paonta Sahib is qua registration of the Marriage of the petitioner with Man Bahadur in the record of Gram Panchayat, Kamarau, however, for want of proof qua solemnization of a valid marriage, no such order could have been passed. Therefore, the present is a case where cogent and reliable evidence qua solemnization of a legal and valid marriage is lacking and the petitioner cannot claim the compensation under the provisions of Workmen's Compensation Act on account of death of Man Bahadur in a Motor Vehicles Accident.

13. As a matter of fact, the petitioner while in the witness-box as PW-2, has admitted that she is the widow of Singha Ram and on his death she received compensation from the Court. Therefore, the documents Ex.PA, Ex.PB and Ex.PC etc., seem to have been engineered and fabricated merely to grab money from the insurer respondent No.2. Being so, the present is not a case where it can be said that the evidence available on record has not been appreciated in its right perspective and on that count the findings recorded by learned Commissioner below are vitiated. The petitioner and deceased Man Bahadur being Nepali National could have solemnized a valid marriage only in accordance with the provisions contained in the Special Marriage Act. Therefore, the impugned award cannot be termed to be legally and factually unsustainable. As a matter of fact, no question of law what to speak of the substantial questions of law as formulated in this appeal arises for determination.

14. For all the reasons hereinabove, this appeal fails and the same is accordingly dismissed. Pending application(s), if any, shall also stands disposed of.

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

Cr. Appeal No. 164 of 2011 a/w
Cr.Appeal No. 230 of 2011
Date of Decision: September 27, 2016

1. Cr.Appeal No. 164 of 2011
State of H.P. ...Appellant.
Versus
Om Prakash ..Respondent.
2.Cr.Appeal No. 230 of 2011
Paramjeet Kaur ...Appellant.
Versus
State of H.P. ..Respondent.

N.D.P.S. Act, 1985- Section 18, 20 and 29- Accused were found in possession of 5.290 kg. charas and 920 grams opium –accused M died during the course of the proceedings and accused O was acquitted – held, in appeal that accused O is a driver with HRTC – it was alleged that he is supplier of drugs but the basis of this allegation was not proved - mobile phones were not connected to the accused O- accused M was running a Dhaba, which is open to the public and mere presence in the same will not make a person liable- there are over writings in the documents which have not been explained – the accused was rightly acquitted in these circumstances - however, the order of confiscation could not have been passed without recording specific findings that the currency notes were used for sale or purchase of drugs – case remanded for determination of this fact. (Para-11 to 24)

Cases referred:
Koluttumottil Razak Versus State of Kerala, (2000) 4 SCCC 465
Harun Rasid Ansari & Anr. Versus The State of W.B., (2015) 3 Cal LJ 408

For the Appellant: M/s Vikram Thakur and Puneet Rajta, Deputy Advocate Generals, for the appellant-State in Cr.Appeal No.164 of 2011.
Mr. Sanjeev Bhushan, Sr. Advocate with Ms.Abhilasha Kaundal, Advocate, for the appellant in Cr.Appeal No.230 of 2011.
For the Respondent: Mr. Vivek Sharma, Advocate, for the respondent in Cr.Appeal No.164 of 2011.

M/s Vikram Thakur and Puneet Rajta, Deputy Advocate Generals, for the respondent-State in Cr.Appeal No.230 of 2011.

The following judgment of the Court was delivered:

Sanjay Karol, J (oral).

Assailing the judgment dated 13.01.2011, passed by Special Judge, Fast Track Court, Shimla, H.P., in Sessions Trial No. 14-S/7 of 2009, titled as *State of H.P. Versus Manjit Singh & another*, whereby accused Om Prakash stands acquitted, State has filed the appeal, being Cr. Appeal No.164 of 2011, under the provisions of Section 378 of the Code of Criminal Procedure, 1973. Also assailing the finding in the aforesaid judgment, whereby the entire case property, so taken into possession during the course of investigation of the case, was ordered to be confiscated to the State of H.P., appellant Paramjeet Kaur has filed the appeal, being Cr. Appeal No.230 of 2011, under the provisions of Section 454 of Cr.P.C.

2. Accused Manjit Singh and Om Prakash were charged for having committed offences punishable under the provisions of Sections 18 and 20, read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as NDPS Act).

3. It is the case of prosecution that a secret information was received to the effect that accused Om Prakash was about to supply contraband substance to accused Manjit Singh. Such information came to be supplied to superior officer DSP Brijesh Sood (PW.19) through ASI Shiv Ram (PW.20), whereafter a raiding party was constituted. DSP Brijesh Sood headed the raiding party comprising of independent witness Smt. Champa Bhardwaj (PW.1), and police officials Vinesh Kumar (PW.18), Vijay Kumar (PW.21) and Sangat Ram (PW.23). On 12.03.2009, police conducted raid at different places and in all recovered 5.290 kgs of charas and 920 grams of opium. Different quantity of contraband substance was recovered from: (a) Dhaba owned and managed by accused Manjit Singh; (b) courtyard of the very same Dhaba; (c) vehicle i.e. Tevera bearing registration No.HP-51A-0863 also owned and possessed by the said accused; and his house which also was exclusively owned and possessed by him. However, his family was also residing therein.

4. Also during search, currency notes of Rs. 1,47,145/- came to be recovered from the locker of the almirah kept in the house of accused Manjit Singh.

5. With the recovery of the contraband substance, different samples came to be drawn by Inspector Sangat Ram (PW.23), who also sent information about the crime to the Police Station, Shimla West, where FIR No. 41/2009, dated 13.03.2009 (Ex.PW.24/A) came to be registered under the provisions of Sections 18 and 20 read with Section 29 of the NDPS Act. Accused were arrested. With the completion of formalities on the spot, contraband substance came to be deposited with MHC Nand Lal Sharma (PW.15), who sent the same for chemical analysis through Constable Kuldeep Singh (PW.22) and reports of FSL, Junga (Ex.PW.23/H, Ex.PW.23/J & Ex.PW.23/K) taken on record. With the completion of investigation, which *prima facie* revealed complicity of the accused in the alleged crime, *Challan* was presented in the Court for trial.

6. The accused were charged for having committed offences punishable under the provisions of Sections 18 and 20 read with Section 29 of the NDPS Act, to which they did not plead guilty and claimed trial.

7. In order to establish its case, in all, prosecution examined as many as twenty four witnesses. Statement of accused Om Prakash under Section 313 of the Code of Criminal Procedure was also recorded, in which he took defence of innocence. No evidence in defence was led.

8. It is a matter of record that during trial accused Manjit Singh expired and as such, proceedings qua him came to be abated. With respect to accused Om Prakash, trial Court

conclusively held the prosecution not to have established, beyond reasonable doubt, his complicity in the crime. As such, he was acquitted on all counts.

9. Such findings are subject matter of challenge by the State in Cr.Appeal No.164 of 2011.

10. It is a matter of record that in terms of the impugned judgment, case property i.e. contraband substance, including the currency notes stand confiscated to the State of H.P. It is also a matter of record that Smt. Paramjeet Kaur wife of accused Manjit Singh, laid challenge to this part of the judgment. In effect, she claims right over the currency notes, so directed to be confiscated.

11. It is also a matter of record that nothing was recovered from the person of accused Om Prakash. However, it is equally true, as stands established through the testimonies of Champa Bhardwaj (PW.1), DSP Brijesh Sood (PW.19) and Sangat Ram (PW.23) that at the time when police party raided the Dhaba of deceased Manjit Singh, accused Om Prakash was present there. Further, it is a matter of record that this accused is a driver working with the Public Transport Corporation (HRTC). It is not his case that he was on leave on that day. But then, this fact alone would by itself not be sufficient enough to suspect or establish his complicity in the alleged crime.

12. It is not the requirement of law that acts of conspiracy are to be presumptuously inferred. It is a settled preposition of law that for invoking statutory presumption under Section 35-A of the NDPS Act, prosecution has to establish its case of complicity of the accused in the crime, beyond reasonable doubt.

13. According to the police, accused Om Prakash is a supplier of drugs. Now what is the basis of such information, is not emanating from the record. Except for bald statement of Sangat Ram, which, on this count, we find not to be inspiring in confidence, there is no iota of evidence establishing such fact.

14. Prosecution wants the Court to believe that accused Om Prakash was in constant touch with accused Manjit Singh on telephone. For establishing such fact, our attention is invited to the testimonies of Ms.Minoo Rana (PW.11) and Madan Lal Sharma (PW.12). Careful perusal of the same only establishes that accused Manjit Singh was possessing mobile No.92185-19888 and one Prakash Dhiman of village Shilgaon, Post Office, Shoghi, was issued mobile/SIM No.93188-32199. Now who is this Prakash Dhiman, is a matter of secrecy.What is his linkage either to Manjit Singh or Om Prakash, remains a shrouded secret. Our specific attention is invited to document (Ex.DB), which reads as under:-

> "OM PRAKASH,DHIMAN, VILLAGE SHILGAON PO SHOGHI, TEHSIL AND DISTT SHIMLA, SHIMLA, 171010 OTAF: , 3/8/2006 6:37:25 PM CAF : 2289370678 RSN :RNK7U2200KMS, PREPAID_001"

But then from where this document came to be procured again remains unexplained, for Madan Lal Sharma (PW.12) has uncontrovertedly deposed that *"Paper Ext. DB having the address was not supplied by us to the police"*. Also it is not the case of police that Prakash Dhiman and Om Prakash Dhiman are the very same person. It also remains unestablished on record that accused Om Prakash was otherwise using the SIM issued in the name of Prakash Dhiman.

15. Police/prosecution has not been able to establish that the mobile phones, 4/6 in number, so recovered by the police at the time of raid, belonged to Om Prakash. Discrepancy in the recovery of mobile phones, as arisen in the statement of Champa Bhardwaj (PW.1) and Sangat Ram (PW.23) is not relevant, for determining the controversy, limited in nature, before this Court, save and except that it otherwise renders the prosecution story to be doubtful.

16. Also there is nothing on record to establish that accused Om Prakash was otherwise in acquaintance with accused Manjit Singh.

17. We cannot lose sight of the fact that accused Manjit Singh was running a Dhaba, opened for general public and recovery came to be effected not in the middle of night or at odd hours, but in broad day light at about 11.00 AM. Thus alleged presence of Om Prakash at that place is not suspicious.

18. Coming to the genesis of the prosecution story of Sangat Ram (PW.23) having received secret information, we find the version, as it has come on record, to be doubtful. According to Sangat Ram, he received the information in the morning of 12.03.2009, at about 9.50 AM. According to the informer, accused Om Prakash, who is a driver by profession, supplies narcotic drugs to accused Manjit Singh. This witness prepared reasons of belief (Ex.PW.19/A), in compliance of Section 42 of the NDPS Act and in a sealed envelop sent it to the superior officer. However, when cross-examined, witness admits that such information is not in his hand, neither does he remember who scribed it. He also admits that none of the witnesses in their statements, so recorded by the police under Section 161 of Cr.P.C., had given reference of the scribe of the said document. Significantly, ASI Shiv Ram (PW.20), who took such information to the superior officer, is also not aware of the author of the said document. Hence his version cannot be relied upon to convict accused Om Prakash in view of law laid down in *Koluttumottil Razak Versus State of Kerala,* (2000) 4 SCCC 465.

19. On this issue, our attention is invited by learned Deputy Advocate General to the decision rendered by a Coordinate Bench of the High Court of West Bengal in *Harun Rasid Ansari & Anr. Versus The State of W.B.,* (2015) 3 Cal LJ 408, wherein it is held that:-

> "10. Significantly, PW 5 is the author of written complaint but the scribe of the said written complaint is one Tanmay Banerjee who was not examined as a witness of prosecution for which learned trial Judge has marked the signature of PW 5 only as exhibit-1. According to learned Advocate for the appellants, the contents of the written complaint cannot be taken into consideration as piece of evidence. On going through the written complaint on record it appears to us as an original document and under Section 62 of the Evidence Act it is a primary evidence and therefore, it is admissible under Section 64 of the Evidence Act. Let us see the version of the PW 5 who signed this document as author. In his deposition, he has stated that the complaint was written by one Tanmay Banerjee of Anara Railway Colony as per instruction of PW 5 and then contents of the complaint was read out by said Tanmay in Bengali and having ascertained it was correctly recorded PW 5 put his signature in Bengali on that complaint. Thus, PW 5 is not an illiterate person. During cross-examination PW 5 has stated nothing to disbelieve the fact of writing by Tanmay Banerjee and signing the complaint by PW 5 and its lodging at P.S. by PW 5. Therefore, we believe that written complaint as documentary evidence exists and it has been duly proved under Section 3 of the Evidence Act. We hold that learned Trial Judge should have marked the whole written complaint and not only the signature of PW 5 as exhibit-1. We are satisfied to look into the contents of the written complaint though we do not hold that the truth has been proved by this document."

The judgment is clearly distinguishable for unlike in the instant case, there was no doubt with regard to the identity of the scribe.

20. Champa Devi (PW.1), Vinesh Kumar (PW.18), Vijay Kumar (PW.21) and Sangat Ram (PW.23) want the Court to believe that accused was present in the Dhaba at the time when recovery came to be effected by the police party. Even though, defence taken by the accused of being on duty at the relevant point in time, remains un-established and improbablized on record, but however, we do not find version of these witnesses/police officials to be inspiring in confidence or in none of the documents prepared on the spot/at the Dhaba, name of Om Prakash came to be recorded. It is a matter of record that total time taken by the police party, in effecting the recovery of the contraband substance, was approximately more than 10 hours (from 10.00 AM to 11.30 PM). But no document whatsoever came to be recorded, acknowledging presence of

Om Prakash on the spot, save and except one document Ex.PB i.e. search and seizure memo, which only contains his signatures, where also there is overwriting on the date. Digit "3" has been overwritten to make to read as "2". Also we find that there is overwriting at the places where dates stand recorded on the other documents. None has come forward to explain the same, rendering correctness of such document, its preparation on the spot, in a manner in which prosecution wants the Court to believe to be doubtful. Also signatures on document (Ext.PB) have not been established by scientific evidence. It is not the requirement of law that particulars of the informer are to be disclosed by the witness, but then there has to be some credible evidence with regard thereto. Sangat Ram does not categorically state that information, so furnished to him pertained to the accused in question. It is not the case of prosecution that accused Om Prakash is the only driver in HRTC.

21. Hence, we do not find any reason to interfere insofar as acquittal of the accused Om Parkash is concerned.

22. We notice that the trial Court, prior to passing of the order of confiscation of the case property, has not returned any specific finding as to whether currency notes recovered from the house of deceased accused Manjit Singh were used for sale or purchase of drugs and as such, required confiscation. As such, on this count alone, findings returned, to the extent of confiscation of the currency notes, are quashed and set aside, with the matter being remanded back to the trial Court for consideration afresh, in terms of Section 63 of the NDPS Act, on the basis of material already on record. Parties undertake to appear before the trial Court on 03.11.2016, whereafter, trial Court shall decide the issue within a period of two months, by affording opportunity of hearing to all concerned.

23. Thus, in view of the aforesaid, judgment of acquittal dated 13.01.2011, passed by Special Judge, Fast Track Court, Shimla, H.P., in Sessions Trial No. 14-S/7 of 2009, titled as *State of H.P. Versus Manjit Singh & another* (being Cr. Appeal No. 164 of 2011), is upheld. Bail bonds furnished by the accused are discharged.

24. So far as the appeal (being Cr.Appeal No.230 of 2011) filed by Paramjeet Kaur, is concerned, the matter is remanded back to the trial Court in the aforesaid terms with the impugned judgment being modified to a limited extent of confiscation of currency notes.

Both the appeals stand disposed of accordingly, so also pending application(s), if any. Record of the trial Court be immediately sent back.

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

Sh. Gaurav Sood. .....Petitioner.

Versus

Dr. T.L. Sharma .....Respondent.

CMPMO No. 452 of 2015

Date of decision: September 28, 2016.

Code of Civil Procedure, 1908- Order 6 Rule 17- An application to amend eviction petition was filed by the landlord seeking the eviction on the ground of bona fide requirement – the application was dismissed by the Rent Controller – held, in revision that the proposed amendment will not change the nature of the eviction petition – it will relate to the date of the institution of the petition – the eviction was not sought initially on the ground of bona fide requirement and the application was filed, when this ground became available to the petitioner/landlord - declining of amendment will result in multiplicity of the proceedings-hence, application allowed subject to the payment of Rs. 5,000/-. (Para- 5 to 9)

Cases referred:
P. Suryanarayana (D) by Lrs. versus K.S. Muddugowramma , 2004(1) RCR 395
Gauri Shankar versus Tilak Raj Sharma, 1988 (2) Sim. L.C. 303

For the petitioner :Mr. Ashok Sood, Advocate with Mr. Dhiraj Thakur, Advocate.
For the respondent :Mr. Bhupender Gupta, Sr. Advocate with Mr. Janesh Gupta, Advocate.

The following judgment of the Court was delivered:

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

In this petition, order dated 24.6.2015 passed by learned Rent Controller, Court No. (7), Shimla in an application under Order 6 Rule 17 read with Section 151 of the Code of Civil Procedure registered as CMA No. 5105 of 2015 filed in Rent Case No. 134/2 of 2015/11 is under challenge. The petitioner herein is the landlord. He has sought the eviction of the respondent-tenant by filing Rent Petition under Section 14 of the HP Urban Rent Control Act on the ground of the respondent-tenant being in arrears of rent and also that the demised premises being in dilapidated condition need reconstruction and rebuilding after demolition. The petitioner-landlord has purchased the demised premises on 17.1.2008 from his previous owner. In terms of the provisions contained under sub section (6) of Section 14 of the Act, in the event of the landlord has acquired any premises by transfer, no application for recovery of possession thereof on the grounds specified in sub clause (i) of clause (a) of sub Section (3) can be made unless and until a period of five years has elapsed from the date of such acquisition. The petition when initially instituted in the year 2011 the statutory period of five years was not complete. The said period was over in the month of January 2013, therefore, the application Annexure P-3 hereinabove under Order 6 Rule 17 CPC came to be filed before learned Controller below on the completion of the period of five years i.e. on 6.5.2014. By way of amendment in para 18(a) of the petition originally filed, the following para has been sought to be added by way of amendment:

> "18(a)(3) That the premises under the occupation along with the premises under the occupation of Sh. S.K. Sharma (now deceased) are also bonafide required by the petitioner after the re-construction of the building on old lines for his own use and occupation and also that of his family member which includes his wife and two daughters. At present the petitioner is residing with his parents in Inder Bhawan, Paras Dass Garden, Shimla 171001 and now he wants to live independently along with his family members. It is significant to mention here that the petitioner is working as contractor and wants to settle himself independently and as such the premises under the occupation of the respondent as well as Sh. S.K. Sharma (now deceased) are most suitable premises keeping in view the status of the petitioner and his present and future requirements. The petitioner is also an income tax assessee. The premises are situated in a posh locality and just near Macchi Wali Kothi/U.S. Club and are on road side leading to the Ridge Shimla.
>
> The petitioner is not occupying another residential building owned by him in the urban area of Shimla and also has not vacated such a building without the sufficient cost within 5 years of the filing of the present petition in the Urban area of Shimla."

2. In reply Annexure P-4 to the application the stand of the respondent-tenant was that the application as framed is not maintainable and filed with malafide intention to deprive him from his right to re-entry in the event of he is ordered to be evicted on the ground of the demised premises required for reconstruction and rebuilding. On merits, it was claimed that the petitioner-landlord has got ample accommodation for his own use and occupation and that on these grounds his eviction from the demised premises cannot be sought. Learned Rent Controller below on consideration of the claims and counter claims has dismissed the application with the

observations that in view of the demised premises acquired by the petitioner on 17.1.2008 the application should have been filed immediately on completion of the period of five years and the filing thereof should have not been delayed. Also that no case is made out to arrive at a conclusion that despite exercise of better diligence the petitioner has applied for amendment at the earliest and also that the proposed amendment has been sought merely to deprive the respondent-tenant from his right to re-entry in the event of the petition is allowed on the ground of the building required for reconstruction and rebuilding.

3. The petitioner-landlord aggrieved by the impugned order has questioned the legality and validity thereof in this Court on the grounds inter alia that the dismissal of the application for amendment in the petition is likely to result in multiplicity of litigation and also that the grounds i.e. the building is required for reconstruction and bonafidely for own use and occupation by the landlord are two separate and independent grounds and can be taken simultaneously in one reference petition, of course, by filing separate petitions also.

4. While Mr. Ashok Sood, Advocate, learned Counsel representing the petitioner-landlord has strenuously contended that the application filed with a prayer to allow the amendment in the petition has been dismissed contrary to settled legal principles at the same time Mr. Bhupender Gupta, learned Senior Advocate assisted by Mr. Janesh Gupta, Advocate, has argued that in the event of the amendment in the petition is allowed the same will be from the date of institution of the eviction petition before learned Rent Controller and in that event the eviction of the respondent-tenant on the ground proposed to be incorporated by way of amendment may not be legally admissible.

5. On analyzing the rival submissions and also the case law cited at the Bar, it would not be improper to conclude that the nature of the amendment being sought in the petition is not going to change the nature of the petition at all for the reasons that amongst other grounds the eviction of a tenant can also be sought on the ground of personal boafide requirement. In the Considered opinion of this Court, the amendment if allowed at this stage shall not relate back to the date of institution of the petition for the reasons that the petitioner had an occasion to seek the amendment only on the completion of statutory period of five years i.e. from the date he acquired the demised premises by way of sale from its previous owner.

6. The Apex Court in ***P. Suryanarayana (D) by Lrs***. versus ***K.S. Muddugowramma , 2004(1) RCR 395*** a case where provision qua having given a right of immediate possession to a widow-landlady incorporated by way of amendment in Karnataka Rent control Act during the pendency of the revision petition in the High Court, the amendment consequent upon such amended provision sought by the petitioner-landlady during the course of proceedings in the revision petition was allowed by the High Court. The Apex Court has affirmed the judgment passed by the High Court.

7. Be it stated that a Co-ordinate Bench of this Court in ***Gauri Shankar*** versus ***Tilak Raj Sharma, 1988 (2) Sim. L.C. 303*** a case where the petition for eviction was filed well before the completion of statutory period of five years has held that the petition was not maintainable. The statutory period of five years in that petition was over during the pendency of that petition resulting in cause of action in favour of the petitioner during the pendency, hence, the petition was not held to be maintainable. That however is not the position in the case in hand because the amendment in this petition has been sought at a stage when the statutory period of five years was already complete. The petition no doubt has been filed well before the completion of said period, however, the eviction of the respondent-tenant was not initially sought on the ground of the demised premises is bonafidely required by the petitioner for his own use and occupation. Being so, the ratio of the judgment in Gauri Shankar's case *supra* is not applicable in this case.

8. Otherwise also in the considered opinion of this Court, declining the prayer for amendment would definitely result in multiplicity of litigation which as per settled principle is not legally permissible. Mr. Gupta has rightly pointed out that the application for amendment

came to be filed at a stage when the case was already at the stage of recording petitioner's evidence and adjourned for the purpose on 6-7 occasions. The intention behind the explanation to Order 6 Rule 17 of the Code of Civil Procedure is to file the application for amendment, if any, before the trial is commenced i.e. settlement of issues. No doubt, the explanation provides for allowing amendment at a later stage also if essentially required for just decision of the case. The amendment no doubt is belated. However, in the opinion of this Court is necessarily required to decide the petition effectively and judiciously. Learned Controller below, therefore, should have allowed the application may be on putting the petitioner-landlord to suitable terms. The dismissal of the application vide impugned order as such is not legally sustainable. The impugned order is, therefore, quashed. The application is allowed. Consequently, the petitioner-landlord is permitted to amend the petition to the extent as indicated in this judgment of course subject to payment of Rs. 5000/- as costs to be paid to the respondent-tenant on the next date before learned Rent Controller below.

9. The parties through learned Counsel representing them are directed to appear before learned Controller below on the date fixed next there.

10. This petition is accordingly allowed and stands disposed of.

11. Pending application(s), if any, shall also stand disposed of.

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

HPSIDC .....Plaintiff-non-applicant

Versus

Shivalik Video Communication (O) Ltd. & others .....Applicant/Defendants

OMP No.358 of 2016 in C.S. No. 37 of 1998
Decided on: 28th September, 2016

Code of Civil Procedure, 1908- Section 151- An application for setting aside ex-parte decree was filed along with an application for condonation of delay – the applications were dismissed in default - an application for their restoration was filed, which was also dismissed for non-prosecution- present application has been filed for setting aside the order on the ground that wrong date of hearing was noted – this plea is not acceptable as the order was passed in the presence of the counsel – the applicant and his counsel were negligent in pursuing the application – application dismissed. (Para-2 to 6)

Case referred:
Shanti Devi & Others versus Kushaliya Devi, JT 2015 (8) SC 577

For the Plaintiff/ Non-applicant : Mr. Dheeraj K. Vashisht, Advocate.
For the respondents/ applicant: Mr. Sushil Gautam, Advocate.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J. (Oral)

This application has been filed with a prayer to set aside order dated 24th August, 2016 and restore OMP (M) No. 4014 of 2013 & OMP No.4241 of 2013, filed in Civil Suit No. 37 of 1998, to its original number.

2. The facts giving rise in filing of this application in a nut-shell are that Civil Suit No.37 of 1998 filed by the Non-applicant/plaintiff was decreed on 21.8.2001. The application OMP No.4241 of 2013 was filed under Order 9 Rule 13 of the Code of Civil Procedure for setting

aside the exparte decree and restoration of the suit to its original number and file. OMP (M) No.4014 of 2013 was filed under Section 5 of the Limitation Act with a prayer to condone the delay as occurred in filing the application for setting aside the exparte decree. Both the applications right from the date of institution remained listed for consideration, however, ultimately came to be dismissed for want of prosecution initially vide order dated 5.10.2015. Order passed in these applications on that day, reads as under:-

> " The application registered as OMP No. 4241/2013 has been filed with a prayer to set aside the exparte decree passed against applicant-defendant No.2. the another application registered as OMP(M) No.4014/2013 has been filed for condonation of delay as occurred in filing the application OMP No.4241 of 2013. Both the applications are listed today for filing rejoinder. These applications were passed over in the pre-lunch session as there was no appearance on behalf of applicant-defendant No.2. when recalled in the post lunch session, there is again no appearance on behalf of the applicant-defendant No.2. Both applications, therefore, are dismissed for want of prosecution. Pending application(s), if any, shall also stand disposed of."

3. Anyhow on an application registered as OMP No. 336 of 2015, this Court has quashed the order dated 5.10.2015 and both the applications were restored to its original number vide order passed on 24.11.2015. The applications thereafter remained listed for consideration before this Court on different dates, however, again came to be dismissed for want of prosecution vide order dated 24.8.2016, which reads as follows:-

> "This matter was called in the pre-lunch session, however, when no one has put in appearance, was passed over. It is called again in the post-lunch session. Again there is no appearance on behalf of the applicant-defendant No.2.
>
> It is seen that these applications were dismissed for want of prosecution previously also vide order dated 5.10.2015. However, vide order passed on 24.11.2015 in OMP No.336 of 2015, the same were restored to its original number and file. As already recorded, today also no one has put in appearance on behalf of the applicant-defendant No.2. Being so, both the applications are dismissed for want of prosecution. Pending application(s), if any, shall also stand disposed of."

4. Now this application came to be filed with the prayer to set aside the exparte order passed on 24.8.2016. The only explanation qua absence of the applicant-defendant No.2 and learned counsel representing him is that inadvertently and under wrong belief, learned counsel was under the impression that the applications were adjourned to 7.9.2016 instead of 24.8.2016. The explanation so set forth is neither reasonable nor plausible for the reason that both applications were adjourned to 24.8.2016, as per order passed on 9.8.2016 in the presence of learned counsel representing applicant-defendant No.2. Being so, there is no question of the counsel was under wrong impression and belief that the applications were adjourned to 7.9.2016. Keeping in view the past conduct of the applicant i.e. dismissal of both applications on two occasions and on one occasion this Court, after taking lenient view of the matter had set aside the exparte order passed on 5.10.2015 and restored the application(s) to its original number. However, the application(s) came to be dismissed in default again on 24th August, 2016. The applicant-defendant No.2 and learned counsel representing him were therefore, negligent in pursuing these applications throughout. In such a peculiar situation allowing the application and setting aside the dismissal would be nothing but a misplaced sympathy having no place in our legal system. Support in this regard can be drawn from the judgment of the apex Court in ***Shanti Devi & Others*** versus ***Kushaliya Devi,*** reported in ***JT 2015 (8) SC 577.***

5. Irrespective of the observations hereinabove, otherwise also, the applicant-defendant No.2 throughout the proceedings in the applications OMP(M) No.4014 of 2013 and OMP No.4241 of 2013 had been pursuing the matter for the purpose of amicable settlement. Reference in this regard can be made to the following orders passed on 21.7.2014:-

" The learned counsel for the defendant No.2 has handed over a draft of Rs. 2,42,800/- which is accepted and acknowledged by the learned counsel for the plaintiff. It is jointly represented by the learned counsel for the parties that the case be now listed after two months so as to enable the parties to explore the possibility of one time settlement. List on 25.9.2014."

6. Thereafter also both applications remained listed for exploring of possibility of amicable settlement. This Court is apprised that execution proceedings are pending in the Court of learned District Judge, Chandigarh. Applicant-defendant No.2, if so advised, may approach learned Executing Court for amicable settlement during the course of execution proceedings, however, so far as this application is concerned, there is no merit in the same and the same is accordingly dismissed.

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

Abdul Gani .....Petitioner.

Vs.

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

Cr. Revision No.: 05 of 2007
Reserved on: 22.09.2016
Date of Decision: 29.09.2016

Prevention of Food Adulteration Act, 1954- Section 16(1)(a)(i)- Accused was found to be selling adulterated milk as it was containing 8.24% of 'milk solids-not-fat' as against the minimum requirement of 9% - he was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that the Food Inspector deposed that before taking the sample, milk was stirred from right to left and it was shaken upward and downward – proper stirring of milk is required to make it representative – Food Inspector did not state as to what method was adopted by him to ensure the churning/stirring of the entire milk - use of the rod or ladle was not established – Food Inspector was duty bound to ensure that milk sample was homogenous and representative of the entire milk – it is not possible to take non fatty solids from milk without reducing or affecting the fat contents – the prosecution version was not proved beyond reasonable doubt and the accused was wrongly convicted by the Courts- Revision allowed and judgment of the trial as upheld by the Appellate Court set aside. (Para- 10 to 23)

Cases referred:

Sanjaysinh Ramrao Chavan *Versus* Dattatray Gulabrao Phalke and Others, (2015) 3 Supreme Court Cases 123

Food Inspector, Municipal Corporation, Baroda Vs. Madan Lal Ram Lal Sharma and another (1983) 1 SCC 135

State of Himachal Pradesh Vs. Prem Chand, 1990(1) PFA 68

State of Himachal Pradesh Vs. Joginder Singh, Latest HLJ 2006 (HP) 712

P.S. Sharma Versus Madan Lal Kasturichandanji and another (2009) 16 Supreme Court Cases 276

Aministrator of the City of Nagpur Vs. Laxman and another 1995 Supp (1) Supreme Court Cases 247

For the petitioner: Mr. Umesh Kanwar, Advocate.

For the respondent: M/s. Vikram Thakur, Parul Negi and Puneet Rajta, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this revision petition, the petitioner has challenged the judgment passed by the Court of learned Sessions Judge, Chamba in Criminal Appeal No. 1 of 2006 dated 04.12.2006 vide which, learned appellate Court while dismissing the appeal filed by the present petitioner upheld the judgment of conviction passed against the present petitioner by the Court of learned Chief Judicial Magistrate, Chamba in Criminal Case No. 302-III of 2004 whereby the petitioner was convicted for commission of offence punishable under Section 16(1)(a)(i) of the Prevention of Food Adulteration Act, 1954 and was sentenced to undergo simple imprisonment for six months and to pay a fine of Rs.1000/-.

2. The case of the prosecution, in brief, was that a complaint was instituted by Food Inspector Shri M.D. Sharma against the present petitioner to the effect that on 01.03.2004, the complainant was on inspection of milk as well as milk vendors when he found accused possessing about 60 Kg. of milk in galvanized tins which was kept for the sale and consumption of general public. The complainant disclosed his identity to the accused for the purpose of inspection of galvanized tins and one witness was also called by him as he intended to lift a sample of the said milk. Accordingly, he gave a notice on Form No. VI in the presence of independent witness Pushp Nath to the accused. The complainant was duly notified as Government Food Inspector for District Chamba and was authorized to this effect vide Notification No. HFW(B) A-2-1/82 part dated 23.09.2009. As per the prosecution, before lifting the sample, the complainant stirred the entire milk clockwise and thereafter anti-clockwise. Thus, after making the milk homogeneous, he purchased 3.5 mls. milk from the accused on payment of Rs.10/- against receipt. The sample so purchased by the complainant was divided into three parts and poured into three clean dry bottles mixing 40 drops of formalin and thereafter each bottle of sample was labelled with a labelling slip and wrapped externally by a thick wrapping paper followed by thread. After completion of formalities, thumb impression of the accused was taken on each sample and one part of the sample was sent to Public Analyst, Kandaghat in a sealed wooden box through registered parcel and a separate copy of Form No. VII was sent to Public Analyst by registered letter. The remaining two parts of the sample and two copies of Form No. VII were handed over to LHA, Chamba for further action. Further as per the prosecution, the sample of milk which was sent was found to be damaged as communicated vide letter No. CTL(F) 4-1(2)/2004-1690, dated 11.03.2004. Thereafter, second sample was sent through Jaram Singh and this sample was handed over against receipt at CTL, Kandaghat on 22.03.2004. The report of Public Analyst disclosed the sample of milk to be "adulterated" as it was found containing 8.24% of "milk solids-not-fat" against minimum of 9%. The report of the Public Analyst was placed before Chief Medical Officer, Chamba alongwith relevant documents, who after going through the records, accorded his written consent vide letter No. M-PW (Food)/04-100-101, dated 30.06.2004 for launching prosecution against the accused. Accused was accordingly summoned and after consideration of allegations as were contained in the complaint, as there existed a prima facie case, notice of accusation under Section 16(1)(a)(i) of the Food Adulteration Act, 1954 was put to the accused to which he pleaded not guilty and claimed to be tried.

3. On the basis of material produced on record by the prosecution, learned trial Court came to the conclusion that against the minimum prescribed standard of 9% as shown in the report of Public Analyst Ex. PW1/M, "milk solids-not-fat" found in the sample of the complainant was 8.24% and it was held by the learned trial Court that though the difference may be insignificant, but the same cannot be ignored which was below the prescribed standard. On these basis, it was concluded by learned trial Court that the sample which was taken by the complainant from the accused was "adulterated" within the meaning of Section 2 (i)(m) of the Act. Accordingly, learned trial Court convicted the accused for commission of offence punishable under Section 16(1)(a)(i) of the Prevention of Food Adulteration Act, 1954 and sentenced him to undergo six months simple imprisonment and also to pay a fine of Rs.1000/- and in default of payment of fine, the accused was ordered to undergo further conviction for a period of one month.

4. Feeling aggrieved by the said judgment passed by learned trial Court, the petitioner filed an appeal which was dismissed by the learned appellate Court vide judgment dated 04.12.2006. Learned appellate Court while upholding the judgment of conviction passed by learned trial Court held that it was fully proved on record that the accused was found selling adulterated milk meant for sale to the general public, i.e. for human consumption. Learned appellate Court further held that Food Inspector while collecting the sample from the accused had made it homogeneous after stirring it in clockwise and anti clockwise and only thereafter the sample was taken from the same. It was further held by learned appellate Court that Section 2(i)(m) of the Prevention of Food Adulteration Act, 1954 provided that food is adulterated if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability, but which does not render it injurious to health. On these basis, it was held by the learned appellate Court that the sample collected from the accused was adulterated as was evident from the report of Public Analyst Ex. PW1/M. On these points, learned appellate Court upheld the judgment of conviction passed by learned trial Court and dismissed the appeal so filed by the accused.

5. Mr. Umesh Kanwar, learned counsel appearing for the petitioner has argued that both the judgments passed by learned Courts below were perverse and not sustainable in the eyes of law. Mr. Kanwar argued that both the learned Courts below failed to appreciate that before collecting the sample of milk from the accused, the milk was not made homogeneous and the sample which was taken from the same was also thus not homogeneous. According to Mr. Kanwar, it was not proved by the prosecution that the milk was properly stirred and made homogeneous before the same was taken from the accused and, therefore, it could not be said that the sample taken by the Food Inspector was representative. He submitted that this very important aspect of the matter had not been appreciated in its correct perspective by both the learned Courts below and, therefore, judgments passed by both the Courts below were liable to be set aside on this count alone. Mr. Kanwar further argued that even otherwise the judgment of conviction passed against the accused was not sustainable in law because both the learned Courts below failed to appreciate that there was a marginal deficiency of .76% in "milk solids-not-fat" and the same could be for number of reasons including the reason that Food Inspector might not have stirred the milk properly so as to make it homogeneous and on this ground, the accused could not have been convicted. Accordingly, he prayed that as there was perversity in the judgments passed by both the learned Courts below, the same be set aside in exercise of its revisional jurisdiction by this Court and the petitioner be acquitted for commission of offence for which he has been convicted by learned trial Court.

6. Mr. Vikram Thakur, learned Deputy Advocate General, on the other hand argued that there was neither any perversity nor any infirmity with the judgments passed by both the learned Courts below. It was contended on behalf of the State that it stood proved from the report of Public Analyst that "milk solids-not-fat" found in the sample taken from the accused was 8.24% as against the minimum of 9%, therefore, it could not be said that the finding of conviction returned by both the learned Courts below was either perverse or not borne out from the records of the case. On these basis, it was argued on behalf of the State that judgment of conviction passed by learned trial Court and affirmed by learned appellate Court did not warrant any interference.

7. I have heard the learned counsel for the parties and also gone through the records of the case as well as judgments passed by both the Courts below.

8. Before proceeding further in the matter, it is relevant to take note of 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 undeserved 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.

9. In the backdrop of the scope of revisional jurisdiction of this Court, hereinafter this Court shall deal with the respective contentions of the parties.

10. The factum of "milk solids-not-fat" having been found to be 8.24% in the sample of milk which was taken from the accused by the Food Inspector is a matter of record. The factum of the said percentage of 8.24 being below 9% minimum fixed in this regard is also a matter of record. This is evident from Ex. PW1/M, which is the report of Public Analyst. This factual position is not disputed even by the petitioner. The argument of the petitioner is that deficiency of .76% as has been found in the report by the Public Analyst could not have been made the basis of conviction of the accused.

11. Before touching this aspect of the matter, I will first deal with the contention of learned counsel for the petitioner that the sample of milk which was taken from the accused by the Food Inspector was not a representative one as there was no proper stirring of milk. Admittedly, there are neither any provisions under the Food Adulteration Act nor under the Rules framed thereunder as to how sample of milk is to be taken. Therefore, it is required to be found as to whether or not the procedure which was adopted by the Food Inspector in the present case when he took the sample could have brought the milk to its homogeneity or not.

12. Sh. M.D. Sharma, Food Inspector entered the witness box as PW-1 and he stated in his testimony that he took the samples from a can in which there was 10 kg. of milk. He further stated that before he took the sample, he stirred the entire milk from right to left direction and also shook it upwards and downwards. It is settled law that in order to ensure that sample is a representative one, proper stirring of milk is required and if the same is not churned and stirred and thereafter the sample is taken, the same cannot be called a representative sample.

13. This Court relying upon the judgment of the Hon'ble Supreme Court in **Food Inspector, Municipal Corporation, Baroda** Vs. **Madan Lal Ram Lal Sharma and another** (1983) 1 SCC 135 has held in **State of Himachal Pradesh** Vs. **Prem Chand**, 1990(1) PFA 68 that before a sample of milk can be treated to be a representative sample, it should be established on record that quantity of the milk was properly churned to make it homogeneous.

14. In **State of Himachal Pradesh** Vs. **Joginder Singh**, Latest HLJ 2006 (HP) 712, this Court has held that merely by shaking 20 kg. milk in its container will not make it homogeneous and the milk is to be properly stirred with a rod or a ladle.

15. Coming back to the facts of the present case, a perusal of the testimony of the Food Inspector demonstrates that it is nowhere mentioned therein that as to what method was adopted by him to ensure that the entire milk in the milk container could be churned/stirred and mixed up from top to bottom. Use of rod or ladle for the same has not been established. The Food Inspector was duty bound to ensure that the sample which he took was representative and homogeneous sample of the entire milk. In my considered view, in the present case, statement of Food Inspector failed to prove that the milk was made homogeneous by him. Therefore, on the basis of evidence on record, prosecution had failed to prove that the Food Inspector in fact had properly churned and stirred the milk and had made it homogeneous and that the sample which was collected by him was in fact a representative sample. This very important aspect of the matter has been ignored by both the Courts below.

16. Now coming to the second aspect of the matter, the Hon'ble Supreme Court in **P.S. Sharma** Versus **Madan Lal Kasturichandanji and another** (2009) 16 Supreme Court Cases 276 has held:

"2. On the basis that the samples of the milk taken from the respondents contained 6.6% of milk fat and 7.5% of milk solids non-fat, the proceedings were initiated. As per the report of the Public Analyst, the sample contained 3.01% milk fat and 11.02 milk solids non-fat. The difference ultimately came down to only one percent from the standard quantity. On this aspect, the contention put forth on behalf of the respondents is that the difference in percentage is on account of the circumstance that the distribution of fat in the milk in separate sample bottles will not be even as a result of violent churning of the milk. When marginal difference like one percent was noticed by the Public Analyst or by the Central Food Laboratory, the courts have taken the view that it is possible that there may be some error creeping in the conclusion reached thereto. In somewhat similar circumstances, this Court has upheld the orders of the courts below acquitting the accused in Aministrator of the City of Nagpur Vs. Laxman. The view taken by the High Court of Gujarat in State Vs. Bhagubhai Ramjibhai followed by the High Court is also on the same lines."

17. The Hon'ble Supreme Court in **Aministrator of the City of Nagpur** Vs. **Laxman and another** 1995 Supp (1) Supreme Court Cases 247 has held:

"2. This appeal against acquittal arises under Prevention of Food Adulteration Act. The whole question is whether the sample of cow milk is adulterated so as to attract the penal provision of the Act. Learned Magistrate who acquitted the respondent who was a small milk vendor noted that the fat percentage is 6% as against 3.5% which is more than the standard prescribed for cow milk. The only shortfall was that S. N. F. was 7.3% where it ought to have been 8.5%. Further, it noted that the total solids are 13.37 which is again more than the satisfying standard of cow milk. Under these circumstances, we cannot say that courts below have erred in acquitting them giving the benefit of doubt to the respondents. The appeal is, therefore, dismissed."

18. The percentage of milk fat and non-fatty milk solids depends on the proper feeding and the health of the animal. It cannot be disputed that there is a problem of non-availability of nourishing and sufficient quantity of food for the cattle, both green and otherwise. The quantity of food given to an animal affects to certain extent, the quantity and quality of milk produced by said animal. Thus, it is not possible to take non fatty solids from milk without reducing or affecting the fat contents.

19. In my considered view, on these basis, it cannot be said that the accused intentionally effected any adulteration in the milk. When milk is found deficient in milk solids not fat, it cannot be said that milk is not pure but only inference which can be drawn is that the buffalo/cow was not properly fed.

20. Learned counsel for the petitioner has also drawn the attention of this Court towards the judgment passed by the High Court of **Punjab and Haryana in Balkar Singh** Vs. **State of Haryana**, Criminal Revision No. 37 of 2006 dated 21.04.2011, in which Hon'ble High Court of Punjab and Haryana has held:

"*4. The solitary submission of learned counsel for the petitioner is that there was a marginal deficiency of 0.46 percent in the milk solids not fat and for the same there could be number of reasons, viz. that (i) Food Inspector might not have stirred properly so as to make it homogeneous (ii) same taken was not found deficient in milk-fat; and (iii) when milk-fat was 5.3 percent and fulfilled the prescribed standard, therefore, the marginal deficiency of 0.46 percent in the milk solids not fat could be due to poor feed of the cow.*

5. To support the submissions, reliance has been placed upon P.S. Sharma Vs. Madanlal Kasturichandji and another 2002(2) FAC 224, Bhal Singh Vs. State of

Haryana 2003 (1) FAC 207 and Administrator of City of Nagpur Vs. Laxman and another 1996(2) FAC 297.

6. In P.S. Sharma's case (supra), there was a marginal difference of only 1 percent from the minimum prescribed standard. It was observed by the Hon'ble Supreme Court that when marginal difference of 1 percent was noticed by the Public Analyst or Central Food Laboratory, it is possible that there may be some error creeping in the conclusion reached thereto. Hon'ble Supreme Court also relied upon its earlier decision in Laxman's case (supra). In that case, the only shortfall was that milk solids not-fat was 7.3 percent, whereas it ought to have been 8.5 percent and the accused-respondent (therein) was acquired by the Courts below and the Hon'ble Supreme Court dismissed the appeal filed by Administrator of the City of Nagpur.

7. In Darshan Singh Vs. State of Haryana 1995(1) FAC 79, the milk was found deficient only by 0.4 percent in milk solids not-fat of the minimum prescribed standard. This Court set-aside the conviction and sentence imposed by the Courts below. To the same effect is the decision of this Court in Sawaran Singh Vs. State of Haryana 1997(3) RCR (Criminal) 546.

8. As observed above, in this case, per the Central Laboratory's report (Exhibit PF), milk solids not-fat was found deficient only to the extent of 0.46 percent. So, possibility cannot be ruled out of an error creeping in particularly because the reports of the two laboratories did not tally.

9. Above being the factual and legal position, this Court is of the opinion that both the Courts below fell in error in convicting and sentencing the petitioner. Thus, revision petition is accepted and the judgments of conviction and order of sentence passed by the Courts below are set aside. The petitioner is acquitted of the charges framed against him."

21. In my considered view, it is apparent from the material which has been produced on record by the prosecution that it had not been established on record that the sample taken by Food Inspector of milk from the accused was a representative one as the prosecution failed to prove that the entire milk was properly churned/stirred and mixed up from top to bottom by the Food Inspector before he took the sample from the same. Similarly, both the learned Courts below erred in convicting the accused on the ground that the sample of milk taken from the accused by the Food Inspector was adulterated as "milk solids-not-fat" was present to the extent of 8.24% against minimum prescribed 9% without appreciating that whereas the fats were found almost in conformity with the prescribed standard and, therefore, looking to this marginal difference in solids not fat the possibility of uncommon distribution of fat in the sample so taken could not be ruled out. Keeping in view the fact that the difference was not more than 1%, therefore, the principles laid down by the Hon'ble Supreme Curt in **P.S. Sharma** Vs. **Madanlal Kasturichandiji and another**, (2009) 16 Supreme Court Cases 276 applied and the accused was entitled for acquittal.

22. Therefore, in view of the discussion held above, in my considered view, both the learned Courts below erred in convicting and sentencing the petitioner for commission of offence punishable under 16(1)(a)(i) of the Prevention of Food Adulteration Act, 1954.

23. Present revision petition is therefore allowed and the judgment of conviction and order of sentence passed by learned trial Court in Criminal Case No. 302-III of 2004 dated 02.09.2005 and upheld by learned appellate Court in Criminal Appeal No. 1 of 2006 dated 04.12.2006 are set aside and the petitioner is accordingly acquitted of the charges framed against him.

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

Intelligence Officer, Directorate of Revenue Intelligence .....Petitioner.
Versus
Shri Anil Kumar and another .....Respondents.

Cr.MMO No. 69 of 2013.
Date of Decision : 29th September, 2016.

Code of Criminal Procedure, 1973- Section 451 and 457- A case for the commission of offence punishable under Section 25-A and 27-A of N.D.P.S. Act was registered – an application for release of medicine was filed, which was allowed- held, that the seized articles constituted case property and its production was necessary for establishing the case of the prosecution – the petition allowed and the order of release set aside. (Para-2)

For the Petitioners: Mr. Ashok Sharma, ASGI with Mr. Angrez Kapoor, Advocate.
For the Respondents: Mr. Anand Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The accused/respondents herein allegedly committed offences punishable under Section 25-A and 27-A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the "Act"). During the pendency of the trial before the learned trial Court, an application stood moved therebefore under Section 457/451 of the Code of Criminal Procedure by the respondents/accused wherewithin they claimed release of medicines as stood seized besides were taken into possession by the petitioner herein while raiding the factory premises of the respondents/accused. The application was allowed by the learned trial Court, whereby it ordered for the release vis-a-vis the respondents/accused, the medicines/drugs as stood taken into possession by the Intelligence Officer from the factory premises of the respondents/accused.

2. The learned counsel appearing on either sides have been heard at length. The relevant seizure made by the Intelligence Officer from the premises of the accused/respondents, constituted the "case property" also with respect thereto offences punishable under Section 25-A and 27-A stand constituted against the accused/respondents. Consequently, for proof qua its efficacious seizure by the Intelligence Officer from the factory premises of the respondents/accused on his raiding the factory premises, its production before the learned trial Court was imperative also thereupon the prosecution would hence succeed in proving the charge whereupon the accused/respondents stand tried by the learned trial Court. Given hence the imperativeness of its production by the prosecuting agency before the learned trial Court, it was manifestly insagacious for the learned trial Court to proceed to order for its release qua the respondents/accused. It appears that the learned trial Court while making its satisfaction qua the imperativeness of its release vis-a-vis the accused/respondents has placed reliance upon a decision of the Hon'ble Apex Court reported in a case titled as Sunderbhat Ambala Desai Vs. State of Gujarat, AIR 2003 SC 638 yet reliance thereupon by it is grossly inapt as the apposite order recorded therein qua the release of the case property stood rendered vis-a-vis its lawful owner also its hence standing ordered to be released by the Hon'ble Apex Court was subject to imposition of certain conditions upon its lawful owner. Even though the respondents/accused may be the owners of the relevant medicines as stand seized from their factory premises by the Intelligence Officer concerned, nonetheless, theirs prima facie standing held in the relevant factory premises in flagrant transgression of the mandate of the provisions of Section 25-A and 27-A of the Act, prima facie renders the accused/respondents to be amenable to face charge before the learned trial Court for theirs allegedly committing the offences constituted in the aforesaid penal provisions of law. Necessarily for reiteration its production before the learned

trial Court by the prosecuting agency is imperative. The learned trial Court while rendering the impugned rendition has misapplied to the factual matrix hereat the ratio decidendi held in the rendition of the Hon'ble Apex Court significantly when gross contradistinctivity occurs in the factual matrix prevailing therein vis-a-vis factual matrix prevailing hereat, contradistinctivity whereof imminently surges forth from the salient fact occurring in the verdict of the Hon'ble Apex Court, qua the owner who therein claimed the release of the case property also being the victim of the offence committed qua it, whereas, hereat the owners of the relevant property are not the victims of the offence rather are alleged to commit offences vis-a-vis the relevant case property. The aforesaid marked distinctivity inter se the factual matrix prevalent thereat vis-a-vis the factual matrix prevalent hereat obviously renders it to not hold any clout hereat for thereupon this Court standing constrained to validate the rendition of the learned trial Court nor hence it constitutes the adherable ratio decidendi. Furthermore, given the factum of the relevant drugs/medicines on standing released suffering the fate of theirs/it standing tampered with also theirs hence nullifying the entire exercise of the Intelligence Officer concerned, prods this Court to interfere with the impugned order. Consequently, the instant petition is allowed and order impugned hereat is quashed and set aside. Records be sent down forthwith. All pending applications also stand disposed of.

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

Mohinder Singh and others ....Appellants.

Versus

Nikku Ram ... Respondent.

RSA No. 263 of 2008.
Reserved on: 16.09.2016.
Decided on: 29.09.2016.

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for declaration that they were owners in possession of the suit land and entries in the revenue record are incorrect - a plea was taken that the suit was barred under Section 57 of H.P. Holdings (Consolidation and Prevention of Fragmentation) Act, 1971 – the objection was upheld by the trial Court and plaint was ordered to be returned for presentation before the appropriate court- an appeal was filed, which was dismissed – held, in second appeal that the plaintiffs had earlier initiated the proceedings before the Consolidation Authorities- they had taken the same pleas, before the authorities which were taken by them in the civil suit – no procedural irregularity was pointed out – the jurisdiction of the civil Court is barred under Section 57 of the Act – the Court had rightly ordered the return of the plaint – appeal dismissed. (Para- 12 to 14)

Cases referred:

Leetho versus Chamelo and others, (2001) II SLJ 1802

Parmeshwari Dass & Ors. Vs. Roshal Lal & Ors. in RSA No. 114 of 1999 (2009) 1Cur.L.J. 225

Dhruv Green Field Limited v. Hukam Singh and others, 2002 (6) SCC 416

For the appellants. : Mr. Anup Rattan, Advocate.

For the respondent : Mr. N.K. Thakur, Sr. Advocate with Ms. Jamuna Pathik, Advocate for the respondent.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge.

By way of this appeal, the appellants/plaintiffs have challenged the judgment passed by the Court of learned District Judge, Una, in Civil Appeal No. 41 of 2007, dated

31.01.2008, vide which, learned Appellate Court dismissed the appeal of the present appellant and upheld the judgment passed by the Court of learned Civil Judge (Jr. Divn.), Court No. 2, Amb, District Una, in Civil Suit No. 83 of 2000, dated 31.05.2007, whereby, learned trial Court had returned the plaint of the plaintiff after endorsement under Order 7, Rule 10 (2) of the Code of Civil Procedure (for short 'CPC) on the ground that the Civil Court was not having the jurisdiction to decide the matter in dispute.

2. This appeal was admitted on 20.11.2008 on the following substantial questions of law:

"Whether the learned Courts below have erred by returning the plaint when the question of title was raised before the learned courts below?

Whether the impugned judgments are against the law laid down by this Hon'ble Court in case titled as Leetho versus Chamelo and others (2001 Volume-II SLJ 1802)"

3. Brief facts necessary for the adjudication of this case are that the appellants (hereinafter referred to as 'plaintiffs') filed a suit for declaration to the effect that they were owners in possession of the suit property being part of courtyard of the residential abadies and defendant had no right, title and interest over the land measuring 0-00-76 hectares, comprised of Khewat No. 214 min, Khatauni No. 299 min, Khasra No. 1473 (old) and Nos. 1155 and 1188 (new) as entered in Nakal Misal Hakiat Istemal for the year 1998-1999, situated in village Nari, Tehsil Amb, District Una, H.P.(hereinafter referred to as 'suit land') and entries in the revenue record in the name of defendants as owner in possession were wrong, illegal, void without the order of any competent authority and ineffective as against the rights of the plaintiffs. Plaintiffs had further prayed for issuance of decree of permanent injunction as a consequential relief restraining the defendants from forcibly ousting the plaintiffs or raising any construction over the suit land.

4. The suit of the plaintiffs was contested by the defendant and a preliminary objection was taken by the defendant with regard to maintainability of the same on the ground that suit was barred under the provisions of Section 57 of The Himachal Prsadesh Holdings (Consolidation and Prevention of Fragmentation) Act, 1971 (hereinafter referred to as 'Consolidation Act'). It was stated in para 6 of the written statement that plaintiffs in fact had filed an appeal under Section 54 of the Consolidation Act before the Director, Consolidation which appeal was preferred against the dismissal of their appeal before Settlement Officer, Consolidation and litigation pertaining to the suit land was pending before the consolidation authorities for the last more than five years. On these bases, it was contended by the defendant that suit in fact was barred under the provisions of Section 57 of the Consolidation Act. Besides this, on merits also, the suit of the plaintiff was contested by the defendant.

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

"1. Whether the plaintiffs are owners in possession of the suit land, as alleged? OPP.

2. Whether the entry in the name of defendant is wrong, illegal, void as alleged? OPP.

3. Whether the plaintiffs are entitled for relief of injunction, as prayed for? OPP.

4. Whether the suit is not maintainable? OPD.

5. Whether this court has no jurisdiction? OPD.

6. Whether plaintiffs have got no cause of action? OPD.

7. Whether the plaintiffs are estopped by their act and conduct? OPD.

8. Whether the suit is not properly valued? OPD

9. Whether the suit is bad for non-joinder of necessary parties?OPD.

10. Relief."

6. On the basis of evidence led by the parties both ocular as well as documentary in support of their respective cases, the issues so framed were answered by the learned trial Court in the following manner:-

"Issue No.1 : Redundant.
Issue No. 2 : Redundant.
Issue No. 3 : Redundant.
Issue No.4 : Redundant.
Issue No.5 : Yes.
Issue No. 6 : Redundant.
Issue No. 7 : Redundant.
Issue No. 8 : Redundant.
Issue No. 9 : Redundant.
Relief : The plaint be returned to the plaintiffs as per operative portion of the judgment."

7. It was held by the learned trial Court that it stood proved on record that plaintiffs had moved an application before the Consolidation Officer under Section 30(2) of the Consolidation Act and aggrieved by the decision on the same, plaintiffs moved an application before the Settlement Officer, Consolidation under Section 30 (3) of the Consolidation Act. Learned trial Court further held that it was also revealed that aggrieved from the order of Settlement Officer, Consolidation, plaintiffs had thereafter filed an appeal under Section 30 (4) of the Consolidation Act before the Director Consolidation which was pending adjudication. On these bases, it was held by the learned trial Court that as the matter in dispute was already pending adjudication before the statutory authority under the Consolidation Act, Civil Court was having no jurisdiction to adjudicate the matter as the jurisdiction of the Civil Court was barred under Section 57 of the Consolidation Act. It was further held by the learned trial Court that though in the plaint, plaintiffs had tried to make out a cause of action for maintaining the suit by pleading that defendant under the garb of wrong revenue record had started throwing illegal threats, however, plaintiffs had concealed in the plaint the factum of having filed applications and appeals before various authorities under the Consolidation Act. On these bases, it was concluded by the learned trial Court that this proved that the plaintiffs themselves were aware that if the said facts were pleaded by them in the plaint then it would have an adverse effect on their case. Accordingly, it was held by learned trial Court that the suit filed by the plaintiffs was barred under Section 57 of the Consolidation Act and the Civil Court was not having jurisdiction to try the same. On these bases, the plaint was returned to the plaintiff after endorsement under Order 7, Rule 10(2) of CPC. It was further held that as the appropriate authorities were already adjudicating the matter in dispute, hence, there was no necessity to direct the plaintiff to present the plaint before the appropriate authorities.

8. Feeling aggrieved by the said judgment passed by the learned trial Court, plaintiffs filed an appeal. Learned Appellate Court vide judgment dated 31.01.2008, upheld the judgment and decree passed by the learned trial Court and dismissed the appeal so filed by the plaintiffs. It was held by the learned Appellate Court that it was a matter of fact that the controversy in the case had arisen out of consolidation proceedings and appeal filed in this regard by the plaintiffs under the Act was still pending before the Appellate Authority. It was held by the learned Appellate Court that in view of the provisions of Section 57 of the Act, jurisdiction of the Civil Court to entertain the suit was clearly barred. Learned Appellate Court further held that the contention of the plaintiffs to the effect that consolidation authorities had failed to observe the procedure laid down in the Consolidation Act and therefore the Civil Court could assume jurisdiction to entertain the suit despite express bar was without any merit as there was no evidence produced on record by the plaintiffs to the effect that while adjudicating the matter in controversy the authorities concerned had failed to observe the procedure laid down under the

Consolidation Act. On these bases, learned Appellate Court while upholding the judgment and decree passed by the learned trial Court dismissed the appeal so filed by the plaintiffs.

9. Mr. Anup Rattan, learned counsel for the appellants has strenuously argued that the findings returned by both the learned Courts below to the effect that the suit filed by the plaintiffs was barred under Section 57 of the Consolidation Act were perverse as the judgments passed by the learned Courts below were not in consonance with the law laid down by this Court in **Leetho versus Chamelo and others, (2001) II SLJ 1802**. It was further argued by Mr. Rattan that both the learned Courts below failed to appreciate that Civil Court was having jurisdiction to adjudicate upon the suit filed by the plaintiffs in view of the fact that the question of title was raised by the plaintiffs in the suit so filed. On these basis, it was argued by Mr. Rattan that the judgments and decrees passed by both the learned Courts below were liable to be quashed and set aside and the suit of the plaintiffs deserves to be decreed as prayed for.

10. On the other hand, Mr. N.K. Thakur, learned senior counsel appearing for the respondent submitted that the judgments and decrees passed by both the learned Courts below were not perverse as both the Courts below had rightly held that the suit filed by the plaintiffs was not maintainable in view of the provisions of Section 57 of the Consolidation Act. It was argued by Mr. Thakur that it was a matter of record that the suit land, subject matter of the Civil Suit filed by the plaintiffs was the same with regard to which, the plaintiffs had already filed proceedings and appeals under Section 30 of the Consolidation Act. Mr. Thakur further argued that it was also an admitted fact that the plaintiff in fact was aggrieved by the consolidation proceedings which had been initiated by the authorities concerned under the provisions of Consolidation Act. It was further argued by Mr. Thakur that because the plaintiffs were aware of the fact that their suit was not maintainable in view of the bar contained in Section 57 of the Consolidation Act, therefore purposely the factum of proceedings already having been initiated by the plaintiffs before the appropriate authorities under the provisions of Consolidation Act were concealed in the plaint. Accordingly, it was argued by Mr. Thakur that there was no merit in the present appeal and the same be dismissed.

11. 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.

12. During the course of arguments, learned counsel for the plaintiffs/appellants did not dispute the fact that the proceedings which had been initiated by the appellants/plaintiffs under the provisions of Consolidation Act pertained to the same land which was subject matter of the civil suit filed by them before the Civil Court, from which this appeal has arisen. Further learned counsel for the appellant also did not deny the fact that the dispute which was raised by the appellants before the consolidation authorities was same and similar to the dispute which had been raised by them in the Civil Suit and therein also the case was filed against the present respondent. Therefore, it is abundantly clear that before filing civil suit bearing No. 83 of 2000 before the Court of learned Civil Judge (Jr. Divn.) Court No. (II), Amb, District Una, the plaintiffs had already invoked the jurisdiction of the competent authorities under the Consolidation Act for the redressal of their grievance qua the land which was subject matter of the civil suit filed before the learned trial Court. Further the suit was filed by the plaintiffs by concealing all these facts and that too during the pendency of an appeal filed by them before the Appellate Authority, feeling aggrieved by the orders which had been filed on their applications by the competent statutory authorities under the Consolidation Act. It is not a case where the jurisdiction of the authorities under the Consolidation Act was invoked by the present respondent. Admittedly, the jurisdiction was invoked by the plaintiffs themselves. Therefore, simply because the orders which were passed by the competent authorities under the Consolidation Act went against the plaintiffs, this did not confer upon the plaintiffs a right to file a suit pertaining to the same land and praying for the similar relief though differently worded before a Civil Court. The findings returned by the learned Appellate Court to the effect that plaintiffs could not point out any procedural irregularity carried out by the competent authority while deciding the matter under the Consolidation Act

could not be demonstrated to be incorrect during the course of arguments in the present appeal by the learned counsel for the appellant.

13. Section 57 of the Consolidation Act reads as under:

> *"57.* ***Jurisdiction of civil court barred as regards matters arising under this Act****-No person shall institute any suit or other proceedings in any civil court with respect of any matter arising out of the consolidation proceedings or with respect of any other matter in regard to which a suit or application can be filed under the provisions of this Act."*

14. As I have already discussed above, it is not in dispute that the case of the plaintiffs on the basis of which they filed the civil suit is arising out of the consolidation proceedings. It is also a matter of record that the plaintiffs were already agitating the issue before the authorities as prescribed under the Consolidation Act and suit was filed without disclosing this fact in the plaint. Be that as it may, fact of the matter still remains that under the provisions of Section 57 of the Consolidation Act, jurisdiction of Civil Court is barred with respect to any matter arising out of consolidation proceedings. In this view of the matter, in my considered view, learned trial Court rightly returned the plaint under the provisions of order 7 Rule, 10(2) of CPC by holding that the suit so filed by the plaintiffs was barred by the provisions of Section 57 of the Consolidation Act. Similarly, learned Appellate Court also rightly upheld the findings so returned by the learned trial Court. There is no infirmity with the findings so returned by both the learned Courts below. The judgment of this Court in case **Leetho Versus Chamelo and others, (2001) II, SLJ 1802**, is distinguishable and has no bearing in the present case. In the above case, this Court was dealing with the interpretation of Section 171 (2) (xvii) of the H.P. Land Revenue Act, 1953 and while interpreting the said provisions it was held by this Court that the statutory provisions of Section 171 (2) (xvii) of the H.P. Land Revenue Act, 1953 puts a bar that Civil Court shall not exercise jurisdiction over any claim of partition of an estate, holding or tenancy, or any question connected with, or arising out of proceedings for partition, but qualifies that a question as to title should not be involved in any of the property of which partition is sought. Thus, on the basis of language of the said provision, it was held by this Court that there was no absolute bar and the moment the question of title is raised, the Civil Court gets the jurisdiction. In my considered view the findings returned by this Court in the abovementioned case do not have any bearing in the present case because in the abovementioned case, this Court was dealing with the provisions of H.P. Land Revenue Act and the interpretation given by this Court was based on the language of statute itself. Similarly the judgment passed by this Court in **Parmeshwari Dass & Ors. Vs. Roshal Lal & Ors. in RSA No. 114 of 1999 reported in (2009) 1Cur.L.J. 225** is also of no assistance to the appellant because in that case it was held by this Court that the revenue entries recorded therein were a nullity and it was on these basis that this Court is relying upon the judgment of the Hon'ble Supreme Court in **Dhruv Green Field Limited v. Hukam Singh and others, 2002 (6) SCC 416** held that civil court had jurisdiction as the action complained was a nullity. In the present case, it is an admitted fact that it was the appellants who invoked the jurisdiction of the competent authority under the Consolidation Act and subsequent proceedings arising thereof were still pending by way of appeal before competent authority which appeal was also filed by the present appellant under the provisions of the Consolidation Act when the suit was also simultaneously filed. Therefore, in my considered view, the judgments and decrees passed by both the learned Courts below against the present appellants cannot be faulted with. Learned trial Court rightly returned the plaint to the plaintiffs under the provisions of Order 7, Rule 10(2) of the Civil Procedure Code and learned Appellate Court rightly upheld the judgment so passed by the learned trial Court.

Keeping in view the fact there is neither any perversity nor any infirmity with the findings which have been returned by learned Courts below and also in view of the ratio of the abovementioned judgments, I do not find any merit in the present appeal and the same is accordingly dismissed with costs. Pending application(s), if any, also stands disposed off.

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

Cr. Revision No.208 of 2008
along with Cr. Revision No. 209 of 2008.
Date of Decision : 29th September, 2016.

1. **Cr. Revision No.208 of 2009**.

Om Prakash .....Petitioner.

Versus

State of H.P. ....Respondent.

2. Cr. Revision No.209 of 2008.

Mohinder .....Petitioner.

Versus

Anil Kumar ....Respondent.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 100 grams of charas – he was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held in revision that 100 grams of charas is more than small quantity; therefore, the case was triable by the Special Court – the trial of the accused was vitiated – revision accepted- case remanded to the Special Court for a fresh decision in accordance with law. (Para-4 to 7)

For the Petitioners: Mr. Naveen K. Bhardwaj, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

Both these petitions are being disposed of by a common judgment as they stand preferred against a common judgment rendered on 20.11.2008 by the learned Additional Sessions Judge, Fast Track Court, Kullu, whereby the latter Court affirmed the judgment of the learned trial Court whereby the accused/petitioners herein stood convicted besides a consequential sentence stood imposed upon them.

2. The facts necessary for an adjudication upon the instant criminal revision petitions are that on 12.11.2005 at about 3.00 a.m., ASI Lal Chand along with other police officials was present at Manali bridge in connection with Nakabandi. One motor cycle came towards Manali bazaar from Aleo side. The motor cycle was stopped. The rider of the motor cycle tried to turn back and on suspicion, the said rider alongwith the pillion rider of the motor cycle were apprehended. During the course of personal search of accused Om Prakash, one steel container was recovered from the left pocket of his jacket and on the opening of the same, it was found containing charas in the shape of small balls kept in a polythene wrapper. Recovered charas was weighed and it was found to be 100 grams. One 10 gram weight, currency note of Rs.11050 had also been recovered from the jacket of accused Om Prakash. Charas was recovered from the person of accused OM Prakash and co-accused Mohinder was having knowledge about the possession of charas by co-accused Om Prakash. Rukka was prepared on the spot which was sent to Police Station, Manali through H.C. Mohar Singh. On the basis of which FIR was registered against the accused. Thereafter the Investigating Officer completed all the codal formalities.

3. The learned Judicial Magistrate 1st Class, Manali charged accused Om Prakash for his committing an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the "Act") besides charged accused Mohinder for his committing an offence punishable under Section 29 of the Act. In sequel, to the conclusion of the trial to which both accused aforesaid stood subjected to, they stood convicted and sentenced by the learned Judicial Magistrate 1st Class, Manali. Both the petitioners standing

aggrieved by the judgment of the learned Judicial Magistrate 1st Class, preferred appeals therefrom before the learned Additional Sessions Judge, Fast Tract Court, Kullu, whereupon the latter Court rendered a judgment in affirmation to the judgment of conviction and sentence imposed upon the accused/petitioners by the learned trial Court.

4. Charas holding a weight of 100 grams stood allegedly recovered from the purported exclusive and conscious possession of accused Om Prakash. At the relevant stage of effectuation of its recovery from the purported exclusive and conscious possession of co-accused Om Prakash, he stood accompanied by co-accused Mohinder Singh. The trite submission addressed herebefore by the learned counsel appearing for the accused/petitioners stands anvilled upon the factum of the learned Judicial Magistrate 1st Class, who convicted besides sentenced the accused for the offences for which they stood charged holding no jurisdiction to hold the accused for trial whereupon he contends of its verdict standing stained with a vice of jurisdictional incompetence also he canvasses qua the judgment in affirmation thereto rendered by the learned Additional Sessions Judge, Kullu also concomitantly standing stained with a parameteria vice of vitiation, vice whereof stands contended by the learned counsel for the appellant to sprout from the factum qua given the quantity of charas allegedly recovered by the Investigating Officer concerned from the purported exclusive and conscious possession of co-accused Om Prakash at the site of occurrence whereat he stood accompanied by co-accused Mohinder Singh rendering both the learned Courts below disempowered to try the accused also theirs holding no jurisdictional clout to convict besides sentence both the accused. The lack of jurisdictional competence in the Judicial Magistrate concerned to hold the accused for trial for theirs purportedly jointly holding possession of 100 grams of charas is embedded in the factum of the aforesaid quantum of charas not falling within the domain of the statutory definition imparted to "small quantity" of charas by Section 2 (xxiia) of the Act, whereupon the relevant jurisdiction to try the accused vested in the Special Court. Definition of "small quantity" as stands encapsulated in Section 2 (xxiia) of the Act stands extracted hereinafter:-

> ""small quantity", in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette."

Significantly, when the statutory definition qua small quantity as stands encapsulated therein holds therewithin an apparent coinage of the relevant narcotic drug being construable to be holding a weight whereupon it would stand characterized to be its small quantity only when its weight as determined by the Investigating Officer concerned is lesser than the weight as stands displayed vis-a-vis it in the relevant notification. Taking a clue from the statutory definition of "small quantity" held in Section 2(xxiia) besides in conjunction therewith bearing in mind the relevant narcotic drug conspicuously "charas" allegedly recovered by the Investigating Officer from the purported conscious and exclusive possession of co-accused Om Prakash at the relevant site, holding a weight of 100 grams, renders its weight to stand constituted in the category of greater than its small quantity, especially when its holding a weight of 100 grams stands pronounced in the relevant notification to be a weight equivalent to its standing characterized as its small quantity, whereas the aforesaid manifestation occurring in the relevant notification stands imperatively enjoined to be read unbereft of rather in coagulation with the statutory definition of "small quantity" held in the aforesaid section of the Act. In sequitur with visible pronouncements occurring in the relevant notification displaying therein the respective weights of the relevant drugs for theirs being thereupon construable to be falling within the ambit of its small quantity or its intermediate quantity or its commercial quantity when as enjoined stand read in coagulation with the statutory definition of "small quantity" wherewithin an echoing is held of the relevant weight of the relevant narcotic drug being construable to be falling within the ambit of "small quantity" only when it holds a weight lesser than its optimum weight specified in the apposite notification existing in the Official Gazettee. Consequently, even if the relevant notification pronounces 100 grams of charas to be the optimum weight qua small quantity of charas, nonetheless, when imperatively in coagulation thereof reverence is also enjoined to be meted to the statutory definition of small quantity, wherewithin a trite articulation occurs qua a

quantity lesser than the optimum quantity of the relevant drug manifested in the apposite notification alone rendering the relevant drug to stand characterized qua its holding a small quantity. In sequel, with charas hereat holding a weight of 100 grams, weight whereof stands pronounced in the apposite notification to be the optimum weight qua its small quantity renders on anvil of the afore extracted statutory definition qua its small quantity wherewithin it is to be construable to be its small quantity only when it holds a weight lesser than 100 grams, qua the weight of 100 grams of charas being obviously construable to be a quantity other than its small quantity, tritely it holding a weight lesser than its commercial quantity or more than its small quantity. While imparting the aforesaid signification to the statutory parlance of "small quantity" held in Section 2 (xxiiia) of the Act, this Court draws succor from a rendition of a Full Bench of this Court reported in ***Ratto versus State of H.P., 2003(2) SimLC 161***, relevant paragraphs No.19 and 20 whereof stands extracted hereinafter, wherewithin a firm dictak occurs of words in a statute being amenable to be imparted their natural grammatical meaning.

> "19. In our considered view quantity greater than, has to be given its simple and grammatical meaning. Reason is that there is no ambiguity in these words. Nor they call be given any other meaning that the one as are understood in the common parlance. We further feel that these words are not capable of being interpreted-in any other manner except that commercial quantity as notified by the Central Government has to be greater than or to say more than/bigger than/larger than one Kg.
>
> 20. For holding so, we are of the view that legislature was well aware when the words "greater than" were incorporated in the sub-section as also about its meaning. There can hardly be any other purpose, import or meaning that can be attributed to the words "quantity greater than" used in the aforesaid sub-section. Thus, there is no ambiguity while examining this provision of law."

5. While holding a literal construction to the definition of "small quantity" held in Section 2 (xxiia) of the Act also on imputing a natural meaning to its phraseology of "any quantity lesser than the quantity specified by the Central Government by a notification in the Official Gazetee" it being alone the apt reckoner for erecting an inference qua the relevant drug being construable to be falling within the ambit of its small quantity, fosters an imminent conclusion of the legislature in its wisdom construing the weight of the relevant drug to fall within the ambit of its "small quantity" only when it holds a weight lesser than its optimum weight displayed in the relevant notification. The word "lesser" occurring in the relevant statutory definition of "small quantity" held in Section 2(xxiiia) of the Act ought to be imputed no meaning other than what it obviously conveys. Consequently, it is held of charas weighing 100 grams as stood allegedly recovered from the purported exclusive and conscious possession of accused Om Prakash at the relevant site of occurrence whereat he stood allegedly accompanied by co-accused Mohinder falling within the ambit and domain of higher than or greater than its small quantity.

6. Be that as it may, it is also imperative to determine the tenacity of the submission addressed hereat by the learned counsel appearing for the petitioner qua the trial held by the Judicial Magistrate concerned standing vitiated, his standing disabled to try the accused for theirs allegedly committing the relevant offences. The relevant guidance for solving the aforesaid conundrum stands purveyed by Section 20 of the Act, relevant provisions whereof stand extracted hereinafter:

> "20. Punishment for contravention in relation to cannabis plant and cannabis.-.....
>
> (a).....
>
> (b).....
>
> (i).....
>
> (ii) where such contravention relations to sub clause (b),-
>
> (A) and involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine, which may extend to ten thousand rupees, or with both;

(B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisnment for a term which may extend to ten years and with fine which may extend to one lakh rupees;

(c) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees;

The aforesaid provisions provide qua on culmination of the trial of the relevant accused qua his allegedly holding conscious and exclusive possession of a narcotic drug holding a weight higher than its statutory small quantity, whereupon the Court concerned records findings of conviction vis-a-vis him, it holding jurisdiction to impose upon him both, a sentence of rigorous imprisonment for a term which may extend upto 10 years and a sentence of fine which may extend upto one lakh rupees. However, the aforesaid provisions stand enjoined to be conjointly read with the provisions of Section 36A (1) (a), which stand extracted hereinafter, wherewithin a mandate is held of where an offence amenable to imposition of punishment of imprisonment for more than three years stands committed, it being triable only by the Special Court constituted in the area. Relevant provisions of Section 36A read as under:-

"36A. Offences triable by Special Courts.- (1) Notwithstanding anything contained in the Code of Criminal Pcoredure, 1973 (2 of 1974),-

(a) all offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court constituted for the are in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government;

....."

Section 36 contains provisions qua constitution of Special Courts. Sub section 3 mandates of no person standing qualified for appointment as a Judge of a Special Court unless he is immediately before such appointment, a Sessions Judge or an Additional Sessions Judge. In aftermath, with the Special Court alone holding jurisdiction to impose a sentence of imprisonment of more than three years for an offence allegedly committed by the accused qua theirs allegedly holding purported conscious and exclusive possession of charas, holding a weight more than its statutory small quantity also with a Sessions Judge or an Additional Sessions Judge alone holding the capacity to man the Special Court, also thereupon the Judicial Magistrate 1st Class, Manali obviously has no jurisdiction to try the accused for theirs allegedly jointly holding purported conscious and exclusive possession of charas, weight whereof is more than its small quantity. In sequitur, with the initial jurisdiction for trying besides convicting and sentencing the accused not vesting in the Judicial Magistrate concerned, his verdict whereupon he convicted and consequently sentenced the accused holds no jurisdictional vigour. Concomitantly, also the renditions in appeals carried therefrom before the learned Additional Sessions Judge, by the latter, whereby, pronouncements in affirmation stood rendered also stand ingrained with a vice of jurisdictional incompetence.

7. Consequently, the instant revisions petitions are allowed. The judgments impugned before this Court are quashed and set aside. The trial of the accused is held to be vitiated. The matter is remanded to the learned Special Judge, Kullu to hold trial afresh of the accused in accordance with law. Records be sent back forthwith. Before parting with the judgment, this Court places on record its appreciation for the valuable legal assistance purveyed to this Court by Mr. Anup Chitakara, Advocate, Mr. Naveen K. Bhardwaj, Advocate and Mr. Vivek Singh Attri, Dy. Advocate General.

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

FAO No.20 of 2011 with FAO No.39 of 2011.
Reserved on : 09.09.2016.
Decided on : 30 .09.2016

1. FAO No.20 of 2011

Ajmer Singh ..... Appellant
Versus
Vyasa Devi and others ..... Respondents

2. FAO No.39 of 2011

Vyasa Devi and others ..... Appellants
Versus
Ajmer Singh and others ..... Respondents

Motor Vehicles Act, 1988- Section 149- Seating capacity of the tractor was only one person- claimants pleaded that deceased was travelling in the tractor after loading saria – driver and owner evasively denied this fact – owner stated in the appeal that the tractor had hit the deceased- owner is liable for the act of the driver by virtue of master servant liability – insurer was rightly exonerated by the trial Court. (Para-9 to 15)

Motor Vehicles Act, 1988- Section 166- Claimants pleaded that the deceased was earning Rs.8,000/- per month from all sources but failed to prove this fact- the Tribunal had rightly held the income of the deceased was Rs.3,000/- per month, however, the Tribunal fell into error in deducting 1/4th from the income of the deceased – claimants are six in number and 1/5th was to be deducted towards personal expenses- monthly loss of dependency will be Rs. 2,400/- - the deceased was 32 years of age at the time of accident and multiplier of '16' will be applicable- thus, claimants are entitled to Rs. 2400 x 12 x 16= Rs. 4,60,800/- under the head 'source of dependency'- claimants are also entitled to Rs. 10,000/- each under the heads 'loss of love and affection' , 'loss of estate' , 'loss of consortium' and 'funeral expenses'- thus, claimants are entitled to Rs. 4,60,800 + 40,000= Rs. 5,08,00/- along with interest. (Para-17 to 21)

FAO No.20 of 2011:

For the appellant: Ms.Tim Saran, Advocate.
For the respondents: Mr.Tara Singh Chauhan, Advocate, for respondents No.1 to 6.
Mr.B.M. Chauhan, Advocate, for respondent No.7.
Ms.Seema K. Guleria, Advocate, for respondent No.8.

FAO No.39 of 2011:

For the appellants: Mr.Tara Singh Chauhan, Advocate.
For the respondents: Ms.Tim Saran, Advocate, for respondent No.1.
Ms.Seema K. Guleria, Advocate, for respondent No.2.
Mr.B.M. Chauhan, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Both these appeals are directed against the award, dated 4th October, 2010, passed by the Motor Accident Claims Tribunal, Bilaspur, H.P., (for short, the Tribunal), whereby compensation to the tune of Rs.4,47,400/, alongwith interest at the rate of 7.5% per annum, came to be granted in favour of the claimants and the owner was saddled with the liability, (for short, the impugned award).

2. Feeling aggrieved, the claimants questioned the impugned award by the medium of FAO No.39 of 2011 on the ground of adequacy of compensation, while the owner/insured

(Ajmer Singh) has assailed the impugned award in FAO No.20 of 2011 on the ground that the Tribunal has fallen into an error in saddling him with the liability and exonerating the insurer.

Facts:

3. Claimants, being widow, parents and children of deceased Suresh Kumar, invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, 1988, (for short, the Act), for grant of compensation to the tune of Rs.15.00 lacs, as per the break-ups given in the claim petition. It was averred that on 23.1.2007, at about 6.45 p.m., the deceased, namely, Suresh Kumar, aged about 33 years, alongwith other labourers, after loading iron rods (saria) in tractor bearing No.HP-23-9813, being driven by its driver, namely, Joginder Singh, rashly and negligently, was traveling in the said tractor for unloading the said material. It was further averred that when the tractor reached at Rest House Dholra, District Bilaspur, due to the rash and negligent driving of the driver of the offending tractor, it met with an accident and Suresh Kumar was crushed underneath the wheel of the tractor, resulting into his death. FIR No.34/07, under Sections 279 and 304-A of the Indian Penal Code, (for short, IPC), came to be registered at Police Station, Sadar, Bilaspur, H.P. It was also averred that the deceased was labourer/mason by profession and was earning Rs.8,000/- per month from all sources.

4. Respondents resisted the claim petition by filing replies.

5. On the pleadings of the parties, the Tribunal framed the following issues:

"1. Whether late Sh. Suresh Kumar died on account of injuries sustained in an accident which took place on 23.1.2007 at about 6.45 P.M. at place Dholra District Bilaspur, due to the rash and negligent driving of tractor (Applied For) temporary No.HP-23-9813 being driven by respondent No.2 as alleged? OPP

2. If issue No.1 is proved in affirmative, to what amount of compensation, the petitioners are entitled to and from whom? OPP

3. Whether the respondent No.2 was not having valid and effective driving licence at the relevant time? OPR-3

4. Whether the offending vehicle was being plied without RC, fitness certificate and route permit at the time of accident in contravention of the provisions M.V. Act? OPR-3

5. Whether the deceased was traveling in the offending vehicle as gratuitous passenger at the relevant time?

6. Relief."

6. In order to prove their case, the claimants examined PW-1 Dr.Ashwani Kumar, PW-2 Gian Chand, PW-3 Balak Ram, PW-5 Madan Lal, while one of the claimants, namely, Vyasa Devi, herself stepped into the witness box as PW-4. On the other hand, driver of the offending tractor Joginder Singh stepped into the witness box as RW-1 and Prakash Chand, one of the labourers, who loaded the saria on the offending tractor on the fateful day, was examined as RW-2.

7. The Tribunal after scanning the pleadings as well as the entire evidence held that the claimants were entitled for compensation to the tune of Rs.4,47,400/- alongwith interest at the rate of 7.5% per annum, and saddled the owner with the liability.

8. Feeling aggrieved, the claimants and the owner have filed the instant appeals, as detailed above.

FAO No.20 of 2011

9. I have gone through findings recorded by the Tribunal in paragraphs 25 to 31 of the impugned award, are legally and factually correct for the following reasons.

10. As provided at Sl.No.13 of the registration certificate Ext.D-3, the seating capacity of the offending tractor (including driver) was only one person. Thus, the risk of any other person who was traveling on the offending tractor was not covered.

11. The claimants, in paragraph 10 of the claim petition, have specifically averred that the deceased Suresh Kumar was traveling in the offending tractor and was going from Dholra to Kallar after loading saria in the said tractor, which fact stands proved by oral as well as documentary evidence led by the parties. It is apt to reproduce paragraph 10 of the claim petition hereunder:

> *"Yes. The deceased was traveling in said tractor and was going from Dholra to Kallar after loading Sariya in the said tractor."*

12. The driver and the owner have filed joint reply to the claim petition. They have evasively denied paragraph 10 of the claim petition in their reply and have further stated that the deceased Suresh Kumar was neither traveling in the offending tractor, as alleged, nor died in the accident. It is apt to reproduce paragraph 5 of the reply hereunder:

> *"5. Paras No.10 to 13 of the petition are denied being incorrect. The deceased was not traveling in the vehicle as alleged nor he died in the said accident."*

13. The appellant-owner has made U-turn while filing the instant appeal, wherein, in paragraph 4(B), the appellant has averred that the deceased Suresh Kumar was hit by the tractor on the road. It is apt to reproduce paragraph 4(B) of the appeal filed by the owner as under:

> *"4(B) That the appellant had not authorized his driver to allow any body to travel on the tractor nor the deceased was permitted by the appellant to travel in the tractor as alleged. The driver of the tractor has categorically stated that the deceased was not traveling on the tractor in question and he was hit on the road. But the learned Tribunal has failed to take notice of the said fact and has wrongly concluded that the deceased was traveling on the tractor in question. Therefore the appellant was not liable to pay compensation if any payable to the respondents-petitioners 1 to 6."*

14. Thus, apparently, the owner has blown hot and cold. As discussed hereinabove, the claimants have pleaded and proved that the deceased Suresh Kumar was traveling on the tractor for loading and unloading of saria. The owner has also pleaded that he had directed the driver of the offending tractor not to allow anyone to travel on the offending tractor. Therefore, keeping in view the relationship of master-servant liability, it is the owner who is liable. The Tribunal, after scanning the evidence, has rightly made discussion in the impugned award.

15. Accordingly, it is held that the Tribunal has rightly exonerated the insurer from its liability.

16. Having said so the appeal filed by the owner (FAO No.20 of 2011) is dismissed.

FAO No.39 of 2011

17. By the medium of this appeal, the claimants have questioned the adequacy of compensation. The claimants have specifically pleaded in paragraph 6 of the claim petition that the deceased Suresh Kumar was earning Rs.8,000/- per month from all sources, as detailed in paragraph 6 of the claim petition. But, the claimants have failed to prove, during trial, that the deceased was earning Rs.8,000/- per month. The Tribunal, as per detailed discussion made in paragraphs 19 and 20 of the impugned award, has taken into account all factors and after exercising guess work, rightly held that the income of the deceased was Rs.3,000/- per month, since at the relevant point of time, a labourer would not have been earning more than Rs.100/- per day. However, the Tribunal has fallen into an error in deducting 1/4th from the income of the deceased. The claimants are six in number, therefore, 1/5th has to be deducted from the monthly income of the deceased in view of the dictum of the Apex Court in the case of **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**. Accordingly, after deducting

1/5th amount, the monthly loss of source of dependency to the claimants can be said to be Rs.2,400/-.

18. The age of the deceased was 32 years at the time of accident. In view of mandate of the Apex Court in Sarla Verma's case (supra), read with 2nd Schedule appended with the Motor Vehicles Act, 1988, the Tribunal has rightly applied the multiplier of 16.

19. In view of the above, the claimants are held entitled to Rs.2,400/- x 12 x 16 = Rs.4,60,800/- under the head loss of source of dependency.

20. In addition to above, a sum of Rs.10,000/- each i.e. Rs.40,000/- in all, is awarded in favour of the claimants under the heads loss of love and affection, loss of estate, loss of consortium and funeral expenses.

21. Having said so, the claimants are held entitled to Rs.4,60,800/- + Rs.40,000/- = Rs.5,00,800/-, alongwith interest as awarded by the Tribunal. The impugned award is modified accordingly and the appeal filed by the claimants (FAO No.39 of 2011) is allowed, as indicated above.

22. The owner is directed to deposit the amount, alongwith interest, within a period of six weeks from today in the Registry of this Court and on deposit, the Registry is directed to release the entire amount in favour of the claimants, strictly in terms of the impugned award forthwith.

23. Both the appeals stand disposed of accordingly.

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

FAO No. 391 of 2011
a/w FAO No. 91 of 2012
Decided on: 30.09.2016

FAO No. 391 of 2011

Bajaj Allianz General Insurance Company Limited ...Appellant.

Versus

Shri Aman and others ...Respondents.

FAO No. 91 of 2012

Aman ...Appellant.

Versus

Shri Neeraj Dewan and others ...Respondents.

Motor Vehicles Act, 1988- Section 149- Injured was 23 years of age at the time of accident and was working as I.T. Engineer with M/s Ambuja Cement, Darlaghat- he sustained injuries and suffered 84% disability of the right arm- the Tribunal had held that insured had committed breach of terms and conditions of the policy and had rightly granted right of recovery to the insurer- these findings were also not questioned by the driver and insured- a third party cannot be left in lurch due to breach by the insured – appeal dismissed. (Para-12 to 29)

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

S. Iyyapan versus United India Insurance Company Limited and another, (2013) 7 SCC 62

United India Insurance Co. Ltd. Versus K.M. Poonam and others, 2011 ACJ 917
Manager, National Insurance Co. Ltd. versus Saju P. Paul and another, 2013 ACJ 554

FAO No. 391 of 2011

For the appellant: Mr. Aman Sood, Advocate.
For the respondents: Mr. Vishal Bindra, Advocate, for respondent No. 1.
Mr. Sanjay K. Sharma, Advocate, for respondent No. 2.
Mr. B.R. Sharma, Advocate, for respondent No. 3.

FAO No. 91 of 2012

For the appellant: Mr. Vishal Bindra, Advocate.
For the respondents: Mr. Sanjay K. Sharma, Advocate, for respondent No. 1.
Mr. B.R. Sharma, Advocate, for respondent No. 2.
Mr. Aman Sood, 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 a common award, thus, I deem it proper to determine both these appeals by this common judgment.

2. Subject matter of these appeals is award, dated 24th August, 2011, made by the Motor Accident Claims Tribunal, Shimla, H.P. (for short "the Tribunal") in M.A.C. Petition No. 41-S/2 of 2008, titled as Sh. Aman versus Sh. Neeraj Dewan and others, whereby compensation to the tune of ₹ 10,48,000/- with interest @ 8% per annum from the date of the claim petition till its realization came to be awarded in favour of the claimant-injured and the insurer was directed to satisfy the award with right of recovery (for short "the impugned award").

3. The 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.

4. The insurer has questioned the impugned award by the medium of FAO No. 391 of 2011 on the grounds taken in the memo of the appeal.

5. The claimant-injured has also called in question the impugned award by the medium of FAO No. 91 of 2012 on the ground of adequacy of compensation.

6. Thus, following points arise for determination in these appeals:

"(i) Whether the Tribunal has rightly directed the insurer to satisfy the impugned award with right of recovery?

(ii) Whether the amount awarded is inadequate?

7. I have gone through the impugned award read with the record and am of the considered view that the Tribunal has rightly directed the insurer to satisfy the impugned award with right of recovery and the awarded amount is adequate for the following reasons:

8. The claimant-injured, who was 23 years of age at the time of the accident and was working as IT Engineer with M/s Ambuja Cement, Darlaghat, became the victim of the vehicular accident, which was caused by the driver, namely Shri Jitender Kumar, while driving Mahindra Pick Up No. HP-09A-1993, rashly and negligently, on 23rd September, 2007, at about 12.30 A.M., near Summer Hill, in which the claimant-injured sustained injuries and suffered 84% permanent disability of right arm. He filed claim petition before the Tribunal and claimed compensation, as per the break-ups given in the claim petition.

9. The respondents in the claim petition resisted the same on the grounds taken in the respective memo of objections.

10. On the pleadings of the parties, following issues came to be framed by the Tribunal:

"1. Whether the petitioner suffered injuries due to rash and negligent driving of Mahindra Pick-Up No. HP-09A-1993 by respondent No. 2? OPP

2. If issue No. 1 is proved, to what amount of compensation the petitioner is entitled to and from whom? OPP

3. Whether the claim petition is not maintainable, as alleged? OPR-3

4. Whether the vehicle in question was being driven in violation of terms and conditions of the insurance policy? OPR-3

5. Whether the respondent No. 2 was not having a valid and effective driving licence at the time of accident? OPR-3

6. Whether the petitioner was an unauthorized passenger in the vehicle at the time of accident? OPR-3

7. Relief."

11. Parties have led evidence.

Issue No. 1:

12. The Tribunal, after scanning the evidence, oral as well as documentary, held that the driver had driven the offending vehicle rashly and negligently at the relevant point of time and caused the accident, in which the claimant-injured sustained injuries. The driver of the offending vehicle has not questioned the said findings, thus, the same have attained finality. However, I have gone through the record and am of the considered view that the claimant-injured had proved by leading evidence that the driver of the offending vehicle had driven the same rashly and negligently on 23rd September, 2007, near Summer Hill and caused the accident, in which the claimant-injured sustained injuries. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

13. Before dealing with issue No. 2, I deem it proper to determine issues No. 3 to 6.

Issue No. 3:

14. It was for the insurer to plead and prove that the claim petition was not maintainable, has not led any evidence to this effect, thus, has failed to discharge the onus. Even otherwise, the Motor Vehicles Act, 1988 (for short "MV Act") has gone through sea change in the year 1994 and in terms of Section 158 (6) and 166 (4) of the MV Act, even a police report can be treated as claim petition. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

Issue No. 5:

15. 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. The Tribunal, after going through the evidence and the record, while making discussions in paras 28 and 29 of the impugned award, has rightly decided issue No. 5 against the insurer. Accordingly the findings returned by the Tribunal on issue No. 5 are upheld.

Issues No. 4 and 6:

17. Admittedly, the offending vehicle was a 'light goods vehicle' and the Tribunal has rightly made the discussions in paras 24 to 27 of the impugned award and has granted right of recovery to the insurer while holding that the owner-insured of the offending vehicle had committed a willful breach of the terms and conditions of the insurance policy. The driver and owner-insured of the offending vehicle have not questioned the said findings, thus, have attained finality. Accordingly, the findings returned by the Tribunal on issues No.4 and 6 are upheld.

Issue No. 2:

18. Admittedly, the claimant-injured was IT Engineer by profession. The injury has shattered his physical frame and has affected his earning capacity. The Tribunal, in paras 15 to 21 of the impugned award, has given details as to how it has assessed the compensation.

19. It is beaten law of the land that in injury cases, the compensation is to be assessed while exercising guess work.

20. 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.

21. 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."*

22. Applying the tests to the instant case, I am of the considered view that the Tribunal has rightly made the assessment and awarded compensation in favour of the claimant-injured, which appears to be just, cannot be said to be inadequate or otherwise. Accordingly, the amount awarded is maintained.

23. Learned counsel for the insurer argued that the findings returned by the Tribunal on issues No. 4 and 6 have attained finality, thus, the Tribunal, has fallen in an error in directing the insurer to satisfy the impugned award with right of recovery.

24. The mandate of Sections 146, 147 and 149 of the MV Act is to protect the rights of third parties and that is why, compulsory duty has been cast on the owners to get the vehicles insured, so that, claim of third parties cannot be defeated.

25. The Apex Court has also discussed this aspect in a case titled as **S. Iyyapan versus United India Insurance Company Limited and another,** reported in **(2013) 7 Supreme Court Cases 62.** It is apt to reproduce para 16 of the judgment herein:

> *"16. The heading "Insurance of Motor Vehicles against Third Party Risks" given in Chapter XI of the Motor Vehicles Act, 1988 (Chapter VIII of 1939 Act) itself shows the intention of the legislature to make third party insurance compulsory and to ensure that the victims of accident arising out of use of motor vehicles would be able to get compensation for the death or injuries suffered. The provision has been inserted in order to protect the persons travelling in vehicles or using the road from the risk attendant upon the user of the motor vehicles on the road. To overcome this ugly situation, the legislature has made it obligatory that no motor vehicle shall be used unless a third party insurance is in force."*

26. In view of the above, the claimant-injured, who is a third party, cannot be left in lurch and cannot be dragged from pillar to post and post to pillar in order to get compensation. Thus, it is the duty of the Court to ensure that the compensation is paid to the claimant-injured by directing the insurer to satisfy the award with right of recovery.

27. My this view is fortified by the judgment rendered by the Apex Court in the case titled as **United India Insurance Co. Ltd. Versus K.M. Poonam and others,** reported in **2011 ACJ 917.** It is apt to reproduce paras 24 and 26 of the judgment herein:

> *"24. The liability of the insurer, therefore, is confined to the number of persons covered by the insurance policy and not beyond the same. In other words, as in the present case, since the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six persons only, notwithstanding the larger number of persons carried in the vehicle. Such excess number of persons would have to be treated as third parties, but since no premium had been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as far as they are concerned. However, the liability of the Insurance Company to make payment even in respect of persons not covered by the insurance policy continues under the provisions of sub-section (1) of Section 149 of the Act, as it would be entitled to recover the same if it could prove that one of the conditions of the policy had been breached by the owner of the vehicle. In the instant case, any of the persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle.*
>
> *25. .....*
>
> *26. Having arrived at the conclusion that the liability of the Insurance Company to pay compensation was limited to six persons travelling inside the vehicle only and that the liability to pay the others was that of the owner, we, in this case, are faced with the same problem as had surfaced in Anjana Shyam's case (supra). The number of persons to be compensated being in excess of the number of persons who could validly be carried in the vehicle, the question which arises is one of apportionment of the amounts to be paid. Since there can be no pick and choose method to identify the five passengers, excluding the driver, in respect of whom compensation would be payable by the Insurance Company, to meet the ends of justice we may apply the procedure adopted in Baljit Kaur's case (supra) and direct that the Insurance Company should deposit the total amount of compensation awarded to all the claimants and the amounts so deposited be disbursed to the claimants in respect to their claims, with liberty to the Insurance Company to recover the amounts paid by it*

over and above the compensation amounts payable in respect of the persons covered by the Insurance Policy from the owner of the vehicle, as was directed in Baljit Kaur's case."

28. It would also be profitable to reproduce paras 19 to 21 and 25 of the judgment rendered by the Apex Court in the case titled as **Manager, National Insurance Co. Ltd. versus Saju P. Paul and another,** reported in **2013 ACJ 554,** herein:

"19. The next question that arises for consideration is whether in the peculiar facts of this case a direction could be issued to the insurance company to first satisfy the awarded amount in favour of the claimant and recover the same from the owner of the vehicle (respondent no. 2 herein).

20. In National Insurance Co. Ltd. v. Baljit Kaur and others, 2004 ACJ 428 (SC), this Court was confronted with a similar situation. A three-Judge Bench of this Court in paragraph 21 of the Report held as under :

"(21) The upshot of the aforementioned discussions is that instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be as to whether keeping in view the fact that the law was not clear so long such a direction would be fair and equitable. We do not think so. We, therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decision of this Court in Satpal Singh. The said decision has been overruled only in Asha Rani. We, therefore, are of the opinion that the interest of justice will be subserved if the appellant herein is directed to satisfy the awarded amount in favour of the claimant, if not already satisfied, and recover the same from the owner of the vehicle. For the purpose of such recovery, it would not be necessary for the insurer to file a separate suit but it may initiate a proceeding before the executing court as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. We have issued the aforementioned directions having regard to the scope and purport of Section 168 of the Motor Vehicles Act, 1988, in terms whereof, it is not only entitled to determine the amount of claim as put forth by the claimant for recovery thereof from the insurer, owner or driver of the vehicle jointly or severally but also the dispute between the insurer on the one hand and the owner or driver of the vehicle involved in the accident inasmuch as can be resolved by the Tribunal in such a proceeding."

21. The above position has been followed by this Court in National Insurance Co. Ltd. v. Challa Bharathamma, 2004 ACJ 2094 (SC), wherein this Court in para 13 observed as under:

"(13) The residual question is what would be the appropriate direction. Considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability. In some cases the insurer has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. It may initiate a proceeding before the executing court concerned as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the executing court shall take assistance of the Regional Transport Authority concerned. The executing court shall pass appropriate orders in accordance with law as to the

manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the executing court to direct realisation by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle i.e. the insured. In the instant case, considering the quantum involved, we leave it to the discretion of the insurer to decide whether it would take steps for recovery of the amount from the insured."

22 to 24. .....

25. The pendency of consideration of the above questions by a larger Bench does not mean that the course that was followed in Baljit Kaur, 2004 ACJ 428 (SC) and Challa Bharathamma, 2004 ACJ 2094 (SC) should not be followed, more so in a peculiar fact situation of this case. In the present case, the accident occurred in 1993. At that time, claimant was 28 years' old. He is now about 48 years. The claimant was a driver on heavy vehicle and due to the accident he has been rendered permanently disabled. He has not been able to get compensation so far due to stay order passed by this Court. He cannot be compelled to struggle further for recovery of the amount. The insurance company has already deposited the entire awarded amount pursuant to the order of this Court passed on 01.08.2011 and the said amount has been invested in a fixed deposit account. Having regard to these peculiar facts of the case in hand, we are satisfied that the claimant (Respondent No. 1) may be allowed to withdraw the amount deposited by the insurance company before this Court along-with accrued interest. The insurance company (appellant) thereafter may recover the amount so paid from the owner (Respondent No. 2 herein). The recovery of the amount by the insurance company from the owner shall be made by following the procedure as laid down by this Court in the case of Challa Bharathamma, 2004 ACJ 2094 (SC)."

29. The same principle has been laid down by this Court in a batch of FAOs, **FAO No. 353 of 2012,** titled as **Dev Raj versus Shri Krishan Lal and others,** being the lead case, decided on 24th June, 2016; and **FAO No. 167 of 2011,** titled as **Narender Singh Shekhawat versus Jasbir Singh and others,** alongwith another connected matter, decided on 12th August, 2016 .

30. Having said so, the Tribunal has rightly directed the insurer to satisfy the impugned award at the first instance with right of recovery.

31. Having glance of the above discussions, the impugned award is upheld and both the appeals are dismissed.

32. Registry 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.

33. 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.

FAO No. 36 of 2012
a/w FAO No. 96 of 2012
Decided on: 30.09.2016

FAO No. 36 of 2012

Bajaj Allianz General Insurance Company Limited ...Appellant.

Versus

Shri Phool Chand and others ...Respondents.

FAO No. 96 of 2012

Shri Phool Chand ...Appellant.

Versus

Smt. Veena Devi and others ...Respondents.

Motor Vehicles Act, 1988- Section 149- It was for the insurer to plead and prove that vehicle was being driven in contravention of the terms and conditions of the insurance policy- owner/ insured did not lead any evidence to prove this fact – the Tribunal had rightly saddled the insurer with liability – appeal dismissed. (Para-7 to 11)

Cases referred:

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

Pepsu Road Transport Corporation versus National Insurance Company, 2013 AIR SCW 6505

Fahim Ahmad & Ors. versus United India Insurance Co. Ltd. & Ors., 2014 AIR SCW 2045

FAO No. 36 of 2012

For the appellant: Mr. Aman Sood, Advocate.

For the respondents: Mr. Vinay Thakur, Advocate, for respondent No. 1.
Mr. V.S. Chauhan, Advocate, for respondents No. 2 and 3.

FAO No. 96 of 2012

For the appellant: Mr. Mr. Vinay Thakur, Advocate.

For the respondents: Mr. V.S. Chauhan, Advocate, for respondents No. 1 and 2.
Mr. Aman Sood, 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 a common award, thus, I deem it proper to determine both these appeals by this common judgment.

2. Challenge in both these appeals is to award, dated 2nd November, 2011, made by the Motor Accident Claims Tribunal, Shimla, H.P. (for short "the Tribunal") in M.A.C. Petition No. 52-S/2 of 2009, titled as Sh. Phool Chand versus Smt. Veena Devi and others, whereby compensation to the tune of ₹ 75,000/- with interest @ 8% per annum from the date of the claim 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").

3. The 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.

4. The insurer has questioned the impugned award by the medium of FAO No. 36 of 2012 on the ground that the Tribunal has fallen in an error in saddling it with liability and exonerating the owner-insured of the offending vehicle for the reason that the owner-insured has not obtained the route permit of the offending vehicle at the relevant point of time.

5. The claimant-injured has also called in question the impugned award by the medium of FAO No. 96 of 2012 on the ground of adequacy of compensation.

6. The dispute involved in both these appeals revolves around issues No. 2 and 7, which read as under:

> *"(ii) If issue No. (i) is proved in affirmative, to what amount of compensation the petitioner is entitled to and from whom? OPP*

(vii) Whether the vehicle in question was being driven in contravention of the terms and conditions of the insurance policy? OPR-3"

7. It was for the insurer to plead and prove that the offending vehicle was being driven in contravention of the terms and conditions of the insurance policy and the owner-insured has committed willful breach, has not led any evidence, thus, has failed to discharge the onus.

8. My this view is fortified by the judgment rendered by the Apex Court in the case titled as **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 herein:

"105. .....

(i) .....

(ii) .....

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

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

(v).....

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

9. The Apex Court in another case titled as **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **2013 AIR SCW 6505,** has laid down the same principle. It is profitable to reproduce para 10 of the judgment herein:

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

different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh's case (supra). 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."

10. The Apex Court in the case titled as **Fahim Ahmad & Ors. versus United India Insurance Co. Ltd. & Ors.,** reported in **2014 AIR SCW 2045,** held that the insurer has not only to plead the breach but has also to substantiate the same by adducing positive evidence. It is apt to reproduce para 6 of the judgment herein:

"6. Although the plea of breach of the conditions of policy was raised before the Tribunal, yet neither any issue was framed nor any evidence led to prove the same. In our opinion, it was mandatory for respondent No. 1-Insurance Company not only to plead the said breach, but also substantiate the same by adducing positive evidence in respect of the same. In the absence of any such evidence, it cannot be presumed that there was breach of the conditions of policy. Thus, there was no reason to fasten the said liability of payment of the amount of compensation awarded by the Tribunal on the appellants herein."

11. Having said so, the Tribunal has rightly determined issue No. 7 against the insurer and is accordingly upheld.

12. I have gone through the assessment made by the Tribunal and am of the considered view that the Tribunal has rightly made the assessment, cannot be said to be meagre. Accordingly, the amount awarded is held to be just and is upheld.

13. Having glance of the above discussions, the impugned award is upheld and both the appeals are dismissed.

14. Registry 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.

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

****

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

Sh. Kashmir Singh s/o late Sh. Teka ....Revisionist.

Versus

Sh. Om Parkash s/o late Sh.Lala @ Lal Chand ....Non-revisionist

Civil Revision Petition No. 45/2014
Order Reserved on 16.07.2016
Date of order: 30.09.2016

Code of Civil Procedure, 1908- Order 21 Rule 32- A decree for permanent prohibitory injunction was passed by the Court- it was pleaded that judgment debtor had forcibly cut and removed bamboo trees from bamboo bushes – he had also blocked the passage through which decree holder used to go to his land – the Executing Court dismissed the Execution Petition- aggrieved from the order, present revision has been filed- held, that proceedings order XXI Rule 32 are punitive in nature- no satisfactory evidence was led to prove that judgment debtor had

intentionally and willfully disobeyed the decree of the Court- Court cannot re-appreciate the evidence in exercise of revisional jurisdiction and can interfere only if the findings of fact are perverse, which is not the case here – Revision dismissed. (Para-14 to 16)

Cases referred:
Ram Autar Vs. Kaushal Kishore, AIR 1965 All 44
Masjid Kacha Tank Nahan Vs. Tuffail Mohammed, AIR 1991 Apex Court page 455
Gurdial Singh Vs. Raj Kumar Aneja, AIR 2002 Apex Court page 1004
P. Udayani Devi Vs. V.V. Rajeshwara Prasad Rao, AIR 1995 Apex Court page 1357
Indore Municipality Vs. K.N. Palsikar, AIR 1969 Apex Court page 580

For revisionist : Mr. Surinder Saklani, Advocate
For non-revisionist : Mr. B. C. Verma, Advocate.

The following order of the Court was delivered:

P. S. Rana, J.

Present civil revision petition is filed under Section 115 Code of Civil Procedure 1908 against the order dated 14.03.2014 passed by learned executing Court Civil Judge (Jr. Division) Baijnath Camp at Palampur Distt. Kangra (H.P.) in CMA No.98/2009 whereby application for execution of decree filed under Order XXI Rule 32 CPC by the revisionist is dismissed.

Brief facts of the case:

2. Sh. Kashmir Singh revisionist filed execution application for decree under Order XXI Rule 32 CPC pleaded therein that C.S. No.166/2003 was filed and same was decided by learned Civil Judge (Jr. Division) Baijnath Camp at Palampur Distt. Kangra (H.P.) on 22.04.2006. It is pleaded that non-revisionist was restrained by way of permanent prohibitory injunction from interfering, taking forcible possession, digging, raising structure or interfering in any manner over suit land comprised in khata No.94min khatoni No.254 khasra Nos.1013 and 1014 measuring 0-00-77 hects. situated at Mohal and Mauza Salan Tehsil Palampur Distt. Kangra (H.P.). It is pleaded that on 13.01.2009 judgment debtor forcibly cut and remove bamboo trees from bamboo bushes. It is further pleaded that non-revisionist also did not allow the revisionist to cut the bamboo fodder from the suit land. It is further pleaded that on 10.03.2009 judgment debtor also blocked the passage through which decree holder used to go to his land. It is further pleaded that judgment debtor was requested to honour the decree and not to disobey the judgment and decree passed by learned Trial Court but judgment debtor did not accept the request of decree holder. Prayer for initiating proceedings under Order XXI Rule 32 CPC sought and prayer that judgment debtor be detained in civil prison for a period of three months and his property be attached for his willful and intentional act of disobedience also sought.

3. Per contra response filed on behalf of judgment debtor pleaded therein that decree holder has no cause of action. It is further pleaded that present application is filed just to harass the judgment debtor illegally. It is further pleaded that judgment debtor did not cut bamboo trees from bamboo bushes on 13.01.2009. It is also denied that judgment debtor did not allow the decree holder to cut bamboo fodder from the suit land. It is also denied that judgment debtor has blocked the passage. Prayer for dismissal of application filed under Order XXI Rule 32 CPC sought. Decree holder filed rejoinder and reasserted the allegations mentioned in the petition.

4. On dated 05.12.2009 learned executing Court framed following issues: (1) Whether JD has violated the judgment and decree dated 22.04.2006 as alleged? OPA. (2) Whether applicant-DH has no cause of action against JD? OPR. (3) Relief.

5. Learned executing Court decided issue No.1 in negative and decided issue No.2 in affirmative. Learned executing Court dismissed the application filed under Order XXI Rule 32 CPC. Feeling aggrieved against the order decree holder filed present civil revision petition.

6. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionist and Court also perused the entire record carefully.

7. Following points arise for determination:

1) Whether civil revision petition filed under Section 115 Code of Civil Procedure 1908 is liable to be accepted as mentioned in memorandum of grounds of revision petition?

2) Final order.

Findings upon Point No.1 with reasons:

8. AW-1 Sh. Kashmir Singh has stated that he filed civil suit which was decreed in the year 2006. He has stated that judgment debtor was directed not to interfere in the suit property in any manner. He has stated that after passing of judgment and decree judgment debtor interfered in the suit property. He has stated that on dated 13.01.2009 judgment debtor cut 4/5 bamboo trees. He has stated that judgment debtor also blocked the path. He has stated that thereafter he reported the matter in panchayat. He has stated that panchayat told him that decree already passed by the civil Court and he was directed to approach the civil Court. He has stated that he also filed criminal complaint before the police authority. In cross-examination he has stated that abadi is joint inter se parties. He has stated that bamboo trees cut from khasra Nos. 1013 & 1014. He has stated that land is joint and is in his possession since his ancestors.

9. AW-2 Sh. Gurdev has stated that parties are known to him and he has also seen the disputed land. He has stated that at the spot he saw that bamboo trees were fallen. He has stated that parties were also fighting with each other.

10. RW-1 Sh. Om Parkash has stated that he was not in his house w.e.f. 12.01.2009 to 14.01.2009. He has stated that he is posted in security duty in Jia H.P. Baner Power House. He has stated that he does not know that decree was passed against him. He has denied suggestion that he has disobeyed the decree in any manner. He has denied suggestion that on 13.01.2009 he cut bamboo trees. He has denied suggestion that personal path of decree holder is situated in khasra Nos. 1013 & 1014. He has denied suggestion that on 10.03.2009 he blocked the path. He has denied suggestion that he is harassing the judgment debtor after passing of decree.

11. RW-2 Sh. Bongar Ram has stated that both parties are known to him. He has stated that land is joint inter se parties. He has stated that no one is using bamboo trees. He has stated that on 13.01.2009 a bamboo tree was fallen upon path and same was lifted by Sh. Kashmir Singh decree holder. He has stated that no quarrel took place. He has stated that decree holder himself took the bamboo trees in his presence to his residential house.

12. RW-3 Sh. Bakshi Rana has stated that he is posted in H.P. State Electricity Project Baner as Supervisor since December 2009. He has stated that judgment debtor is also posted as armed guard. He has stated that w.e.f. 13.01.2009 to 15.01.2009 judgment debtor was on his continuous duty as armed guard in the project.

13. Following documents filed by parties. (1) Ext.A1 & A2 are copies of judgment and decree dated 22.04.2006 passed in C.S. No.166 of 2003. (2) Ext.A3 is copy of complaint filed by Om Parkash against Kashmir Singh and others under sections 323, 500, 506, 452 IPC before Judicial Magistrate Palampur (H.P.). (3) Ext.A4 is copy of statement of Om Parkash (4) Ext.A5 is notice issued by panchayat to Om Parkash (5) Ext.R1 & R2 are Aks Sajra.

14. Submission of learned Advocate appearing on behalf of revisionist that judgment debtor has intentionally and willfully disobeyed the judgment and decree passed by learned Trial

Court in C.S. No.166/2003 title Kashmir Singh Vs. Om Parkash decided on 22.04.2006 is rejected being devoid of any force for reasons hereinafter mentioned. It is proved on record that on dated 22.04.2006 learned Trial Court passed decree of permanent prohibitory injunction against judgment debtor restraining judgment debtor from interfering, taking forcible possession, digging, raising structure or interfering in any manner in the suit land comprised in khata No.94min khatoni No.254 khasra Nos.1013 and 1014 land measuring 0-00-77 hects. situated at Mohal and Mauza Salan Tehsil Palampur Distt. Kangra (H.P.). Onus to prove that judgment debtor has intentionally and voluntarily disobeyed the decree is upon the decree holder. Decree holder has examined AW-2 Sh. Gurdev as eye witness. Court has carefully perused the testimony of AW-2 Sh. Gurdev. AW-2 Sh. Gurdev has simply stated that he saw that bamboo trees were fallen on the ground and both parties were quarrelling with each other. AW-2 did not state that judgment debtor has cut and removed bamboo trees on 13.01.2009 from suit land. AW-2 Sh. Gurdev has not stated that judgment debtor has blocked the passage of decree holder. Testimony of AW-1 is not corroborated by AW-2 independent witness. Testimony of AW-1 is rebutted by RW-1 Sh. Om Parkash, RW-2 Sh. Bongar Ram and RW-3 Sh. Bakshi Rana. RW-2 Sh. Bongar Ram has specifically stated that bamboo trees were fallen upon the ground and decree holder lifted the same. RW-3 Sh. Bakshi Rana has stated in positive manner that judgment debtor was on armed duty w.e.f. 13.01.2009 to 15.01.2009. RW-1, RW-2 & RW-3 rebutted the testimony of AW-1.

15. It is well settled law that proceedings under Order XXI Rule 32 CPC are punitive proceedings and in order to punish judgment debtor positive cogent and reliable evidence is required. In the present case there is no positive cogent and reliable evidence on record in order to prove that judgment debtor has intentionally and voluntarily disobeyed the decree passed by learned Trial Court. See AIR 1965 All 44 title **Ram Autar Vs. Kaushal Kishore**.

16. In revisional jurisdiction under section 115 Code of Civil Procedure 1908 High Court cannot reappreciate the evidence. Under section 115 Code of Civil Procedure 1908 High Court is empowered to interfere with the findings of facts only if the findings of facts are perverse. See AIR 1991 Apex Court page 455 title **Masjid Kacha Tank Nahan Vs. Tuffail Mohammed**. See AIR 2002 Apex Court page 1004 title **Gurdial Singh Vs. Raj Kumar Aneja.** See AIR 1995 Apex Court page 1357 title **P. Udayani Devi Vs. V.V. Rajeshwara Prasad Rao.** See AIR 1969 Apex Court page 580 title **Indore Municipality Vs. K.N. Palsikar.** In view of above stated facts it is held that order of learned executing Court is not illegal nor perverse. Point No.1 is answered in negative.

Point No.2 (Final Order).

17. In view of findings upon point No.1 above present civil revision petition is dismissed. Order of learned executing Court is affirmed. Parties are left to bear their own costs. File of learned executing Court alongwith certified copy of the order be sent back forthwith. C.R. No.45/2014 is disposed of. Pending applications if any also disposed of.

****

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

Kumari Reena & another. .....Appellants

Versus

Heera Nand & another. .....Respondents.

FAO No. 481 of 2016
Reserved on : 27.9.2016
Decided on : 30.9.2016

Workmen Compensation Act, 1923- Section 2 and 4- The claim petition was dismissed on the ground that claimant had failed to prove the relationship with the deceased- held, that one of the claimants was major and could not have been a dependent upon the deceased- however, the other claimant was minor and unmarried girl- she has to be treated as a dependent on her

brother – the salary of the deceased was Rs. 3,000/- per month- he was also getting daily allowance of Rs. 100/- - thus, his salary will be Rs. 6,000/- - in view of Section 4, explanation II monthly income cannot be taken more than Rs. 4,000/- – 50% of the wages has to be taken into consideration applying the relevant factor- compensation of Rs. 2000 x 218.47= Rs. 4,36,940/- is payable- insured is liable to pay this compensation along with interest @ 12% per annum.

(Para-3 to 7)

For the Appellants: Mr. H.C Sharma, Advocate.
For the Respondents: Mr. Chandan Goel, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The instant appeal stands directed against the impugned order of 9.9.2011 rendered by the Commissioner (IV) Shimla, Exercising Powers under Employee's Compensation Act, 1923 (for short "the Commissioner") whereby he dismissed the application preferred therebefore by the claimants whereby they had claimed compensation on occurrence of demise of their brother Raju in a motor vehicle accident involving vehicle No. HP-01A-1393 whereon he stood engaged as a driver by respondent No.1.

2. Uncontrovertedly the demise of Raju , the brother of the claimants occurred during the course of his performing employment under respondent No.1 as a driver in the afoersaid relevant vehicle. The Commissioner discounted, the oral testification of PW-2 (Ravi Kumar) wherein he bespoke qua his and co-applicant Reena holding a relationship with deceased Raju respectively as his brother and his un-married minor sister, merely for want of adduction of documents in proof thereof comprised in the relevant pariwar register maintained with the Panchayat concerned. The reason aforesaid as meted by the learned Commissioner for discounting the factum of the claimants' holding a relationship with the deceased as his brother and sister respectively is extremely fragile given the submission made at the bar by the learned counsel for the claimants qua theirs being Nepali nationals whereupon obviously the relevant Pariwar register qua them was not amenable for preparation by the Panchayat concerned nor obviously non-occurrence of their names therein depictive of theirs holding the apposite relationship with the deceased was unamenable to a construction qua theirs thereupon hence not proving the factum of theirs holding the apposite relationship with the deceased. Obviously hence on ground aforesaid the testification of PW-2 qua the apposite relationship of the claimants/appellants herein with deceased Raju did not warrant its standing discountenanced. Also the Commissioner while discounting the relationship of the claimants with the deceased, had meted a reason of PW-2 testifying in his cross-examination qua theirs residing with their uncle and aunt whereupon it concluded of theirs holding the best knowledge qua their relationship with deceased Raju whereas theirs remaining unexamined constrained the Commissioner to draw an adverse inference against the claimants qua the relevant fact. However, it appears of the learned Commissioner untenably thereupon discounting the testification of PW-2 wherein he echoed qua his and Renna holding a relationship with the deceased as his brother and minor sister respectively. Even if assumingly PW-2 had echoed qua theirs residing with their Uncle and Aunt also if the aforesaid may have lent corroborative succor to the apposite testification of PW-2 nonetheless with the respondents also holding by citing the uncle and aunt of PW-2 as witnesses hence leverage to belie the testimony of PW-2 qua the relevant fact deposed by him wherefrom on theirs stepping into the witness box they may well could qua the relevant fact evinced the apposite elicitations yet the respondents omitted to do so, hence their omission to lead into the witness box the uncle and aunt of PW-2 was rather enjoined to be borne in mind by the Commissioner, for his thereupon drawing an adverse inference vis-à-vis the respondent rather vis-à-vis the claimants as un-tenably done by him. In sequel the findings recorded by the Commissioner qua the claimants' not holding any relationship with the deceased suffers from want of proper appreciation of evidence on record. In sequel the relevant findings warrant theirs being quashed and set aside.

3. Be that as it may the claimants could in their apposite petition claim compensation from the respondents concerned only when they fell within the ambit of the mandate of Section 2 (1) (d) (iii) (d) which stands extracted hereinafter:-

> 2(1)(d) (iii) (d) :- "dependent" means any of the following relatives of deceased employee, namely:-
>
> A minor brother or an unmarried sister or a widowed sister if a minor. "

4. However co-claimant Ravi Kumar while testifying on 24.2.2010 discloses therein qua his thereat standing aged 21 years wherefrom given the occurrence on 14.9.2008 of the ill-fated accident involving the relevant vehicle whereon the deceased stood engaged as a driver obviously rendered him to be a major thereat hence with his at the relevant time not being a dependent of the deceased within the mandate of the afore-extracted provisions of the Act whereupon he on demise of Raju stands incapacitated to claim compensation. However, the Commissioner had also not construed co-claimant Reena unmarried sister of deceased Raju to be a minor also hence it concluded of she also on demise of her brother standing disentitled to receive compensation. The reason as meted by it for declining the compensation to Reena is perse shaky and vague. Though PW-2 had unequivocally testified qua Reena standing aged 17 years hence a minor also he testified qua hers being unmarried, testifications whereof when remained un-repulsed by any efficacious evidence in rebuttal thereto remaining un-adduced warrants the inevitable conclusion of hers being construable to be a dependent of her deceased elder brother. The respondent No.2 holds an insurance policy executed by respondent No.1 qua the relevant vehicle. The insurance policy stands comprised in Ex. R-1. PW-3 has placed on record mark X the driving license held by deceased Raju. He has deposed qua its original standing held by the deceased. However since the deceased met his end in the ill-fated occurrence involving the relevant vehicle whereon he stood employed as a driver. In sequel, the conclusion is of the claimants holding no capacity to produce original thereof. Consequently the photocopy of the apposite DL tendered by the claimants is to be concluded to prove the relevant fact of his holding the relevant license for driving the ill-fated vehicle. Since the insurer did not adduce the best evidence comprised in adduction of the relevant records for falsifying mark X begets an inference of Mark X standing not stained with any vice of fictitious, contrarily it is to be concluded to be the true copy of the valid and effective DL held by deceased Raju.

5. The Commissioner had concluded of there occurring an infraction of Ex.PW-3/A arising from the factum of it at the relevant time standing occupied by passengers beyond the permissible capacity enshrined therein. However the aforesaid conclusion stands rested solely upon the testimony of PW-1 who in his cross-examination deposes qua occurrence of the aforesaid infractions merely on anvil of the apposite FIR making the aforesaid disclosure therein. However since the FIR qua the relevant accident involving the relevant vehicle does not constitute substantive evidence hence any reliance placed thereon by the Commissioner to conclude qua the apposite infractions standing begotten at the relevant time was wholly inapt. Contrarily it has to be concluded of with no infraction qua terms and conditions of the insurance policy comprised in Ex.R-1 upsurging forth the liability qua compensation amount would be borne by the insurer. Now hereat it is imperative to determine the quantum of compensation payable to Reena unmarried sister of deceased. The owner of the vehicle in his testification has voiced therein qua his defraying to deceased Raju per mensem salary of Rs. 3000/- besides testifies qua his also defraying to him daily allowance quantified @ 100. The aforesaid testification remains unshred of its efficacy by the counsel for the insurer while holding him to cross-examination also the mere factum of his not placing the relevant record personifying the aforesaid factum would not hinder this Court to conclude of deceased Raju drawing wages per mensem 6000/- from his employer while the latter engaging him as a driver in the relevant vehicle predominantly when the factum of his standing engaged thereon in the aforesaid capacity remains uncontroverted also when hence the aforesaid amount can easily be concluded to be the legitimate, admissible wages per mensem of a driver at the relevant time. However the amount aforesaid cannot be concluded to be the relevant figure for applying thereto the statutory principles for assessing compensation especially when explanation II to Section 4 of the Act fastens a statutory condition of in the event

of wages of a workman exceeding 4000/- as exceed hereat, his monthly wages for the purpose of computation of compensation by applying the relevant statutory principle being pegged at Rs.4000/-.

6. Consequently while taking Rs.4000/- to be the salary per mensem derived by deceased Raju from his employment as a driver in the relevant vehicle of respondent No.1, this Court assesses compensation qua appellant No.1 in the hereinafter manner:-

Average monthly wages	Rs. 4000/-
Restricted to 50%	Rs. 2000/-
Relevant factor applied.	
Compensation = 2000x218.47=	4,36,940/-

7. Since qua the relevant vehicle the insured employer of deceased held a valid insurance cover comprised in Ex. R-1 also for reasons afore-stated with no infraction of the insurance cover occurring at the instance of the insured constrains this Court to fasten the liability qua compensation amount alongwith interest @ 12% simple interest from 14.10.2008 till the date of actual payment determined vis-à-vis Kumari Reena upon the insurer of the relevant vehicle. It is clarified that the interest component of the compensation amount shall also be indemnified by the insurer to the insured unless an interdiction stands held therewithin whereupon it stands prohibited to defray it to the insured whereupon the interest levied qua the compensation amount assessed vis-à-vis Reena shall be defrayed by respondent No.2/owner of the vehicle to Kumari Reena.

8. In view of above the appeal is partly allowed qua co-appellant Reena. All pending applications stand disposed of accordingly. Records be sent back. Substantial question of law framed on 6.9.2016 stands answered accordingly.

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

Mansa Devi .....Appellant

Versus

Regional Manager, HRTC and others .....Respondents

FAO No.67 of 2012
Decided on : 30.09.2016

Motor Vehicles Act, 1988- Section 167- Tribunal dismissed the claim petition on the ground that the claimants ought to have resorted to the proceedings under Workmen Compensation Act- held, that Tribunal had fallen in error in dismissing the claim petition on this ground- the claimants had an option either to invoke the jurisdiction under Workmen Compensation Act or to file the petition under the Motor Vehicles Act - compensation of Rs. 4 lacs awarded in lump sum.

(Para-3 to 6)

For the appellant: Ms.Anjali Soni Verma, Advocate.
For the respondents: Mr.Jagdish Thakur, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This appeal is directed against the award, dated 30th June, 2011, passed by Motor Accident Claims Tribunal-II, Kangra at Dharamshala, (for short, the Tribunal), whereby the claim petition filed by the claimant was dismissed, (for short, the impugned award).

2. During the course of hearing, Mr.Jagdish Thakur, learned counsel for the respondents, frankly conceded that the claimant was entitled to compensation under the Workmen's Compensation Act, 1923 (for short, WC Act). His statement is taken on record.

3. A perusal of the impugned award shows that the Tribunal has dismissed the claim petition on the ground that the claimant ought to have resorted to proceedings under the WC Act. Perhaps, the Tribunal has lost sight of the fact that Section 167 of the Motor Vehicles Act, 1988, (for short, MV Act) provides for option to the claimant to seek compensation either under WC Act or MV Act. It is apt to reproduce Section 167 of the MV Act, hereunder:

> *"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."*

4. Thus, in terms of Section 167 of the MV Act, the claimants have option either to invoke the jurisdiction under the Workmen's Compensation Act or to file a petition under the Motor Vehicles.

5. At this stage, learned counsel for the respondents stated that the appeal may be disposed of by awarding compensation, as per the mandate of WC Act, in favour of the claimant, without interest.

6. Therefore, in the facts of the case, I deem it proper to award Rs.4.00 lacs in lump sum, as compensation, in favour of the claimant. Respondent-HRTC is directed to deposit the amount in the Registry of this Court within a period of eight weeks from today and on deposit, the amount be released in favour of the claimant forthwith through her bank account. It is made clear that in case respondent-HRTC fails to deposit the amount within a period of eight weeks from today, the amount shall carry interest at the rate of 7.5% per annum from today till deposit.

7. The appeal is disposed of accordingly.

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

National Insurance Co. Ltd. .....Appellant

Versus

Nemwati and others ..... Respondents

FAO No.84 of 2012
Decided on : 30.09.2016

Motor Vehicles Act, 1988- Section 173- Insurer filed an appeal to question the adequacy of compensation- held, that the insurer can contest the claim petition only if it has obtained permission under Section 170 of Motor Vehicles Act- in case, the permission has not been sought and granted, insurer is precluded from questioning the award on adequacy of compensation or any other grounds – no application for seeking permission under Section 170 was filed- hence, the appeal is not maintainable – appeal dismissed. (Para-7 to 18)

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.Ashwani K. Sharma, Senior Advocate, with Mr.Ishan Thakur, Advocate.

For the respondents: Mr.Sanjeev Kuthiala, Advocate, for respondents No.1 and 2.
Mr.Dinesh Bhanot, Advocate, for respondents No.3 and 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This appeal is directed against the award, dated 19th November, 2011, passed by Motor Accident Claims Tribunal-I, Solan camp at Nalagarh, District Solan, H.P., (for short, the Tribunal), whereby compensation to the tune of Rs.4,10,000/-, with interest at the rate of 7.5% per annum from the date of filing of the petition till realization, came to be awarded in favour of the claimants, and the insurer was saddled with the liability, (for short, the impugned award).

2. Facts of the case, in brief, are that on 13th July, 2008, deceased Neeraj Kumari, was bringing water from tap at Khere Ka Mandir, Barotiwala, when truck bearing registration No.HP-12A-8321, being driven by its driver rashly and negligently, crushed her. The deceased, at the time of accident, was 13 years of age. Hence the claimants, being the parents of deceased Neeraj Kumari, filed the claim petition before the Tribunal for grant of compensation to the tune of Rs.8.00 lacs.

3. Respondents resisted the claim petition by filing replies and issues came to be framed.

4. Parties have led evidence. The Tribunal after examining the pleadings and scanning the evidence, allowed the claim petition and saddled the insurer with the liability.

5. The owner, the driver and the claimants have not questioned the impugned award on any ground.

6. Only the insurer has challenged the impugned award by the medium of instant appeal only on the ground of adequacy of compensation, as submitted by the learned counsel for the appellant during the course of hearing.

7. Thus, the question is – Whether the insurer can question the adequacy of compensation and whether the appeal is maintainable? The answer is in the negative for the following reasons.

8. 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.

9. 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."*

10. 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.

11. 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.

12. 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."

13. Thus, the insurer can question the adequacy of compensation only if it has sought permission under Section 170 of the MV Act.

14. In the present case, it has to be seen whether the insurer has sought any such permission?

15. I have gone through the record, which does disclose that though the insurer moved application under Section 170 of the MV Act, but the same was dismissed by the Tribunal vide order dated 20th February, 2010.

16. Having said so, the only ground of attack projected and urged is not available to the insurer.

17. However, I have gone through the impugned award and the record. This Court in similar case in FAO Nos.143 and 144 of 2008, decided on 29th May, 2015, after making guess work and relying upon the law expounded by the Apex Court, held the claimants entitled to Rs.4,80,000/-.

18. The Tribunal, in the instant case, has awarded compensation, which is on the lower side. However, the claimants have not questioned the same. Therefore, the impugned award is reluctantly upheld and the appeal filed by the insurer is dismissed.

19. The Registry is directed to release the awarded amount forthwith 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.

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

FAO Nos.49 & 51 of 2012
Decided on : 30.09.2016

1. FAO No.49 of 2012

National Insurance Co. Ltd. .....Appellant

Versus

Pushpa Devi and others ..... Respondents

2. FAO No.51 of 2012

National Insurance Co. Ltd. .....Appellant

Versus

Ruma Devi and others .....Respondents

Motor Vehicles Act, 1988- Section 149- Claimants specifically pleaded that deceased was travelling in the vehicle along with fruits- owner filed a reply pleading that the deceased was travelling in the vehicle – rest of the averments were denied – the Tribunal held that deceased was travelling as owner of goods and not as a gratuitous passenger- held, in appeal that it was for the insurer to plead and prove that driver was not having a valid and effective driving licence and that owner had committed breach of the terms and conditions of the insurance policy- no evidence was led to prove these facts – the Tribunal had rightly saddled the insurer with liability –

however, rate of interest was wrongly granted at 9% per annum, which is reduced to 7.5% per annum from the date of filing of the claim petition. (Para-14 to 22)

Cases referred:

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 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 Supreme Court Cases 738

Savita versus Binder Singh & others, 2014 AIR SCW 2053

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

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

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

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

For the appellant(s):	Mr. Rajiv Jiwan, Advocate.
For the respondent(s):	Mr.Karan Singh Kanwar, Advocate, for respondents No.1 to 4 in FAO No.49 of 2012.
	Mr.Vijay Arora, Advocate, for respondents No.1 to 3 in FAO No.51 of 2012.
	Mr.Naveen K. Bhardwaj, Advocate, for respondent No.5 in FAO No.49 of 2012 and for respondent No.4 in FAO No.51 of 2012.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

The awards, impugned in these appeals, passed by Motor Accident Claims Tribunal, Kullu, H.P., (for short, the Tribunal), are the outcome of one accident caused by the driver, while driving Trax Jeep bearing registration No.HP-49A-1739, rashly and negligently, on 26th September, 2010. Therefore, both these appeals are clubbed and are being disposed of by this common judgment.

2. Facts of the case, in brief, as pleaded by the claimants in both the claim petitions, are that on 26th September, 2010, deceased, namely, Partap Singh and Anil Kumar hired Trax Jeep bearing registration No.HP-49A-1739, for carrying fruits from their houses to Subzi Mandi and when the said vehicle reached near Kotladhar Public Highway, a landslide occurred due to which Partap Singh and Anil Kumar, including the driver of the offending vehicle, lost their lives.

3. The claimants/legal representatives of deceased Partap Singh filed Claim Petition No.31 of 2010, titled Pushpa Devi and others vs. Teja Singh and another, (subject matter of FAO No.49 of 2012), claiming compensation to the tune of Rs.20.00 lacs, as per the break-ups given in the claim petition.

4. The claimants/legal representatives of deceased Anil Kumar invoked the jurisdiction of the Tribunal by filing Claim Petition No.37 of 2010, titled Ruma Devi and others vs. Teja Singh and another, whereby compensation to the tune of Rs.20.00 lacs was claimed, (subject matter of FAO No.51 of 2012).

5. Both the claims petitions were resisted by the respondents, by filing replies.

6. On the pleadings of the parties, the Tribunal framed almost similar issues in both the claim petitions. Issues framed in Claim Petition filed by the dependants of deceased Partap Singh i.e. Claim Petition No.31 of 2010, titled Pushpa Devi and others vs. Teja Singh and another, are reproduced hereinbelow:

> *"1. Whether Sh.Partap Singh died in an accident on 26.9.2010 around 8.15 a.m. at place Kotladhar Road, Kullu involving Jeep bearing No.HP-49A-1739 being driven by deceased Keshav Ram in a rash and negligent manner? OPP*
>
> *2. If issue No.1 is proved in affirmative, for what amount of compensation the petitioners are entitled and from whom? OPP*
>
> *3. Whether the driver of the vehicle No.HP-49A-1739 was not having valid and effective driving licence to drive the vehicle in question, if so, its effect? OPR-2*
>
> *4. Whether the vehicle in question was being plied in contravention of the provisions of Motor Vehicles Act and contract of insurance, if so, its effect? OPR-2*
>
> *5. Whether deceased Shri Partap Singh was gratuitous passenger in the vehicle No.HP-49A-1739 at the time of accident, if so, its effect? OPR-2*
>
> *6. Whether the petitioners are not legal heirs of deceased Sh.Partap Singh? OPR-2*
>
> *7. Relief."*

7. Parties led evidence. The Tribunal, after appreciating the pleadings of the parties and the evidence adduced, allowed both the claim petitions vide the awards impugned in the instant appeals and awarded compensation, in each claim petition, to the tune of Rs.4,80,800/-, alongwith interest at the rate of 9% per annum, in favour of the claimants, and the insurer was saddled with the liability.

8. Feeling aggrieved, the insurer has questioned the impugned awards by the medium of instant appeals.

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

10. During the course of hearing, the learned counsel for the insurer argued that the Tribunal has fallen into an error in saddling the insurer with the liability inasmuch as the deceased were traveling in the offending vehicle as gratuitous passengers. Thus, it was submitted that the owner had committed willful breach of the terms and conditions of the insurance policy, therefore, he was liable to be saddled with the liability and not the insurer.

11. On the other hand, the learned counsel for the insured supported the impugned awards for the reasons given therein.

12. Thus, the only question to be determined in both the appeals is – Whether the insurer came to be rightly saddled with the liability.

13. To determine the said question, a brief reference may be made to the pleadings of the parties.

14. The claimants in paragraph 10 of the Claim Petition No.31 of 2010 (subject matter of FAO No.49 of 2012) have specifically pleaded that, on the fateful day, the deceased was traveling in the offending vehicle alongwith fruits which he was taking from Jhibhi to Banjar Market. It is apt to reproduce paragraph 10 of the claim petition hereunder:

> *"No. The deceased was traveling in the ill-fated vehicle and was carrying fruits in it from Jhibhi to Banjar Market."*

15. Owner of the offending vehicle filed reply to the claim petition, wherein it has been admitted that the deceased was traveling in the vehicle on the fateful day. It is apt to reproduce paragraph 10 of the reply filed by the owner to the claim petition, hereunder:

"That para No.10 of the claim petition is correct to the extent that the deceased was traveling in the vehicle, but rest of the para is wrong and hence denied and the petitioner be put to strict proof of the same."

16. Similar are the averments in the other Claim Petition, therefore, are not being referred to for the sake of brevity.

17. The owner of the offending vehicle while appearing as RW-3 has stated that the deceased Partap Singh and Anil Kumar were carrying the apple crates for selling the same in Subzi Mandi Banjar. The Tribunal, in both the claim petitions, after referring to the evidence has held that the deceased were traveling in the offending vehicle as owners of the goods and not as gratuitous passengers. It was also observed by the Tribunal that the seating capacity of the offending vehicle, including driver, was three. The said findings recorded by the Tribunal are borne out from the records, are liable to be upheld.

18. 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 and that the owner has committed willful breach of the terms and conditions contained in the insurance policy, has not led any evidence to prove the said factum. On the contrary, it is seen from the records that the driver of the offending vehicle was having a valid and effective driving licence at the time of accident.

19. The questions of rashness and negligence, and adequacy of compensation are not in dispute.

20. Accordingly, the findings returned by the Tribunal, on all the issues, in both the claim petitions, are upheld.

21. However, the Tribunal has fallen into an error in awarding interest at the rate of 9% per annum. 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 Supreme Court Cases 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 Supreme Court Cases 738****;* ***Smt. Savita versus Binder Singh & others,*** **reported in** ***2014 AIR SCW 2053****;* ***Kalpanaraj & Ors. 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 Supreme Court Cases 433,*** **and** ***Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another****,* reported in ***(2015) 4 Supreme Court Cases 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**.

22. Having said so, it is held that the amount of compensation shall carry interest at the rate of 7.5% per annum from the date of filing of the claim petitions till the deposit thereof.

23. In view of the above discussion, the impugned awards are modified, as indicated above, and the appeals filed by the insurer are allowed to the above extent.

24. The Registry is directed to release the amount in favour of the claimants forthwith through their respective bank accounts, strictly in terms of the conditions contained in the impugned awards and the excess amount, if any, be refunded to the insurer through payees' account cheque.

25. Both the appeals stand disposed of accordingly.

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

Oriental Insurance Company Limited .....Appellant.
Versus
Gopal Chand & another ....Respondents.

FAO No. 451 of 2009.
Reserved on : 20.09.2016.
Decided on : 30th September, 2016.

Workmen Compensation Act, 1923- Section 4- Claimant was employed by respondent No. 2 on a monthly wages of Rs. 5,000/- per month for performing drilling work in the construction of the road – a big stone rolled down from the upper side of the hill and caused serious injury to the claimant as a result of which claimant sustained 100% disability- the Commissioner allowed the petition – the respondent No. 2 holds a valid insurance cover insuring the liability for two drill men- the claimant was a drill man and therefore, the insurer is liable to indemnify the respondent No. 2 for the compensation payable to the claimant - average monthly wages of the claimant is Rs. 2700/- per month- 60% of the same is Rs.1,620/-- loss of earning capacity is 100%- therefore, compensation of Rs. 1620 x 215.28= Rs. 3,48,754/- is payable - in addition to this interest @ 9% per annum w.e.f. 17.3.2006 Rs. 1,04,741/- is payable and total amount of compensation of Rs. 4,53,495/- is payable- the liability to pay the interest is that of the insured and not of the insurer. (Para-4 to 10)

For the Appellant: Mr. G.D. Sharma, Advocate.
For Respondent No.1: Mr.Malay Kaushal, Advocate vice Mr.Anand Sharma, Advocate.
For Respondent No.2: Mr.S.D. Vasudeva, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal arises from the impugned order of the learned Commissioner, rendered under the Workmen's Compensation Act, 1923 Palampur, District Kangra, H.P. (for short the "Commissioner"), whereby he allowed the application preferred thereat by the claimant/respondent No.1 for grant of compensation under the Workmen's Compensation Act (for short the "Act"). The claimant/respondent No.1 herein stood employed by respondent No.2 herein on a monthly wage of Rs.5000/- for performing drilling work in the construction of a road near Punti Road Thana Pangi District Chamba and during the course of his performing employment under his employer, a big stone rolled down from upper side of the hill and caused a serious injury to the claimant/respondent No.1 herein. In sequel thereto, the petitioner/respondent No.1 herein suffered 100% disability.

2. The learned Commissioner allowed the petition preferred thereat by the claimant/respondent No.1 herein. The Insurance company-appellant herein standing aggrieved by the rendition of the learned Commissioner hence concerts to assail it by preferring an appeal therefrom before this Court.

3. When the appeal came up for admission on 12.10.2009, this Court, admitted the appeal instituted by the Insurance company/appellant against the order of the learned Commissioner, on the hereinafter extracted substantial questions of law:-

a) Whether the insured can be held liable to pay the award especially when there has been suppression/concealment of material facts and mis-representation made in the proposal form which form the basis of the contract of insurance?

b) Whether the appellant can be held liable to pay the interest especially where there is specific endorsement in the contract of insurance Ex.R-5 that the policy shall not extend to indemnify the insured in respect of any interest or penalty which may be imposed upon them on account of failure to comply with the requirements laid under the Workmen Compensation Act, 1923, and subsequent amendments of the said Act?

Substantial Questions of law No.1 and 2.

4. Uncontrovertedly, the workman as displayed by disability certificate comprised in Ex.PA suffered 100% disability, in sequel, to his uncontrovertedly sustaining injuries during the course of his performing employment under the relevant employer who stands impleaded as respondent No.2. Respondent No.2 holds a valid insurance cover from the insurer wherein the insurer is fastened with a liability to indemnify the insured for any liability determined under the Act vis-à-vis a workman employed by him. Ex. R-5 is the apposite insurance policy executed inter se the insurer and respondent No.2 wherein the latter stood insured qua liability towards compensation assessed under the Act vis-à-vis a workman employed by him. Ex.R-5 is an unnamed policy for workers. Obviously with the name of the relevant workman not occurring therein, the insurer has espoused a contention of its hence holding leverage to exculpate its liability arising from its executing Ext.R-5 with respondent No.2. However, the aforesaid contention loses its tenacity in the trite factum of the relevant insurance policy though not unraveling therein the name of the relevant workman yet it including therewithin the liability of the insurer for indemnifying a claim adjudged qua two drillermen by the competent authority. Consequently, with the relevant workman standing employed by respondent No.2 as a drillerman in the relevant work, factum whereof qua his standing engaged in the relevant work in the aforesaid capacity by respondent No.2 has remained unimpeached wherefrom the ensuing sequel is of with evidently the relevant workman standing deployed as a drillerman in the relevant work, whereupon, hence despite his name not occurring in Ex.R-5 rather with Ex.R-5 insuring the aforesaid category of workmen deployed by respondent No.2 gives leverage to the insured to claim indemnification from the insurer qua the compensation amount determined vis-à-vis him by the Commissioner, under the Act. Ex.R-5 is a contract of insurance, its terms and conditions enjoined meteing of deference by the insurer. Its perusal unveils of the insurer circumscribing the limit of insurance besides its therein fettering the limit qua the apposite indemnification by it vis-à-vis the relevant pronouncement by the competent authority qua the relevant workman, who suffers evident disability, in sequel, to his sustaining injury during the course of his performing employment under his employer, to the extent of the relevant computation of the relevant compensation amount assessed qua the workman by the competent authority emanating on application by the authority concerned the relevant statutory parameters, parameters whereof stand derived by it, by its meteing reverence to the relevant condition in Ex.R-5 wherein the insurer in the bilateral contract of insurance executed by it with the insured, has limited the per mensem wages of the relevant workman upto Rs.2700/- per month, also therefrom the relevant computations were enjoined to spur whereas the competent authority in digression therefrom taking Rs.3900/- per month to be the figure whereto the relevant statutory principles for computation of compensation amount vis-à-vis the workman stands applied, has hence infracted an inherent condition in the contract of insurance whereupon this Court would hold jurisdiction to interfere with the award of the learned Commissioner. The aforesaid submission obviously holds weight prominently when the relevant contract of insurance holds clout on all fronts, also when any infraction of its terms and conditions would render the relevant computation made by the learned Commissioner to fall apart. In sequel, this Court metes deference to Ex. R-5 wherewithin the insurer has qua the relevant workman pegged his salary/wages at Rs.2700/- per month whereto the relevant statutory principles are enjoined to be applied, for arriving at the compensation amount payable to him. Consequently, this Court construes Rs.2700/- per mensem to be relevant insured wage/salary per mensen of the workman thereupon this Court on application of the relevant statutory parameters, assesses the compensation amount payable to him in the hereinafter manner:-

Average monthly wages Rs. 2700/-

Restricted to 60% Rs. 1620/-

Relevant factor applied

Loss of earning capacity 100%

(a) Compensation =1620x215.28= Rs.3,48,754 (rounded of)

(b) Interest @ 9% w.e.f. 17.3.2006=Rs.1,04,741/-
to 16.7.2009:

Total of (a) & (b)= Rs.3,48,754 + Rs.1,04,741 /-= Rs.4,53,495/-

Amount of compensation to be paid : Rs.4,53,495.

5. Also the liability of the interest component qua the compensation amount determined by the Commissioner stood fastened upon the insurer. The fastening of liability qua interest calculated on the compensation amount determined by the Commissioner qua the workman, upon the insurer, is also in transgression of the mandate of the verdict of the Hon'ble Apex Court encapsulated in New India Assurance Co. Ltd. Versus Harshadbhai Amrutbhai Modhiya and another, (2006)5 SCC 192, relevant paragraph No.24 whereof stands extracted hereinafter wherein a visible mandate stands enshrined of the authority assessing compensation amount qua a workman under the Act standing enjoined to vindicate the contract of insurance executed inter se the insured and the insurer. Also a graphic mandate stands embodied therein of in the event of the insurance cover excluding the insurer to indemnify the insured qua the interest levied on the compensation amount assessed by the authority concerned vis-à-vis the workman, the relevant authority concerned while exercising jurisdiction under the Act not holding any jurisdiction, to fasten any liability qua the interest component of the compensation amount, upon the insurer. Relevant paragraph No.24 of the judgment supra reads as under:-

> "24. Section 17 of the Workmen's Compensation Act voids only a contract or agreement whereby a workman relinquishes any right of compensation from the employer for personal injury arising out of or in the course of the employment and insofar as it purports to remove or reduce the liability of any person to pay compensation under the Act. As my learned Brother has noticed, in the Workmen's Compensation Act, there are o provisions corresponding to those in the Motor Vehicles Act, insisting on the insurer covering the entire liability arising out of an award towards compensation to a third party arising out of a motor accident. It is not brought to our notice that there is any other law enacted which stands in the way of an insurance company and the insured entering into a contract confining the obligation of the insurance company to indemnify to particular head or to a particular amount when it relates to a claim for compensation to a third party arising under the Workmen's Compensation Act. In this situation, the obligation of the insurance company clearly stands limited and the relevant proviso providing for exclusion of liability for interest or penalty has to be given effect to Unlike the scheme of the Motor Vehicles Act the Workmen's Compensation Act does not confer a right on the claimant for compensation under that Act to claim the payment of compensation its entirety from the insurer himself. The entitlement of the claimant under the Workmen's Compensation Act is to claim the compensation from the employer. As between the employer and the insurer, the rights and obligations would depend upon the terms of the insurance contract. Construing the contract involved here it is clear that the insurer has specifically excluded any liability for interest or penalty under the Workmen's Compensation Act and confined its liability to indemnify the employer only against the amount of compensation ordered to be paid under the Workmen's Compensation Act. The High Court was, therefore, not correct in holding that the appellant Insurance Company, is also liable to pay the interest on the amount of compensation awarded by the Commissioner. The workman has to recover it from the employer." ....(pp 199-200)

Consequently, the fastening by the learned Commissioner upon the insurer of the liability of interest calculated by it upon the compensation amount assessed by it vis-à-vis the workman suffers from an inherent fallacy. In sequel, the award of the Commissioner to the extent of its fastening liability of interest calculated upon the compensation amount as determined by it upon the insurer, stands quashed and set aside. Contrarily, the liability of interest on the compensation amount as stands determined by this Court vis-a-vis the workman is fastened upon the employer/respondent No.2 herein. Substantial questions of law are answered accordingly.

10. For the reasons recorded hereinabove, the instant appeal is partly allowed and the order impugned before this Court is modified. The petitioner/respondent No.1 is held entitled to a compensation of Rs.3,48,754/- + interest Rs.1,04,741/- (total Rs.4,53,495). The appellant herein/insurance company is directed to indemnify respondent No.2/employer qua the compensation amount as per the insurance policy. However, the liability qua the interest as calculated thereon quantified at Rs.1,04,741/- is fastened upon the employer/respondent No.2. The aforesaid amount(s) shall be respectively deposited before this Court by the insurance company and the employer/respondent No.2 within two months from today, failing which it shall carry interest at the rate of 9% per annum from the date of order. All pending applications also stand disposed of. No order as to costs.

****

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

Oriental Insurance Company Limited ...Appellant.

Versus

Smt. Kanta Devi and others ...Respondents.

FAO No. 37 of 2012
Decided on: 30.09.2016

Motor Vehicles Act, 1988- Section 149- Insurance policy shows that the seating capacity of the vehicle was 4- thus, the risk of deceased was covered- insurer had failed to lead any evidence that the deceased was travelling as gratuitous passenger and there was breach of terms and conditions of the policy by insured- appeal dismissed. (Para- 4 to 7)

For the appellant: Mr. G.C. Gupta, Senior Advocate, with Mr. Abhay Gupta, Advocate.

For the respondents: Mr. Anupinder Rohall, Advocate, vice Mr. M.L. Chauhan, Advocate, for respondent No. 1.
Mr. Dibender Ghosh, Advocate, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Challenge in this appeal is to award, dated 31st December, 2011, made by the Motor Accident Claims Tribunal, Kinnaur Civil Division at Rampur Bushahr, H.P. (for short "the Tribunal") in MAC Petition No. 66 of 2009, titled as Smt. Pushpa Devi and others versus Smt. Kanta Devi and another, whereby compensation to the tune of ₹ 11,12,320/- with interest @ 7.5% per annum from the date of the claim 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 on the ground that the Tribunal has fallen in an error in saddling it with liability.

4. I have gone through the record. The insurance policy is on the file as Ext. RB, the perusal of which does disclose that the seating capacity of the offending vehicle was '4', thus, the risk of the deceased was covered.

5. Learned Senior Counsel appearing on behalf of the insurer argued that the deceased was travelling in the offending vehicle as a gratuitous passenger and no such issue was framed by the Tribunal. The argument is not tenable for the following reasons:

6. On the pleadings of the parties, the following issues came to be framed by the Tribunal on 13th December, 2010:

> *"1) Whether late Sh. Mehar Singh died on account of the injuries sustained by him due to the rash and negligent driving of vehicle No. HP-06-3157 being driven by its owner Sh. Shamsher Singh owner-cum-driver (since deceased), as alleged? 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 (Shamsher Singh, since deceased) of the offending vehicle was not possessed of valid and effective driving license at the relevant time? OPR-2*
>
> *4) Whether the offending vehicle was being plied in breach of the terms and conditions of the insurance policy? OPR-2*
>
> *5) Whether the offending vehicle at the relevant time was being plied without valid documents, as alleged? OPR-2*
>
> *6) Relief."*

7. It was for the insurer to plead and prove that the deceased was travelling in the offending vehicle as a gratuitous passenger. Issue No. 2 to the extent of 'from whom' and issue No. 4 relate to the said plea. The insurer has not led any evidence to prove the said factum, thus, has failed to discharge the onus.

8. Having said so, the ground urged by the insurer is not tenable.

9. The amount awarded by the Tribunal is adequate, cannot be said to be meagre or excessive in any way.

10. Viewed thus, the Tribunal has rightly made the impugned award, needs no interference.

11. Having glance of the above discussion, the impugned award is upheld and the appeal is dismissed.

12. Registry 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.

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

****

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

Oriental Insurance Company Ltd. and another .....Petitioners.

Vs.

Dr. Gyan Prakash .....Respondent.

Civil Revision No. 124 of 2006
Reversed on : 07.09.2016
Date of Decision: 30.09.2016

H.P. Urban Rent Control Act, 1987- Section 14- An eviction petition was filed pleading that the tenants had damaged the wall of the building and had joined it to another building – the tenants had materially impaired the value and utility of the building – the petition was allowed by the Rent Controller – an appeal was filed, which was dismissed- held in revision that the plea of the tenants that alteration was made by the landlord was not proved by evidence on record – carrying out structural alteration without the written consent of the landlord by carving out one passage materially impaired the value and utility of the building as two independent sets were converted into one unit – revision dismissed. (Para- 14 to 28)

Cases referred:

Om Prakash Vs. Amar Singh and other (1987) 1 Supreme Court Cases 458
Om Pal Vs. Anand Swarup (1988) 4 Supreme Court Cases 545
Vipin Kumar Vs. Roshan Lal Anand and others (1993) 2 Supreme Court Cases 614
Gurbachan Singh and another Vs. Shivalak Rubber Industries and others (1996) 2 Supreme Court Cases 626
Waryam Singh Vs. Baldev Singh (2003) 1 Supreme Court Cases 59
Purushottam Das Bangur and others Vs. Dayanand Gupta (2012) 10
Hindustan Petroleum Corporation Vs. Dilbahar Singh (2014) 9 Supreme Court Cases 78

For the petitioners: Dr. Lalit K. Sharma, Advocate.
For the respondent: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge :

By way of this revision petition, the petitioners have challenged the judgment passed by the Court of learned appellate authority, Solan in C.M.A. No. 10-S/14 of 2005 dated 22.05.2006, whereby learned appellate authority dismissed the appeal filed by the present petitioners against order dated 25.05.2004 passed by the Court of learned Rent Controller, Solan in Rent Petition No. 34/2 of 1998 vide which, the eviction petition filed by the landlord against the tenant-Company was allowed.

2. Brief facts necessary for the adjudication of the present case are that Dr. Gyan Parkash, land owner filed an application under Section 14 of the H.P. Urban Rent Control Act, 1987 for ejectment of the present petitioners on the grounds that he had let out three rooms, latrine, bathroom and lobby, situated on the first floor from the road level of The Mall Solan, H.P. in building known as Mamoore bearing No. 63, The Mall Solan, H.P. to the present petitioners/tenants on monthly rent of Rs.875/- on 01.02.1978 and tenants had damaged the joint structural wall separating the buildings of landlord (i.e. respondent in the present case) and that of Dr. Chaman Lal Gupta by breaking a portion of the joint structural wall in between two buildings, one belonging to him and the other belonging to Dr. Chaman Lal Gupta and had opened a window in the first room and similarly had damaged a part of the same joint structural wall and had left a big portion 4' X 7' lying open, thus connecting the two separate buildings, one belonging to him and other belonging to Dr. Chaman Lal Gupta and had converted it into a single unit while he had given on rent his building separately on separate date by a different rent note at different rate of rent. Landlord thus sought the eviction of the tenant-company on the ground that the tenant-company had without the written consent of the landlord damaged the main joint wall dividing two different properties, one belonging to him and other to Dr. Chaman Lal Gupta, details of which had already been given above and had thus connected two separate/different buildings into a single building and had materially impaired the utility of building of the landlord as well as Dr. Chaman Lal Gupta. As per the landlord, said demolition of the joint wall and opening of the window and leaving gap was without his written consent and thus, the tenants were liable to be evicted on the above mentioned grounds.

3. Before proceeding further, it is clarified that the tenants before the Court of learned Rent Controller were present petitioners and respondent before this Court was the landlord. Hereinafter, the present petitioners shall be referred to as 'the tenants' and the present respondents shall be referred to as 'the landlord'.

4. In its reply filed to the eviction petition, the stand taken by the tenants was that no structural change had been carried out in the premises and the premises in fact were in the same shape and condition in which these were let out to the tenants by the landlord. As per the tenants, the alleged changes were in fact made by the landlord at the time of renting out second set to the tenants in the year 1981. As per the tenants, the eviction petition had been filed with a malafide intention/ulterior motive to have the rent increased. It was further mentioned in the reply that no alteration whatsoever had been made by the tenant at any stage and, therefore, the question of any written consent did not arise at all. As per the tenants, one set comprising of three rooms, bath room and latrine were taken on rent by the tenants from the landlord in the year 1978 and thereafter in the year, 1981, brother of the landlord Dr. Chaman Lal Gupta, who was owning the same accommodation in the adjoining set approached the then Branch Manager of the tenant-company alongwith the present landlord and proposed to rent out the said accommodation to them. As per the tenants, both the present landlord as well as Dr. Chaman Lal Gupta were asked to make some changes in between the sets so that both sets could be used as one unit so as to make it convenient to the tenants to use the property as a single office. This was agreed to by the landlord and Dr. Chaman Lal Gupta, his brother and they accordingly carved out one passage in the shape of an open door in the common wall separating the sets. They also opened one small service window in the said wall. As per the tenants, these minor changes were made by the landlord and his brother of their own free will. As per the tenants, as per the desire of the two brothers, two separate rent deeds were made in respect of their separate rent accommodations and the same were in fact in occupation of the tenants since 1981. On these basis, it was contended by the tenants, that no additions or structural changes had been made by them at any point of time. According to the tenants, the landlord as well as his brother were frequently visiting the Branch Office premises ever since the inception of their respective tenancies and they were fully aware of the structural position of the premises. On these basis, the tenants denied the claim of the landlord.

5. In the rejoinder, landlord categorically denied that any changes had been made in the property by him at the time of renting out of second set to the tenants by the other landlord in the year 1981 as was being alleged by the tenants. As per the landlord, as far as he was concerned, he had independently rented out his premises to the tenant-company w.e.f. 01.02.1978 and renting out of other set to the tenant-company in the year 1981 by the other landlord was an independent act because these were independent premises rented out to the tenant-company not by him, but by Shri Chaman Lal Gupta w.e.f. 1.3.1981, whereas he had rented out his premises much prior, i.e. w.e.f. 01.02.1978. It was also denied that the petition had been filed either with the malafide intention or ulterior motive to increase the rental value. It was reiterated by the landlord that the tenant-company had damaged the main wall and had materially impaired value and utility of the building and it was emphatically denied by the landlord that the alterations had been made by him as alleged by the tenant company. In the rejoinder, landlord categorically denied that he was the brother of Dr. Chaman Lal Gupta and stated that he was the son of brother of Dr. Chaman Lal Gupta. He also denied that he alongwith Dr. Chaman Lal Gupta had approached the then Branch Manager of the tenant-Company and proposed to them to take on rent the accommodation of Dr. Chaman Lal Gupta and thereafter he and Dr. Chaman Lal Gupta had made changes in their sets so that both sets could be used conveniently by the Company as a single office. It was further denied by the landlord that changes effected were only minor in nature. As per the landlord, the unilateral changes/alterations carried out by the tenant-Company were major changes and structural changes had been carried out by them without the written consent of the landlord as well as Dr. Chaman Lal Gupta. It was also denied that the landlord and his uncle had been frequently visiting the Branch of the premises as was alleged by the tenant-Company.

6. On the basis of the pleadings of the parties, learned Rent Controller framed the following issues:

> *"1. Whether the respondents have committed such acts by damaging structure wall separating the building of the petitioner which act as such has impaired the value and utility of the building as alleged? OPP*
>
> *2. Relief."*

7. On the basis of material produced on record by the respective parties, the issues so framed were answered in the following terms by learned Rent Controller:

> *"Issue No. 1: Yes.*
>
> *Relief: The petition stands allowed as per operative portion of the order."*

8. It was held by the learned Rent Controller that material changes were carried out in the premises in question by the tenants without the approval of landlord and said changes were not carried out in the year 1981, but were rather carried out subsequently. It was further held by learned Rent Controller that landlord Gyan Parkash who entered the witness box as PW-1 had categorically stated that the premises in issue were rented out to the tenant-Company on 01.02.1978 vide agreement Ex. 1/B executed between the two and the building of Dr. Chaman Lal Gupta, which was situated by the side of the demised premises was rented out by its owner to the tenant-Company in the year 1981. This witness further categorically deposed that the tenant-Company demolished the wall of the premises in question and open space measuring 4 feet X 7 feet was carved out in the form of a passage and one window was also opened from one room. This was done by the tenant-Company in order to convert two sets of accommodation into one unit. This witness further stated that window was opened in the joint wall belonging to him and Dr. Chaman Lal Gupta and thus structural changes were carried out by the tenant-Company without his consent, which had otherwise also caused intensive damage to the building in question and had impaired its utility. Learned Rent Controller further held that though the said witness was subjected to lengthy cross-examination, however, he emphatically denied that the changes in issue were in fact carried out in the premises in question before the other building of Dr. Chaman Lal Gupta was rented out in year 1981. He also disputed that service window and passage was opened with his consent. Learned Rent Controller took note of the fact that specific stand taken by the tenant-Company was that though the structural changes were carried out in the shape of opening of window and passage, but the same was done with the consent of the landlord before the set of Chaman Lal Gupta was taken on rent. It was further held by the learned Rent Controller that one letter having been addressed to Branch Office of the tenant-Company at Solan from Head Office, Chandigarh was put to PW-1 Gian Parkash in his cross-examination, which stood tendered in evidence as Mark-X. Surprisingly, this document relied upon by the tenant-Company during the course of cross-examination of PW-1 Gyan Parkash was not tendered in evidence in accordance with law when tenants led their evidence. Learned Rent Controller also held that a "glance" of document "mark-X" revealed that the tenant-Company had suggested its Branch Office at Solan to execute an agreement with the landlord in order to convert two sets into one combined unit and it appeared that this document "mark-X" had been intentionally withheld by the tenant-Company because it was apparent from this communication that the Head Office of the tenant-Company had directed the Branch Office at Solan to execute an agreement with the landlord, whereas no such agreement had been produced on record by the tenant-Company. Learned Rent Controller further held that the contention of the tenant-Company that the landlord had agreed for the conversion of two sets into one unit stood disputed and, therefore, it was apparent that structural changes were carried out by the tenant-Company without the consent of the landlord. Learned Rent Controller also took note of the agreement executed between the tenant-Company and Dr. Chaman Lal Gupta Ex. P2, in which it was clearly recited in Para Nos. 6 and 7 that the tenants will not make any structural changes in the premises in question and the tenants were permitted to erect wooden partitions, counters and cabins without causing any damage or change to the structural position of the leased premises.

On these basis, it was held by the learned Rent Controller that neither joint wall was permitted to be demolished nor window was permitted to be opened nor passage was permitted to be carved out. Accordingly, it was held by the learned Rent Controller that the tenant-Company had carried out structural changes without the consent of the landlord which were material in nature and which had affected the value and utility of premises and on these basis, learned Rent Controller allowed the eviction petition.

9. Feeling aggrieved by the order passed by the learned Rent Controller, Solan, the tenant-Company filed an appeal before the learned appellate authority. Vide its judgment dated 22.05.2006, learned appellate authority while concurring with the findings returned by learned Rent Controller, Solan dismissed the appeal so filed by the tenant-Company and affirmed the order passed by learned Rent Controller dated 25.05.2004

10. The judgment so passed by the learned appellate authority has been challenged by way of present revision petition, so also the application filed by the landlord under Section 14(2)(iii) of the Himachal Pradesh Urban Rent Control Act, 1987.

11. Dr. Lalit K. Sharma, learned counsel appearing for the petitioners/tenant-Company has argued that the judgment passed by learned appellate authority as well as the order passed by learned Rent Controller, Solan were not sustainable in the eyes of law as the findings returned by both the Courts below were perverse, erroneous "absurd" and based upon misleading, misconstruing and misinterpretation of evidence led by the respective parties. Dr. Sharma argued that the judgment passed by learned appellate authority as well as the order passed by learned Rent Controller were not sustainable as both the learned Courts below erred in not appreciating that the landlord when he entered the witness box as PW-1 himself admitted the fact that the common wall between the demised premises and the adjoining set was still intact and the factum of opening of passage from the common wall by the tenant-Company had not been proved on record by the landlord nor was it supported by any of his witnesses. On these basis, it was submitted by Dr. Sharma that the findings arrived at by both the learned Courts below to the effect that the passage and a window were carved out by materially impairing the value and utility of the premises or the landlord were perverse findings. Dr. Sharma further argued that the learned Courts below had erred in concluding that it stood proved on record that the alleged alterations took place in the year 1987, whereas according to him, it was the landlord himself who had carried out the alterations before the adjacent set was taken on rent by present petitioners from Dr. Chaman Lal Gupta. It was further contended by Dr. Sharma that both the learned Courts below erred in not appreciating that the petition in fact had been filed with a malafide intent for getting the rent increased by 100% and the intent with which the petition was filed has escaped the notice of both the learned Courts below. It was further urged by Dr. Lalit Sharma that neither proper issues were framed nor any material was produced on record by the landlord to substantiate that any material alterations had been carried out by the tenant-Company which had materially impaired the value of the property of the landlord. He further argued that the testimonies of the witnesses of the tenant-Company were also ignored by both the learned Courts below in a cursory manner without appreciating that their testimonies duly proved that no structural changes were in fact made/carried out by the tenant-Company. Accordingly, on these grounds it was argued by Dr. Sharma that the judgment passed by learned appellate Court as well as the orders passed by learned Rent Controller were perverse and not sustainable in the eyes of law and the same were liable to be set aside and the application filed by the landlord under Section 14(2)(iii) of the Himachal Pradesh Urban Rent Control Act was liable to be rejected. No other point was urged.

12. On the other hand, Mr. Neeraj Gupta, learned counsel appearing for the landlord/respondent vehemently argued that there was no merit in the present revision petition and in fact the contention of the learned counsel for the petitioners that the findings arrived at by both the Courts below were perverse was totally incorrect. Mr. Gupta argued that it stood established from the records that the premises subject matter of the present revision petition were let out to the tenant-Company in the year 1978 by way of an independent agreement. Mr.

Gupta further argued that right from the day when the tenant-Company was inducted as a tenant till the filing of the application under Section 14 of the Himachal Pradesh Urban Rent Control Act, no written consent whatsoever was ever given by the landlord to the tenant-Company to carve out either any passage or to create any window in the walls of the let out premises to connect the same with the other premises, which were even otherwise independently taken on rent by the tenant-company from one Dr. Chaman Lal Gupta and that too by an independent agreement entered into in the year 1981. Mr. Gupta further argued that in fact the contentions of the learned counsel for the petitioners were self contradictory and self destructive. According to Mr. Gupta, on one hand it was being urged by the petitioners that both the Courts below erred in not appreciating that the landlord failed to prove on record that any passage or window was in fact carved out from the common wall at all and on the other hand, the case being put forth by the petitioners was that either everything was done by the landlord himself or it was done with express consent of the landlord. It was further argued by Mr. Gupta that in the present case, the act of the tenant-Company had resulted in opening of a passage and window from the common wall of the set of the present landlord and that of Dr. Chaman Lal Gupta resulting in these two sets becoming one and by creating an opening in such a manner so as to connect the premises let out by the present landlord with those of another is nothing but an act which materially impaired the value and utility of the premises of the landlord which was let out to the tenant-Company. Mr. Gupta further argued that even otherwise keeping in view the fact that both the learned Courts below had come to the conclusion that the tenant-Company had carried out material alterations which impaired the value and utility of the property without the consent of the landlord, the findings so arrived at did not warrant any interference by this Court in exercise of its revisional jurisdiction. According to Mr. Gupta, the findings so returned by both the Courts below were duly borne out from the records of the case and the petitioners had failed to point out any perversity or jurisdictional error committed while adjudicating the case by both the Courts below. He further argued that learned counsel for the petitioner wanted this Court to re-appreciate the entire evidence which was not possible in exercise of its revisional jurisdiction. On these basis, it was urged by Mr. Neeraj Gupta that there was no merit in the revision and the same be dismissed.

13. I have heard the learned counsel for the parties and also gone through the records of the case as well as the order passed by the Court of learned Rent Controller and judgment passed by learned appellate Court.

14. Firstly, I will deal with the issue raised by Dr. Lalit K. Sharma, learned counsel for the petitioners that the impugned order and judgment passed by the Court of learned Rent Controller and learned appellate Court respectively are perverse and not sustainable in law on the grounds that both the learned Courts below erred in not appreciating that landlord as PW-1 himself admitted the fact that the common wall between the demised premises and the adjoining set was still intact and the factum of opening of passage from the common wall by the tenant-Company had not been proved on record by the landlord. In other words, the contention of Dr. Sharma is that very edifice of the case of the landlord was without any basis as neither the common wall between the demised premises and the adjoining set was altered at all by the tenant-Company nor any passage from the common wall was carved out. In my considered view, this argument of the learned counsel for the petitioner deserves outright rejection. This is for the reason that the argument raised by learned counsel for the petitioners is contrary to the pleadings. A perusal of the reply filed by the tenant-Company to the eviction petition filed by the landlord demonstrates that the case set up by the tenant-Company therein was that the alleged changes in fact had not been carried out by the tenant-Company, but had been made by the landlord at the time when the adjoining set was taken on rent by the tenant-Company in the year 1981. If the averments made in the reply so filed by the tenant-Company are to be believed, then the arguments of Dr. Sharma to the effect that the landlord admitted in the witness box that the common wall is intact and no passage has been carved out is contrary to the pleadings. Even a perusal of the statement of PW-1 demonstrates that he has nowhere stated therein that the common wall of the demised premises and that of the adjoining set was either intact and no

passage has been carved out. On the contrary, in his cross-examination, suggestions given to the landlord by the tenant-Company were to the effect that he and his uncle had agreed that in order to make the two sets as a compact unit, they will provide a service window and a passage between the same, which suggestion was denied by the landlord. Therefore, in my considered view, there is no merit in the contention of Dr. Sharma that the edifice of the case of the landlord is without any genesis as the argument of Dr. Sharma to the effect that in fact the landlord had no cause of action because he had admitted that the common wall was intact and no passage was carved out from the same is contrary to the records and sans merit.

15. Now, I will come to the second contention of learned counsel for the petitioners, which is that passage and common wall were not carved out from the demised premises and adjoining set by the tenant-Company without the consent of landlord, but it was the landlord who himself had carried out these alterations as was verbally agreed by him with the tenant-Company. The argument of Dr. Sharma to the effect that it was the landlord who himself had carried out the alterations in his common wall in the year 1981 has been disbelieved by both the learned Courts below. No credible evidence save and except the self serving statements of its employees which are also uncorroborated has been produced on record by the tenant-Company to substantiate this contention of their's. It is a matter of record that no written document has been produced by the tenant-Company on record from which it could be inferred that the passage and the window were carved out from the common wall either by the landlord on the asking of the tenant-Company or by the tenant-Company with the consent of the landlord. No evidence has been led by the tenant-Company from which it could be inferred that the said alterations were in fact carried out by the landlord voluntarily on the asking of the tenant-Company in the year 1981 when the adjacent set was taken on rent by the tenant-Company. On the other hand, landlord on the basis of evidence placed by him on record has duly proved and established that the alterations were carried out by the tenant-Company without his consent written or otherwise. This assumes importance in view of the fact that it is an admitted position that the adjoining set did not belong to the present landlord but was owned by some other person, who incidentally also filed an eviction petition against the tenant-Company on the ground of materially impairing the value of the rented premises by carving out a passage and a window from the common wall of his set and of the present landlord without his consent. Therefore, there is no merit in the contention of Dr. Sharma that the passage and window in the common wall were not carved out by the tenant-Company unilaterally without the consent of the landlord, but these alterations were voluntarily done by the landlord on the verbal asking of the tenant-Company in the year 1981. At this stage, it is relevant to refer to the fact which has been taken note of by the learned Courts below. It has come in the order passed by learned Rent Controller that during the cross-examination of landlord, one letter was put to him which stands tendered in evidence as Mark-X. Learned Rent Controller took note of the fact that the document in question Mark-X which was put to the landlord during his cross-examination was not tendered in evidence in accordance with law when the tenant-Company led its evidence. It was further held by learned Rent Controller that a glance of Mark-X revealed that Head Office of the tenant-Company had suggested its Branch Office at Solan to execute an agreement with the landlord in order to convert two sets into a combined unit. On these basis, it was held by learned Rent Controller that it appeared that the said document was intentionally withheld by the tenant-Company because the same revealed that the Head Office of the tenant-Company had asked the Branch Office to execute an agreement in this regard, whereas no such agreement was placed on record by the tenant-Company nor any evidence was produced qua the execution of any such document. Therefore, in my considered view, the findings which have been returned by both the Courts below that the alterations in question were in fact carried out by the tenant-Company unilaterally and without the consent of the landlord are correct findings as not even an iota of evidence had been produced on record by the tenant-Company to the contrary.

16. Now, I will deal with the last contention raised by Dr. Lalit Sharma, which was to the effect that even if it is assumed that the alterations were in fact carried out unilaterally by the tenant-Company, even then, the eviction petition filed by the landlord was liable to be dismissed

on the ground that the landlord had failed to prove that the alterations so carried out by the tenant-Company had materially impaired the utility of the building of the landlord.

17. The details of material alterations which were carried out by the tenant-Company in the premises of the landlord which were let out by the landlord to the tenant-Company have already been discussed above and the same are not being reiterated. Before proceeding further, it is relevant to take note of the judgments passed by the Hon'ble Supreme Court of India as well as this Court as to what amounts to 'materially impairing' the value or utility of the premises. Section 14(2)(iii) of the Himachal Pradesh Urban Rent Control Act, 1987 provides for eviction of tenant on the ground that the tenant has committed such acts as are likely to impair materially the value or utility of the building or tented land.

18. The Hon'ble Supreme Court in **Om Prakash** Vs. **Amar Singh and other** (1987) 1 Supreme Court Cases 458 while interpreting Section 14 of the U.P. Cantonment Rent Control Act, 1952 has held:

> *"5. The Act does not define either the word 'materially' or the word 'altered'. In the absence of any legislative definition of the aforesaid words, it would be useful to refer to the meaning given to these words in dictionaries. Concise Oxford Dictionary defines the word 'alter' as change in character, position. 'Materially' as and adverb means "important" essentially concerned with matter not with form. In Words and Phrases (Permanent Edition) one of the meanings of the word "alter" is "to make change, to modify, to change, change of a thing from one form and set to another. The expression "alteration" with reference to building means "substantial" change, varying change the form or the nature of the building without destroying its identity". The meaning given to these two words show that the expression "materially altered" means "a substantial change in the character, form and structure of the building without destroying its identity". It means that the nature and character of change or alteration of the building must be of essential and important nature. In Babu Manmohan Das Shah Vs. Bishun Das, this Court considering the expression 'material alterations' occurring in Section (1)(c) of U. P. (Temporary) Control of Rent and Eviction Act, 1947 observed:*
>
> *"Without attempting to lay down any general definition as to what material alterations mean, as such a question would depend on the facts and circumstances of each case, the alterations in the present case must mean material alterations as the construction carried out by the respondent had the effect of altering the form and structure of the accommodation.*
>
> *6. In determining the question the Court must address itself to the nature, character of the constructions and the extent to which they make changes in the front and structure of the accommodation, having regard to the purpose for which the accommodation may have been let out to the tenant. The legislature intended that only those constructions which bring about substantial change in the front and structure of the building should provide a ground for tenants' eviction, it took care to use the word "materially altered the accommodation". The material alterations contemplate change of substantial nature affecting the form and character of the building. Many a time tenants make minor constructions and alterations for the convenient use of the tenanted accommodation. The Legislature does not provide for their eviction instead the construction so made would furnish ground for eviction only when they bring about substantial change in the front and structure of the building. Construction of a Chabutra, Almirah, opening of a window or closing a verandah by temporary structure or replacing of a damaged roof which may be leaking or placing partition in a room or making similar minor alterations for the convenient use of the accommodation do not materially alter the building as in spite of such constructions the front and structure of the building may remain unaffected. The essential element which needs consideration is as to whether the*

constructions are substantial in nature and they alter the form, front and structure of the accommodation."

19. The Hon'ble Supreme Court in **Om Pal** Vs. **Anand Swarup** (1988) 4 Supreme Court Cases 545 has held:

"9.....As has been repeatedly pointed out in several decisions it is not every construction or alteration that would result in material impairment to the value or the utility of the building. In order to attract Section 13(2) (iii) the construction must not only be one affecting or diminishing the value or utility of the building but such impairment must be of a material nature i.e. of a substantial and significant nature. It was pointed out in Om Prakash Vs. Amar Singh (at SCC P. 463) that the legislature had intended that only those constructions which brought about a substantial change in the front and structure of the building that would provide a ground for the tenant's eviction and hence it had taken care to use the word "materially altered the accommodation" and as such the construction of a chabutra, almirah, opening of window or closing a verandah by temporary structure or replacing of a leaking roof or placing partition in a room or making minor alterations for the convenient use of the accommodation would not materially alter the building. It would therefore follow that when a construction is alleged to materially impair the value or utility of a building, the construction should be of such a nature as to substantially diminish the value of the building either from the commercial and monetary point of view or from the utilitarian aspect of the building."

20. The Hon'ble Supreme Court in **Vipin Kumar** Vs. **Roshan Lal Anand and others** (1993) 2 Supreme Court Cases 614 has held:

"1. This appeal by Special Leave arises against the order of the Punjab and Haryana High Court in Civil Revision No.11-25 of 1984 dated July 18, 1984 confirming the decree of eviction passed by the Rent Controller and confirmed by the Appellate Authority under the provisions of the East Punjab Urban Rent Restriction Act, 1949 for short 'the Act'. The ground for eviction ultimately upheld by the Courts below was that the appellant had constructed a wall in the varandah of the demised premises and put up a door which materially impaired the value or utility of the building. Shri Prem Malhotra, learned counsel for the appellant contended that the appellant had not constructed the offending construction. Even if it is so there is no proof adduced by the landlord that by such a construction the value or utility of the building had materially impaired. As such the decree of eviction is clearly illegal. In support thereof he placed reliance on a judgment of this court reported in Om Prakash v. Amar Singh & Anr., A.I.R. 1987 SC 617. The question, therefore, is whether the finding of Courts below concurrently found that the appellant had constructed a wall in the varandah which materially effected the value or utility of the shop is vitiated by law. The building consists of two shops and the appellant was inducted into one such shop. He constructed the-wall in the verandah and put up the door. Therefore, it is a finding of fact which we cannot evaluate the evidence and upset that finding. It was also found that the wall was constructed without the permission of the landlord. Due to construction the value or utility of the building have been materially affected. Section 13(2)(iii) provides thus:-

"A tenant in possession of a building of rented land shall not be evicted therefrom in an execution of a decree passed before or after the commencement of this Act or otherwise and whether before or after the termination of the tenancy, except in accordance with the provisions of this Section (or) in pursuance of an order made under Section 13 of the Punjab Urban Rent Restriction Act, 1947 as subsequently amended)".

Clause 3 of sub-section (2) of Section 13 provides that "if the tenant has committed such acts as are likely to impair materially the value or utility 643 of the building or rented land', the Rent Controller may make an order directing the tenant to put the landlord in possession of the building or rented land. If the Controller is not so satisfied, he shall make an order rejecting the application. It is, therefore, clear that if the tenant had committed such acts as are likely to impair materially the value or utility of the building, he is liable to ejectment. The finding recorded by the Controller is that on account of the construction of the wall and putting up a door the flow of light and air had been stopped. He removed the futures. So the value of the demised shop has been impaired and utility of the building also is impaired. The impairment of the value or utility of the building is from the point of the landlord and not of the tenant. The first limb of Clause 3 of sub-section (2) of Section 13 is impairment of the building due to acts committed by the tenant and the second limb is of the utility or value of the building has been materially impaired. The acts of the tenant must be such that by erecting the wall had materially impaired the value or utility of the demised premises. It is contended by Mr. Prem Malhotra that the landlord should prove as to how it is materially effected and that there is no evidence adduced by the landlord. We find no force in the contention. By constructing the wall, whether the value or utility of the building has materially been impaired is an inferential fact to be deduced from proved facts. The proved facts are that the appellant without the consent of the landlord had constructed the wall and put up a door therein as found of the Rent Controller, the flow of air and light has been stopped. He removed the fixtures. From these facts it was nferred that the value or utility of the building has een materially effected. It is then contended that sub-section (2) of Section 13 gives discretion to the Rent Controller to order eviction while the cases covered under Sub-section (3) of Section 13 it is made mandatory to direct eviction of the tenant. Therefore, the Rent Controller has to independently consider and exercise discretion vested in him keeping in view the proved facts to decree ejectment. It is for the landlord under the circumstances to prove such facts which warrant the Controller to order eviction in his favour. The landlord had not proved such faces in his favour. Therefore, the Court had committed illegality in granting the decree of ejectment We find no force in the contention. Undoubtedly the statute, on proof of facts, gives discretion to the court, by Sec. 13(2) and made mandatory in case covered by Sec. 13(3), to order eviction. In a given set of facts the Rent Controller, despite finding that the tenant committed such acts which may impair the value or utility of the building yet may refuse grant the relief of eviction. It is for the tenant to plead and prove that the circumstances are such as may not warrant eviction and then the burden shifts on to the landlord to rebut those facts or circumstances. Then the Rent Controller is to weigh pros and cons and exercise the discretion. No such attempt was made by the appellant. So no fault can be laid at the Rent Controller's failure to exercise the discretion."

21. The Hon'ble Supreme Court in **Gurbachan Singh and another** Vs. **Shivalak Rubber Industries and others** (1996) 2 Supreme Court Cases 626 has held:

12. Section 13(2) (iii) of the Act which provides a ground for eviction of tenant reads as under :-

"13(2) (iii).-The tenant has committed such acts as are likely to impair materially the value or utility of the building or rented land". A plain reading will go to show that it contemplates that a tenant is liable to eviction who has committed such acts as are likely to impair materially the value or utility of the building or rented land. The meaning of the expression "to impair materially" in common parlarce would mean to diminish in quality, strength or value substantially. In

other words to make a thing or substance worse and deteriorate. The word "impair" cannot be said to have a fixed meaning. It is a relative term affording different meaning in different context and situations. Here in the context the term "impair materially" has been used to mean, considerable decrease in quality which may be measured with reference to the antecedent state of things as it existed earlier in point of time as compared to a later stage after the alleged change is made or affected suggesting impairment. Further the use of the word "value" means intrinsic worth of a thing. In other words utility of an object satisfying, directly or indirectly, the needs or desires of a person. Thus, the ground for eviction of a tenant would be available to a landlord against the tenant under Section 13(2) (iii) of the Act, if it is established that the tenant has committed such acts as are likely to diminish the quality, strength or value of the building or rented land to such an extent that the intrinsic worth or fitness of the building or the rented land has considerably affected its use for some desirable practical purpose. The decrease or deterioration, in other words the impairment of the worth and usefulness or the value and utility of the building or rented land has to be judged and determined from the point of view of the landlord and hot of the tenant or any one else. This Court while dealing with the provisions of Section 13(2) (iii) of the Act in the case of Vipin Kumar v. Roshan Lal Anand & On., [1993] 2 SCC 614 expressed the view as follows:

"The impairment of the value of utility of the building is from the point of the landlord and not of the tenant. The first limp of clause III of sub- section (2) of Section 13 is impairment of the building due to acts committed by the tenant and the second limb is of the utility or value of the building has been materially impaired. The acts of the tenant must be such that erection of the wall had materially impaired the value or utility of the demised premises".

13. In the instant case before us as discussed in the foregoing paragraphs it is distinctly clear that the tenant-respondents have constructed a lintel roof over all the S shops No. 2 to 6 by removing their original roof and they not only removed the intervening or partition walls of the shops but also removed the doors of the 5 shops and converted them into sheds, store and kothries. They also converted the verandah in front of the shops into sheds by closing it from the front by masonary work. The door of shop No. 2 has been removed altogether and instead a small window with iron grills has been affixed in the front. The full size door of shop No, 3 has also been removed and a door measuring 3 x 7" has been installed in front of the verandah by merging the shop No. 3 into that part of the verandah. Similarly shop No. 4 has also been merged with the verandah by removing the door of the shop and fitting a door in the verandah itself in order to make it a godown. Shops No. 5 and 6 have also been merged with the part of the verandah in front of those shops with masonary work. The 17 ft long and 5 ft 9 inches high boundary wall existing on the western side of the demised land touching the kothi of Chander Muni respondent No, 1 A has been demolished so as to facilitate a passage from the Kothi of respondent No, 1 A to demised premises by fixing one big wooden door and another steel door in place of the demolished boundary wall, A small triangular shaped kothri has also been constructed and a brick stair case has been raised in order to facilitate an access from the courtyard of respondent No. 1 A to the roof of the shed made over the demised land as a direct approach.

14. Thus, from the above mentioned facts it is clear that even if it is assumed that the tenant respondents raised the construction of shed over the part of the open land of the demised premises with the written consent of the landlord as may be spelt out from the rent note Ext. A/1, then the rest of the construction, additions and alterations of the 5 shops and the verandah in front of the said shops of a permanent nature, will certainly amount to acts as have or likely to have impaired materially the value or utility of the building/premises let out to them. The nature of

the construction is relevant consideration in determining the question of material impairment in the value or utility of the building or the demised premises. In the present case the removal of the roof of the shops partition walls and the doors, laying of a roof, merging of the verandah with the shops, closing the doors and opening new doors and windows and converting the premises altogether, giving totally a new and a different shape and complexion by such alteration would certainly be regarded as one involving material impairment of the premises affecting its Fitness for use for desirable practical purpose and intrinsic worth of the demised premises from the point of view of the appellant-landlords within the meaning of Section 13(2) (iii) of the Act. The High Court, therefore, fell in patent error in dismissing the revision in limine without going into the correct legal position involved in the case. Having regard to the facts and circumstances discussed above, we are of the firm view that this is a case which squarely falls within the mischief of the provisions contained in Section 13(2) (iii) of the Act which make the tenant-respondents liable for eviction from the demised premises."

22. The Hon'ble Supreme Court of India in **Waryam Singh** Vs. **Baldev Singh** (2003) 1 Supreme Court Cases 59 has held that order for eviction can be passed only if the landlord proves (a) that the tenant had carried out the construction, (b) that the same was without the consent of the landlord and (c) that the value or utility had been materially impaired.

23. The Hon'ble Supreme Court of India in **Purushottam Das Bangur and others** Vs. **Dayanand Gupta** (2012) 10 Supreme Court Cases has held:

"20. To sum up, no hard and fast rule can be prescribed for determining what is permanent or what is not. The use of the word 'permanent' in Section 108 (p) of the Transfer of Property Act, 1882 is meant to distinguish the structure from what is temporary. The term 'permanent' does not mean that the structure must last forever. A structure that lasts till the end of the tenancy can be treated as a permanent structure. The intention of the party putting up the structure is important, for determining whether it is permanent or temporary. The nature and extent of the structure is similarly an important circumstance for deciding whether the structure is permanent or temporary within the meaning of Section 108 (p) of the Act. Removability of the structure without causing any damage to the building is yet another test that can be applied while deciding the nature of the structure. So also the durability of the structure and the material used for erection of the same will help in deciding whether the structure is permanent or temporary. Lastly the purpose for which the structure is intended is also an important factor that cannot be ignored.

21. Applying the above tests to the instant case the structure was not a temporary structure by any means. The kitchen and the storage space forming part of the demised premises was meant to be used till the tenancy in favour of the respondent-occupant subsisted. Removal of the roof and replacement thereof by a concrete slab was also meant to continue till the tenancy subsisted. The intention of the tenant while replacing the tin roof with concrete slab, obviously was not to make a temporary arrangement but to provide a permanent solution for the alleged failure of the landlord to repair the roof. The construction of the passage was also a permanent provision made by the tenant which too was intended to last till the subsistence of the lease. The concrete slab was a permanent feature of the demised premises and could not be easily removed without doing extensive damage to the remaining structure. Such being the position, the alteration made by the tenant fell within the mischief of Section 108 (p) of the Transfer of Property Act and, therefore, constituted a ground for his eviction in terms of Section 13(1)(b) of the West Bengal Premises Tenancy Act, 1956.

> *22. We may at this stage refer to the decision of this Court in Ranju alias Gautam Ghosh v. Rekha Ghosh and Ors. (2007) 14 SCC 81 where this Court found that cutting of a collapsible gate by 5/6" and replacing the same without the consent and permission of the landlord was tantamount to violation of Section 108 (p) of the Transfer of Property Act read with Section 13 (1)(b) of West Bengal Premises Tenancy Act, 1956. It is thus immaterial whether the structure has resulted in creating additional usable space for the tenant who carries out such alteration and additions. If addition of usable space was ever intended to be an essential requirement under Section 108 (p) of the Act, the Parliament could have easily provided so. Nothing of this sort has been done even in Section 13 (1) (b) of the State Act which clearly shows that addition of space is not the test for determining whether the structure is permanent or temporary."*

24. A perusal of the judgments referred to above clearly and categorically demonstrate that when a building is given to a tenant for accommodation on rent, it is not open to the tenant to alter it in any manner without the permission of the landlord. Further, when that is the ground for eviction, it is for the Court to find out whether the value or utility of the building has been materially impaired from the point of view of the landlord who is owner of the building. It has been further held by the Hon'ble Supreme Court that nature of construction carried out is a relevant consideration in determining the question of material impairment in the value or utility of the building or the demised premises. It has also been held by the Hon'ble Supreme Court that when a construction is allowed to materially impair the value or utility of a building, the construction should be of such a nature as to substantially diminish the value of the building either form the commercial and monetary point of view or from the utilitarian aspect of the building. Thus, it is apparent that words 'materially altered' means "a substantial change in the character, form and the structure of the building without destroying its identity" and this also means that the nature and character of change or alteration of the building must be of essential and important nature. Another important aspect which has to be considered is as to whether the alterations are substantial in nature and they altered the form and structure of the accommodation.

25. In the backdrop of the law discussed above, when we come to the facts of the present case, in my considered view, the findings returned by both the learned Courts below to the effect that not only material alterations were carried out with the demised premises by the tenant-Company without the consent of the landlord, the alterations so carried out also had materially affected the value and utility of the premises cannot be faulted with. It has come on record that material impairment which had been carried out by the tenant-Company was that they had carried out the structural changes without the written consent of the landlord by carving out one passage in the shape of an open door in the common wall which separated the set of the landlord from the adjoining independent set and besides this, one small service window was also opened in the wall. Result of this material alteration was that it materially impaired the value and utility of the building because the changes so carried out by the tenant-Company converted two independent sets into a common unit and incidentally these two independent sets were not owned by common landlord. Therefore, in my considered view, it has been rightly held by both the learned Courts below that structural changes carried out by the tenant-Company had materially impaired the value and utility of the premises, which calls for eviction of the tenant-Company. Even otherwise, in view of the fact that no perversity has been shown by learned counsel for the petitioners in the findings returned by both the Courts below and neither it has been demonstrated on record that the findings returned by both the learned Court below are not borne out from the records of the case, in my considered view, no interference is required with the order passed by learned Rent Controller as well as with the judgment passed by learned appellate Court in exercise of its revisional jurisdiction by this Court.

26. It has been held by the Hon'ble Supreme Court in **Hindustan Petroleum Corporation** Vs. **Dilbahar Singh** (2014) 9 Supreme Court Cases 78 that the consideration or examination of the evidence by the High Court in revisional jurisdiction under Rent Control Acts

is confined to find out that finding of facts recorded by the Court/authority below is according to law and does not suffer from any error of law. The Hon'ble Supreme Court further held that a finding of fact recorded by Court/authority below, if perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, open to correction because it is not treated as a finding according to law.

27. None of the ingredients which have been specified by the Hon'ble Supreme Court warranting interference by this Court in exercise of its revisional jurisdiction could be substantiated by the learned counsel for the petitioners in the order passed by learned Rent Controller as well as in the judgment passed by learned appellate Court.

28. Therefore, in view of findings returned above, there is no merit in the present revision petition and the same is accordingly dismissed with costs. Miscellaneous application(s), if any, also stands disposed of.

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

Raman Kumar alias Kala .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 301 of 2015.
Reserved on: 19th September, 2016.
Date of Decision: 30th September, 2016.

Indian Penal Code, 1860- Section 376- Accused caught hold of the prosecutrix, took her to a nearby bathroom and raped her – the accused was tried and convicted by the trial Court- held, in appeal that the place of incident was heavily populated the prosecutrix had not raised any cries- the report was written by B – the prosecutrix was married and the presence of semen stain will not help the prosecution – the trial Court had not properly appreciated the evidence- appeal allowed – accused acquitted. (Para-10 to 13)

For the Appellant: Mr. Rajiv Rai, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the judgment rendered on 18.06.2015 by the learned Sessions Judge, Solan, District Solan, H.P. in Sessions trial No.15-NL/7 of 2013, whereby, the learned trial Court convicted the accused/appellant herein for his committing an offence punishable under Section 376 of the IPC and sentenced him to undergo rigorous imprisonment for seven years and to pay fine of Rs.50,000 and in default of payment of fine amount to further undergo imprisonment for a period of one year.

2. Brief facts of the case which are necessary to determine the appeal are that the prosecutrix aged about 27 years is having two children and her husband is a rickshaw puller. On 21.10.2012 at about 4.30 p.m, the prosecutrix had gone in search of her children, who had gone for playing and at that time the accused came from behind and caught hold of the prosecutrix and took her to a nearby bathroom where he committed forcible sexual intercourse with the prosecutrix after opening string of the salwar of the prosecutrix. The accused also gagged the mouth of the prosecutrix when the prosecutrix tried to raise alarm and after committing the sexual intercourse the accused ran away. The prosecutrix thereafter went to her house where her

elder sister-in-law namely Bholi (PW6) met the prosecutrix and the prosecutrix narrated the entire incident to her. The husband of the prosecutrix was out of the house with his rickshaw and as such Smt. Bholi (PW6) took the prosecutrix to the police station where the prosecutrix lodged a complaint Ex.PW9/A on the basis of which FIR Ex.PW10/A came to be recorded at Police Station, Nalargah by SI Mehar Singh. After the registration of the FIR, the police started the investigation in the case and concluded all the formalities thereto.

3. On conclusion of the investigation, into the offence, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared and filed in the Court.

4. The accused was charged by the learned trial Court for his committing an offence punishable under Section 376 IPC to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 13 witnesses. On closure of prosecution evidence, the statement of accused, under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence. However, he has not led any defence evidence.

6. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/appellant.

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

8. On the other hand, 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 theirs meriting vindication.

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

10. The sole testimony of the prosecutrix would ipso facto hold clout with this Court for returning findings of conviction against the accused. However, any implicit reliance upon the testimony of the prosecutrix would be insagacious also thereupon it would be unbefitting to conclude of her testification qua the occurrence holding a paragon virtue of truth unless a wholesome reading of her testimony comprised both in her examination-in-chief besides in her cross-examination unveils qua hers deposing with inter-se consistency. Contrarily, also when disclosures in her cross-examination hold unfoldments qua hers thereby contradicting her version qua the incident comprised in her examination-in-chief they would thereupon lean this Court to undermine the efficacy of her testimony. When this Court proceeds to with optimum incision analyze her testification comprised both in her examination-in-chief and in her cross-examination, the apparent visible fact which comes to the forefront is of hers accepting the factum of Mark A-1 to A-5, comprising the photographs of the bathroom whereat she allegedly stood subjected to forcible sexual intercourse by the accused. With mark A-1 to A-5 constituting the photographs of the relevant site of occurrence, in sequel with the prosecutrix in her cross-examination testifying qua existence of the house of Dr.Atul and of Desh Raj in its vicinity also hers acquiescing therein qua 8 to 10 tenants residing in its vicinity, whom she deposes to throughout the day remain housed in their respective habitations, besides hers acquiescing to the factum of the relevant area being inhabited and qua people passing through the relevant site of occurrence, acquiescence whereof when read in conjunction with her omission to raise shrieks and outbursts to invite their presence thereat also her omission to depart therefrom,

predominantly also with none of the residents of the houses located in close proximity to the site of occurrence despite the visibility of the relevant site of occurrence from their habitations noticing the occurrence, all hold the inevitable effect qua hence the prosecutrix contriving the factum of hers thereat standing subjected to forcible sexual intercourse by the accused. The prosecutrix also palpably appears to falsely implicate the accused in the alleged occurrence given hers communicating in her cross-examination qua hers embossing her signatures on Mark-A at the instance of Bholi Devi, whom she echoes in her cross-examination to dictate its contents to its scribe. Consequently, it appears of the entire report qua the occurrence also the testification in corroboration thereto rendered by the prosecutrix standing engineered by Bholi Devi for wreaking vengeance upon the accused given the evident factum acquiesced by the prosecutrix qua Rafiq, the father-in-law of Bholi Devi standing arraigned as an accused by the mother of the accused herein. In sequel, a doctored version qua the occurrence comprised in Mark-A whereupon an FIR stood registered against the accused is unworthy of credence.

11. Be that as it may, the prosecutrix had made a communication in Mark-A qua hers standing gagged by the accused, concomitantly, also of hers standing subjected to forcible sexual intercourse by him, yet the aforesaid testification would hold paramount vigour dehors hers omitting to raise shrieks and cries to invite at the relevant site of occurrence the presence of the residents of the habitations existing in close proximity to it only when her apposite medical examination comprised in Ex.PW5/B echoed loud pronouncements qua her body holding injuries, existence whereof thereon were imperative for succoring her testification qua hers standing subjected to forcible sexual intercourse by the accused despite hers offering resistance to the sexual misdemeanors ascribed by her to the accused. However, Ex.PW5/B omits to bespeak of her body holding any injury, non existence whereof thereon holds leverage for forming an inference qua hers not offering any resistance to the sexual misdemeanors, if any, which allegedly stood perpetrated upon her person by the accused. In aftermath, sexual intercourse, if any, to which she stood subjected to is to be construed to emanate on her purveying consent to the accused. The clothes of the prosecutrix stood subjected to chemical analysis at the FSL concerned whereon the latter as portrayed by Ex.PW4/B rendered an opinion qua the existence of human semen on salwar, vaginal smear slides and vaginal swab of the prosecutrix. The existence of semen thereon may solitarily constitute clinching evidence for rendering findings of conviction against the accused yet with a rider of the prosecution by cogent evidence displaying of the Salwar, whereon semen stood detected as unveiled by Ex.PW4/B belonging to her. The testification of the prosecutrix comprised in her cross-examination unveils qua the relevant clothes as stood handed over to the Investigating Officer concerned standing worn by Bholi Devi since 2-3 days hitherto, testification whereof when remains not firmly denied by PW-6 on hers standing held to cross-examination by the learned defence counsel, hence evidently displays of the Salwar, whereon semen stood detected by the FSL concerned not belonging to the prosecutrix rather it belonging to Bholi Devi also a married lady. Consequently, occurrence thereon of human semen is insignificant for returning findings of conviction against the accused. Evidently, the prosecutrix is a married lady, consequently, the existence of semen in her vaginal slides besides in her vaginal swab would be unbefitting to conclude therefrom qua the existence of human semen thereon belonging to the accused unless it stood formidably displayed in Ex.PW4/B of semen found therewithin belonging to the accused. However, the aforesaid display remains undepicted in Ex.PW4/B. In sequel, the existence of human semen in the vaginal swabs of the prosecutrix cannot firmly connect the accused in the alleged 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 the evidence on record.

13. In view of the above, the instant appeal is allowed and the accused is acquitted for the offence punishable under Section 376 of the IPC. In sequel, the impugned judgment is set

aside. The accused be released from the custody forthwith if not required in any other process of law. Record of the learned trial Court be sent back forthwith.

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

Shri Satya Pal ...Petitioner.
Versus
Union of India & others ....Respondents.

Civil Revision No. 62 of 2011
Reserved on : 19.9.2016.
Decided on : 30/09/2016

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for permanent prohibitory injunction – no relief for declaration and restoration of possession was sought – plaintiff had filed an application before High Court to institute the suit for possession separately- the application was allowed- the possession of the defendant was not disputed- plaintiffs omitted to consolidate all causes of action- petition allowed. (Para-3 to 9)

For the Petitioner: Mr. G.C Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.
For the Respondents: Mr. Ashok Sharma, ASGI with Mr. Angrej Kapoor, Advocate for respondent No.1.
Mr. Vivek Singh Attri, Deputy Advocate General for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The learned Additional FTC, Shimla, H.P. returned findings against the defendants therein/petitioner No.1 and respondents No. 3 to 5 herein (for short "the defendants") on preliminary issues No. 1 and 2 as stand extracted hereinafter. The defendant No. 1/petitoner herein stands aggrieved by the aforesaid findings rendered thereon by the learned trial Court, hence he stands constrained to therefrom institute herebefore the instant revision petition.

"1. Whether the present suit for permanent and prohibitory injunction without seeking declaration of title is maintainable, on the facts pleaded in the plaint? OPP

2. Whether the suit has been properly valued for the purposes of court fee and jurisdiction? OPP."

2. An incisive perusal of the plaint unveils of the plaintiffs/respondents herein (for short "the plaintiffs) claiming a relief of permanent prohibitory injunction qua the suit property vis-à-vis the defendants. A scanning of the plaint also unveils of the plaintiffs acquiescing to the factum of the defendants holding unauthorized possession of the suit land. For reasons assigned hereinafter hence prima-facie the relief of permanent prohibitory injunction ventilated qua the suit property by the plaintiffs vis-à-vis the defendants may falter.

3. The plaintiffs had on various grounds delineated in the plaint assailed the validity of the relevant mutation(s) attested qua the suit land qua the predecessor-in-interest of the contesting defendants. Further more the relief of permanent prohibitory injunction stands thereupon erected by the plaintiffs, relief whereof for reasons hereinafter assigned may prima-facie stagger besides the effect of the plaintiffs' acquiescing qua the contesting defendants holding unauthorized possession of the suit land is qua theirs standing enjoined to apartfrom challenging the efficacy of the relevant mutation(s) attested qua the suit property vis-à-vis the predecessor-in-interest of the contesting defendants, to also claim a relief of restoration of possession of the suit

property from them. However, the plaintiffs omit to both seek a declaratory decree qua setting aside of the relevant mutation(s) attested qua the suit land by the revenue authority vis-à-vis the predecessor in interest of the contesting defendants also omit to ask for a consequential relief for restoration of possession of the suit property to them from the contesting defendants.

4. Concomitantly also advolram Court fee qua the relief of possession remains un-affixed on the plaint. The learned Court below has for grossly untenable reasons dispelled the effect of the omissions of the plaintiffs to in their plaint embody the aforesaid relief(s).

5. A perusal of order-sheets makes a vivid disclosure qua the plaintiffs' instituting before this Court OMP No. 613/2004 claiming therein a relief for permission to institute a separate suit for possession qua the suit property. This Court had thereon pronounced orders on 21.5.2004 whereupon the relief as prayed for in the aforesaid OMP stood accorded vis-à-vis the plaintiffs subject to just exceptions besides if a separate suit for possession qua the suit property is maintainable in law. The omissions of the plaintiffs' to materialize the relief as granted to them by this Court on 21.5.2004 justifiably estopps them to ventilate herebefore when evidently the defendants' hold possession of the suit property qua hence their simpliciter suit for injunction prima-facie holding tenacity also they stand estopped to dehors theirs omitting to ask for a declaratory relief for setting aside the mutation(s) attested qua the suit property qua the predecessor-in-interest of the contesting defendants, espouse herebefore qua their simpliciter suit for injunction when otherwise for reasons aforesaid is prima-facie embedded in shaky foundations, being maintainable. Conspicuously with the proactive waiver and abandonment of the plaintiffs' comprised in theirs not concerting to materialize the relief as stood granted to them by this Court on 21.5.2004 they prima-facie stand estopped to urge herebefore qua without a declaratory relief qua the relevant mutation(s) being quashed and set aside their simpliciter suit for injunction being amenable for its standing decreed. Moreso when they do not hold possession of the suit land hence assumingly even if a declaratory decree is affordable, it without the apposite relief of possession standing claimed its rendition if any being illusory besides un-fructifiable.

6. Be that as it may the learned counsel for the plaintiffs though had instituted before this Court OMP No. 163 of 2004 whereon this Court had pronounced an order as referred hereinabove yet their counsel despite holding awareness qua the statutory mechanisms engrafted in Order 6 Rule 17 CPC being available to be resorted to, for incorporating in the plaint the relief of declaration qua the relevant mutations being set aside also for incorporating therein the relief of possession of the suit land, he in his wisdom omitted to avail them whereas they constituted the apposite statutory mechanisms for adoption by him. The imposition of trammels or fetters thereon qua its maintainability visibly stands sparked from the awareness of this Court qua the effect of non-availment by the plaintiffs of the apposite statutory mechanisms for begetting incorporation with the leave of the Court the aforesaid relief(s) in the plaint also the imposition of the aforesaid trammels upon the plaintiffs' while this Court proceeded to accord permission to them to institute a separate suit for possession palpably emanated from its perceiving the play of the provisions of Order 2 Rule 2 CPC against the institution of a separate suit by the plaintiffs qua the relevant relief(s) besides causes of action which remained alive at the stage of institution of the extant suit whereat they were peremptorily enjoined to be included or consolidated in the extant suit. The provisions of Order 2 Rule 2 CPC encapsulate therein the trite principle qua the plaintiffs standing peremptorily enjoined to incorporate in their plaint their entire claim qua the suit property, omission whereof begetting the statutory sequel of the subsequent suit holding ventilations qua relief(s) or causes of action evidently accruing or occurring at the stage contemporaneous to the institution of extant suit, facing the ordeal qua its non-maintainability arising from its attracting the embargo of estoppel constituted under Order 2 Rule 2 CPC. Emphatically the underlying nuance of the provisions occurring in Order 2 Rule 2 CPC is to obviate successive institution of suits qua a cause of action or relief which the plaintiffs were peremptorily obliged to consolidate in the earlier suit. However the plaintiffs omitted to consolidate all the causes of action besides all the relief(s), predominantly relief of possession qua the suit property also the relief of declaration qua the relevant mutations attested qua the suit

property by the revenue agency vis-à-vis the predecessor in interest of the contesting defendants being quashed and set aside conspicuously when they accrued or occurred at the stage contemporaneous to the institution of the extant suit by them. As a corollary with accentuated vigor, a conclusion is drawable qua their relevant omissions stirring their counsel to proceed to institute before this Court the OMP aforesaid, relief accorded whereon appears to for obvious reasons remain un-actioned by the plaintiffs. The institution of the aforesaid OMP before this Court by the learned counsel for the plaintiffs is a portrayal of theirs acquiescing qua theirs suit suffering from an inherent defect of non-incorporation therein with specificity the apposite relief(s), for overcoming whereof they conceived besides instituted the OMP aforesaid before this Court. Nonetheless the aforesaid OMP obviously is misconceived. In aftermath the inability of the plaintiffs to work to their benefit the provisions of Order 6 Rule 17 CPC for theirs thereupon with the leave of the Court begetting incorporation in the plaint the relief of possession qua the suit property also relief for a declaratory decree qua the mutation(s) attested qua the suit property qua the predecessor-in-interest of the contesting defendants being quashed and set aside prima facie spells doom to the suit of the plaintiff wherein a simpliciter relief of injunction qua the suit property is claimed despite an admission made by the plaintiffs in their plaint qua the defendants' holding its possession whereupon the trite principle of law governing the according or declining of relief of injunction vis-à-vis the plaintiffs' founded upon the plaintiffs evidently holding its possession whereas the aforesaid factum probandum for affording relief of injunction to them for reason aforesaid stands prima-facie negativated besides infracted. In sequel, the effect of the plaintiffs' despite the dire necessity of their incorporation in the apposite relevant portion of the plaint not concerting to beget the apposite amendments in the plaint, is qua the learned Court below hence overlooking their impact. Also the effect of the afore-stated proactive omissions, abandonments and waivers of the plaintiffs' is conspicuously qua theirs prima-facie estopping the plaintiffs' to prima-facie seek a simpliciter relief of injunction qua the suit property. In aftermath, the preliminary issues afore-stated were trite vis-à-vis the relevant omissions also were enjoined to be read by the learned trial Court in conjunction with the aforesaid omissions on the part of the plaintiffs to beget the apposite amendments in the plaint whereas the learned trial Court has committed a gross impropriety by relegating their effect to the realm of obscurity predominantly when the apposite provisions engrafted in Order 6 Rule 17 CPC are an exception to the provisions of Order 2 Rule 2 CPC and could well be resorted to by the counsel for the plaintiff to preempt the sway of the provisions of Order 2 Rule 2 CPC vis-à-vis the subsequently instituted suit against the defendants qua causes of action besides a relief which had occurred contemporaneous to the stage of institution of the extant suit.

7. Consequently when the relief of permanent prohibitory injunction claimed by the plaintiffs for reasons aforesaid may prima-face falter also when the trite assault qua the contesting defendants' holding unauthorized possession of the suit property stands anvilled upon the relevant mutation(s) attested qua it by the revenue agency concerned vis-à-vis the predecessor-in-interest of the contesting defendants', holding no validity. Obviously it was incumbent upon the plaintiffs to seek a declaratory relief qua the relevant mutation(s) being quashed and set aside. Also it was incumbent upon the plaintiffs' to seek a consequential relief of possession qua the suit property. Moreover, it was also incumbent upon the plaintiffs' to affix advalorem Court fee on the plaint vis-à-vis relief of possession. However, all the aforesaid facets remained un-attended by the plaintiffs. Significantly when the relevant apposite averments in consonance therewith remain unincorporated in the apposite relevant para of the plaint despite the dire necessity of their incorporation therein, entails a ensuing sequel qua the findings returned in favour the plaintiffs on preliminary issues extracted hereinabove suffering from an inherent fallacy. The reason for the plaintiffs not availing the mechanism engrafted in order 6 Rule 17 CPC for thereupon theirs with the leave of the Court incorporating in the relief clause of the plaint the relevant amendments afore-stated, though their incorporation therein was of utmost significance besides was facilitative qua rendition of an omnibus executable decree qua the suit property, visibly generated from their contriving to not affix on the plaint advalorem Court fee vis-à-vis the relief of possession

8. The learned Deputy Advocate General has relied upon a decision of Hon'ble Apex Court reported in (1989) 3 SCC 612, relevant paragraph whereof is extracted hereinafter wherein it stood mandated qua the entire plaint standing read and not the relief portion alone, reading whereof when unveils of the relief of injunction standing foisted upon the predominant factum of the aggrieved plaintiffs thereupon concerting to establish title qua the suit property would render a simpliciter suit for injunction to be maintainable dehors the plaintiffs' not asking for a relief of declaratory decree of title qua the suit property also therein theirs not asking for relief of possession of the suit property. However this Court would not accept the contention of the learned Deputy Advocate General given the foundation of his contention resting upon a verdict of the Hon'ble Apex Court getting shaken in the evident contradistinctivity occurring in the factual matrix prevailing thereat vis-à-vis the factual matrix prevailing hereat, tritely the one of therein the plaintiffs holding possession of the suit land, factum whereof stood concluded by the Hon'ble Apex Court to not debar the plaintiffs to obtain relief of injunction dehors its not claiming the declaratory decree of title qua it, significantly when relief of injunction on a wholesome reading of the plaint stood entrenched on title thereto standing evidently asserted by the plaintiffs also with the revenue records therein qua the suit land depicting the plaintiff therein to be holding title to the suit property whereas hereat with the plaintiffs' acquiescing qua the defendants holding un-authorized possession of the suit property contrarily enjoined them, to, especially when they also assail the legitimacy of the relevant mutation(s) attested qua the suit property, qua the predecessor-in-interest of the contesting defendants, concomitantly ask for a declaratory decree for theirs being quashed and set aside, preeminently when the title of the defendants qua the suit land rests upon the relevant mutation(s), mutation(s) whereof unless prayed to be set aside would preserve the title of the contesting defendants in the suit property. Tritely when hence for stripping the relevant mutation(s) of their validity a consequential relief qua theirs standing declared to be quashed and set aside was enjoined to imperatively occur in the plaint, its non-occurrence therein would render the relevant averments constituted in the plaint qua theirs purportedly holding invalidity to be merely an idle exercise. In sequel with the plaintiff in a case relied upon by the learned Deputy Advocate General standing depicted in the relevant records to be holding title to the suit property therein also his prima-facie holding its possession obviously constrained the Hon'ble Apex Court to construe of a simpliciter suit for injunction being maintainable against the defendants dehors the plaintiff therein not asking for a declaratory decree of title qua the suit property, especially when title to the suit property of the plaintiff therein was not under cloud whereas the plaintiffs' herein concerting to cloud the title of the defendant qua the suit land also with the defendants holding possession of the suit property, besides the revenue records concerned manifesting of the defendants standing pronounced therein to be holding ownership of the suit property warranted the plaintiffs to, also when they do not hold its possession, not constitute a simplicitor suit for injunction rather to by resorting to the provisions of Order 6 Rule 17 CPC concert to with the leave of the Court incorporate in the plaint all the relief(s) inclusive of possession of the suit property also qua a declaratory decree of the relevant mutation(s) being quashed and set aside, preeminently when to strip the vigor of the mandate of Order 2 Rule 2 CPC their incorporation in the extant suit in the afore-stated manner by the plaintiffs was a preemptory necessity also when the provisions of Order 6 Rule 17 CPC are a statutory exception thereto. Consequently all the omissions qua the facets aforesaid by the plaintiffs does constrain this Court to conclude of the findings recorded by the learned Court on the preliminary issues aforesaid being amenable for interference.

> "So far the scope of the suit is concerned, a perusal of the plaint clearly indicates that the foundation of the claim of the plaintiffs is the title which they have pleaded in express terms in paragraph 2 of the plaint. It has been stated that after cancelling the acquisition of the suit property for a burial ground the land was transferred to Guttahalli Hanumaiah under G.O No. 3540 dated June 10, 1929 on payment of upset price. In paragraphs 3 and 5 the plaintiffs have reiterated that the first plaintiff was the owner-in-possession. It is well established that for deciding the nature of a suit the entire plaint has to be read and not merely the relief portion, and the plaint in the present case does not

leave any manner of doubt that the suit has been filed for establishing the title of the plaintiffs and on that basis getting an injunction against the appellant-corporation. The Court fee payable on the plaint has also to be assessed accordingly. It follows that the appellant's objection that the suit is not maintainable has to be rejected. The Additional Civil Judge, who heard the appeal from the judgment of the trial Court, examined the question of the plaintiffs' separately taken up and it was found that the plaintiffs had failed to prove their possession until August 24,1973 when they allege that the appellant-corporation trespassed. Accordingly the appeal was allowed and the suit was dismissed."

9. In view of the above, the present petition stands allowed. The impugned order stands quashed and set aside. Records be sent back. 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, J.

Savitri Devi .....Appellant.

Versus

Surender Pal & another. ....Respondents.

RSA No. 371 of 2005
Reserved on : 28.9.2016
Decided on : 30.9.2016

Indian Succession Act, 1925- Section 63- Plaintiffs filed a civil suit pleading that the deceased had executed a Will in their favour and the Will set up by the defendant is false, factious and fabricated- mutation attested on the basis of the same are illegal, null and void- the suit was decreed by the trial Court- an appeal was filed, which was dismissed- held in second appeal that the testimonies of defendant's witnesses in support of the Will propounded by him were contradictory to each other – the execution of the Will propounded by the plaintiffs was duly proved – appeal dismissed. (Para-9 to 13)

For the Appellant: Mr. Vijay Bhatia, Advocate.
For the Respondents: Mr. Abhinandan Thakur, Advocate vice Mr. J.R Thakur, Advocate for the respondents.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant Regular Second Appeal is directed against the impugned judgment and decree rendered by the learned Presiding Officer/Additional District Judge-1, Fast Track Court, Hamirpur, H.P in Civil Appeal No. 43 of 1999/148 of 2004 , whereby the judgment and decree rendered by the learned Sub Judge, Hamirpur, H.P. in Civil Suit No. 237 of 1992 of 25.5.1999 stood affirmed.

2. The brief facts of the case are that the suit land comprising of Khata No. 53 Khatoni No. 53 Khasra Nos. 8, 103, 183, 185, 186, 11,13,14 Kita 8 measuring 17 Kanals 15 marlas, situated in Tika BairiBrahmna, Tappa Mewa Tehsil Bhoranj, District Hamirpur, H.P. Khata No. 308 , Khatoni No. 381 Khasra No. 111, 135 and 136 kita 3, measuring 9 Kanalas 1 marla, situated in Tika Gharsah Tappa Mewa, Tehsil Bhoranj, District Hamirpur, H.P and Khata No. 115, Khatoni No. 122, Khasra No. 397 measuring 1 kanal 5 marlas, situated in tika Bhukker, Tappa Mewa, Tehsil Bhoranj, District Hamirpur, H.P. was owned and possessed by the deceased Sihnu who was grandfather of the respondents herein (for short "the plaintiffs"). It is averred by

the plaintiffs that they and their father Ram Singh were looking after the deceased and because of his love and affection he had executed a registered will in favour of the plaintiffs on 4.7.1989 qua the suit land owned by him. They have further averred that the defendant had left the house of their father in the year 1978 and had never turned up to join matrimonial home and on the contrary she started residing in her parental home in village Mundkhar. They further averred that the defendant at the time of her residing in their house used to quarrel with the deceased and had been misbehaving with him because of which she was having strained relations with the deceased and because of these reasons the deceased had executed the will in their favour on 4.7.1998. They have further averred that the defendant is also alleging will to have been executed by the deceased in her favour which is altogether false and fictitious and fabricated. They have averred further that the defendant has got the mutations No. 251,1142 and 720 of 18.6.1992 sanctioned in her favour qua the suit property in connivance with the revenue officials and all these mutations are illegal, null and void. They have prayed for declaring them to be owners in possession of the suit property and have also prayed to restrain the defendant from interfering in the suit land and from changing its nature or alienating it in any manner on the basis of wrong mutations.

3. The defendant/appellant herein contested the suit and filed written-statement. She in her written-statement has averred that the suit is not maintainable in the present form as the plaintiffs are out of possession of the suit land. She has also averred further that the act and conduct of the plaintiffs are bar to the present suit and that the suit has not been properly valued for the purpose of Court fee and jurisdiction. She has further averred that the plaintiffs are son of Ram Singh from the second wife which marriage is illegal, null and valid and therefore they cannot succeed to estate of the deceased. On merits, she has specially averred that she is residing in the house of the deceased Sihnu who was her father-in-law and that she had been looking after him nicely during his life time and he had executed valid will qua his estate in her favour as well as in favour of the plaintiffs on 22.6.1991 vide which he had bequeathed half of the suit property in her favour. In brief she has denied the case of the plaintiffs as a whole.

4. The plaintiffs filed a replication to the written-statement filed by the defendant and reasserted the stand taken in the plaint.

5. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties at contest:-

1. Whether the suit is not maintainable in the present form? OPD

2. Whether Sihnu deceased executed a valid will dated 22.6.1991 qua his half share in the suit land in favour of the defendant ?OPD

3. Whether the suit is not properly valued for the purpose of Court fee and jurisdiction, if so, what is its value for this purpose? O.P Parties.

4. Whether the plaintiffs are entitled to inherit the properly of Sihnu as alleged? OPP

5. Whether the plaintiffs are entitled to the relief of injunction as prayed for? OPP

5 (A) Whether Sihnu deceased had executed a valid will in favour of the plaintiffs on 4.7.1989, if so, to what effect? OPP

5(B) Whether the suit is barred under Order 2 Rule 2 CPC?OPD

6. Relief.

6. On an appraisal of the evidence adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs. An appeal stood preferred therefrom by the aggrieved defendant/appellant herein before the learned first Appellate Court. The latter Court on an appraisal of evidence adduced before it affirmed the judgment and decree of the learned trial Court. In sequel, the appeal preferred by the defendant/appellant herein before the first Appellate Court came to be dismissed.

7. The defendant/appellant herein standing aggrieved by the judgment and decree rendered by the first appellate Court has hence instituted the instant Regular Second Appeal herebefore.

8. When the appeal came up for admission on 3.8.2005, this Court admitted the appeal on the hereinafter extracted substantial question of law:-

> "*(4) Whether the impugned judgment and decree is the result of complete misreading, mis-interpreting and mis-appreciation of provision of Order 2 Rule 2 CPC?.*"

Substantial question of Law No. (4):-

9. PW-2/A comprises the testamentary disposition of deceased Sihnu Ram. It, on completion of its execution in the manner enshrined in Section 63 of the Indian Succession Act stood presented besides accepted for registration on 4.7.1989 by the Registering Officer concerned. Both the Courts below concurrently concluded qua PW-2/A holding legal efficacy. However, subsequent thereto deceased testator executed Ex. DW-2/A vis-à-vis his estate qua the defendant/appellant. However, DW-2/A is an unregistered testamentary disposition of deceased Sihnu Ram. Since Ex.DW-2/A stood executed by the deceased testator subsequent to execution Ex. PW-2/A, the former would hold prevalence vis-à-vis the latter, significantly when there occurs a recital therein qua the deceased testator revoking his previous testamentary disposition comprised in Ex.PW-2/A. However for within the mandate of the statutory parameters imputing validation to DW-2/A an allusion is imperative to the testification of DW-2, its scribe who therein has unequivocally communicated qua his scribing it at the instance of the deceased testator also to the testification of DW-3 a marginal witness thereto who therein deposes qua satiation standing begotten of the statutory tenets engrafted in Section 63 of the Indian Succession Act (for short "the Act") whereupon it is amenable for its being construed to be proven to be validly and duly executed nonetheless the deposition of both DWs 2 and 3 qua the relevant fact stands undermined given DW-3 standing employed as a Munshi by DW-2. Also the effect, if any, of proof lent by DW-3 a marginal witness qua DW-2/A standing hence proven to be validly and duly executed by the deceased testator wanes in the face of apparent contradictions occurring inter-se his testimony vis-à-vis the testimony of DW-2 the scribe of Ex.DW-2/A wherefrom it stands tenably concluded by both the Courts below qua hence their simultaneous presence at the relevant time standing undermined wherefrom proof, if any, qua valid and due execution of DW-2/A testified by DW-3 a marginal witness thereto, subsides. The reason for making the aforesaid inference emanates from DW-2 testifying in his cross-examination qua the paper for scribing the will standing carried by him and of his charging Rs.40/- and Rs.50/- for scribing it. Also he testifies in his cross-examination qua his entering Ex. DW-2/A in his register. However the aforesaid deposition of DW-2 stands controverted by DW-3, a marginal witness to DW-2/A wherein he contrarily deposes of DW-2 not charging any fee from the deceased testator for scribing DW-2/A. Also he contradicts DW-2 by testifying qua his carrying the relevant paper, pen and register significantly when as afore-stated the aforesaid factum qua the carrying of the relevant papers stands testified by DW-2 to stand carried by him. The aforesaid contradictions are not minimal rather are major, they belie the simultaneous presence at the relevant time of DWs 2 and 3 also hence belie the factum of DW-3 a marginal witness thereto throughout the process of its standing scribed and signatured by the deceased testator, his remaining present alongwith the latter besides with DW-2 wherefrom it is to be concluded of his deposing a doctored version qua satiation standing begotten of the statutory principles engrafted in Section 63 of the Act for a will being construable to be clinchingly proven to be validly and duly executed. Momentum to the aforesaid conclusion spurs from the factum of DW-2 deposing qua the will standing written in a separate room adjacent to the house of Bachittar Singh in contradiction whereof DW-3 deposes of DW-2/A standing executed inside the room of the deceased. Also though the deposition of any marginal witness to DW-2/A was sufficient under law to prove its valid and due execution yet with this Court erecting the inference aforesaid qua the testimony qua the relevant factum probandum rendered by PW-3 wanting in probative vigor it was imperative for the defendant/appellant herein to examine other marginal witness thereto, who

however remained un-examined. In sequel for want of their examination it has to be concluded qua an adverse inference being draw-able qua the defendant/appellant herein.

10. Be that as it may preponderantly DW-2 deposes qua his scribing the earlier will Ex.PW-2/A also he testifies qua his entering it in his register. However when he also scribed PW-2/A also when he was maintaining a register to enter the documents scribed by him, as evident from his recording in his register an apposite entry qua Ex.PW-2/A also a "will" of the deceased testator which stands propounded by the plaintiffs/respondents herein whereas the factum of his not entering DW-2/A in his apposite register, obviously spurs an inference of it being a suspicious circumstances pronouncing upon the factum of Ex.DW-2/A standing stained with a vice of invalidity.

11. The rule of estoppel against institution of a successive suit qua a cause of action which stood enjoined to be espoused by the plaintiffs in the earlier suit especially given its occurrence/accrual at the stage contemporaneous to the institution of the previous suit whereupon hence it stood enjoined to be embodied thereat, would hold sway with its fullest might, only on evident display of the previous lis holding congruity vis-à-vis the contesting litigants hereat also with evident display of the relevant earlier contest standing anvilled upon alike cause of action which stands agitated subsequently. However the might of the rule of estoppel constituted in Order 2 Rule 2 CPC fades, in the trite factum of the previous suit occurring inter-se one Ram Singh alias Gopi through whom the plaintiffs being minors institute the extant suit vis-à-vis the defendant. Conspicuously hence with want of congruity inter-se the contesting parties thereat vis-à-vis the contesting parties hereat forcefully undermines the might of the rigor of the provisions of Order 2 Rule 2 CPC.

12. Moreover with the relief canvassed therein by Savitri Devi who stands hereat impleaded as a defendant standing comprised in hers seeking to restrain Ram Singh from contracting a second marriage when stands read in coagulation with the trite factum of the estate of deceased testator Sihnu opening for succession on his demise i.e on 18.7.1991 besides with the earlier suit of the defendant/appellant herein whereon orders stood rendered by Sr. Sub Judge, Hamirpur on 11.12.1978 stood obviously vis-à-vis the extant suit instituted much earlier also when obviously there was no occasion thereat for the plaintiffs' propounding the testamentary disposition of the deceased testator, sequels an inference of the aforesaid cause of action not occurring contemporaneously with the institution of the previous suit by the defendant herein against Ram Singh through whom extantly the plaintiffs being minors sue nor also there was any preemptory obligation cast upon them to also include in the previous suit the aforesaid cause of action, significantly when it did not arise or occur thereat preponderantly also the non-inclusion therein of the deceased testator executing qua his estate a testamentary disposition vis-à-vis the plaintiffs comprised in Ex.PW-2/A would not warrant attraction qua it of the principle of estoppel nor would the inclusion by the plaintiffs of the aforesaid cause of action in the extant suit which arose subsequently would render it to be not maintainable, its attracting the embargo of the provisions of Order 2 Rule 2 CPC. The substantial question of law is answered accordingly.

13. Consequently, I find no merit in this appeal, which is accordingly dismissed and the judgment and decree of the learned trial Court and as affirmed by the learned Appellate Court is maintained and affirmed. Records be sent back forthwith. All pending applications stand disposed of accordingly. No costs.

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

Soma Devi .....Appellant

Versus

Kumari Bharti & others .....Respondents.

FAO No. 683 of 2008
Reserved on: 20.9.2016
Decided on : 30.9.2016

Workmen Compensation Act, 1923- Section 4- The claim petition was dismissed and liberty was granted to institute a fresh claim petition against the original registered owner- held, that Commissioner had mis-appreciated the evidence – it was proved by the suggestion of the Counsel of the Insurer that deceased was employed as a driver on a monthly sum of Rs. 2,000/- transfer of ownership of the vehicle was not reported to Registration and Licencing Authority and therefore the employer of the deceased cannot be treated to be the registered owner – insurer is not liable to indemnify him- appeal allowed and compensation of Rs. 2000 x 213.57 = Rs. 4,27,140/- awarded to be payable by respondent No. 4. (Para-2 to 8)

For the Appellant:	Mr. Ashok Chaudhary, Advocate.
For the Respondents:	Mr. Nimish Gupta, Advocate for respondents No.1 and 4. Mr. Deepak Bhasin, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal arises from the impugned order of the Commissioner for Workmen's Compensation Jawali, District Kangra, H.P. (for short "the Commissioner") rendered under the Workmen's Compensation Act, 1923, (for short 'the Act') whereby he dismissed the petition preferred thereat by the dependent of deceased Krishan Kumar who met his end in a motor accident involving car bearing registration No.DL-4CA-7237 whereon he stood purportedly engaged as a driver by deceased Rakesh Kumar who had purchased it from respondent No.3. Respondent No.1 and 4 are the LRs of deceased Rakesh Kumar. The Commissioner while returning findings on Issues No.2 and 3 against the dependent of deceased Krishan Kumar had yet proceeded to afford liberty to the dependent/claimant to institute a petition afresh aginst the original registered owner of the relevant car, who stood impleaded in the petition as respondent No.3.

2. The findings on issues No.2 and 3 stand visibly returned against the claimant/dependent. The findings recorded on issues No.2 and 3 by the Commissioner emanate on a gross mis-appreciation by him of the relevant material on record. Conspicuously when the counsel for the insurer while holding PW-1 to cross examination had put a suggestion to him qua Rakesh Kumar defraying to deceased Krishan Kumar wages per mensem quantified not in a sum of Rs.4000/- contrarily quantified in a sum of Rs.2000/- wherefrom the ensuable sequel warranting its eruption therefrom was hence of the insurer acquiescing to the deceased not only performing employment under deceased Rakesh Kumar as a driver in the relevant vehicle also his standing defrayed by his aforesaid employer salary quantified in a sum of Rs.2000/- per mensem.

3. The effect of the aforesaid pronouncement is of hence the learned Commissioner obviously erring in concluding qua Rakesh Kumar not employing deceased Krishan Kumar as a driver in the relevant vehicle nor his defraying to him any salary whereupon it declined relief qua the petitioner vis-à-vis deceased Rakesh Kumar whose LRs stand impleaded as respondents No.1 and 4 whereupon whom for reasons assigned hereinafter the apposite liability would stand fastened qua compensation determined vis-à-vis the claimant-dependent. Even though it stood aptly concluded by Commissioner qua deceased krishan Kumar suffering his end in a Motor Vehicle accident involving the relevant vehicle yet it reiteratedly for reasons afore-stated inaptly concluded of the deceased not standing employed by Rakesh Kumar.

4. Be that as it may even if it hence evidently upsurges of Rakesh Kumar employing the deceased as a driver in the relevant vehicle who evidently in course of performance of duties thereon as its driver met his end nonetheless the Commissioner concerned aptly concluded of even if deceased Rakesh Kumar had acquired possession of the relevant vehicle by transmitting the sale consideration to its hitherto owner impleaded as respondent No.3 yet significantly with

the provisions of Section 50 of the Motor Vehicles Act which stand extracted hereinafter enjoining upon the registered owner to within 30 days of the relevant transaction, report to the relevant registering authority concerned the factum of transfer by him of the relevant vehicle whereas evidently with the mandate of the afore-stated provisions standing infracted, the obvious sequel thereof is of the insurer being un-amenable for fastening of liability qua compensation determined under the Act. Conspicuously, also the effect of transgression by the registered owner of the mandate afore-stated held in the provisions of Section 50 of the Act, is, thereupon the title qua the relevant vehicle of its hitherto owner not suffering any erosion nor obviously any title as owner in the relevant vehicle vesting in the predecessor-in-interest of respondents No.1 and 4 dehors the latter purveying the sale consideration qua it to respondent No.3 besides the liability qua compensation amount determined vis-à-vis the claimant/dependent, of the deceased being un-amenable for standing fastened upon the insurer. The aforesaid view is squarely in tandem with the mandate engrafted in Section 50 of the Act, tritely when its mandatory provisions suffer infraction at the instance of respondent No.3 also when the predecessor-in-interest of respondents No.1 and 4 for want of his name occurring in substitution of respondent No.3 in the apposite registration certificate, is not construable to be holding title thereto dehors his transferring the apposite sale consideration to respondent No.3 nor also his successors-in-interest impleaded in the apposite petition as Respondents No.1 and 4 can hence be construable to be holding lawful title thereto.

> "50. Transfer of ownership.—
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> (1) Where the ownership of any motor vehicle registered under this Chapter is transferred,—
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> (a) the transferor shall,—
>
> (i) in the case of a vehicle registered within the same State, within fourteen days of the transfer, report the fact of transfer, in such form with such documents and in such manner, as may be prescribed by the Central Government to the registering authority within whose jurisdiction the transfer is to be effected and shall simultaneously send a copy of the said report to the transferee; and
>
> (ii) in the case of a vehicle registered outside the State, within forty-five days of the transfer, forward to the registering authority referred to in sub-clause (i)—
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> (A) the no objection certificate obtained under section 48; or
>
> (B) in a case where no such certificate has been obtained,—
>
> (I) the receipt obtained under sub-section (2) of section 48; or
>
> (II) the postal acknowledgment received by the transferee if he has sent an application in this behalf by registered post acknowledgment due to the registering authority referred to in section 48, together with a declaration that he has not received any communication from such authority refusing to grant such certificate or requiring him to comply with any direction subject to which such certificate may be granted;
>
> (b) the transferee shall, within thirty days of the transfer, report the transfer to the registering authority within whose jurisdiction he has the residence or place of business where the vehicle is normally kept, as the case may be, and shall forward the certificate of registration to that registering authority together with the prescribed fee and a copy of the report received by him from the transferor in order that particulars of the transfer of ownership may be entered in the certificate of registration.
>
> (2) Where—
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> (a) the person in whose name a motor vehicle stands registered dies, or
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> (b) a motor vehicle has been purchased or acquired at a public auction conducted by, or on behalf of, Government, the person succeeding to the possession of the vehicle or, as the case may be, who has purchased or acquired the motor vehicle, shall make an application for the purpose of transferring the ownership of the vehicle in his name, to

the registering authority in whose jurisdiction he has the residence or place of business where the vehicle is normally kept, as the case may be, in such manner, accompanied with such fee, and within such period as may be prescribed by the Central Government.

(3) If the transferor or the transferee fails to report to the registering authority the fact of transfer within the period specified in clause (a) or clause (b) of sub-section (1), as the case may be, or if the person who is required to make an application under sub-section (2) (hereafter in this section referred to as the other person) fails to make such application within the period prescribed, the registering authority may, having regard to the circumstances of the case, require the transferor or the transferee, or the other person, as the case may be, to pay, in lieu of any action that may be taken against him under section 177 such amount not exceeding one hundred rupees as may be prescribed under sub-section (5): Provided that action under section 177 shall be taken against the transferor or the transferee or the other person, as the case may be, where he fails to pay the said amount.

(4) Where a person has paid the amount under sub-section (3), no action shall be taken against him under section 177.

(5) For the purposes of sub-section (3), a State Government may prescribe different amounts having regard to the period of delay on the part of the transferor or the transferee in reporting the fact of transfer of ownership of the motor vehicle or of the other person in making the application under sub-section (2).

(6) On receipt of a report under sub-section (1), or an application under sub-section (2), the registering authority may cause the transfer of ownership to be entered in the certificate of registration.

(7) A registering authority making any such entry shall communicate the transfer of ownership to the transferor and to the original registering authority, if it is not the original registering authority."

5. Herein-after, it is also imperative to determine the legality of dispelling by the Commissioner the efficacy of Ex.P-2, exhibit whereof comprises the driving license held by deceased Krishan Kumar. The learned Commissioner had ousted the efficacy of Ex.P-2 on the score of its not being the original of the relevant driving licence. Also it cast an obligation upon the appellant to summon its original from the licensing authority concerned, omission whereof on her part stood concluded by it to work adversely vis-à-vis her claim. However, the aforesaid ousting by the Commissioner qua the tenacity of Ex.P-2 is grossly fallacious significantly when it was incumbent upon the insurer to belie the efficacy of Ex.P-2. Moreover with the deceased suffering fatal injuries in the motor vehicle accident wherefrom it is inevitable to conclude of his thereat holding the driving licence rendering hence his dependant to stand incapacitated to produce it whereas the insurer omitting to summon the relevant record from the Licensing authority concerned warranted a conclusion of its not concerting to belie Ex.P-2 whereupon it was inapt for the Commissioner to conclude of Ex.P-2 wanting in any probative vigor.

6. In aftermath also with the insurer not belying its effect by summoning its original from the licensing authority concerned, it was un-warranted for the learned commissioner to conclude qua Ext.P-2 for want of production of original by the claimant not holding any efficacy. With this Court concluding of the deceased Krishan Kumar suffering his end in a Motor vehicle accident involving the relevant vehicle wherein he stood employed as a driver by deceased Rakesh Kumar on a per mensem salary of Rs.4000/-, yet with this Court concluding qua deceased Rakesh Kumar not being the registered owner of the relevant vehicle wherefrom it is apt to conclude qua the insurer being un-amenable for any liability being fastenable upon it for indemnifying deceased Rakesh Kumar or his successors-in-interest impleaded as respondents No.1 and 4 qua the compensation amount as stands assessed by this Court.

7. In view of the above, the present appeal is allowed. The impugned award is quashed and set aside. The appellant is held entitled to compensation determined as follows:

Average monthly wages 4000/-
Restricted to 50% 2000/-
Relevant factor applied
Compensation = 2000x213.57=427140/-

8. The aforesaid amount of compensation shall be paid by respondent No.4 on her behalf and on behalf of minor respondent No.1 with 12% simple interest from due date i.e 5.1.2002 till the date of actual payment. All pending applications stand disposed of accordingly. Substantial questions of law framed on 4/x/2010 stand answered accordingly.

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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
Raman Kumar .....Respondent.

Cr. Appeal No. 191 of 2013
Date of decision: September 30, 2016.

N.D.P.S. Act, 1985- Section 20- Accused were found in possession of 825 grams charas- they were tried and acquitted by the trial Court on the basis of the judgment of High Court in **State of H.P. Versus Mazar Hussain, 2012 (1) Drugs Cases (Narcotics) 415**, which relied upon the judgment of High Court in **Sunil Versus State of H.P., 2010 (1) Shimla Law Cases 192**- the judgment in Sunil has been overruled in **State of H.P. Versus Mehboob Khan, 2013 (3) Him.L.R. 1834 (F.B.)** – hence, the judgment of trial Court set aside and the case remanded to the trial Court with a direction to decide the same afresh. (Para-8 to 10)

Cases referred:
State of H.P. vs. Mazar Hussain, 2012(1) Drugs Cases (Narcotics) 415
Sunil Vs. State of Himachal Pradesh, 2010 (1) Shim. L.C. 192
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 respondent : Mr. Manohar Lal Sharma, 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, Kullu, Division at Kullu has erroneously acquitted the accused of the charge under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act' in short), vide impugned judgment dated 1.12.2012 passed in Sessions trial No. 50 of 2010.

2. The legality and validity of the impugned judgment has been questioned before this Court on several grounds, however, mainly that the trial Court has miserably failed to appreciate the evidence available on record in its right perspective and also the law applicable to the case in hand.

3. The prosecution case, as disclosed from the record, in a nut shell, is that a police party headed by PW-7 SI Het Ram of Police Post City Akhara Bazar, Kullu accompanied by

Constable Anil Kumar and Constable Diwan Chand (PW-6) vide rapat Ext. PW-2/A proceeded for patrolling at night time i.e. around 12:45 AM. It was around 3:00 AM when the police party present at Bhootnath temple, the accused was spotted coming from left bank road towards bridge connecting Bhootnath temple. On seeing the police party, the accused tried to escape, however, was apprehended by PW-7 with the help of police officials accompanying him. On enquiry, the accused has disclosed his name and other antecedents. Though, Constable Anil Kumar was deputed to call someone for being associated as independent witness, however, due to odd hours no one was found available. PW-7 SI Het Ram had thus associated Constable Anil Kumar and PW-6 Constable Diwan Chand as witnesses and apprised the accused about his legal right of being searched either before a nearby Magistrate or a Gazetted Officer vide memo Ext. PW-6/A. He, however, agreed for his search by the police itself. PW-7 SI Het Ram had thus offered his own search first to the accused vide memo Ext. PW-6/B, however, nothing incriminating could be recovered from his possession. It is the bag Ext. P-2, the accused was holding with him, which was searched and charas weighing 825 grams recovered therefrom. After sampling and sealing process and filling up the NCB-I form Ext. PW-3/D in triplicate, the recovered charas was taken into possession vide recovery memo Ext. PW-6/D. The sample of seal Ext. PW-6/C was drawn separately. A copy of the recovery memo was supplied to the accused free of costs. It is thereafter, the rukka Ext. PW-3/A was prepared and handed over to PW-6 Constable Diwan Chand for being taken to Police Station Kullu for registration of the case. On receipt of rukka Ext. PW-3/A, SI Tej Ram (PW-3), the then Addl. SHO, Police Station Kullu has registered FIR Ext. PW-3/B. The accused was thereafter arrested. He was apprised about the grounds of his arrest i.e. the offence he committed and the sentence provided therefor under the NDPS Act. The information qua his arrest was also given to the persons of his choice.

4. On completion of the investigation at the spot, PW-7 SI Het Ram has produced the accused and also the case property before Addl. SHO Tej Ram who has resealed the case property with seal "A" and also filled in the relevant columns of the NCB-I form Ext. PW-3/D. The facsimile of seal "A" Ext. PW-3/E was drawn separately. The case property was thereafter deposited in the malkhana with MHC Police Station, Kullu for safe custody. The special report Ext. PW-5/A was prepared and submitted to Addl. Superintendent of Police, Kullu. On receipt of the report of chemical examiner Ext. PW-7/D, report under Section 173 Cr.P.C. was filed against the accused in the trial Court.

5. Learned Special Judge on appreciation of the report and the documents annexed therewith has concluded that a prima-facie case under Section 20 of the NDPS Act is made out against the accused. Charge against the accused was framed accordingly. Since he pleaded not guilty to the charge therefor, the prosecution was called upon to produce evidence in order to sustain the charge against accused persons.

6. The prosecution in order to sustain the charge against the accused has examined seven witnesses in all. The material prosecution witnesses are PW-6 Constable Diwan Chand and PW-7 I.O. SI Het Ram. The remaining prosecution witnesses are also police officials, however, formal as they remained associated during the investigation of the case in one way or the other.

7. The accused in his statement recorded under Section 313 Cr.P.C. has denied the prosecution case as incorrect or for want of knowledge. His defence is that the case has been falsely registered against him. He opted for not producing any evidence in his defence.

8. The learned trial Court, while rejecting all the arguments addressed on merits by learned defence counsel and holding that the charas was recovered from the conscious and exclusive possession of the accused, has proceeded to record the findings of acquittal on the sole ground that the report of the Chemical Examiner Ext. PW-7/D is silent about the resin contents in the recovered charas by applying the ratio of the judgment of Division Bench of this Court in ***State of H.P. vs. Mazar Hussain*** reported in ***2012(1) Drugs Cases (Narcotics) 415,*** in which reliance has been placed on a previous judgment, again that of a Division Bench of this Court in ***Sunil*** Vs. ***State of Himachal Pradesh***, ***2010 (1) Shim. L.C. 192.*** The relevant portion of the impugned judgment reads as follows:

"21. The Hon'ble Division Bench of our own Hon'ble High Court in State of H.P. Vs. Mazar Hussain reported in 2012(1) Drugs Cases (Narcotics) 415 has held in para No. 5,6 and 7 as under:-

"5. Inter alia on many other grounds, one important aspect which requires consideration is that in view of the report Ext. PW-11/C, Assistant Chemical Examiner has observed as below:

'Various scientific tests such as physical identification, chemical and chromatographic tests were carried out in the laboratory with the exhibit marked as S-1 under reference. The tests performed above indicated cannabinoids including the presence of tetrahydrocannabinol in the sample. The miscroscopic examination indicated the presence of Cystolithic hairs in the sample. Charas is a resinous mass and resin is an active ingredient of charas, which on testing was found present. The quantity of resin as found in the sample is 34.29% w/w. The result thus obtained is given below:"

6. We also notice that Assistant Chemical Examiner in Ext. PW-11/C has not indicated the percentage of tetrahydrocannabinol in sample. In the similar facts and circumstances, the Division Bench of this court in 2010(1) Drugs Cases (Narcotics) 63: 2010 (1) Shim. L.C. 192 Sunil Vs. State of HP has observed as below:

"23. In Parikh's Textbook of Medical Jurisprudence, Forensic Medicine and Toxicology, Sixth Edition, it is mentioned at page-10.54, in answer to Question No. 10.21 that tetrahydrocannabinol-THC is active principal and it is present in Bhang to the extent of 15 per cent, in ganja to the extent of 25 per cent and in charas to the extent of 25040 per cent.

29. As noticed herein above, the only tests, which were conducted by the Experts, were to find out tetrahydrocannabinol or cystolithic hair. They found tetrahydrocannabinol but did not indicate in their reports the percentage thereof. While in the witness box also, the experts did not say what was the percentage of tetrahydrocannabinol in the samples. Specific category of a cannabis product, like Charas, ganja, or mixture, as defined in Section 2(iii) of the Act, or anything else, like bhang etc. can also be determined, with reference to the percentage of tetrahydrocannabinol in the stuff. As noticed hereinabove, percentage of tetrahydrocannabinol varies from one product to other product of cannabis.

30. According to Parikh's Textbook of Medical Jurisprudence, Forensic Medicine and Toxicology, in the case of bhang it is 15 per cent, in the case of ganja it is about 25 per cent and in the case of Charas it is between 25 to 40 per cent. When the percentage of tetrahydrocannabinol in the sample stuff is not indicated in the report nor had any test been conducted to ascertain whether the stuff was Charas, that is to say resin, or some other preparation of cannabis, it cannot be said that the stuff was in fact Charas. As regards cystolithic hair, these being the fibre of cannabis plant, are bound to be present in all the products of cannabis. It is quite likely that the samples were only of bhang i.e. the dried leaves of cannabis plant, which is also supposed to contain 15 per cent concentration of tetrahydrocannabinol. Possession of only the leaves or the seeds of cannabis plant is no offence, because it is only the Charas, ganja or mixture, as defined in Section 2(iii) of the Act, which is an offence, under Section 20 of the Act. Leaves and seeds

of cannabis plant are not included either in the definition of charas or ganja and are rather specifically excluded from the definition of ganja, unless accompany the flowering and fruiting tops of the plant.

7. Since in the present case, no percentage of tetrahydrocannabinol has been mentioned, in such circumstances, were are of the considered view that the contraband good, so recovered, cannot be said to be 'charas' in view of report Ex. PW-11/C of Assistant Chemical Examiner and in view of the judgment of this Court (DB) in Sunil (supra).

22. The relevant portion of the chemical report Ex. PW-7/D in the present case is reproduced as under:-

"RESULT OF THE EXAMINATION.

Various scientific tests such as physical identification, chemical & chromatographic analysis 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 exhibit. The microscopic examination indicated the presence of cystolithic hairs in the exhibit. Charas is a resinous mass and resin is an active ingredient of Charas, which on testing was found present in the exhibit. The quantity of resin as found in the exhibit was 28.64% w/w. The result thus obtained is given below.

The exhibit is extract of cannabis and sample of CHARAS".

9. 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 Bench 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 ***7th November, 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 DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

State of Himachal Pradesh .....Appellant.
Versus
Randhir & others. .....Respondents.

Cr. Appeal No. 181 of 2013
Date of decision: September 30, 2016.

N.D.P.S. Act, 1985- Section 20- Accused were found in possession of 200 grams charas- they were tried and acquitted by the trial Court on the basis of the judgment of High Court in **State of H.P. Versus Mazar Hussain, 2012 (1) Drugs Cases (Narcotics) 415**, which relied upon the judgment of High Court in **Sunil Versus State of H.P., 2010 (1) Shimla Law Cases 192**- the judgment in Sunil has been overruled in **State of H.P. Versus Mehboob Khan, 2013 (3) Him.L.R. 1834 (F.B.)** – hence, the judgment of trial Court set aside and the case remanded to the trial Court with a direction to decide the same afresh. (Para-9 to 11)

Cases referred:
State of H.P. vs. Mazar Hussain, 2012(1) Drugs Cases (Narcotics) 415
Sunil Vs. State of Himachal Pradesh, 2010 (1) Shim. L.C. 192
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 : Mr. Sunil 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, Kullu, Division at Kullu has erroneously acquitted the accused persons of the charge under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act' in short), vide impugned judgment dated 1.12.2012 passed in Sessions trial No. 148 of 2012.

2. The legality and validity of the impugned judgment has been questioned before this Court on several grounds, however, mainly that the trial Court has miserably failed to appreciate the evidence available on record in its right perspective and also the law applicable to the case in hand.

3. The facts, in a nut shell, are that on 13.8.2009, PW-6 ASI Daya Ram accompanied by LHC Pinki Devi, HC Lal Singh (PW-2) and Constable Dinesh Kumar (PW-1) was on routine checking duty in front of the gate of Police Station, Manali. Around 4:50 PM, jeep bearing registration No. HP-66-0852 coming from Kullu side arrived at the spot where the vehicles were being checked by the aforesaid police party. Accused Om Parkash (hereinafter referred to as 'accused No. 3') was on the wheel of the jeep whereas his co-accused Randhir and Sandeep (hereinafter referred to as accused Nos. 1 & 2, respectively) were occupying the same. It was Janmashtami festival on that day, therefore, no one was available for being associated as

independent witness. PW-6 ASI Daya Ram who is also Investigating Officer had therefore associated PW-1 Constable Dinesh Kumar and PW-2 HC Lal Singh as witnesses and offered first his search to the accused persons vide memo Ext. PW-1/A. Nothing incriminating was recovered from his possession, therefore, he checked the jeep thereafter. During checking, a dark grey coloured bag was found near the gear box of the jeep. On opening the said bag, charas in the shape of rounds was found kept therein. When the recovered charas weighed, it was found to be 200 grams in weight. After observing the sampling and sealing process, PW-6 ASI Daya Ram has filled in the NCB-I form Ext. PW-6/A in triplicate, the sample whereof is Ext. PW-1/G. The seal after its use, was handed over to PW-1 Const. Dinesh Kumar for safe custody. The recovered charas was taken into possession vide recovery memo Ext. PW-1/B. The jeep was also taken into possession vide memo Ext. PW-1/C. It is, thereafter, rukka Ext. PW-6/B was prepared and handed over to PW-2 HC Lal Singh for being taken to the Police Station, Manali for registration of the case. On the basis thereof, the then Moharar Constable PW-4 Sher Singh has registered the FIR Ext. PW-4/A. PW-6 ASI Daya Ram has arrested all the accused persons. They were apprised about the grounds of arrest i.e. the offence they committed and the provision of sentence provided under the NDPS Act therefor vide memo Exts. PW-1/D, PW-1/E and PW-1/F. The information of their arrest was given to the persons of their respective choice. The statements of the witnesses were recorded.

4. On completion of the investigation at the spot, the case property was produced before PW-7 ASI Ram Swaroop, the then officiating SHO, who resealed the same with seal "M" and also filled in the relevant columns of the NCB-I form Ext. PW-6/A. The facsimile of seal "M" was drawn separately which is Ext. PW-7/A. The case property was thereafter deposited in the malkhana with PW-4 MHC Sher Singh.

5. On completion of the further investigation, such as preparation and submission of special report (Ext. PW-3/A) and receipt of the report of Chemical Examiner (Ext. PX), the report under Section 173 Cr.P.C. was filed against all the three accused in the trial Court.

6. Learned Special Judge on appreciation of the report and the documents annexed therewith has concluded that prima-facie, a case under Section 20 of the NDPS Act is made out against all the accused. Charge against each of them was framed accordingly. Since they pleaded not guilty to the charge therefore, the prosecution was called upon to produce evidence in order to sustain the charge against accused persons.

7. The prosecution has examined seven witnesses in all. The star prosecution witnesses are PW-1 Constable Dinesh Kumar, PW-2 HHC Lal Singh and PW-6 the I.O. ASI Daya Ram. The remaining prosecution witnesses PW-3 to PW-5 and PW-7 who were also police officials are formal as they remained associated with the investigation of the case in one way or the other.

8. All the accused in their statements recorded under Section 313 Cr.P.C. though have denied all incriminating circumstances appearing against them in the prosecution evidence, either being wrong or for want of knowledge, however, interestingly enough, in reply to question No. 7 that charas in the shape of chapatti was recovered from grey coloured bag lying near the gear box has been admitted by all of them as correct. There is no explanation that if they were not in possession of the charas, how the same came to be implanted in the vehicle. The accused persons have also not opted for producing evidence in defence.

9. The learned trial Court, while rejecting all the arguments addressed on merits by learned defence counsel and holding that the charas was recovered from the conscious and exclusive possession of the accused persons, has proceeded to record the findings of acquittal on the sole ground that the report of the Chemical Examiner Ext. PX is silent about the resin contents in the recovered charas by applying the ratio of the judgment of Division Bench of this Court in ***State of H.P. vs. Mazar Hussain*** reported in ***2012(1) Drugs Cases (Narcotics) 415,*** in which reliance has been placed on a previous judgment, again that of Division Bench of this Court in ***Sunil*** Vs. ***State of Himachal Pradesh***, ***2010 (1) Shim. L.C. 192.*** The relevant portion of the impugned judgment reads as follows:

"20. The Hon'ble Division Bench of our own Hon'ble High Court in State of H.P. Vs. Mazar Hussain reported in 2012(1) Drugs Cases (Narcotics) 415 has held in para No. 5,6 and 7 as under:-

> "5. Inter alia on many other grounds, one important aspect which requires consideration is that in view of the report Ext. PW-11/C, Assistant Chemical Examiner has observed as below:
>
> > 'Various scientific tests such as physical identification, chemical and chromatographic tests were carried out in the laboratory with the exhibit marked as S-1 under reference. The tests performed above indicated cannabinoids including the presence of tetrahydrocannabinol in the sample. The miscroscopic examination indicated the presence of Cystolithic hairs in the sample. Charas is a resinous mass and resin is an active ingredient of charas, which on testing was found present. The quantity of resin as found in the sample is 34.29% w/w. The result thus obtained is given below:"
>
> 7. We also notice that Assistant Chemical Examiner in Ext. PW-11/C has not indicated the percentage of tetrahydrocannabinol in sample. In the similar facts and circumstances, the Division Bench of this court in 2010(1) Drugs Cases (Narcotics) 63: 2010 (1) Shim. L.C. 192 Sunil Vs. State of HP has observed as below:
>
> "23. In Parikh's Textbook of Medical Jurisprudence, Forensic Medicine and Toxicology, Sixth Edition, it is mentioned at page-10.54, in answer to Question No. 10.21 that tetrahydrocannabinol-THC is active principal and it is present in Bhang to the extent of 15 per cent, in ganja to the extent of 25 per cent and in charas to the extent of 25040 per cent.
>
> 29. As noticed herein above, the only tests, which were conducted by the Experts, were to find out tetrahydrocannabinol or cystolithic hair. They found tetrahydrocannabinol but did not indicate in their reports the percentage thereof. While in the witness box also, the experts did not say what was the percentage of tetrahydrocannabinol in the samples. Specific category of a cannabis product, like Charas, ganja, or mixture, as defined in Section 2(iii) of the Act, or anything else, like bhang etc. can also be determined, with reference to the percentage of tetrahydrocannabinol in the stuff. As noticed hereinabove, percentage of tetrahydrocannabinol varies from one product to other product of cannabis.
>
> 30. According to Parikh's Textbook of Medical Jurisprudence, Forensic Medicine and Toxicology, in the case of bhang it is 15 per cent, in the case of ganja it is about 25 per cent and in the case of Charas it is between 25 to 40 per cent. When the percentage of tetrahydrocannabinol in the sample stuff is not indicated in the report nor had any test been conducted to ascertain whether the stuff was Charas, that is to say resin, or some other preparation of cannabis, it cannot be said that the stuff was in fact Charas. As regards cystolithic hair, these being the fibre of cannabis plant, are bound to be present in all the products of cannabis. It is quite likely that the samples were only of bhang i.e. the dried leaves of cannabis plant, which is also supposed to contain 15 per cent concentration of tetrahydrocannabinol. Possession of only the leaves or the seeds of cannabis plant is no offence, because it is only the Charas, ganja or mixture, as defined in Section 2(iii) of the Act, which is an offence, under Section 20 of the Act. Leaves and seeds

of cannabis plant are not included either in the definition of charas or ganja and are rather specifically excluded from the definition of ganja, unless accompany the flowering and fruiting tops of the plant.

7. Since in the present case, no percentage of tetrahydrocannabinol has been mentioned, in such circumstances, were are of the considered view that the contraband good, so recovered, cannot be said to be 'charas' in view of report Ex. PW-11/C of Assistant Chemical Examiner and in view of the judgment of this Court (DB) in Sunil (supra).

21. The relevant portion of the chemical report Ex. PX in the present case is reproduced as under:-

"RESULT OF THE EXAMINATION.

Various scientific tests such as physical identification, chemical & chromatographic analysis 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 exhibit. The microscopic examination indicated the presence of cystolithic hairs in the exhibit. Charas is a resinous mass and resin is an active ingredient of Charas, which on testing was found present in the exhibit. The quantity of resin as found in the exhibit was 31.72% w/w. The result thus obtained is given below.

The exhibit is extract of cannabis and sample 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 Bench in ***Sunil's*** case (supra) and concluded as under:-

g. 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.

h. 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.

i. 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.

j. 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.

k. 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.

l. 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 ***7th November, 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.

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

State of Himachal Pradesh ... Appellant

Versus

Sardeep Kumar and another ... Respondents

Cr. Appeal No. 431 of 2010
Reserved on: 19.09.2016
Date of decision: 30.09.2016

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- The deceased was married to the accused S- accused J was her mother-in-law- accused started torturing the deceased – a complaint was also made to ex-vice president – informant received a phone call from the deceased that accused S had beaten her under the influence of liquor and accused were asking her to leave the matrimonial home- subsequently, the deceased committed suicide by consuming poison – accused were tried and acquitted by the trial Court- held, in appeal that it was not proved that there was any dowry demand - accused J was residing separately – no complaint was lodged before the police- the deceased was not treated medically for her injuries- no external injury was found on the body of the deceased- accused S was not at home when the deceased had consumed poison- the evidence led by the prosecution merely casts suspicion and does not prove the prosecution version – trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-19 to 32)

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, Mr. Vikram Thakur and Mr. Puneet Rajta, Deputy Advocate Generals.

For the respondents: Mr. Rajnish Maniktala, 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 Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala, in Sessions Trial No. 20/2010 dated 06.05.2010, vide which, learned trial Court has acquitted the accused for commission of offences punishable under Sections 498-A and 306 read with Section 34 of Indian Penal Code.

2. The case of the prosecution was that deceased Reeta Devi sister of complainant Shamsher Singh was married to accused Sardeep Kumar in the year 2003. Co-accused Jagtamba was the mother-in-law of the deceased. After two years of marriage, accused started torturing Reeta Devi. They used to tease her over day-to-day domestic work and whenever Reeta used to visit the complainant, she used to narrate the said conduct of the accused to him. As per the prosecution, the deceased was maltreated by the accused who used to give her beatings and she was also not provided proper food and clothes. In this regard, Shamsher had also made a

complaint to Ex-Vice President Karam Chand. On 17.05.2009 complainant received phone call from Reeta to the effect that accused Sardeep had beaten her under the influence of liquor and she had been abused by both the accused. She further told the complainant that the accused were asking her to leave the matrimonial house. Before this, the complainant had lodged a complaint with Pradhan, Aberi Gram Panchayat, Pawan Kumar, who thereafter went alongwith the complainant to the house of the accused and asked them to behave properly. However, the accused did not mend their ways. On 19.05.2009 at 1.00 P.M. complainant received a phone call from his aunt, Judhiya Devi to the effect that Reeta had consumed poison and had become unconscious. Consequently, complainant alongwith his brother Amit and uncle Gopal Thakur went to the house of the accused and on the way they met Judhiya Devi and Karam Chand and found that Reeta was being taken to Palampur hospital in a van. First aid was given to Reeta at Palampur however, she died after sometime. Information was accordingly provided to the police and statement of the complainant was recorded under Section 154 Cr.P.C., on the basis of which FIR was registered. MLC of Reeta was obtained by the police and after her death, postmortem was conducted. Packet of one medicine was recovered from the house of Reeta. Viscera and other case property were sent to FSL, Junga and Chemical Examiner's report was obtained which revealed that the cause of death of Reeta was poisoning. Thereafter, Investigating Officer visited the spot and prepared site map.

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 of Indian Penal Code, to which they pleaded not guilty and claimed trial.

4. On the basis of material placed on record by the prosecution both ocular as well as documentary, it was held by learned trial Court that prosecution had failed to prove the liability of the accused under Sections 498-A and 306 read with Section 34 I.P.C. beyond the scope of all reasonable doubts. It was held by learned trial Court that the deceased was sensitive and she could not sustain the pressure of day to day married life and was unable to bear the pressure of routine married discord which otherwise occurred in routine in married life. It was further held by learned trial Court that routine married life differences cannot be termed as cruelty and on these basis, it was concluded by learned trial Court that the deceased had committed suicide due to her sensitive nature and it had got nothing to do with the behaviour of accused towards her. It was also held by the learned trial Court that there was no cogent and convincing evidence against the accused to connect them with the offences in question. On these basis, learned trial Court acquitted the accused for commission of offences punishable under Sections 498-A and 306 read with Section 34 I.P.C.

5. Mr. V.S. Chauhan, learned Additional Advocate General, has strenuously argued that the judgment of acquittal returned by learned trial Court was perverse and not sustainable in law. He argued that learned trial Court had discarded the testimony of prosecution witnesses for untenable reasons in the absence of any proof of enmity and further no cogent reasons were assigned by learned trial Court for discarding the version of prosecution witnesses. It was further urged by him that learned trial Court erred in not appreciating that there was sufficient cogent and convincing material on record to establish the liability of the accused persons. Mr. Chauhan submitted that the testimony of PW-1 Shamsher Singh fully corroborated the case of the prosecution, however, statement of this witness alongwith witnesses PW-2 Gopal Thakur and PW-3 Pawan Kumar, Pradhan Gram Panchayat, was brushed aside by learned trial Court without properly evaluating them. Mr. Chauhan further argued that learned trial Court also failed to appreciate the presumption attached to under Section 113-A of the Evidence Act keeping in view the fact that the marriage of the deceased with the accused had taken place in the year 2003 and she has committed suicide on 19.05.2009 i.e. within seven years of the marriage. On these basis, it was urged by Mr. Chauhan that that the judgment of acquittal passed by learned trial Court was not sustainable and the same be therefore set aside and the accused be convicted for commission of offences punishable under Sections 498-A and 306 read with Section 34 of the Indian Penal Code.

6. Mr. Rajnish Maniktala, learned counsel for the respondents on the other hand, argued that the judgment of acquittal passed by learned trial Court was neither perverse nor it could be said that the findings of learned trial Court of acquittal in favour of the respondents were not borne out from the records of the case. Mr. Maniktala strenuously argued that the material produced on record by the prosecution did not prove that the accused had committed offences punishable under Sections 498-A and 306 I.P.C. According to Mr. Maniktala, the deceased was neither subjected to any cruelty nor the accused abetted the deceased to commit suicide. Mr. Maniktala argued that the testimony of the prosecution witnesses was neither cogent nor reliable or trustworthy so as to be made the basis for convicting the accused. It was further urged by him that a perusal of the judgment passed by learned trial Court would demonstrate that learned trial Court in detail had taken note of the entire evidence on record and after minute scrutiny of the same it had held, and rightly so, that the prosecution had failed to prove its case against the accused beyond reasonable doubt. On these basis, it was submitted by Mr. Maniktala that there was no merit in the present appeal and the judgment of acquittal returned by learned trial Court did not warrant any interference.

7. We have heard learned counsel for the parties and have also gone through the records of the case as well as judgment passed by learned trial Court.

8. In order to prove its case, prosecution examined 13 witnesses.

9. Complainant Shamsher Singh entered the witness box as PW-1 and he stated that they were four brothers and sisters and his parents were dead. He further deposed that his sister Reeta was married to accused Sardeep in the year 2003 at Bhoura Tappa. He further stated that for two years of marriage behaviour of the accused persons with his sister remained good. However, thereafter the accused started beating his sister as they used to say that she did not work in the house. This witness further deposed that his sister had told him about the torture being meted out to her by the accused persons when she visited his house. He further deposed that he and his younger brother Amit had gone to the house of the accused to make them understand many times. He further stated that he asked the accused not to beat his sister and whenever there is any problem, they could talk to him. He further deposed that the accused did not mend their ways and Reeta Devi had told the occurrence of beating to her uncle father-in-law who was Ex-Vice-President of the Panchayat, who tried to make the accused understand, however, the accused did not change their behaviour. This witness further stated that on 17.05.2009 his sister telephoned him and told him that both the accused were quarrelling with her and accused Sardeep was under the influence of liquor and saying why was'nt she dead. He further deposed that he narrated said occurrence to his younger brother Amit and then he telephonically told his sister that they would come within one or two days. He further deposed that he had told the aforesaid occurrence of beating to the President of his Gram Panchayat Pawan Kumar Pappa. He also deposed that he alongwith President Pawan Kumar Pappa and his brother Amit had gone to the house of accused and had tried to make the accused understand but they did not agree with them. He further deposed that on 19.05.2009 his aunt Judhiya Devi telephonically informed him that his sister had consumed poison. This witness further stated that at that time he was on duty at Holta. He telephoned his uncle Gopal as well as his brother Amit and came to Banuri from Holta where his uncle and brother met him. He further stated that from there they went in their car to the house of accused. This witness further deposed that they met his aunt Judhiya and her husband Prabhat. Karam Chand was also with them and they had brought Reeta from the house to road. According to him, Reeta was put in one van by said persons and they told them that Reeta was being taken to Palampur hospital. He further stated that Reeta was brought to Palampur hospital, however, she died there after sometime. He also stated that on that very date he had made a phone call to his sister but she had not picked up his phone. He also deposed that in his view his sister had consumed poison as a result of illtreatment meted out to her by the accused persons. In his cross-examination, this witness admitted it to be correct that on 19.05.2009 Sardeeep was out of the house in connection with his duty. He also admitted it to be correct that Jagtamba was residing separately with her younger son Sunil. He also admitted it to be correct that they had not lodged any written

complaint before the Panchayat against the accused and self stated that an oral complaint was made. He also stated in his cross-examination that they had not lodged any complaint against the accused before the police. He admitted it to be correct that after the alleged beating given to his sister by the accused they did not carry out any medical examination of his sister. He further admitted it to be correct that last rites of Reeta were performed by her in-laws.

10. Gopal Thakur entered the witness box as PW-2 and this witness deposed that he knew Reeta Devi and her brothers. He also stated that Shamsher brother of Reeta had told him that accused persons used to beat Reeta and they also used to say that Reeta did not know any household work. He also deposed that Shamsher had also told him that accused persons were not providing food and clothes to her. He further stated that once he had gone to the house of accused alongwith Shamsher, Amit and Pawan, Pradhan. He also stated that he remained outside the house and he had gone to the house of his aunt. This witness further deposed that on 19.05.2009 Shamsher telephonically informed him that Reeta had consumed something and he had asked him to come to Banuri with a vehicle alongwith his brother Amit. He further stated that thereafter they went to the house of the accused and saw that Reeta Devi was being put inside one vehicle. He further deposed that his aunt, her husband and uncle of accused Karam Chand were there and then all of them brought Reeta to Palampur hospital where she died after 10 minutes. In his cross-examination, this witness deposed that Reeta had told him once when she had come to attend the marriage of her sister that the accused persons used to beat. He further stated that he had not mentioned these facts in his statement recorded by the police. He also admitted in his cross-examination that father of Reeta was his cousin.

11. Pawan Kumar entered the witness box as PW-3 and this witness deposed that he was President of Gram Panchayat, Aberi and he knew Shamsher as well as Amit. He further deposed that he knew that Reeta was married to Sardeep and Shamsher had come to his house and had made an oral complaint that Reeta was being tortured by her husband and mother-in-law. He further stated that on this he, Shamsher, Amit and Gopal Thakur had gone to the house of the accused and had tried to make the accused understand. He further deposed that Reeta had told him that her husband used to beat her under the influence of liquor and her mother-in-law used to abuse her. In his cross-examination, this witness stated that he had not received any written complaint in this regard. He also admitted that Shamsher etc. were his voters.

12. Dr. R.K. Aluwalia entered the witness box as PW-4 and this witness deposed that since November, 1999 he was posted as Medical Officer at Civil Hospital, Palampur and on 19.05.2009 at around 2.05 P.M. Reeta Devi wife of Sardeep was brought to him with the alleged history of suspected case of poison. He further stated that patient was gasping and her pulse could not be felt. He further stated that patient died at around 2.15 P.M. In his cross-examination he admitted it to be correct that when he examined Reeta Devi, no injury was found on her person. MLC issued by the said witness is on record as Ext.PW4/C.

13. Dr. Ajay Sood entered the witness box as PW-5 and this witness deposed that in May, 2009, he was posted as Medical Officer in Sub Divisional Hospital, Palampur and on 20.05.2009 at the request of police he had conducted postmortem of Reeta Devi wife of Sardeep. He further stated that there was slight frothing from the mouth and there was no ligature mark seen on the neck. He also stated that there were no external injuries. This witness further deposed that in his opinion the cause of death was asphyxia. This witness was re-examined on 07.01.2010 and after going through the report of State FSL, H.P. Junga, he gave his final opinion that the cause of death of the deceased was due to poisoning.

14. PW-6 Constable Darshan Singh, PW-7 Shanti Sawrup, PW-8 HC Jogidner Singh, PW-9 HC Vijay Kumar, PW-10 Constable Daljit Singh and PW-11 SI Jagdish, are formal witnesses.

15. Judhiya Devi entered the witness box as PW-12 and she stated that the deceased was her niece and was married to accused Sardeep about 5-6 years ago. She further stated that on the date of the death of Reeta her mother-in-law and other accused had told her that Reeta had closed the door and therefore they had asked her to come. This witness further

deposed that thereafter, one lady came and asked them to hurry up as Reeta had consumed something. She further stated that thereafter she went to the house of Reeta and saw her lying on the cot and was in agony. She further stated that she telephonically called to her nephew and uncle of Reeta Gopal Thakur, who reached in between 01.30/2.00 P.M. She further stated that Reeta was removed to hospital in a vehicle, however, there she expired. She also stated that whenever she used to ask Reeta, deceased used to tell her that her brothers were alone and she would be killed. She further stated that she could not say whether her niece was happy with her husband and mother-in-law. In her cross-examination, this witness stated that marriage of her niece with accused Sardeep was arranged marriage and at that time accused was working as a driver. She further stated that when Reeta died at that time also accused Sardeep was working as a driver. She admitted it to be correct that Reeta never told her that accused persons had been torturing her.

16. ASI Yogidner Paul entered the witness box as PW-13 and he deposed that on 19.05.2009 at 2.30 P.M. MHC, Police Station Palampur, HC Jogidner, telephonically informed that one lady who had consumed poison had been admitted in Palampur hospital for treatment. This witness further stated that thereafter he lodged rapat No. 10 Ext. PW10/A in the Police Post and came to Palampur hospital alongwith other police officials. He further stated that he reached the hospital at around 3.00 P.M. and came to know that Reeta had expired and her dead body was kept in the dead house. He further deposed that thereafter he went to dead house and took the photographs of dead body and also moved an application for conducing postmortem of the deceased. He also stated that he recorded the statement of Shamsher and sent Rukka through Constable Sanjiv to Police Station, Palampur. He further deposed that on the same evening he went to the spot and prepared spot map. He further stated that in the presence of both the accused he searched the room and kitchen of the house and one empty packet of Sulphas was recovered from kitchen which was taken into possession. He further stated that he recorded the statements of other witnesses and also obtained the postmortem report of the deceased on the next day. In his cross-examination, he admitted it to be correct that it had come in the course of investigation that the marriage between deceased and accused Sardeep was arranged marriage. He also admitted it to be correct that the accused was working as a driver in a private school. He denied it to be incorrect that due to meager salary of accused, the deceased used to remain under depression. He further stated that the witnesses had told him that the deceased was unhappy as the accused used to beat her. He admitted it to be correct that Shamsher was the brother of the deceased, Gopal was the uncle and Ajudhiya Devi was the aunt of the deceased. He further stated that he had not associated any other person as a witness. He further stated that before the present FIR, no complaint was lodged with the police by the deceased. He also admitted it to be correct that when Reeta had consumed poison accused Sardeep was not present in the house. He also admitted it to be correct that when accused Sardeep came to know that Reeta had consumed poison he immediately came to the house. He also admitted it to be correct that Jagtamba was living separately with her younger son. He also admitted it to be correct that during life time of the deceased all her expenses were borne by her husband.

17. As this Court has held earlier also, 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.

18. 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.

19. 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.

20. In order to prove its case, prosecution relied upon the testimony of PW-1 Shamsher Singh, PW-2 Gopal Thakur, PW-3 Pawan Kumar and PW-12 Devi. All these witnesses except PW-3 are closely related to the deceased. Therefore, keeping in view the fact that they are interested witnesses, their testimony require to be scrutinized with lot of care and caution.

21. As per the records of this case, deceased committed suicide on 19.05.2009 during day time. FIR was lodged on 19.05.2009 on the complaint of PW-1 Shamsher Singh. It was mentioned in the said FIR that the deceased was married with accused Sardeep in the year 2003 and though the deceased was treated properly for a period of two years after her marriage but thereafter, the accused started telling the deceased that she did not know household work properly and both the accused used to physically assault the deceased and also used to harass her mentally and also used to verbally abuse her. It was further mentioned in the FIR that the deceased was not even given proper food and clothes and she disclosed these facts on various occasions to the complainant as well as his younger brother Amit Kumar. It was further mentioned in the FIR that Reeta in fact had brought this fact verbally in the notice of her husband's uncle (Chacha) Karam Chand, Ex. Up-Pradhan of Gram Panchayat, who had taken up the matter with the accused and had made them understand but the accused did not heed to his advice also. It was further mentioned in the FIR that on 17.05.2009 Reeta telephonically informed the complainant that her husband was under the influence of liquor and both the accused had physically assaulted her as well as were verbally abusing her. It also finds mention in the FIR that the complainant had brought this fact in the notice of Pawan Kumar, Pradhan, Gram Panchayat Aberi, who alongwith him and his younger brother had accompanied them to the house of the accused on 2-3 occasions to make the accused understand.

22. A perusal of the testimony of PW-1 demonstrates that he has admitted in his cross-examination that accused Jagtamba, mother-in-law of the deceased, was residing separately with her younger son Sunil. This witness has also admitted in his cross-examination that they had not lodged any written complaint before the Panchayat etc. against the accused. He further admitted that they had never lodged any complaint against the accused before the police. It was also admitted by him that no medical examination of his sister was got conducted by them on account of her being allegedly beaten up by the accused. He also admitted in his cross-examination that the expenses of the house were borne by Sardeep and Sardeep had come back to his house at once when he came to know that Reeta had consumed poison. He also admitted it to be correct that last rites of Reeta were performed by her in-laws.

23. At this stage, it is relevant to take note of the fact that both PW-4 Dr. R.K. Aluwalia, who attended upon Reeta when she was brought to the hospital at Palampur as well as PW-5 Dr. Ajay Sood, who conducted the postmortem of Reeta have in unison stated that there were no external injury found on the body of the deceased.

24. Gopal Thakur, who entered the witness box as PW-2 is a hearsay witness because it is apparent from his statement that whatsoever has been deposed by him in the Court was on the basis of knowledge gathered by him from Shamsher Singh. In his cross-examination, he stated that deceased had once told him when she had come to attend the marriage of her sister that the accused persons used to beat her. However, he mentioned in his cross-examination that he had not stated these facts in his statement which was recorded by the police. It has also come on record that the father of deceased Reeta was his cousin.

25. PW-3 Pawan Kumar, President, Gram Panchayat Aberi, has stated that he knew Reeta and that Shamsher had come to his house and made an oral complaint to the effect that

Reeta was tortured by the accused and on this he alongwith Shamsher, Amit and Gopal Thakur, had gone to the house of the accused. He further stated that Reeta told him that her husband used to beat her under the influence of liquor and her mother-in-law also used to abuse her. In his cross-examination, this witness deposed that he had not received any written complaint in this regard. He also admitted that Shamsher etc. were his voters.

26. Judhiya Devi, who entered the witness box as PW-12, had admitted in her cross-examination that Reeta never told her that accused persons were torturing her.

27. It has come in the testimony of PW-13 ASI Yoginder Paul that when Reeta consumed poison, accused Sardeeep was not at home and he immediately came to the house when he came to know about this fact. He also admitted it to be correct that Jagtamba was living separately with her younger son. He admitted that during her life time all the expenses of Reeta were borne by Sardeep. It has also come in his cross-examination that earlier to the registration of the FIR pursuant to the suicide committed by Reeta, no complaint was lodged before the police by the deceased against the accused.

28. Karam Chand, uncle of the accused Sardeep, was not examined by the prosecution.

29. In our considered view, it stands established on the basis of the testimony of PW-1 and PW-13 that accused Jagtamba Devi was not residing with accused Sardeep but was residing separately with her younger son Sunil. Another fact which stands proved on record is that before the unfortunate commission of suicide by the deceased neither any complaint was lodged with the Panchayat nor any complaint was lodged with the police either by the deceased or by family members of the deceased to the effect that the deceased was being tortured and harassed both mentally and physically by the accused. This is apparent from the testimony of PW-1 Shamsher Singh as well as from the testimony of PW-13 Investigating Officer Yoginder Paul.

30. Therefore, save and except the bald assertions of prosecution witnesses who otherwise are interested witnesses being close relative of the deceased, there is not even an iota of evidence on record to substantiate or prove that the deceased in fact was mentally and physically harassed by the accused and accused Sardeep used to beat the deceased under the influence of liquor. It has come in the testimony of Doctors who examined Reeta that there was no external injury found on the body of Reeta Devi. In these circumstances, the case of the prosecution that Reeta committed suicide as a result of her being both mentally as well as physically harassed by the accused, cannot be said to have been proved against the accused beyond reasonable doubt. The evidence produced on record by the prosecution though casts a suspicion on the accused, however, in our considered view, howsoever strong suspicion may be the same cannot be a substitute for proof and according to us, there is no substantive evidence placed on record by the prosecution from which it can be inferred that the deceased was harassed and tortured by the accused as a result of which she committed suicide. There is no material produced on record by the prosecution from which it can be inferred that the deceased was subjected to cruelty.

31. Accordingly, in our considered view, it cannot be said on the basis of material produced on record by the prosecution that the case stood proved against the accused beyond reasonable doubt. This is for the reason that the allegation to the effect that deceased was maltreated and subjected to cruelty by the accused on account of demand of dowry has not at all been substantiated by the prosecution.

32. The Hon'ble Supreme Court in ***Sangara Bonia Sreen Vs. State of Andhra Pradesh*,*1997 (5) Supreme Court Cases 348***, has held 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.

33. 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.

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

Union of India .....Appellant.
Versus
Chatur Singh & Ors. ....Respondents.

RFA No. 214 of 2006.
Reserved On 19th September, 2016.
Decided on : 30th September, 2016.

Land Acquisition Act, 1894- Section 18- Land of the claimants was acquired for defence purposes – Land Acquisition Collector determined different rates for different types of land – a reference petition was filed and District Judge enhanced the market value to Rs. 60,000/- per bigha irrespective of classification of land- held, in appeal that District Judge had relied upon the judgment of the High Court to grant compensation at uniform rate – the purpose of acquisition is the same and therefore, the assessment at uniform rate is just and expedient- appeal dismissed.

(Para-6 to 10)

For the Appellant: Ms.Nishi Goel, vice counsel.
For Respondents: Mr.Vinay Kuthiala, Senior Advocate with Mr. Diwan Singh Negi, Advocate for respondents No.1 to 9.
Mr.Vivek Singh Attri, Dy.A.G. for respondent No.10.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

The instant Regular First Appeal stands preferred by the appellants herein against the award rendered on 31.05.2003 by the learned District Judge, Kinnaur Civil Division at Rampur Bushahr, H.P.

2. Briefly stated the facts of the case are that the lands of the respondents herein comprised in Khasra No.5379, measuring 7-16 bighas, situated in Mauza Averi, Tehsil Nirmand, District Kullu, H.P. stood acquired for defence purposes. The Land Acquisition Collector vide award No.1/98 of 19.3.1998 determined diverse rates qua market value for diverse categories of lands whereupon he concomitantly determined diverse rates of compensation amount qua diverse categories of lands brought to acquisition.

3. The award of the Land Acquisition Collector was subjected to impeachment by way of the land holders/land owners preferring a reference petition under Section 18 of the Land Acquisition Act before the learned District Judge, Kinnaur Civil Division at Rampur Bushahr, H.P. In the impugned award, the learned District Judge, on a consideration of the material as laid before him, had enhanced the compensation amount qua the land subjected to acquisition. The learned District Judge, in his impugned award has come to enhance the market value of the acquired land to Rs.60,000/- per bigha irrespective of the classification of lands brought to acquisition.

4. The appellant herein/respondent before the learned Court below, stands aggrieved by the Award rendered by the learned District Judge, Kinnaur Civil Division at Rampur Bushahr, H.P. and consequently, by way of the present appeal laid before this Court has, hence, challenged the impugned award.

5. The learned counsel appearing for the parties have been heard at length.

6. The learned District Judge while pronouncing the award in land reference petition No. 42 of 2000 wherefrom the instant appeal has arisen had as displayed by an incisive perusal of the relevant rendition also as evincible from the evidence as exists hereat meted reverence to all the relevant factors enjoined to be borne in mind whereupon, he allowed the reference petition preferred therebefore by the aggrieved landowners wherein they assailed the insufficiency of the compensation amount as assessed qua their lands by the Land Acquisition Collector. Moreover, in the learned District Judge meteing deference to the relevant evidentiary material while assessing compensation qua the lands of the aggrieved land owners he has not wandered astray from the trite principles of law.

7. The reliance as placed by the learned Reference Court upon the relevant material in display of the lands of the landowners as brought to acquisition holding the monetary value as enumerated therein does not suffer from any fallacy arising from his infracting the relevant parameters held in judicial pronouncements qua the relevant material as stood relied upon holding vis-à-vis the lands brought to acquisition (a) proximity from time angle and (b) proximity from location angle. Consequently, the reliance as stood placed by the learned District Judge on the relevant material pronouncing upon the market value borne by the land of the landowners brought to acquisition does not suffer from any inherent fallacy.

8. The learned District Judge had interfered with the award rendered by the learned Land Acquisition Collector wherein he had assessed varying rates of compensation qua contradistict categories of land. Contrarily, the learned District had assessed a uniform rate of compensation amount qua diverse categories of land. In the learned District Judge assessing a uniform rate of compensation qua diverse categories of land hence his proceeding to set aside the award of the Land Acquisition Collector concerned who had assessed diverse rates of compensation for contradistinct categories of land, he had anvilled his relevant assessment upon a verdict of this Court rendered in a case titled as Gulabi v. State, AIR 1998 HP (DB) wherein it is mandated qua uniform rate of compensation being assessable qua lands brought to acquisition irrespective of their varying classifications, conspicuously when the purpose qua the lands as stand brought to acquisition is common to each category of land. In aftermath, when the purpose for acquiring the lands of the land owners is common to varying categories of lands hence contradistinctivity in their respective classification also the contradistinctivity in their monetary value pales into insignificance. In sequel, the assessment of a uniform rate of compensation for all categories of lands is both just and expedient. Consequently, the award of the learned District

Judge assessing a uniform rate of compensation qua diverse categories of land does not suffer from any infirmity.

9. In sequel, the instant appeal is dismissed and the award impugned herebefore is maintained and affirmed. All pending applications also stand 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.

Arushi Thakur & others .....Petitioners

Versus

Maharishi Markandeshwar Private Medical College & others .....Respondents

CWP No. 2423 of 2016
Date of decision: 03.10.2016

Constitution of India, 1950- Article 226- The admission was granted to the petitioners after execution of the undertaking- respondent No. 1 has approached the State Authority for revision of admission and other ancillary fees – the matter is pending before State Authority- direction issued to the State Authority to examine the request of respondent No. 1 and to take the decision within 6 weeks after hearing it. (Para-2 to 4)

For the petitioners : Mr. Dilip Sharma, Senior Advocate with Ms. Nishi Goel, Advocate.

For the respondents: Mr. K.D. Shreedhar, Senior Advocate with Mr. Yudhbir Singh Thakur, Advocate, for respondent No. 1.

Mr. Ashok Sharma, Assistant Solicitor General of India with Mr. Ajay Chauhan, Advocate, for respondent No. 2.

Mr. Narender Thakur, Advocate, for respondent No. 3.

Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals with Mr. J.K. Verma, Deputy Advocate General, for respondent No. 4.

Mr. J.L. Bhardwaj, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Respondent No. 1 has already filed reply. Mr. Romesh Verma, learned Additional Advocate General, stated at the Bar that reply on behalf of respondent No. 4 stands filed before the Registry. The Registry to trace and place the same on record.

2. Learned Senior Counsel appearing on behalf of respondent No. 1-College argued that respondent No. 1 has complied with the directions passed by this Court and granted admission to the petitioners, after execution of the undertaking by the petitioners, in terms of the order dated 20.09.2016. Further argued that respondent No. 1 has already approached the State-Authority for revision of admission fee and other ancillary fee and the matter is still pending, be directed to decide the issue, as early as possible, after hearing respondent No. 1.

3. Virtually, the reliefs sought by the petitioners stand granted to them in terms of the order dated 20.09.2016, subject to the undertaking, which the petitioners have executed.

4. In the given circumstances, the State Authority, i.e. respondent No. 4 is directed to examine the request of respondent No. 1 and make a decision within six weeks from today, after hearing it.

5. Accordingly, the writ petition is disposed of alongwith pending applications.

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

Ganga Ram. .....Appellant.

Versus

Dalip Singh. .....Respondent.

Cr. Appeal No. 204 of 2008
Reserved on: 20.09.2016
Decided on: 03.10.2016

Indian Penal Code, 1860- Section 500- Accused levelled allegations of adultery against the complainant and his sister S- these allegations tarnished the reputation of the complainant amongst the general public- the complaint was dismissed by the trial Court- held, in appeal that the complainant had filed a civil suit earlier, which was dismissed on the ground that S was living in adultery- no appeal was filed- the complainant had named D and K as witnesses but they were not examined and adverse inference has to be drawn against the complainant – the trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-5 to 10)

Case referred:
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the appellant: Mr. J.R. Poswal, Advocate.
For the respondent: Mr. Manoj Thakur, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant-complainant (hereinafter referred to as "the complainant") against the accused-respondent (hereinafter referred to as "the accused") assailing the judgment passed by the learned Judicial Magistrate, 1st Class, Court No. 2, Ghumarwin, District Bilaspur in case No. 170/2 of 2004/2003, whereby the complaint, preferred by the complaint under Section 500 IPC, was dismissed.

2. Briefly stating the facts giving rise to the present appeal are that the complainant maintained a complaint under Section 500 IPC, seeking punishment of the accused. As per complainant, he retired Subedar-Major from Army and a resident of Village Tihri, holding a respective post of vice President of Gram Panchayat. The accused is a resident of Village Bharoli Kalan, serving as JBT Teacher in Middle School Gangloh. The accused is married to Smt. Sumati Devi, who is a cousin sister of the complainant. It is further averred that from the very beginning, the accused had been maltreating and beating Smt. Sumati Devi, so the complainant came forward for the rescue of his sister. The accused once succeeded in obtaining a divorce decree against Smt. Sumati Devi in a fraudulent manner. The said *ex parte* judgment and decree of divorce was set aside by the order of learned District Judge, Bilaspur. It is further alleged that accused did not make payment of maintenance to his children, he also moved a petition under Section 6 of Hindu Minority and Guardian Act, 1956, which was turned down by the competent Court below. The complainant alleged that the accused is having another illegal wife, named Smt. Kero Devi and he is willing to marry her. The complainant rendered all possible help to Smt. Sumati Devi, during all legal proceedings, hence, out of frustration, in order to damage the reputation of the complainant, the accused had made unjustifiable and false allegations of

adultery against the complainant and his sister Smt. Sumati Devi. The accused has also filed a case before the learned Sub-Judge, Ghumarwin, where he alleging that the complainant, who is brother of Smt. Sumati Devi, is living an adulterous life with her. According to complainant, these allegations tarnished his reputation among general public. It is further alleged that the accused has been distributing the copies of defamatory plaint (Ext. DA), to the friends and known persons of the complainant to defame him.

3. The complainant in order to establish his case has examined two witnesses. The complainant himself stepped into the witness box as CW-1 and stated that he is Ex. Vice President of Gram Panchayat and a retired Subedar-Major from Army. Accused Dalip Singh is brother-in-law of the complainant and is working as JBT Teacher. Smt. Sumati Devi is a daughter of complainant's uncle and has been married to Dalip Singh, accused. The complainant has to take responsibility of a son, as his uncle does not have any son. According to complainant, accused used to torture Smt. Sumati Devi, as a result of which various civil and criminal litigations started between them. Accused refused to pay maintenance to the children, and fraudulently got a divorce decree against Smt. Sumati Devi. He further submitted that accused is having illegal relationship with one Smt. Kero Devi. In order to lower the reputation of the complainant the accused is making allegations that complainant is living an adulterous life with Smt. Sumati Devi and he is also distributing the copies of a suit filed before the learned Sub-Judge, Ghumarwin. The complainant has also produced the copy of complaint with affidavit, Mark-X, copy of order dated 24.8.98, Mark-Y, copy of order dated 10.12.2002, Mark-Z.

4. CW-2, Mansa Ram has also supported the statement of complainant. He has also submitted that due to the suit filed by the accused against the complainant, the reputation of the complainant among the people of the locality, has been lowered.

5. The complainant, in his cross-examination, specifically admitted that Smt. Sumati Devi and the complainant have different ancestors. It is also admitted by him that there are brothers of Smt. Sumati Devi, who are her cousins, but none of these persons had helped her during the course of legal proceedings. The complainant further admitted that on the similar grounds he has filed a suit for claiming damages of Rs. 6,00,000/-(Rupees six lakh) against the accused Dalip Singh, which was dismissed by the Court of competent jurisdiction, the copy of which is Ext. DA. He further admitted that no appeal was filed by him against the judgment, but Smt. Sumati Devi has filed a petition for maintenance against the accused, however, the said petition was dismissed on the grounds that Smt. Sumati Devi is living in adultery. The Court has only granted the maintenance in favour of two children of Smt. Sumati Devi and the revision petition against the order of learned Chief Judicial Magistrate, copy of which is Ext. DB, was also dismissed by the learned Sessions Judge, Bilaspur, H.P., copy of which is Ext. DX.

6. There is no evidence on record wherefrom it can be assumed that Smt. Sumati Devi is real sister/or cousin of the complainant, Ganga Ram. It has not come in Civil Suit No. 290/1 of 2003, that the allegations of adultery against Smt. Sumati Devi were leveled for the first time by the accused, Dalip Singh, grounds on which the maintenance was refused to Smt. Sumati Devi. The complainant has himself alleged that the accused, Dalip Singh, is having illicit relations with one Smt. Kero Devi. He has also stated that these allegations have been made by him under a bona fide belief. Likewise, in his cross-examination, the complainant did not deny the suggestions that allegations made by the accused were also under a bona fide belief.

7. However, as per the original list of witnesses filed by the complainant, Sh. Durgu Ram and Sh. Karam Chand, were also mentioned there as complainant's witnesses, but these witnesses has not been examined by the complainant. Thus, an adverse inference is drawn against the complainant that these witnesses would not have supported the case of the complainant. CW-2, Mansa Ram has also admitted in his cross-examination, that accused, Dalip Singh did not give copies of the plaint to him. On the other hand, complainant has not been able to produce any copy of the plaint, which was allegedly distributed by the accused in general public. There is no evidence on record that with an intention to damage the reputation of the complainant the copy of plaint has been distributed by the accused to the public. This witness

has specifically admitted that there has been no loss of reputation of the complainant, Ganga Ram, and he is still a respectable person in the society. Thus, the complainant has failed to prove the guilt of the accused beyond the shadow of reasonable doubt and beyond suspicion.

9. It has been held in **K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258,** that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/misappreciation of evidence on record, reversal thereof by High Court was not justified.

10. The Hon'ble Supreme Court in **T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

11. In view of the aforesaid decisions of the Hon'ble Supreme Court and discussion made above, the acquittal of the accused is as per law and need no interference. Therefore, I find no merit in the present appeal and the same is accordingly dismissed.

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

ICICI Lombard General Insurance Co. Ltd. .....Appellant.

Versus

Smt. Kalawati & others. .....Respondents.

FAO No. 389 of 2011
Reserved on: 15.09.2016
Date of on: 03.10.2016

Motor Vehicles Act, 1988- Section 149- Deceased was travelling in the vehicle for bringing new tyres – the onus to prove that deceased was a gratuitous passenger was upon the insurer who had not led any evidence to discharge the same- therefore, the insurer was rightly held liable to indemnify the insured. (Para-10 and 11)

For the appellant: Mr. Jagdish Thakur, Advocate.

For the respondents: Mr. Lovneesh Thakur, Advocate, vice Mr. Amar Deep Singh, Advocate, for respondents No. 1 & 2.
Nemo for the remaining respondents.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant-ICICI Lombard General Insurance Company Limited, who was respondent No. 3 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 01.08.2011, passed by the Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P., in M.A.C. Petition No. 60-MAC/2 of 2009.

2. Briefly stating the facts giving rise to the present appeal are that respondents No. 1 and 2/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, respondents No. 3 and 4 herein, who were respondents No. 1 and 2, respectively, being owner and driver of the ill fated vehicle, which met with an accident, (hereinafter referred to as "respondents No. 1 and 2") for compensation on account of death of son

of claimant No. 1, Smt. Kalawati, and brother of claimant No. 2, Shri Balwant Singh, which was caused due to the rash and negligent driving of respondent No. 2 while driving the vehicle, bearing registration No. HP 18-B-0203 (pick up) owned by respondent No. 1.

3. As per the petitioners on 19.06.2009 Shri Sampuran Singh (deceased), who is son of claimant No. 1 and brother of claimant No. 2, was traveling in Pick Up, bearing registration No. HP-18-B-0203 and he had died in motor vehicle accident which occurred at about 11:30 p.m involving the abovesaid pick-up near Thana Kashoga Temple,Tehsil Nahan. FIR, Ex. PW-1/B, was registered qua the accident at Police Station, Nahan. Post mortem of the deceased was also conducted and the post mortem report is Ex. PW-1/C. The deceased had died due to rash and negligent driving of the respondent No. 2. the claimants have sought compensation on account of loss of earnings to the family, as he was earning from his avocation as businessman. It is further averred in the claim petition before the learned Tribunal below that the deceased was a meritorious student and he had done Bachelor of Physical Education in 2008 from Nagpur and he was likely to get the job of Physical Education Teacher and would have earned more than Rs. 15,000/- per month. It is further pleaded that the deceased was running a daily need items shop in the village and was earning Rs. 5000/- per month. Lastly, the claimants have claimed compensation to the tune of rupees five lac from the respondents.

4. On the other hands, the respondents, by filing separate replies, contested and resisted the claim petition. Respondent No. 1 (owner of the vehicle) contended that as he was not present at the time of the accident, he cannot disclose about the cause of accident. Respondents No. 1 and 1 and 2 have admitted the occurrence of the accident and registration of the FIR. However, they have denied the rest of the averments made in the claim petition and have contended that the claimants are not entitled to any compensation from the replying respondents. Respondent No. 1 has also contended the offending vehicle was duly insured with respondent No. 3 (Insurance Company) and if any compensation is to be paid, it is the liability of the Insurance Company.

5. Respondent No. 3/Insurance company, by filing reply, has raised preliminary objection viz., deceased being unauthorized passenger in the vehicle, the driver of the vehicle did not possess any valid and effective driving licence and the vehicle was being plied in violation of terms and conditions of insurance police. The Insurance Company has contended that claim petition has been filed in collusion with respondents No. 1 and 2. On merits, the factum of accident has been denied and it is contended that a false report has been manipulated in order get undue compensation. The compensation claimed was stated to be disproportionate and rest of the averments made in the claim petition were denied.

6. The learned Tribunal below has framed the following issues:

"1. Whether Sampuran Singh died on account of rash or negligent driving of Pick-up bearing No. HP-18B-0203 driven by respondent No. 2 Devender Singh on 19.06.2009 at about 11.30 PM near Thana Kashoga Temple, 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 deceased was an unauthorized passenger and his risk was not covered under the insurance policy, as alleged? OPR-3

4. Whether the driver of the vehiclein question did not possess a valid and effective driving licence and the vehicle was being plied in violation of the terms and conditions of insurance policy, as alleged? OPR-3

5. Whether the petition has been filed in collusion with respondents No. 1 and 2, as alleged? OPR-3

6. Relief."

After deciding issues No. 1 and 2 in favour of the claimants and issues No. 3 to 5 against respondent No. 3/Insurance Company, the claim petition was allowed in favour of claimant No. 1 (mother of the deceased). Hence the present appeal.

7. Learned counsel for the appellant has argued that the vehicle met with an accident. However, the deceased was a gratuitous passenger. He has argued that there were no goods in the vehicle and the deceased could not be taken as owner of the goods. On this count he has argued that the appeal is required to be allowed. He has further argued that the deceased was the son of the owner and he could not be said to be owner of the goods. On the other land, learned counsel appearing for the claimants has argued that the deceased was traveling in the vehicle not as a gratuitous passenger, but he was going to Paonta Sahib to bring tires.

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

9. Smt. Kalawati (PW-1), the mother of the deceased, and Shri Govind Sharma (PW-2) have stated that the accident has occurred due to the rash and negligent driving of the vehicle. They have further stated that the vehicle went off the road without their being any mechanical defect and the deceased died in the accident. The statements of these witnesses itself makes it clear that the vehicle met with an accident due to the rash and negligent driving of the driver of the vehicle. The principle of *res ipsa loquitur* is applicable to the facts of the present case. On the other hand, the owner and driver of the vehicle have not adduced any evidence to discharge the onus on them to prove that the vehicle had not met with an accident due to the rash and negligent driving of the driver. As the owner and driver of the vehicle (respondents No. 1 and 2, respectively, herein) have failed to discharge the onus to prove the issue against them and as the vehicle has fallen from the road due to the rash and negligent driving of the driver, the only conclusion is that the vehicle met with an accident due to the rash and negligent driving of the driver.

10. Now coming to the fact that whether the deceased was traveling in the vehicle as a gratuitous passenger, as claimed by respondent No. 3/Insurance Company, the evidence on record shows that the deceased was traveling in the vehicle for bringing new tires for the vehicle on behalf of the owner/respondent No. 1. On the other hand, the onus to prove this issue was on respondent No. 3/Insurance Company, but it did not lead any evidence to discharge the onus and prove the issue when the positive evidence to the effect that the deceased was not traveling in the vehicle as a gratuitous passenger, then it was incumbent upon the Insurance Company to have led any reliable and cogent evidence to prove that the deceased was traveling as a gratuitous passenger. As the present is a beneficial legislation and positive evidence has also come that the deceased was traveling in the vehicle as an agent of the owner to bring the tires on behalf of the owner from Paonta Sahib and in the absence of any evidence on behalf of respondent No. 3/Insurance Company to discharge the onus, this Court finds it difficult to hold otherwise, then as held by the learned Tribunal below that the deceased was a gratuitous passenger, therefore, the findings of the learned Tribunal below holding that the deceased was not a gratuitous passenger, requires no interference.

11. As far as the quantum is concerned, the learned counsel for the claimants has argued that taking into consideration the age, prospects of life and educational qualifications of the deceased, the quantum is very much on the lower side and the multiplier is also quite on the lower side, but no appeal or cross-objection has been filed by the claimants, therefore, this Court finds that in the absence of any appeal or cross-objection, findings of the learned Tribunal below, on this score, are not required to be disturbed.

12. In a nut shell, the result of the above discussion is that the appeal is devoid of merits and deserves dismissal and is accordingly dismissed, however, with no orders as to costs.

13. 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 SURESHWAR THAKUR, J.

Shri Krishan Dutt Verma .....Petitioner.

Versus

Shri Shyam Singh .....Respondent.

Civil Revision Petition No. 83 of 2016
Decided on : 3.10.2016

H.P. Urban Rent Control Act, 1987- Section 14- An eviction petition was filed on the ground of arrears of rent and premises being required bonafide for the purpose of housing the grand-daughter of the petitioner- the petition was allowed by the Rent Controller – an appeal was filed, which was allowed- held, that Appellate Court had wrongly held that there was a requirement of corroboration of the testimony of the landlord – documents established the claim of the landlord- Appellate Authority had mis-appreciated the evidence- revision allowed and order of Appellate Authority set aside. (Para-5 to 10)

For the Petitioners: Mr. P.S Goverdhan, Advocate.
For the Respondent: Ms. Rita Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant petition stands directed against the judgment of 9.12.2015 rendered by the learned Appellate Authority-I, Solan, District Solan, H.P. in Rent Appeal No. 1-S/14 of 2015, whereby it partly allowed the appeal and set aside the order of eviction rendered vis-à-vis the respondent herein by the learned Rent Controller Solan on 30.12.2014 in Rent petition No. 34/2 of 2011.

2. The petitioner/landlord claimed eviction from the demised premises of the respondent herein on the following grounds:-

(a) The respondent falling into arrears of rent;

(b) His bonafide requiring the demised premises for housing therein his grand-daughters who stand averred to prosecute studies at Solan.

3. The petitioner also asserted therein of the demised premises standing also bonafidely required for his personal stay significantly for easing his inconvenience of traveling from his native place, Subathu to Solan and vice versa.

4. The learned Rent Controller on the issue relating to the respondent/tenant falling into arrears of rent returned findings in the affirmative also the learned Rent Controller on the apposite issue of the tenanted premises standing bonafidely required by the landlord for the averred purposes thereon returned findings in affirmation. However, the learned Appellate Authority in an appeal carried therefrom before it by the respondent/herein partly allowed the appeal and set aside order of his eviction from the demised premises. Standing aggrieved by the judgment of the learned Appellate Authority the petitioner has filed the instant petition before this court.

5. However, the learned counsel for the petitioner contends of his not pressing at this stage issue No.1 given the respondent/tenant depositing before the learned Rent Controller concerned the entire arrears of rent within the statutory period. However he contends of the findings returned by the learned Appellate Authority on issue No.2 warranting interference.

6. The learned Appellate Authority, had dispelled the sole testification of the petitioner /landlord wherein he had made communications in tandem with the apposite

averments cast in the petition qua his holding a bonafide requirement of the relevant demised premises for enabling both his grand-daughters to stay thereat who extantly stand beset with inconvenience of traveling daily to Solan from Subathu and vice versa for prosecuting their studies at Solan also for facilitating his staying therein for reducing his traveling daily from Subathu to Solan and vice versa, on the sole reason of his not adducing any corroborative evidence thereto. Insistence by the learned Appellate Authority qua corroboration occurring vis-à-vis the sole testification of the petitioner/landlord is grossly inapt also for reason ascribed hereinafter has begotten the sequel of the impugned rendition standing stained with a vice of his excluding from consideration the relevant documentary evidence as exists on record in portrayal of the grand-daughters of the petitioner/landlord prosecuting studies at Solan.

7. Moreover the Appellate Authority has excluded from consideration the factum of the respondent in his concert to rid of sanctity the sole testification of the petitioner qua his bonafidely requiring the relevant premises for the purpose averred by him besides testified by him, not, making vigorous pronouncements in his testification qua the facet aforesaid rather his feigning ignorance qua the grand-daughters of the petitioner/landlord traveling daily from village Subathu to Solan located at a distance of 22 km from each other also his feigning ignorance qua theirs prosecuting studies at Solan whereupon contrarily an imperative inference sprouted qua the respondent tacitly accepting the relevant bonafide requirement of the demised premises by the petitioner for the averred purpose also thereupon an invincible inference spurred qua his not projecting a fierce contest to the relevant bonafide requirement of the petitioner/landlord of the demised premises rather his abandoning his contest qua the facet aforesaid.

8. The learned Appellate Authority by excluding the effect of the aforesaid relevant documentary evidence besides by excluding the effect of omission of concert of the respondent to project a fierce opposition to the relevant claim qua the demised premises of the petitioner/landlord by his eliciting the relevant records from the relevant institutions whereon the granddaughters of the petitioner prosecute studies whereupon the factum of the granddaughters of the petitioner prosecuting studies at Solan would stand belied, has hence committed a grave illegality also it by making an insistence upon adduction by the petitioner evidence in corroboration to his sole testimony whereas given the trite factum of the respondent not adducing vigorous evidence for undermining his testification qua his bonafidely requiring the demised premises begetting the sequel of his acquiescing to the claim of the petitioner/landlord has hence aggravated the impropriety imbuing his impugned rendition conspicuously when for reiteration an inference of the respondent waiving his contest to the relevant trite factum surges forth.

9. Be that as it may the petitioner had disclosed in his petition qua his son and his family members holding occupation of his building located at Subathu, factum whereof remains uncontroverted by the respondent by his adducing cogent evidence in rebuttal thereto. Even if assumingly the petitioner/landlord holds a residential building at Subathu also if assumingly it is not in occupation of his son yet the factum of his grand-daughters prosecuting studies at Solan located at a distance of 22 kms therefrom when remains un-controverted by the respondent by his adducing cogent evidence in displacement thereof also when for their behalf the petitioner claimed his bonafidely requiring the demised premises, conspicuously for theirs standing housed therein for easing their discomfort besides inconvenience of traveling thereupto from Subathu and vice versa, inconvenience whereof extantly besets them also besets him, hence cannot be construed to be bereft of any trace or element of veracity also when the purpose aforesaid cannot be construed to be not a genuine bonafide requirement of the petitioner/landlord qua the relevant premises. Consequently it was inapt for the learned Appellate Authority to by grossly mis-appreciating the relevant evidence also his grossly including into consideration irrelevant material besides excluding relevant and germane evidence render incorrect findings on issue No.2.

10. In view of the above, the present petition stands allowed. Impugned judgment stands quashed and set aside qua refusal of relief of eviction of the respondent herein from the

tenanted premises on the ground of bonafide requirement. All pending applications stand disposed of accordingly.

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

Lachhman and others. ...Appellants.

Versus

Nag Ram ...Respondent.

RSA No.372 of 2006.
Reserved on : 22.9.2016.
Decided on: 03.10.2016.

Specific Relief Act, 1963- Section 38- Plaintiffs sought an injunction pleading that parties are joint owners of the suit land – the defendant collected construction material for raising construction without getting the same partitioned- the defendant pleaded that suit land was partitioned in a family partition- plaintiff had also raised construction over the same – the suit was decreed by the trial Court- an appeal was preferred, which was allowed- held, in second appeal that exclusive possession of the defendant was proved over the portion where the construction was being raised - plinth was laid in the year 1995 and the construction work also started in the month of March, 2005- plaintiffs have nothing to do with the portion over which the construction is being raised – the Appellate Court had rightly appreciated the evidence- appeal dismissed. (Para-10 and 11)

For the appellants : Mr. Rahul Mahajan, Advocate.
For the respondent : Mr. Shyam Singh Chauhan, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present Regular Second Appeal is maintained by the appellants against the judgment and decree passed by learned District Judge, Kullu, District Kullu, in Civil Appeal No.27 of 2006, dated 25.7.2006, whereby the learned District Judge, Kullu, District Kullu, had set aside the judgment and decree passed by learned Civil Judge (Senior Division), Kullu, District Kullu, in Civil Suit No.143 of 2005, dated 19.4.2006.

2. Briefly stating facts giving rise to the present appeal are that appellants/plaintiffs (hereinafter referred to as 'the plaintiff') filed a suit for injunction against the respondent/defendant (hereinafter referred to as 'the defendant') claiming that they are joint owner of the land measuring 3-13-0 bighas entered in Khata No.942, Khatauni No.125 min/473 min. situated in Phati and Kothi Bajaura, Tehsil and District Kullu, H.P (hereinafter referred to as 'the suit land') alongwith the defendant. The entire land measuring 38-15 bighas entered in Khasra numbers Kitta 9 Khata No.125 min. Khatauni No.473 min of Phati and Kothi, Bajaura, Tehsil and District Kullu, including the suit land is partitioned. The suit land which is abutting National Highway-21, is valuable one and is in joint ownership and possession of the parties to the suit. The defendant, however without getting the same partitioned started collecting the construction material over the suit land for raising construction of residential building thereon. The plaintiffs requested him not to raise any type of construction without getting it lawfully partitioned, but of no avail. He started digging the foundation for raising the construction of a building over the suit land on 14.8.2005. He was requested not to lay foundation over the suit land, but of no avail and he has flatly refused to admit the claim of the plaintiffs. The defendant filed written statement and averred that the revenue entries qua the suit land are not disputed. It

is contended that the entire land comprised in Khasra No.942 was 3-3-13 bighas and out of it land measuring 0-8-16 bighas denoted by Khasra No.942/1 was acquired by H.P. P.W.D, thereby reducing the area of the suit land and to 3-4-0 bighas. The same is not joint and rather has been separated by the parties in family settlement having taken place in the year 1989. The defendant has been allotted two bighas of land out of it, which is on the Northern side. He is in settled possession of the same because over a portion thereof, his single storeyed slate roofed house measuring 42 x 14 feet is in existence. His cow shed and kitchen is also in existence over this land. There was one wooden structure and cow shed constructed by him over the suit land which is in his possession, which has been subsequently acquired by H.P. P.W.D. The compensation thereto was given to him alone because plaintiffs have admitted that wooden structure and cow shed having been constructed by him. In Southern side, there exists house of plaintiff Lachhman, Gauri Shankar and Bir Chand. Their cow sheds are also in existence there. The construction of the plaintiff is stated to be on the land they got in the family partition. It is denied that the defendants started collecting construction material and digging of the suit land on 14.8.2005 for laying foundation, however he has already laid the plinth to raise construction of the house measuring 60 x 40 feet long back i.e. in the year 1995. Over two bighas of land, which in family settlement has been given to him, he has started further construction in March, 2005.

3. The learned trial Court framed following issues :

"1. Whether the suit property is jointly owned and possessed by the parties, as alleged ? OPP.

2. Whether the plaintiffs are entitled to the Prohibitory Injunction, as prayed for ? OPP.

3. Whether the plaintiffs have a cause of action ? OPP.

4. Whether the plaintiff have the locus standi to sue ? OPP.

5. Whether the plaintiffs have not come to the Court with clean hands as alleged, if so its effect ? OPP.

6. Whether the suit is not maintainable in the present form ? OPD.

7. Whether the plaintiffs are estopped from filing the suit by their act and conduct ? OPD.

8. Relief."

4. The learned trial Court has decided Issue Nos.1 to 4 in favour of the plaintiffs, Issue No.4 not pressed and Issue Nos.6 and 7 against the defendant and decreed the suit. However, the learned lower Appellate Court set aside the findings of the learned Court below and dismissed the suit of the plaintiffs and thereafter the present appeal was admitted on the following substantial questions of law :

"1. Whether the learned First Appellate Court has failed to appreciate the legal principles qua the rights and liability of co-owners/joint owners in respect of joint land resulting in wrong and illegal findings if so, its effects ?

2. Whether the Appellate Court has misread, misconstrued and misinterpreted the provision of Section 114 (g) of Evidence Act qua family settlement having to be proved in accordance with law, if so its effects ?

3. Whether Appellate Court has misconstrued and misinterpreted Ex.P-1 and revenue record resulting in wrong and illegal findings, if so, its effects ?"

5. Learned counsel appearing on behalf of the plaintiff has argued that the learned Court below has failed to appreciate the fact that the land was joint *inter se* the parties and no co-sharer has a right to change the nature of the suit land. On the other hand, learned counsel appearing on behalf of the defendant has argued that the learned Lower Appellate Court has

given the findings after appreciating the fact to its true perspective. He has further argued that as per the admission of the plaintiffs, the land was already partitioned.

6. In rebuttal, learned counsel appearing on behalf of the plaintiff has argued that there is no partition over the suit land and no written document of partition was produced on record by the defendant.

7. To appreciate the arguments of learned counsel for the parties, I have gone through the record in detail.

8. The plaintiff and defendants No.1 and 2 are the real brothers. PW-1 has stated that the suit land is in their joint ownership and possession and abutting to National Highway-21, hence more valuable, as compared to their other joint holding. The defendant according to him has started construction over a portion thereof without getting the same partitioned. In his cross-examination, he has stated that out of the suit land, land measuring 0-8-16 bigha has been acquired by H.P. P.W.D for road and an old house as well as cow shed was in existence thereon. The compensation thereof was paid by the Government to Nag Ram (defendant) and according to PW-1, they had given in writing that the compensation should be paid to the defendant. He has admitted that the old duplex house consisting of two rooms of the defendant is on a portion of the suit land, where he has started construction of the new house. His cow shed and kitchen are also stated to be in existence on that very land. He has also admitted that his own house as well as that of Lachhman (plaintiff No.1) is also in existence over the suit land towards Southern side. He has categorically admitted that out of the suit land, two bighas falls in the share of the defendant and he has laid the plinth for raising construction of new house. It is also admitted that the dimension of the proposed house of the plaintiff is 60 x 40 feet. According to him, the land stands partitioned during the life time of their fore-fathers. Three separate portions of the suit land are being cultivated separately. It is also admitted that the defendant is not interfering with the land in the possession of the plaintiffs. It is also admitted that the defendant is not causing interference even in the vacant land which situates in front of his house nor he has any concern therewith in any manner. It is denied that the defendant has started construction work in March, 2005 and that he has stacked construction material also there, however he has stated that he has started construction of new house about two months ago. The plinth of the house of the plaintiff is old one. It is admitted that the suit land was partitioned between them in the year 1989. PW-2 Dagu Ram has stated that the parties are known to him and he has also seen the suit land. The portion of the suit land is vacant on the spot and it is not yet partitioned between the parties. Now the defendant has started raising construction of the house over a portion thereof, which is abutting the National Highway. In his cross-examination, he has stated that there exists three houses on the suit land, out of which, one is that of defendant another of plaintiff No.2 Gauri Shankar and third one of Gangu Ram. He has also admitted that the house of the plaintiff are situated in Southern side of the suit land and as per family settlement arrived at between the parties, it was agreed upon that they will raise the construction of their house over that very land, which has been given to them in family settlement. It is also admitted that the suit land situates on the Northern side is being cultivated by the defendant, as per family partition and that land is in exclusive possession of the defendant. It is also admitted that the proposed house of the defendant is being constructed on that very land, which situates in Northern side and exclusively in his possession.

9. PW-1 and PW-2, they have categorically admitted the partition of the land between the parties in a family settlement long back during the life time of their fore-fathers. PW-1 has admitted that the family partition was arrived at between them in the year 1989. The plaintiffs are possessing the portion of the suit land situated in Southern side because their houses are in existence thereon. The defendant according to both the witnesses has never caused any interference in possession of the plaintiffs qua the portion of the suit land, which situates in Southern side and in possession of the plaintiffs. It is also crystal clear that the land in Northern side has been given to the defendant in family settlement and he is exclusive owner of the same due to family partition. PW-1 has admitted that two bighas of land out of the suit land

has been given to the defendant. Not only this, but both the witnesses have categorically stated that the defendant has started raising construction over the land in Northern side and on land in his exclusive possession. They have not stated anything as to how the land over which the defendant has started construction according to him is more valuable, as compared to in the Southern side which has been given to them in family settlement. The defendant has started the construction over a valuable portion of the suit land is also without any substance. The compensation qua 0-8-16 bighas of land acquired by P.W.D out of the suit land has been given to the defendant and as regards the plaintiff also recommends payments thereof to him. Meaning thereby that the land acquired by P.W.D was in exclusive possession of the defendant because it is for this reason the compensation has been given to him alone and not to the plaintiffs. Both these witnesses examined by the plaintiffs have, thus, fully supported the case set out by the defendant. The same finds corroboration from own testimony of the defendant that the portion of the suit land over which he has started construction work is in his exclusive possession and it falls in his share pursuant to the family settlement having taken place in the year 1989. His old slate roofed house was in existence on this land and his kitchen and cow shed also situate there. Out of the suit land two bighas of land which falls in Northern side has been given to him. The compensation of the old cow shed and wooden structure existing over the land acquired by P.W.D was also given to him. The plinth for raising new construction according to him was laid long back that is in the year 1995 and thereafter in March, 2005 he has started construction work. Such construction is at the level of plinth, but the plaintiff knowing fully well that he has spent more than five lacs for raising such construction and the construction material worth lacs of rupees is also still lying there have filed the suit only to harass him. In his cross-examination, it is admitted that the parties own and possess 38 bighas of land, the suit land is abutting National Highway and as such valuable. No writing qua family settlement was prepared nor any entry thereof was made in the revenue record. It is however, denied that no family partition took place.

10. It is proved on record that the defendant is in exclusive possession portion of the suit land over which he has started raising construction. It is also established that the plinth was laid by him long back in the year 1995 and the construction work also commenced thereon in the month of March, 2005. The report of Local Commissioner was also revealed that the foundation of new constructed house of the defendant is old one. In this view of the matter the plaintiff merely to harass the defendant mentally and also financially because otherwise they have nothing to do with the portion of the suit land over which he has started raising construction of the new house. Since the plaintiffs have themselves admitted that the suit land stand partitioned long back and on the Northern side on which the defendant raising construction on the old house in his exclusive possession, so when the parties had partitioned the land and they are in exclusive possession, this Court find that the judgment and decree passed by the learned Appellate Court is just and reasoned. Substantial question of law No.1 is answered accordingly holding that the suit land is not joint between the parties, so there is no question with regard to the rights of the joint owners. As far as substantial question of law No.2 is concerned that the plaintiffs have themselves admitted in the learned Court below that the partition has taken place, therefore, the learned Court below has not misread, misconstrued and misinterpreted the provision of Section 114 (g) of the Indian Evidence Act, as it is the plaintiff, who has admitted the facts alleged by the defendant with respect to the partition of the suit land as well as separate possession of the plaintiff on the Southern side and the defendant's possession on the Northern side and the construction of the house by the defendant at the place on the Northern side, where his house was already existing. As far as substantial question of law No.4 is concerned, it is held that the learned Court below has appreciated Ex.P-1 correctly, as the defendant has proved on record that the land is no more joint.

11. In view of the above discussion, there is no illegally and infirmity in the judgment and decree passed by the learned Appellate Court, so no interference of this Court is required. In these circumstances, the appeal of the appellant is without merit and deserves dismissal, hence the same is dismissed. However, in the peculiar facts and circumstances of this case,

parties are left to bear their own cost (s). Pending application (s), if any, shall also stands disposed of.

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

Sh. Manoj Kumar. .....Appellant.

Versus

Sh. Khel Chand Negi & anr. .....Respondents.

FAO No. 450 of 2009.
Date of decision: October 3, 2016.

Workmen Compensation Act, 1923- Section 4- Claimant was employed as a driver in a bus – the bus met with an accident- claimant sustained injuries in his chest, back and legs- he remained hospitalized for more than one month – Commissioner awarded compensation of Rs. 80,770/- along with interest @ 12% per annum – held, in appeal that the salary of the claimant was Rs. 4,500/- per month – his age was 43 plus- the income was to be restricted to Rs. 4,000/- as per the Act- the claimant had sustained 25% permanent disability but he cannot drive the vehicle on long routes - even while driving the vehicle, he may feel pain in his body- thus, there was total loss of income –the relevant factor will be 60% of the monthly wages- factor of 175.54 will be applicable – therefore, claimant will be entitled to Rs. 2,400 x 175= Rs. 4,20,000/- with interest @ 12% per annum- petition allowed and compensation enhanced. (Para-2 to 6)

Case referred:

Ved Prakash Garg vs. Premi Devi and others, AIR 1997 SC 3854

For the appellant	Mr. Rakesh Manta, Advocate.
For the respondents	Mr. B.N. Sharma, Advocate, for respondent No. 1. Mr. Rohit Chauhan, Advocate, vice Mr. Suneet Goel, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

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

Manoj Kumar who is victim of an accident is in appeal before this Court as he is aggrieved by the payment of inadequate compensation towards loss caused to him in the accident of a private bus No. HP-06-1401. As a matter of fact the first respondent Khel Chand has deployed the appellant-claimant as driver with the bus in question. On the fateful day i.e. 3.1.2005 he was on the wheel of bus enroute Dansa to Rampur in Tehsil Rampur, District Shimla. The bus met with an accident around 7:00 A.M. at a place namely Shaneri and as a result thereof the appellant (hereinafter referred to as petitioner-claimant) received injuries in his chest, back and also legs. There were multiple fractures and as such he remained hospitalized as an indoor patient for a period over one month i.e. one month and five days in IGMC Shimla. When the insured-respondent No. 1 has failed to pay the due and admissible compensation within the stipulated period i.e. one month, therefore, he had to file a petition under Section 22 of the Workmen's Compensation Act before Commissioner under Workmen's Compensation Act (SDM) Rampur Bushahr District Shimla. The petition came to be registered as case No. 11/05. Learned Commissioner after taking on record the pleadings of the parties and affording them opportunity to adduce evidence as well as hearing arguments has taken the salary of the petitioner-workman as Rs.4500/- per month and applying 175.54 the relevant factor has awarded a sum of Rs.80,770/- together with interest @12% as compensation to the petitioner vide impugned award dated 2.7.2009.

2. The petitioner-workman being aggrieved and dissatisfied with the award of compensation has approached this Court by filing the present appeal for enhancement of the compensation on the grounds inter alia that the compensation as awarded is contrary to the provisions contained in the Act, hence not legally sustainable. It has been urged that as per the disability certificate Ext.PW1/A the disability to the extent of 25% is permanent and in relation to whole body. PW1 Shri Desh Raj Chandel has categorically stated that the petitioner cannot adopt driving as his profession with such disability, therefore, according to the petitioner-claimant the present is a case of total loss of earnings.

3. Analyzing the rival submissions with the help of evidence available on record admittedly the petitioner was deployed as driver with ill fated bus by first respondent. The petitioner has successfully pleaded and proved his salary to be Rs.4500/- per month. His age at the time of accident, however, was not 35 and rather he was +43 years at that time because in disability certificate issued on 4.5.2006 his age has been mentioned as 45 years, meaning thereby that he was 43 years of age at the time of accident. At the time of accident i.e. 3.1.2005 Act No. 46 of 2000 was in force being made operational on and w.e.f. 8.12.2000.

4. In terms of explanation 2 to Section 4(b) of that Act in the event of the monthly wages of the workman exceed to Rs.4000/- the same was required to be restricted to Rs.4000/-. The Commissioner below therefore has erroneously taken the monthly income of the petitioner as Rs.4500/- for the purpose of termination of the compensation payable to him.

5. Learned Commissioner has again went wrong while taking the loss of earning only to the extent of 25% for the reasons that when as per the expert opinion he cannot adopt driving as a profession throughout his life the loss has to be termed as total. The reference in this behalf can be made to the disability certificate Ext.PW1/A issued by Medical Board comprising of Professor & Head, Department of Orthopedics, Consultant, Incharge Unit and Registrar, Department of Orthopedics in Indira Gandhi Medical College, Hospital Shimla. The Medical Board comprising such senior member has, therefore, found the disability i.e. 25% permanent in nature and in relation of whole body. In terms of the statement of PW1, one of the members of the Board, the petitioner cannot drive the vehicle on long routes and even while driving on long routes may feel pain in his body and as such according to him the petitioner cannot now drive the vehicle. Therefore, such evidence available on record is suggestive of that it is a case of total loss of income. The case of the petitioner for the purpose of determination of the loss of earnings is covered by clause (b) of Section 4 of the Act ibid. The relevant factor for determination of the compensation would be 60% of the monthly wages of the injured workman to be multiplied by the relevant factor.

6. The monthly income of the petitioner-workman has already been assessed as Rs.4000/-. The 60% thereof would come to Rs.2400/-. Keeping in view the age of the petitioner 43 years the relevant factor in the present case would be 175.54 by rounding it off the relevant factor has been taken as 175. Therefore, multiplying the loss of earning caused to the petitioner in this accident the same would work out as 2400x175=Rs.4,20,000/-. Besides, interest @12% is also awardable on this amount from the date of petition till the payment is made to the petitioner-claimant. The compensation i.e. Rs.87,770/- awarded by the Commissioner below is, therefore, highly inadequate. The respondent No. 2-insurer has deposited this amount together with interest before learned commissioner below. Let the said respondent to deposit the amount now enhanced and proportionate interest accrued thereupon and this amount be now paid together with proportionate interest @12% per annum.

7. On the question of penalty, I have heard learned Counsel representing the insured-respondent No. 1. No reasonable and plausible explanation has come on record as to why the insured is justifying the delay as occurred in making the payment to the petitioner-workman. I can draw support in this regard from the judgment of Hon'ble Apex Court in ***Ved Prakash Garg*** vs. ***Premi Devi and others***, ***AIR 1997 SC 3854*** relied upon by this Court also in a recent judgment dated August 31, 2016, FAO(WCA) No. 160 of 2009, titled the Oriental Insurance Company Vs. Smt. Deno & ors. However, the amount of penalty is to be paid by the

insured-respondent No. 1 in terms of the provision contained under Section 4-A(3)(b) of the Act. The ratio of the judgment ibid in Ved Prakash's case supra can be applied in this case qua this aspect of the matter also. Therefore, in the given facts and circumstances besides the award of compensation as aforesaid the injured is also burdened with penalty which shall be 20% of Rs.4,20,000/- the awarded amount.

8. With the above observations, the appeal is allowed and stands disposed of.

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

Nishal Mahajan .....Petitioner.
Versus
Chander Bhan Singh ....Respondent.

Cr.MMO No. 6 of 2016.
Date of Decision: 3rd October, 2016.

Indian Evidence Act, 1872- Section 45- Accused filed an application for comparison of admitted handwriting of the complainant with the detail of the amount mentioned in the dishonoured cheque – the application was dismissed by the trial Court- held, that the accused had taken a defence that blank cheque was issued by him- the defence can be established by comparison of the handwriting of the complainant with the handwriting on the cheque – dismissal of the application caused serious prejudice to the accused – petition allowed and the admitted handwriting ordered to be sent for comparison with the disputed handwriting. (Para- 3 and 4)

For the Petitioner : Mr. Divya Raj Singh, Advocate
For the Respondents: Mr. Abhishek Barowalia, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The complainant/respondent herein instituted a complaint under Section 138 of the Negotiable Instruments Act against the accused/petitioner herein arising out of dishonour of negotiable instrument which stood issued by the accused/petitioner herein to the complainant. During the pendency of the complaint before the learned trial Court, an application under Section 45 of the Indian Evidence Act stood preferred therebefore by the petitioner/accused with a prayer therein qua the writings scribing the details of the amount in the dishonoured negotiable instrument being ordered to be compared with the admitted handwriting of the complainant given his contesting the factum of his scribing the details of the amount of money reflected in the dishonoured negotiable instrument rather his espousing qua the aforesaid details standing scribed therein by the complainant/respondent herein. Consequently, he espoused therein qua the ordering by the learned trial Court for transmission of the relevant cheque to the handwriting expert concerned for facilitating him to after comparing the admitted handwriting of the complainant with the handwritings qua the aforesaid facet occurring in the relevant cheque render an apposite opinion thereon. The learned trial Court dismissed the application.

2. The accused stands aggrieved by the pronouncement of the learned trial Court on his apposite application, hence, for assailing it he has instituted the instant petition herebefore. A perusal of the application preferred under Section 45 of the Indian Evidence Act by the accused/petitioner herein before the learned trial Court unfolds qua his therein admitting qua the relevant cheque holding his signatures. Admission of the accused qua the aforesaid facet did disable him to repudiate authenticity of his signatures occurring on the relevant cheque also thereupon he stood disabled to ask for a relief qua his signatures occurring on the relevant

cheque warranting determination of their authenticity by the expert concerned. Consequently, the relief qua the facet aforesaid as stood refused to the petitioner/accused by the learned trial Court does not warrant any interference.

3. Be that as it may, it appears that the learned trial Court has slighted the additional averment made in the apposite application qua his not scribing the amount of money occurring in the relevant cheque rather the aforesaid amount standing scribed by the respondent/complainant whereupon he prayed qua the authorship of the aforesaid writings being ordered to be determined by the expert concerned. Since, the aforesaid facet holds leverage to the petitioner/accused to canvass a defence of his issuing a blank cheque to the respondent/complainant whereupon hence he may concomitantly succeed qua his prima facie standing falsely arraigned in the complaint as an accused, hence, for facilitating the aforesaid defence, it was incumbent upon the learned trial Court to make an apposite pronouncement significantly for facilitating the facet aforesaid standing firmly clinched qua hence an apposite reference being made to the handwriting expert. However, its omission to do so has caused a serious prejudice to the defence, if any, anchored upon the aforesaid facet which may stand reared by the petitioner/accused. In sequel, to this extent the impugned order stands gripped with an infirmity.

4. Consequently, the instant petition is partly allowed. In sequel, the order of the learned trial Court qua its refusing to order qua the signatures of the accused occurring in the relevant cheque standing transmitted to the expert concerned for theirs thereupon standing compared by him with the admitted signatures of the complainant is maintained and affirmed. However, its refusal to order for comparison by the expert concerned, the writings scribing the details of the amount of money recited in the relevant cheque with the admitted handwriting of the complainant is quashed and set aside. The learned trial Court is directed to send the cheque to the expert concerned for determination by him, the authorship of the apposite recitals occurring in the cheque by his comparing them with the admitted handwritings of the complainant respondent herein. All pending applications stand disposed of.

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

Prem Chand & Ors. .....Appellants.

Versus

Ameshwar Singh & Ors. .....Respondents.

RSA No. 329 of 2005
Reserved on 15.09.2016
Decidedon: 03.10.2016

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that the suit land belonged to the extent of half share to 'H', father of defendants No. 1 and 2 and husband of defendant No. 3- he had sold the same for consideration of Rs. 350/- to T, father of plaintiff and other persons – suit land was inherited by the plaintiff and others- it was allotted to C, daughter of T in a family settlement- remaining half share was obtained by the plaintiff in an oral exchange- the entries were wrongly recorded in favour of defendants- hence, the suit was filed- suit was dismissed by the trial Court- an appeal was preferred, which was allowed- held, in second appeal that, even if the sale deed was not reflected in the revenue record, it does not extinguish the rights of the purchaser – mutation does not confer any title – the version of the plaintiff was corroborated by revenue record- Appellate Court had rightly appreciated the evidence- appeal dismissed. (para-11 to 14)

For the appellants: Mr. S.S. Mittal, Sr. Advocate, with Mr. Surinder Sharma, Advocate.
For the respondents: Mr. T.S. Chauhan, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal is maintained by the appellants/defendants (hereinafter called as "the defendants") against the respondents/plaintiffs (hereinafter called as "the plaintiffs") assailing the judgment and decree dated 30.03.2005, passed by learned District Judge, Kullu, District Kullu, H.P. in Civil Appeal No. 76-04, whereby the judgment and decree passed by learned Civil Judge (Senior Division), Lahaul Spiti, H.P. in Civil Suit No. 196 of 1999/ 180 of 2000, dated 25.08.2004, was set-aside.

2. Briefly stating the facts giving rise to the present appeal are that as per the plaintiffs, the suit land, to the extent of half share measuring 0-7-0 bigha, was in the possession of Hira Lal, father of defendants No. 1 and 2 and husband of defendant No. 3, with possession "*Khanakashat*". Hira Lal, sold half of his share, measuring 0-7-0 bigha, to one Thakur Ram Dass, father of Champa Devi (plaintiff) and Durga Thakur and Padma Devi, proforma defendants No. 4 and 5 respectively, for consideration of Rs. 350/-, vide sale deed, dated 07.12.1962. As a result of which, Thakur Ram Dass became owner to the extent of half share and came in possession of the same. It is further averred that Thakur Ram Dass died in the year 1983 and on account of his death, his entire share was inherited by plaintiffs, proforma defendants No. 4 and 5 and his widow Lotmi Devi. Lotmi Devi Died in the year 1985, and her estate was inherited by original plaintiff Champa Devi and proforma defendants No. 4 and 5. After family settlement, aforementioned half share came in the share of Champa Devi, daughter of Thakur Ram Dass, this settlement was entered into amongst the legal representatives of Lotmi Devi, after her death. The remaining half share of the suit land was obtained by the plaintiff in an oral exchange from Amar Singh, etc. On the basis of said oral exchange, mutation No. 1638 of phati dwara was entered and attested. In view of this, the plaintiff came in possession of the entire suit land and became exclusive owner in possession of the suit land. It was further averred that Hira Singh, predecessor-in-interest of defendants No. 1 to 3 had already sold his share in the suit land in favour of Thakur Ram Dass and he was left with no right, title or interest in the suit land. Defendants No. 1 to 3 in connivance with the revenue Officials and without the knowledge of the plaintiffs, got entered their names and name of Gumtu Devi, widow of Het Ram, in the jamabandi. After the death of Gumtu Devi, widow of Het Ram, respondents No. 1 to 3, become her legal representatives. On the basis of wrong revenue enteries, defendants threatened to dis-possess the plaintiff from the land wrongly and by show of force. Despite repeated requests, the defendants did not refrain from their unlawful acts.

3. Conversely, the defendants, by way of filing written statement, raised preliminary objections qua maintainability, suppression of material facts, estoppel, non-joinder of necessary parties and valuation. On merits, the defendants averred that sale deed, dated 07.11.1962, was nothing but only a paper transaction, as no possession was delivered by Hira Lal to the purchaser and no money was paid to the seller by the purchaser, the alleged sale deed was not given effect in the revenue papers and till the filing of the suit, enteries on the basis of sale deed could not be made. It was further averred that in the suit land Hira Lal and Lahlu were co-sharers alongwith one Dile Ram. Dile Ram was owner to the extent of half share in the suit land, who transferred his full share measuring 0-7-0 bigha, by way of exchange, in favour of Hira Lal on 12.03.1962. As a result of which, enteries were effected in the name of Hira Lal in revenue papers and he became owner of 0-10-0 bigha. On account of family settlement between Hira Lal and Lahulu, both brother and sister were in possession of total suit land. It was further averred that Hira Lal transferred his half share in favour of Amar Singh vide mutation No. 1341, for the reasons that the plaintiff is not a possession of entire suit land. It was further averred that possession of seven biswas of land was never given by their father to the plaintiffs and the exchange between Thakur Ram Dass and Dile Ram is forged and fictitious, as Dile Ram has already parted with his share in favour of Hira Lal by way of exchange. Hence, the defendants prayed for dismissal of the suit.

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

"1. Whether the plaintiffs is owner in possession of the suit land, as alleged? OPP

2. Whether the plaintiffs is entitled to the relief of permanent injunction, as prayed for? OPP

3. Whether sale deed dated 07.12.1962 executed by late Shri Hira Lal is a paper transcation, as alleged? OPD

4. Whether the suit is time barred? OPD

5. Whether the plaintiffs is stopped from filing the suit by her act and conduct? OPD

6. Whether the suit is bad for non-joinder of necessary parties? OPD

7. Whether the suit is properly valued is for the purpose of court fee and jurisdiction? OPD

8. Relief".

After deciding issues No. 1 and 2 against the plaintiffs, issue No. 3 against the defendants, issues No. 4 to 6, as not pressed and issue No. 7 holding that suit was properly valued, suit was dismissed by the learned trial Court.

5. In the first appeal, the learned lower Appellate Court allowed the appeal of plaintiffs and decreed the suit for permanent prohibitory injunction, whereby defendants were restrained from making any type of interference with the ownership and possession of the plaintiffs over the suit land, comprised in khata, khatauni No. 32/64, khasra Nos 420 and 421, measuring 0-14-0 bighas, situated in phati Dwara, Kothi-Baragarh, Tehsil & District Kullu.

6. The present regular second appeal was admitted on the following substantial questions of law:

"1. Whether the First Appellate Court has erred in validating the sale deed Exhibit P-1 to be a document under Section-90 of Evidence Act, thereby vitiating the impugned judgment & decree?

2. Whether without seeking declaration regarding the entry in the record of rights and proving possession of the suit land, the permanent prohibitory injunction can be issued, threby vitiating the impugned judgment and decree?

7. Shri S.S. Mittal, learned Senior Counsel for the appellants has argued that the judgment and decree passed by the Court below is perverse and deserves to be set aside and the suit is required to be dismissed. On the other hand, the learned counsel for the plaintiffs has argued that the findings recorded by the learned Appellate Court below, are as per law and after appreciating the oral evidence and documents to their right perspective and need no interference.

8. In rebuttal, the learned Senior Counsel has argued that the learned lower Appellate Court has validated sale deed, Ext. P-1, without their being any evidence on record and so the Court below has misinterpreted document and the findings are perverse.

9. To appreciate the arguments of the learned counsel for the parties, I have gone through the records in detail.

10. Champa Devi (plaintiff) is claiming half share in the suit land on the basis of sale deed, Ext. P-1, executed by Hira Singh, predecessor-in-interest of defendants No. 1 to 3 in favour of predecessor-in-interest of the plaintiff, and proforma defendants and other half share on the basis of exchange between her, Amar Singh and Pritam Singh sons of Dile Ram, vide mutation No. 1638. Thus, she claims her exclusive possession over the suit land.

11. Even if the sale deed, Ext. P-1, was not given effect in the revenue record, the same does not extinguish right of the purchaser. There is no dispute that on the basis of said sale deed Ext. P-1, mutation could not be attested in favour of Thakur Ram Dass or proforma defendants and said fact has not been explained by the plaintiffs, but non explaining of the said

fact does not affect the case of the plaintiffs, because mutation does not create or extinguish any right, title or interest in the immovable property. Mutation is required to be done simply to keep the revenue record upto date and for the purpose of receipt of land revenue. It has been correctly held by the learned lower Appellate Court that sale deed Ext. P-1, stands duly proved. On the basis of sale deed, Ext. P-1, this fact is established that Hira Lal, predecessor-in-interest of defendants No. 1 to 3 sold half share, measuring 7 biswas, out of the suit land to plaintiff, Champa Devi and Thakur Ram Dass, predecessor-in-interest of the plaintiff, and they were duly put in possession of the suit land. After his death, Champa Devi and now the plaintiffs remained in possession of the said land which was purchased by Thakur Ram Dass.

12. It is revealed from the remarks column of jamabandi, Ext. D-1, that Dile Ram exchanged half share of the suit land with Sangat Ram, vide mutation No. 441, on 12.03.1962, and thus Sangat Ram came in the possession of the suit land to the extent of remaining half share. He further exchanged half share of the land measuring 0-7-0 bigha, with Hira Lal, predecessor-in-interest of defendants No. 1 to 3, so Hira Lal became the owner-in-possession of the entire suit land to the extent of 0-7-0 bigha. It is proved from the copy of mutation, Ext. PB No.1341, dated 17.08.1990, that Hira Lal sold the said half share of the suit land in favour of Amar Nath and Pritam Singh, vide mutation No. 1638, Ext. P-2, dated 23.09.1996, exchanged 6/11 share, out of the suit land which was partitioned by them. Hira Lal had got the same from Dile Ram in exchange with original plaintiff, Champa Devi with her land, comprised in khasra No. 465, as a result of which Champa Devi became owner of the entire 6/11 share of the suit land. In view of this, predecessor-in-interest of Champa Devi named Thakur Ram Dass purchased half share of the suit land from Hira Lal, vide registered sale deed Ext. P-1, and came in possession of the same and remaining suit land was obtained by Champa Devi by way of exchange with Amar Singh and Pritam Singh. Thus, she became owner of whole of the suit land and came in possession of the suit land as co-sharer.

13. Even no person has been examined by the defendants to prove that they are in actual possession of the suit land. In view of what has discussed hereinabove, substantial question of law No. 2 is answered holding that the sale deed is appreciated by the learned Lower Appellate Court correctly. The documents is in existence and have been proved on record, the findings recorded by learned lower Appellate Court on the basis of sale deed, Ext. P-1 are after appreciating the document is correct and substantial question of law No. 2 is answered holding that the revenue enteries have been rebutted by the plaintiffs by leading cogent evidence.

14. Resultantly, the findings arrived at by the learned Lower Appellate Court are just reasoned and after appreciating the evidence on record to perspective and calls for no interference.

15. As a result of the above discussion, the appeal is devoid of merits, hence deserves dismissal.

16. In view of dismissal of the appeal, pending application(s), if any, shall also stand(s) disposed of. However, the parties are left to bear their own costs throughout.

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

Criminal Appeals No.441/2009, 43/2010 & 321/2010
Reserved on : 6.9.2016
Date of Decision : October 3, 2016

1. Cr.A No.441/2009

Sanjeev Kumar ...Appellant.

Versus

State of Himachal Pradesh ...Respondent.

2. Cr.A No.43/2010
State of H.P. ...Appellant.
Versus
Sanjeev Kumar @ Sanju ...Respondent.
3. Cr.A No.321/2010
State of H.P. ...Appellant.
Versus
Raj Kumar and another ...Respondents.

Indian Penal Code, 1860- Section 307 and 506 read with Section 34- **Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act, 1989-** Section 3(2)- Accused inflicted a blow with knife on the person of PW-7 with an intent to cause injury which could have caused death – accused S made a disclosure statement which led to the recovery of weapon of offence- accused S was convicted by the trial Court, while other accused were acquitted- held, in appeal that prosecution witnesses had improved upon their version and stated the facts not disclosed to the police- victim had also made major improvements, exaggeration and embellishment in his version – motive of the crime was not proved – the victim was not found under the influence of liquor as was suggested by the prosecution- however, the ocular version regarding the involvement of accused S was satisfactory – it was corroborated by medical evidence and the recovery of weapon- the accused S was rightly convicted by the trial Court- appeals dismissed. (Para-8 to 28)

Cases referred:
Jai Narain Mishra and others v. State of Bihar, (1971) 3 SCC 762
Dharma Pal and others v. State of Punjab, 1993 CRI. L.J. 2856
State of Uttar Pradesh v. Siyaram and another, (2010) 15 SCC 94
Suresh Sakharam Nangare v. State of Maharashtra, (2012) 9 SCC 249
Chittarmal v. State of Rajasthan, (2003) 2 SCC 266

For the Appellant(s) : Mr. N.K. Thakur, Senior Advocate, with Ms Jamuna Pathik, Advocate in Cr.A No.441/2009; and Mr. V.S. Chauhan, Additional Advocate General and Mr. Vikram Thakur, Deputy Advocate General in Cr. Appeals No. 43/2010 & 321/2010.

For the Respondent(s) : Mr. V.S. Chauhan, Additional Advocate General and Mr. Vikram Thakur, Deputy Advocate General, in Cr. Appeals No.441/2009; and Mr. N.K. Thakur, Senior Advocate with Ms Jamuna Pathik, Deputy Advocate General, and Mr. Shivank Singh Panta, in Cr. Appeals No.43/2010 and 321/2010.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Since all these appeals arise out of the very same impugned judgment, they are being considered and disposed of as such.

2. Accused Sanjeev Kumar, Raj Kumar and Vinod Kumar were charged to face trial for having committed offences punishable under Section 307, 506, both read with Section 34 of the Indian Penal Code, and Section 3(2) of the Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act, 1989, hereinafter referred to as the Atrocities Act.

3. In terms of the impugned judgment dated 26.11.2009, passed by Sessions Judge (Special Judge), Una, Himachal Pradesh, in SC/ST Case No.1 of 2008, titled as *State of Himachal Pradesh v. Sanjeev Kumar and others,* all the accused stand acquitted for having committed offence, punishable under Section 506, read with Section 34 of the Indian Penal Code, as also

Section 3(2) of the Atrocities Act. However, only accused Sanjeev Kumar stands convicted for having committed offence punishable under Section 307 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of two years and pay fine of Rs.5,000/-, and in default thereof to further undergo simple imprisonment for a period of six months. The other accused stand acquitted of the said charge.

4. The said judgment is the subject matter of challenge in these appeals, so filed by accused Sanjeev Kumar (Cr.A No.441 of 2009) against his conviction and the State, one for enhancement of sentence against accused Sanjeev Kumar (Cr.A No.43 of 2010) and the second (Cr.A No.321 of 2010) against acquittal.

5. Through the testimonies of Hitesh Kumar (PW-1), Umesh Kumar (PW-2) and Suresh Kumar (PW-7), prosecution wants the Court to believe that on 8.10.2006, accused persons in furtherance of their common intention inflicted blow with a knife on the person of Suresh Kumar and such act was committed with an intent of causing injury, which could have caused death, and also criminally intimidated him, apart from calling him names to be a person falling within the provisions of the Atrocities Act.

6. Also, in police custody, accused Sanjeev Kumar made a disclosure statement (Ex.PW-3/B), which led to the recovery of the weapon of offence (Ex.P-3) in the presence of Bansi Lal (PW-3).

7. No specific defence, save and except of false implication, stands taken by the accused, in his statement under Section 313 of the Code of Criminal Procedure, but as is evident from the line of cross-examination and so admitted by the prosecution witnesses that the complainant party is closely related to police officials, who have been serving in the very same District.

8. At the threshold, it be only observed that from the careful perusal of testimony of Hitesh Kumar, Umesh Kumar and Suresh Kumar, it cannot be, even remotely, inferred that the accused committed any offence under the provisions of the Atrocities Act. There is not even a whisper to establish the same against any one of the accused persons. As such, acquittal by the Court below in relation of the offence under the provisions of the Atrocities Act, is totally sustainable in law.

9. Insofar as the appeal filed by the State against the judgment of acquittal of co-accused Raj Kumar and Vinod Kumar is concerned, we are of the considered view that no interference is warranted, and this we say so for the reason that from the bare reading of the testimonies of Hitesh Kumar, Umesh Kumar and Suresh Kumar, who no doubt in their examination-in-chief state that the other accused also dragged injured Suresh Kumar upto a distance of 10-12 feet and gave fist blows to him and while fleeing away all three of them extended threats of eliminating the victim at an opportune moment, but however, in the cross-examination part of their testimonies, they admit such fact not to have been recorded in their previous statements, so exhibited in Court, with which they were confronted.

10. Specifically, we find major improvement, exaggeration and embellishment in the statement of victim (PW-7) to the effect that at the time when accused Sanjeev Kumar inflicted blow with a knife, accused Raj Kumar and Vinod Kumar facilitated such act by holding him by the arm. Hitesh Kumar and Umesh Kumar have nowhere corroborated such version. As such, there is no credible evidence against accused Raj Kumar and Vinod Kumar in the commission of crime.

11. We now proceed to decide the issue of conviction of accused Sanjeev Kumar, in relation to offence under the provisions of Section 307 of the Indian Penal Code.

12. At the threshold, it be only observed that the motive of crime remains unestablished on record. Accused Sanjeev Kumar, from the line of cross-examination, wants the Court to believe that even though he was present on the spot, the victim, who was under the

influence of liquor, created ruckus in the presence of several persons present on the spot and in the milieu, victim fell on the ground and sustained injuries with a sharp edged object.

13. Impliedly, it is also suggested that since the family members of the victim were in police force, they deliberately interfered with the investigation leading to the genesis of the crime.

14. Incident took place on 8.10.2006 at about 12.15 a.m. Police reached the spot and the victim was promptly got medically examined, which as per the version of Dr. A.K. Sharma (PW-8) was at 12.50 a.m. Now the doctor did not find the victim to be under the influence of liquor nor is there any evidence even remotely suggesting such fact. The accused never protested against false implication. In fact, testimony of the doctor suggests that same day, at about 1.35 p.m., even this accused was got medically examined from him, when also he (accused) did not reveal anything to him. After all, the doctor was a neutral and independent person. Hence, the defence cannot be said to have been probablized.

15. With these facts, we now proceed to discuss the evidence on record.

16. Suresh Kumar categorically states that on the day of the incident, he had gone to attend a religious function in the temple (Sidh Chanan) at village Kangar. While he was watching the programme, at 12.15 a.m. (night intervening 7th/8th October, 2006), accused Raj Kumar called for him. Thereafter, Raj Kumar picked up a quarrel and alongwith his co-accused dragged him for a distance of 10-15 feet. We find the role ascribed to accused Raj Kumar not be convincing and inspiring in confidence. But however, his further version that accused Sanjeev Kumar, who was armed with a dagger, inflicted one blow on the left side of his stomach, as a result of which he fell down, when again another blow was inflicted, from which he was able to save himself with his arm, but however, it did cause injury on his left shoulder. Cut marks on his clothes corresponded to the injuries sustained by him and also clothes were stained with blood. Clothes, i.e. vest (Ex.P-4) and T-Shirt (Ex.P-5) stand exhibited on record. Now this version stands corroborated from the unrebutted testimonies of spot witnesses Hitesh Kumar and Umesh Kumar, who, with certainty, have deposed that accused Sanjiv Kumar inflicted two blows with a knife.

17. We find that even the doctor (PW-8), who examined the victim, found the following injuries:

i) Incised wound on left iliac 3" x 1/2 ". Omentum coming out of the wound oval. Depth could not be done omentum was coming out. Bleeding was present. The shape of injury was spindle shape. I had drawn the diagram of the injury in MLR. I had referred Suresh Kumar to R.H. Una for specialized treatment and for final opinion.

ii) Incised wound on the left shoulder/over lying over the scapular region 3" x 1.5" muscle deep. Margin sharp bleeding positive.

iii) contusion on the chin 3cm x 1 cm reddish in colour.

18. The victim had to be further referred for treatment at the Post Graduate Institute of Medical Sciences (PGI), Chandigarh, where he was examined by Dr. Rudra Prasad Doley (PW-17), who uncontovertedly has stated that the incised wound, 5cm in length, suffered in the abdomen was dangerous to life.

19. Both the doctors, who have proved medical report (Ex.PW-8/D and 17/A), are categorical that the injuries could have been sustained with knife (Ex.P-3).

20. It is seen that the injury was on the vital part of the body, i.e. stomach, and the second blow was intended to cause injury on the head, which though the victim was able to prevent with the help of his arm, yet it caused injury on his shoulder.

21. We find, through the testimonies of police officials Raghubir Singh (PW-15) and Shiv Pal (PW-16), and independent witness Bansi Lal (PW-3), that the accused made a disclosure

statement (Ex.PW-3/B), which led to the recovery of the weapon of offence, i.e. knife (Ex.P-3), vide Memo (Ex.PW-3/C), so concealed in bushes in village Kangar.

22. Seeking reliance upon a decision of the apex Court in *Jai Narain Mishra and others v. State of Bihar,* (1971) 3 SCC 762, it is contended that at best the case would fall under Section 324 and not 307 of the Indian Penal Code. The decision came to be rendered in the given facts and circumstances, where the blows inflicted were by more than one person and some of the injuries were simple in nature. To similar effect is the decision rendered by the apex Court in *Dharma Pal and others v. State of Punjab,* 1993 CRI. L.J. 2856.

23. Decision in *State of Uttar Pradesh v. Siyaram and another,* (2010) 15 SCC 94 is of no help to the accused.

24. Decisions in *Suresh Sakharam Nangare v. State of Maharashtra,* (2012) 9 SCC 249, and *Chittarmal v. State of Rajasthan,* (2003) 2 SCC 266, are more on the question of common intention, which in the backdrop of the view already taken, is not relevant.

25. In our considered view, prosecution has been able to establish the guilt of the accused Sanjeev Kumar, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, not only ocular but also corroborative in the shape of recovery of weapon of offence.

26. From the material placed on record, it stands established by the prosecution witnesses that accused Sanjeev Kumar is guilty of having committed the offence charged for. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The guilt of the accused stands proved beyond reasonable doubt to the hilt. The chain of events stand conclusively established and lead only to one conclusion, i.e. guilt of accused Sanjeev Kumar. It cannot be said that accused is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

27. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeals filed by accused-convict Sanjeev Kumar (Cr.A No.441/2009) against his conviction and that of the State against acquittal (Cr.A No.321/2010) are dismissed.

28. Trial Court has sentenced the accused to rigorous imprisonment for a period of two years and fine of Rs.5,000/-, and in default of payment thereof to further undergo simple imprisonment for a period of six months. This was so done by taking into account the fact that accused is about 23 years of age and has a large family to support and that it is his first offence. We find no infirmity in the same. Hence, the appeal filed by the State for enhancement of sentence (Cr.A No.43/2010) is also dismissed.

All the three appeals stand disposed of, so also pending application(s), if any.

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

State of H.P. .....Appellant.

Versus

Chamaru Ram and another .....Respondents.

Cr. Appeal No. 284 of 2008.
Date of Decision: 3rd October, 2016.

Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989- Section 3 (1) (x)- Accused abused the informant and threatened to kill him in case of taking water from Bawari- the accused were tried and acquitted by the trial Court- held in appeal that an officer not below the rank of Deputy Superintendent of Police can alone investigate into an offence as per Rule 7- the violation of this rule vitiates the trial – in the present case, investigation was partly conducted by an Inspector – further, PW-1 was hearing impaired and therefore was unable to identify the voices - his testimony will not implicate the accused - there was enmity between the informant and the accused- the trial Court had rightly acquitted the accused- appeal dismissed.

(Para-9 to 13)

For the Appellant: Mr. Vivek Singh Attri, Dy. .A.G.
For Respondent No.1: Ms. Leena Guleria, Advocate
For Respondent No.2: Mr. Neel Kamal Sharma, 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 Special Judge, Mandi, Himachal Pradesh, rendered on 18.12.2007 in Sessions Trial No. 21 of 2005 whereby, he acquitted the accused/respondents herein for theirs allegedly committing an offence punishable under Sections 3 (1) (x) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

2. The facts relevant to decide the instant case are that complainant Amka Ram (PW1) filed a private complaint before the Additional Chief Judicial Magistrate, Sarkaghat with the allegations that on 18.3.2002 at about 9.00 p.m., the complainant was in his house and in the meantime accused Chamaru Ram came near his house and started abusing the complainant by saying "JULAHE DAGI TUNE BAURI KA PANI CHHUIH DIA JIS SE PANI GANDA HO GAYA, MEIN TUJHE APNE GHAR KE PAS KI BAURI SE PAANI NAHIN BHARNE DUNGA". The accused also gave threat to the complainant not to fetch water from the said Bawri otherwise the accused will do away with his life. In the meanwhile, accused Narain Singh came on the spot and joined hands with accused Chamaru Ram and also uttered abusive words and threatened to do away with the life of the complainant. The complainant is "Julaha" by caste, a Scheduled Caste whereas both the accused are from very high caste. The accused by uttering aforesaid filthy words had hurt the feelings of the complainant. After filing of the above complaint the learned Additional Chief Judicial Magistrate ordered for registration of the case under Section 156(3) of the Cr.P.C. on the basis of which FIR Ex. PE was registered against the accused in police station Sarkaghat by deceased Inspector Tulsi Ram. Thereafter, the investigation of the case was entrusted to Inspector Manoj Kumar, PW-6, who prepared the site plan and also recorded the statements of Ambika Ram, Parwati Devi, Lalman, Munshi Ram and Hem Raj. Ramesh Chhajta, PW-7 has conducted partial investigation of the case and tried to prove handwriting of Tulsi Ram on the FIR Ex.PE.

3. On conclusion of the 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 competent Court.

4. The accused were charged by the learned trial Court for theirs committing an offence punishable under Section 3 (1)(x) of the Scheduled Caste and Scheduled Tribes (Prevention of atrocities) Act, 1989. In proof of the prosecution case, the prosecution examined 7 witnesses. On conclusion of recording of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded by the trial Court, in which they 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. is 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 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 learned Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

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

9. The mandate constituted in Rule 7 of the Scheduled Caste and Scheduled Tribes (Prevention of atrocities) Act, 1989 qua an officer not below the rank of Deputy Superintendent of Police standing alone foisted with authority to investigate offences constituted in the Act aforesaid, mandate whereof stands approbated by a catena of judicial decisions reported in S.M. Kumar vs. State of A.P., 2004 Cr. L.J. (NOC) 347 (Andh Pra), Chandra Sekhar Pant vs. State of Orissa, 2004 Cr. L.J. 2626 and Manoj Kumar Vs. State of Jharkhand, 2004 Cr.L.J., 869 and in State of H.P. vs. Baldev Bhandari and others 2006 (1) SLC 33 also therewithin a pronouncement occurs qua on infraction of the mandate comprised in the aforesaid renditions, the trial standing vitiated whereupon the accused stands entitled to acquittal, verdicts whereof stand aptly meted deference by the learned trial Court evidently when the relevant investigations stood initially not conducted by an officer not below the rank of Deputy Superintendent of Police rather stood conducted by an Inspector, whereupon the aforesaid mandate stood infracted hence concomitantly aptly prodded the learned trial Court to pronounce qua the relevant investigations standing stained with a taint of vitiation whereupon it aptly pronounced an order acquitting the accused for the offences constituted in the apposite FIR.

10. The view aforesaid as propounded by the learned trial Court below for its hence recording an order of acquittal vis-a-vis the accused stands contended by the learned Deputy Advocate General to be amenable for reversal given the Inspector concerned only partly investigating the case whereafter the Deputy Superintendent of Police concerned, who held the statutory authorization to hold investigations, holding the relevant investigations in the case, whereupon hence he contends of the investigations conducted precedingly by the Inspector concerned getting rid of the stain of the relevant statutory interdiction against his investigating the offences. However, the aforesaid submission warrants its standing dispelled by this Court imperatively when no part of investigations at any stage were enjoined to be held by the Inspector rather were enjoined to be not only at the out set contrarily throughout thereafter solitarily held by an officer not below the rank of Deputy Superintendent of Police. Even otherwise on merits, the learned trial Court had alluded to the testimonies of the relevant witnesses who deposed as PW-1, PW-2 and PW-3. However, the testimony of PW-1, who though testified in support of the allegations constituted in the complaint comprised in Ex.PA, yet his testification holds no tenacity in the evident fact of his communicating therein qua his standing afflicted with an auditory impairment, impairment whereof constrained him to omit to unequivocally testify qua his hearing the voices of the accused/respondents. Since his auditory impairment disabled him to identify the voices of the respondents/accused, in sequel, his testification qua the accused hurling vituperative penal abuses upon him holds no credence. Likewise, he has testified qua his not sighting the accused properly. The effect of his also omitting to depose unequivocally qua his sighting the accused cannot hold any capitalization to the prosecution to infer therefrom qua his testification firmly establishing the factum of the accused being the persons, who committed the

alleged offences. Even though, PW-1 ascribes an inculpatory role to accused Narain Singh yet the incriminatory role fastened by the complainant qua accused Narain Singh is minimal besides is bereft of penal elements given PW-1 testifying qua him qua his making utterances "TU KAYA BAK RAHA HAI", utterances whereof do not hold any element of inculpability under the Scheduled Caste and Scheduled Tribes (Prevention of atrocities) Act, 1989.

11. Be that as it may, on a scanning of his testimony, it surges forth qua his acquiescing qua six harijan families still continuously fetching water from the bawari wherefrom he was prevented to draw water by the accused/respondents besides with his also acquiescing to the suggestion put him while his standing held for cross-examination by the learned defence counsel qua the mules of accused Chamaru damaging his crop whereafter he had held a verbal wrangle with him, is a pointer to the complainant prior to the incident holding inimicality vis-a-vis the accused wherefrom it is apt to conclude qua the penal role as stands ascribed to the accused by him being concocted besides to wreak vendetta upon the accused/respondents. Even though PW-2 the son of the complainant has concerted to lend corroborative vigour to the testimony of his father yet his testification wanes, conspicuously, when the testification of PW-1 whereto he concerts to lend corroboration stands ingrained with a pervasive vice of incredulity, necessarily when the testification of PW-1, who lodged a complaint Ex.PA against the accused was enjoined to be bereft of any traces of incredulity, whereas for reasons aforestated, his testimony stands ingrained with a pervasive taint of inveracity. As a corollary, any testification in corroboration thereto lent by PW-2 is to suffer the concomitant fate qua worth, if any, it holds falling apart. Predominantly, the independent witness PW-3 has not supported the prosecution case. In sequel, the entire edifice of prosecution case gets jettisoned.

12. 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.

13. Consequently, I find no merit in the instant appeal which is accordingly dismissed and the judgment of acquittal recorded in favour of the accused/respondent herein by the learned trial Court is affirmed. Records be sent back forthwith.

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

State of Himachal Pradesh .....Appellant.

Versus

Jai Chand .....Respondent.

Cr. Appeal No.129 of 2008.
Reserved on : 20.09.2016.
Decided on : 03.10.2016.

Indian Penal Code, 1860- Section 279- Informant was driving a jeep- a bus being driven by the accused came at a high speed- informant stopped the jeep on the left side of the road but the bus hit the jeep- the jeep suffered damages – the accident had taken place due to the negligence of the accused- the accused was tried and acquitted by the trial Court- held, in appeal that no skid marks were visible in the photographs – the jeep was not dragged and the version that bus being driven with high speed hit the jeep becomes doubtful – there are contradictions and improvements in the statements of prosecution witnesses- the trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-7 to 13)

Cases referred:
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the appellant : Mr. Pushpinder Singh Jaswal, Dy. Advocate General.
For the respondent: Mr. Vinay Thakur, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant-State of Himachal Pradesh against the judgment of acquittal of the accused in a case under Section 279 of the Indian Penal Code passed by the learned Judicial Magistrate 1st Class, Court No.II, Una, District Una, H.P, dated 30.11.2006, in Criminal Case No.226-I of 1998.

2. Briefly stating facts giving rise to the present appeal are that statement under Section 154 Cr. P.C (Ex.PW3/A) of complainant (PW-3) was recorded by HC Harpal Singh that on 2.10.1998 at about 11:15 PM, complainant was going to Village Budhan in a Jeep bearing No. HP-20-6109, as a driver alongwith Joginder Kumar, Yashpal and Pinku and on reaching at place Suniarwah (Bangana curve), he noticed a bus bearing No.HP-37-0445 of HRTC enroute Sundernagar to Beas being driven by the accused (hereinafter referred to as 'the accused') at a high speed and he abruptly stopped the Jeep being driven by him on unmetalled portion of the road, on his left side, but the accused while driving the aforesaid bus hit the jeep from the right front portion of the Jeep and crossed through in a process of dashing with the vehicle (jeep), as a result of which, front glass and side mirror of the Jeep were broken besides pressing of front driver side. However, no one sustained any injuries. The accident has taken place due to the rash and negligent driving of the accused. Statement of the complainant was recorded by the Investigating Officer and sent to Police Station, Bangana through Constable Beant Kumar No.32, on the basis of which FIR (Ex.PW9/B), was registered against the accused. During the course of investigation, site plan (Ex.PW10/A) was prepared.

3. The prosecution, in order to prove its case, examined as many as 10 witnesses. Statement of the accused was recorded under Section 313 Cr. P.C, wherein he has denied the prosecution case and claimed innocence. No defence evidence was led by the accused.

4. Learned Deputy Advocate General appearing on behalf of the appellant has argued that the appeal is required to be allowed and the accused is liable to be convicted, as the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt.

5. On the other hand, learned counsel appearing on behalf of the accused has argued that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt and so, the accused was rightly acquitted.

6. To appreciate the arguments of learned Deputy Advocate General and learned counsel for the accused, this Court has gone through the record in detail and minutely scrutinized the statements of the witnesses.

7. PW-1, PW-2, and PW-6 are the occupants of the Jeep and PW-3 was driver of the Jeep. The owner of Jeep PW-4 Gian Chand. PW-5 is the witness to recovery of Route Permit, Registration Certificate as well as Duty Register. The Photographer who took the photographs has appeared as PW-7. PW-8 Mechanic, who examined both the vehicles involved in the accident. PW-10 is the Investigating Officer. PW-1 has admitted that the Jeep belongs to a friend of his father-in-law. This version has also been admitted by PW-2, when he has stated that the Jeep belonged to his neighbour and friend. The owner of the vehicle PW-4 has stated that the vehicle was being driven by PW-3 Mohan Lal. PW-6 has also stated that he was learning the driving on the Jeep. PW-1 has further stated that after the accident, there was a traffic jam, thereafter, Police reached after about 20 minutes, so many vehicles were stranded on either side. He has also stated that the Police got both the vehicles taken away from the spot and thereafter released

the traffic. PW-2 has deposed that after the accident, when the Bus was stopped, its rear portion was parallel to the rear portion of the Jeep. However, the photographs Ex.PW7/A and Ex.PW7/B and the spot map did not depict such a situation. PW-3 has also stated that on seeing Bus coming from the opposite direction, he parked his Jeep on the left side, but the accused while driving the Bus, hit on right side of the Jeep and in a process of dashing the Jeep, he took the Bus ahead. In his cross-examination, he has denied that after the accident there was a traffic jam on either sides. However, he has stated that the light vehicles were passing through, but not the heavy vehicles. He has also stated that the photographs were taken earlier. PW-6 has stated that the bus after causing the accident, stopped at a distance of about 7-8 feet ahead. PW-6 has admitted in his cross examination that the accidental vehicles were shifted from the spot and thereafter the traffic was got released.

8. From the perusal of photographs Ex.PW7/A & Ex.PW7/B, no skid mark of tyre of the Jeep are visible on the spot and similarly such skid marks are also not shown in the site plan Ex.PW10/A. As per the statement of the driver of the Jeep (PW-3) on seeing a speeding Bus coming from the wrong direction, he had parked his Jeep on left side, but the speeding bus hit the right side of the Jeep and crossed in that process. If the version of PW-3 and other witnesses are believed that the still Jeep was hit by the speeding bus, which was coming downwards then obviously, it could have dragged the Jeep to some an extent and there should have been the skidding marks on the road, but the photographs (Ex.PW7/A & Ex.PW7/B) did not depict such skid mark.

9. PW-1, PW-2 and PW-3 have stated that the Jeep in question, had taken a turn and thereafter the accident had taken place. However, in the site plan, the spot of occurrence is depicted exactly on the curve. There is also contradiction with regard to the time taken by the Police for reaching on the spot, because as per PW-1, it reached within 20 minutes, but PW-2 stated that it took one hour. PW-3 deposed that it reached within 15 to 20 minutes whereas, PW-10 deposed that the Police Party reached on the spot at about 12:45 PM. PW-3 has also made certain improvements with regard to the availability of women passengers in the Jeep, whereas he has not stated so in his statement under Section 154 Cr. P.C. There is also contradiction in the statement of PW-3 and recovery memo Ex.PW3/B with regard to the spot of their recording because PW-3 has stated that his statement was recorded at the Police Station whereas, memo Ex.PW3/B was prepared on the spot, whereas as per PW-10, these documents were prepared on the spot and statement Ex.PW3/A was sent to the Police Station, for registration of the FIR.

10. From the above, it is clear that there are material contradictions in the prosecution story. The prosecution has failed to prove the guilt of the accused conclusively and beyond the shadow of reasonable doubt.

11. It has been held in **K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258,** that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/misappreciation of evidence on record, reversal thereof by High Court was not justified.

12. The Hon'ble Supreme Court in **T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

13. So, in my considered view the prosecution has failed to prove the guilt of the accused conclusively and beyond reasonable doubt. There is no illegality and infirmity in the findings, so recorded by the learned trial Court.

14. In view of the aforesaid decisions of the Hon'ble Supreme Court and discussion made above, I find no merit in this appeal and the same is accordingly dismissed. Record of the learned trial Court be sent back forthwith.

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

Subhash Chand .....Petitioner.
Versus
State of H.P. .....Respondent.

Cr. Revision No. 152 of 2007.
Date of Decision: 3.10.2016.

Indian Penal Code, 1860- Section 279, 337 and 304-A- A scooter being driven by the accused at high speed hit the deceased on the wrong side – wife of the accused and his child also sustained injuries in the accident- the accused was tried and convicted by the trial Court – an appeal was preferred, which was dismissed – held, in revision that Court has limited power to appreciate the evidence in exercise of revisional jurisdiction- it was not disputed that scooter was being driven by the accused at the relevant time – it was also not disputed that deceased had sustained injuries in the accident, which caused his death – prosecution version was proved by the statements of PW-1 to PW-3 – there was nothing in their cross examination to doubt their testimonies – defence version was not probable- benefit of Probation of Offenders Act cannot be granted to a person convicted of rash and negligent driving- however, considering the time lapse, the sentence modified to 15 days. (Para-8 to 25)

Cases referred:
State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241
Yudhbir Singh versus State of Himachal Pradesh 1998(1)S.L.J. 58
State of Punjab versus Saurabh Bakshi 2015 (5) SCC 182

For the petitioner: Mr. Vivek Singh Thakur, Advocate.
For the respondent: Mr. Rupinder Singh Thakur, Additional Advocate General, with Mr. Rajat Chauhan, Law Officer.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

The present criminal revision petition filed under Section 397 of the Cr.PC, is directed against the judgment dated 23.10.2007, passed by the learned Additional Sessions Judge-II, Kangra at Dharamshala, HP, in Criminal Appeal No. 32-K/X/2002, affirming the judgment dated 20.9.2002, passed by the learned Judicial Magistrate Ist Class, Kangra, District Kangra HP, in Criminal Case No. 387-II/96/93, whereby the accused-petitioner has been sentenced to undergo simple imprisonment for a period of three months for commission of offence punishable under **Section 279 IPC**. The petitioner has been further sentenced to undergo simple imprisonment for three months for the commission of offence punishable under **Section 337** of IPC and for period of six months for the commission of offence punishable under **Section 304**-A of the Indian Penal Code.

2. Briefly stated facts as emerged from the record are that on 17.3.1993, at about 7:30 pm, police on having received information from the Medical Officer, S.D.H Kangra, visited the Hospital, where injured Bhagwan Dass, was admitted after the accident. However, fact remains that Medical Officer opined in writing that injured is not fit to make any statement. Accordingly, statement of the complainant Swroop Kumar was recorded, who stated to the police that on 17.3.1993 at about 7:00 pm, he along with late Sh. Bhagwan Dass was returning to Mataur from Kachhiari when scooter bearing No. JK-02-5747 came from Mataur side being driven by the accused-petitioner. The complainant stated to the police that wife of the accused

was pillion rider along with child and the scooter was being driven on a very high speed in rash and negligent manner. As per the complainant, petitioner-accused while negotiating the curve hit deceased Bhagwan Dass by coming on the wrong side, as a result of which, he sustained injuries on his leg and fell down. The complainant also reported that wife of the accused and his child also sustained injuries. The complainant specifically reported to the police that the accident occurred due to rash and negligent driving of the accused, who was driving scooter bearing No. JK-02-5747. On the basis of aforesaid complaint having been made by Swroop Kumar, police lodged formal FIR. Head Constable Krishan Dutt completed the investigation after visiting the spot and also prepared the site plan, and recorded the statements of witnesses under Section 161 Cr.PC. But unfortunately, injured Bhagwan Dass succumbed to injuries on the next date of the accident and the case was converted in the offence punishable under Section 279/304 of the IPC. Police also took into possession the scooter and got the same mechanically examined. The I.O. also obtained MLCs and autopsy report from the Hospital. Police after completion of investigation found the petitioner accused guilty of having committed offences under Section 279, 337 and 304-A IPC and accordingly, presented the Challan before the competent court of law.

3. Learned Judicial Magistrate Ist Class, Court No.II Kangra, District Kangra (HP), after satisfying itself that prima facie case exists against the accused person put a notice of accusation, to which he pleaded not guilty and claimed trial. Learned trial Court on the basis of evidence adduced on record by the prosecution, found the accused guilty of having committed offence under the Act and convicted and sentenced him as per description already given above.

4. The present petitioner-accused being aggrieved with the judgment of conviction passed by the learned trial Court, filed appeal under Section 374 of Cr.PC before the Court of learned Additional Sessions Judge-II, Kangra at Dharamshala, HP, who vide judgment dated 23.10.2007, dismissed the appeal. Hence, this criminal revision petition before this Court.

5. Mr. Vivek Singh Thakur, Advocate, representing the petitioner vehemently argued that the impugned judgments of conviction and sentence recorded by 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, further contended that learned trial Court below while recording conviction of the petitioner accused mis-read and mis-interpreted the statements of the witnesses, especially, the statement of the pillion rider DW1, who categorically before the learned trial Court stated that deceased Bhagwan Dass was not hit by the Scooter but by a Maruti Car, which was coming from Mataur side in very high speed. Mr. Thakur further stated that the learned trial Court lent undue credence to the statements of the prosecution witnesses while convicting the accused because there was overwhelming evidence on record to suggest that the deceased Bhagwan Dass was not hit by the Scooter, rather, he was hit by a Marti car, which was not taken into custody by the police intentionally with a view to help the driver of the Maruti Car. Mr. Vivek Further stated that there is no evidence qua the identification, if any, of the petitioner-accused either by deceased or by any of the prosecution witness because none of them had actually saw him at the time of alleged accident. Hence, learned trial Court committed grave illegality while recording conviction of the present petitioner-accused on the mere statement of interested witnesses. With a view to substantiate his aforesaid argument, Mr. Thakur, invited attention of this Court to the statement given by the PWs to demonstrate that material PWs who were allegedly eye witnesses candidly admitted in their examination in chief and cross examination that they were related to Bhagwan Dass and as such, Court below while recording conviction of the petitioner ought to have exercised due care and caution while placing reliance on the depositions made by the interested witnesses. He also invited attention of this Court to the spot map to demonstrate that there were number of shops in and around the site of the occurrence but for the reasons best known to the prosecution, no independent witness/person from those shops was cited by the prosecution as a witness to prove its case beyond reasonable doubt. While concluding his arguments, Mr. Thakur, vehemently contended that there are material contradictions in the depositions made by the PWs, which are fatal to the case of the prosecution and no conviction, if any, could be recorded by the Court below merely on the basis of statement of PW1 to PW3, who are not trustworthy, rather interested

witnesses. Mr. Thakur, prayed that in case this Court comes to conclusion that accused is guilty of having committed offences, he being first offender may be given benefit of the Probation of Offenders Act, 1958.

6. Per contra, Mr. Rupinder Singh Thakur, Additional Advocate General, duly assisted by Mr. Rajat Chauhan, Law Officer, representing the State supported the impugned judgment passed by the courts below. Mr. Rupinder, vehemently argued that bare perusal of the impugned judgments suggests that same are based upon the correct appreciation of the evidence available on record and prosecution has been able to prove its case beyond reasonable doubt. He further contended that in the given facts and circumstances of the case, no interference, whatsoever, of this Court, is warranted, where it stands proved on record that accused had hit the deceased Bhagwan Dass by Scooter. Mr. Rupinder, also opposed the prayer of the accused for extending him benefit of Section 4 of the Probation of Offenders Act. He also reminded this Court that it has very limited powers while exercising its revisionary powers under Section 397 of the Cr.PC to re-appreciate the evidence, especially when it stands duly proved on record that the courts below have dealt with each and every aspect of the matter very meticulously. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in case ***State of Kerala*** *Vs***. *Puttumana Illath Jathavedan Namboodiri*** (1999)2 Supreme Court Cases 452, wherein it has been held as under:-

> *"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 Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."*

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

8. True, it is that this Court has very limited powers under Section 397 Cr.PC while exercising its revisionary jurisdiction but in the instant case, where accused has been convicted and sentenced, it would be apt and in the interest of justice to critically examine the statements of the prosecution witnesses 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.

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 of sentence or order. The relevant para of the judgment is reproduced as under:-

> *8. The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised*

revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order."

10. From the conjoint reading of pleadings available on record as well as impugned judgments passed by the courts below and submissions having been made by the counsel representing the parties, it is undisputed that deceased Bhangwan Dass succumbed to injuries caused to him due to accident occurred on 17.3.1993 near Mataur, District Kangra. It is also not disputed that Scooter in question was being driven by the petitioner accused at that relevant time. The petitioner accused in his statement recorded under Section 313 Cr.PC has not disputed the accident but in his defence, he stated that deceased Bhagwan Dass got injured due to rash and negligent driving of the Maruti Car which came in high speed from Mataur side and at the first instance, hit deceased and thereafter scooter which was being driven by him, as result of which, he, his wife and child sustained injuries. Perusal of statement of the petitioner under Section 313 Cr.PC clearly suggests that the accident has been not disputed by him but stated that injuries to deceased Bhagwan Dass were caused by Maruti Car driver not by him.

11. During the proceedings of the case, this Court had an occasion to peruse the entire evidence led on record by the respective parties and it has no hesitation to conclude that prosecution has been able to prove its case beyond reasonable doubt that Bhagwan Dass suffered injuries due to rash and negligent driving of the petitioner-accused. Though, petitioner accused made an attempt to demonstrate that at that relevant time, one Maruti Car being run by an unidentified person was coming from the Mataur side, who at the first instance hit Bhagwan Dass and then the scooter but this Court was unable to lay its hand to any evidence, be it ocular or documentary, led on record by the petitioner-accused to demonstrate that in the said accident, one Maruti Car was also involved and as such, this Court finds it difficult to differ with the concurrent finding of facts recorded by the Courts below on the basis of evidence adduced on record by the prosecution.

12. In the present case, prosecution with a view to prove its case examined as many as ten witnesses. PW1 Swroop Kumar, who is an eye witness specifically, stated that he was going towards Mataur from Kachhiari with deceased Bhagwan Dass at the time of the alleged accident. He stated that they were going on the left side of the road and in the meantime, Scooter in question came in high speed and hit Bhagwan Dass, as a result of which, he suffered injuries and later on passed away. He also stated that he made his statement Ext.PW1/A under Section 154 Cr.PC on the basis of which, formal FIR was recorded by the police before carrying out investigation in the matter. In his cross examination, he admitted that, Bhagwan Dass was bleeding when he was brought in the Hospital. He specifically denied the suggestion put to him by the defence that Maruti Car came from Palampur Side and dashed with Bhagwan Dass. He also denied that thereafter car hit the scooter. He also denied the suggestion that scooter skidded due to grit lying on the road and thereby the scooter went towards right side of the road. However, in his cross-examination and examination-in-chief, he specifically stated that scooter was at very high speed and accident occurred due to the rash and negligent act of the accused because he came on wrong side of the road and hit the deceased. He also denied the suggestion that accident caused due to the fault of the car driver and not due to the fault of the accused-petitioner.

13. PW2, Mehar Chand, another witness also stated that Scooter came from Mattaur side when deceased and one other person were coming on the road. He further stated that Scooter rider hit the injured as a result of which, he later on succumbed to injuries. It has also come in his statement that scooter was in very high speed and accident took place due to rash and negligent driving of the accused. In his cross –examination, he specifically stated that Swroop Kumar is not known to him and he was present at the site at the time of accident. He

like PW1 denied the suggestion put to him by the defence that car came from Palampur side and hit the deceased and thereafter hit the scooter. He also denied the suggestion put to him that he is not an eye witness to the occurrence. PW2 categorically denied the suggestion put to him that accident was caused by Maruti Car. PW3 Swarna Devi also stated that at 6:30 pm, a scooter came from Mataur side at very high speed and hit Bhagwan Dass by coming on wrong side and due to injury; he succumbed to injury. In her cross-examination, she also denied that car came from Palampur side and due to skid the Car hit the scooter and accident occurred due to high speed of the Car. Aforesaid witness also denied the suggestion put to her that she is deposing falsely.

14. PW4, Dr. A.B. Gupta, Medical Officer, Hospital Kangra, stated that he examined the injured Sushma Devi wife of the accused, resident of Kholi vide MLC Ext.PW4/A, Banti, Son of Subhash Chand resident of Kholi vide MLC Ext.PW4/B as well as Subash, Son of Amar Singh Resident of Kholi vide MLC Ext.PW4/C and opined the nature of injuries to be simple on their person. However, He also stated that he examined deceased Bhagwan Dass vide MLC Ext.PW/D and nature of the injuries was found to be grievous on his person and he was referred to Dharamshala. PW10, Dr. Sulakshna Puri, Medical Officer conducted post mortem of the dead body of deceased Bhagwan Dass vide postmortem report Ext.PW10/A.

15. PW5 Durga Dass, mechanically examined the scooter and gave report vide Ext.PW5/A. However, in his cross-examination, he stated that he cannot tell that handle of scooter could break due to collusion with the Vehicle.

16. PW6 ASI, Duni Chand, PW7 HC Uttam Chand and PW8 Lekh Raj are formal witnesses and may not be relevant at this juncture while examining the correctness of the judgments passed by the courts below.

17. PW9 ASI Krishan Chand, I.O., stated that he, on receiving information from the SDH, Kangra on 17.3.1993, recorded the statement of Swroop Kumar, under Section 154 Cr.PC, on the basis of which, FIR Ext. PW6/A was recorded. He also stated that he had moved an application (Ext.PW9/B) for taking statement of the injured but same was declined by the Medical Officer because the deceased was not fit to make any statement. He stated that the scooter was taken into possession vide recovery memo Ext.PW-8/A and site plan Ext.PW9/C was also prepared. In his cross examination, he stated that he cannot say that he had recorded the statement of Smt. Sushma however, he later on stated that he recorded the statements of all injured. He denied the suggestion that witness Swroop Kumar was called from veerta. He categorically denied the suggestion that Maruti Car came from Palampur side and hit Bhagwan Dass and thereafter hit with the scooter. He also denied the suggestion that the car was not traced and a false case was made against the accused and accident occurred due to the fault of the Car driver.

18. Conjoint reading of all the prosecution witnesses, as discussed above, clearly suggests that on 17.3.1993, deceased Bhagwan Dass was hit by Scooter in question being driven by the petitioner accused, who was allegedly driving scooter in most rash and negligent manner at high speed. PWs 1 to 3, who are happened to be the eye witnesses unequivocally, stated that on 17.3.1993, at about 6:30pm to 7:00pm, a scooter being driven by the petitioner-accused, hit Bhagwan Dass, as a result of which, he suffered injuries and ultimately succumbed to injuries. Cross-examination conducted upon these PWs nowhere suggests that defence was able to extract anything contrary from the PWs. Though defence by way of putting suggestion that deceased was hit by Maruti Car coming from Pamalpur side made an attempt to demonstrate that deceased was not hit by Scooter being driven by the petitioner accused, rather he was hit by Maruti Car which after hitting the deceased hit scooter as a result of which petitioner, his wife and child also sustained simple injuries but none of the PWs admitted the aforesaid suggestion put to them by the defence. Version put forth on behalf of these eye witnesses stands fully corroborated by the statement of Doctors, who in unequivocal term stated that he had examined the deceased, who had suffered grievous injury and as a result of which, he passed away. PW10 Ms. Sulakshna Puri proved on record post mortem report Ext.PW10/A. Similarly, perusal of statement given by I.O.

PW9 fully corroborates the version put forth by the aforesaid material witnesses. Even in the cross-examination conducted on the I.O. nowhere suggests that defence was able to extract anything contrary to what he stated in examination in chief.

19. At the cost of repetition, it may be stated that though defence by putting suggestion to PWs that deceased was hit by Car attempted to demonstrate that Bhagwan Dass suffered injuries due to hit by Maruti Car but this Court was unable to lay its hand to any evidence, be it ocular or documentary on record adduced by the defence suggestive of the fact that in the said accident, Maruti car was also involved. DW1 Smt. Sushma Devi, wife of the accused, at that relevant time was pillion rider along with her child stated that accident occurred on 17.3.1993 with Maruti Car coming from Palampur Side in a very high speed. She stated that Car hit the deceased and thereafter scooter. She also stated that Car came from wrong side, however, in her cross examination she admitted that she was admitted in hospital and accused was also admitted. According to her she was also medically examined vide MLC Ext.PW4/A. She also stated that road was metalled and wide enough but categorically admitted in cross examination that the accused applied breaks with force in order to stop the scooter. It has also come in her statement that she as well as her husband (accused-petitioner) did not lodge any complaint against the police for not registering the case against the Maruti Car, who allegedly hit the deceased. Save and except, statement of DW1, there is no evidence on record to suggest that deceased was hit by car as claimed by DW1 and petitioner-accused. But careful perusal of statement of DW1 and the petitioner recorded under Section 313 Cr.PC clearly suggests that scooter being driven by the petitioner-accused was involved in the accident, wherein deceased Bhagwan Dass lost his life. None of the PWs corroborated the version put forth on behalf of the defence that deceased was hit by the Car, rather, all the PWs unequivocally stated that deceased Bhagwan Dass was hit by scooter being driven by petitioner rashly and negligently in high speed. Even the close scrutiny of the cross examination conducted on these PWs nowhere suggests that defence at any point of time put suggestion to them that they were falsely deposing against the petitioner accused. Moreover, defence was not able to prove on record motive, if any, of the PWs to depose falsely against the petitioner.

20. It has come in the statement of DW1 that she resides near the residence of the deceased. It is not understood that why person from same locality would implicate the petitioner accused falsely. Apart from above, this Court sees no reason for PW2 to falsely state that deceased suffered injuries due to being hit by the scooter and not by the Car. Moreover, all the PWs categorically denied the suggestion that deceased was hit by the car at the first instance, this Court after examining the entire evidence led on record by the parties is of the view that story of Maruti Car was brought in by the defence deliberately to confuse the entire issue. It is also not understood that if police had not purposely registered case against the Maruti car driver why petitioner did not take any step to lodge complaint against the police mentioning therein that serious irregularity has been allegedly committed by the police.

21. This Court after perusing the entire evidence is fully convinced that deceased was hit by the scooter, being driven rashly and negligently by the accused and story of Maruti Car was concocted just to create confusion and as such, this Court sees no illegality and infirmity in the judgments passed by the courts below and same deserves to be upheld.

22. Faced with this situation, learned counsel for the petitioner-accused also prayed that accused may be given the benefit of probation under Section 4(b) of the Probation of Offenders Act, 1958 keeping in view his age and his being first offender. He also stated that mitigating circumstance in this case is that more than 23 years have passed after happening of that incident and 14 years have been passed after passing the judgment dated 20.9.2002, whereby the accused was convicted and he has already suffered agony during the pendency of the appeal in the court of learned Sessions Judge, Kangra as well as in High Court of Himachal Pradesh. In support of the aforesaid arguments, Mr. Thakur, also invited the attention of this Court to the judgment passed by this Hon'ble Court in *Yudhbir Singh versus State of Himachal Pradesh 1998(1)S.L.J. 58*, wherein it has been held as under:

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

23. This Court also cannot lose sight of the stern observations made by the Hon'ble Apex Court in *State of Punjab versus Saurabh Bakshi 2015 (5) SCC 182.* While dealing with the accident case, the Hon'ble Apex Court has taken serious view of reduction of sentences by the courts below. Their lordships in the aforesaid judgment in paras No. 1, 14, 24 and 25 have held as under;

"1. Long back, an eminent thinker and author, Sophocles, had to say:

"Law can never be enforced unless fear supports them."

Though the aforesaid statement was made centuries back, it has its pertinence, in a way, with the enormous vigour, in today's society. It is the duty of every right thinking citizen to show veneration to law so that an orderly, civilized and peaceful society emerges. It has to be borne in mind that law is averse to any kind of chaos. It is totally intolerant of anarchy. If any one defies law, he has to face the wrath of law, depending on the concept of proportionality that the law recognizes. It can never be forgotten that the purpose of criminal law legislated by the competent legislatures, subject to judicial scrutiny within constitutionally established parameters, is to protect the collective interest and save every individual that forms a constituent of the collective from unwarranted hazards. It is sometimes said in an egocentric and uncivilised manner that law cannot bind the individual actions which are perceived as flaws by the large body of people, but, the truth is and has to be that when the law withstands the test of the constitutional scrutiny in a democracy, the individual notions are to be ignored. At times certain crimes assume more accent and gravity depending on the nature and impact of the crime on the society. No court should ignore the same being swayed by passion of mercy. It is the obligation of the court to constantly remind itself that the right of the victim, and be it said, on certain occasions the person aggrieved as well as the society at large can be victims, never be marginalised. In this context one may recapitulate the saying of Justice Benjamin N. Cardizo "Justice, though due to the accused, is due to the accuser too". And, therefore, the requisite norm has to be the established principles laid down in precedents. It is neither to be guided by a sense of sentimentality nor to be governed by prejudices.

14. In this context, we may refer with profit to the decision in Balwinder Singh (supra) wherein the High Court had allowed the revision and reduced the quantum of sentence awarded by the Judicial Magistrate, First Class, for the offences punishable under Section 304A, 337, 279 of IPC by reducing the sentence of imprisonment already undergone that is 15 days. The court referred to the

decision in Dalbir Singh v. State of Haryana and reproduced two paragraphs which we feel extremely necessary for reproduction:- (Balwinder Singh case, SCC pp. 186-87, para12)

"12…1. When automobiles have become death traps any leniency shown to drivers who are found guilty of rash driving would be at the risk of further escalation of road accidents. All those who are manning the steering of automobiles, particularly professional drivers, must be kept under constant reminders of their duty to adopt utmost care and also of the consequences befalling them in cases of dereliction. One of the most effective ways of keeping such drivers under mental vigil is to maintain a deterrent element in the sentencing sphere. Any latitude shown to them in that sphere would tempt them to make driving frivolous and a frolic.

13. Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal courts cannot treat the nature of the offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the Probation of Offenders Act. While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily cause any accident; or even if any accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the offence; and lastly, that even if he is convicted he would be dealt with leniently by the court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of the vehicle he cannot escape from a jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles." (Dalbir Singh case, SCC pp. 84—85 & 87, paras 1 &13)"

24. Needless to say, the principle of sentencing recognizes the corrective measures but there are occasions when the deterrence is an imperative necessity depending upon the facts of the case. In our opinion, it is a fit case where we are constrained to say that the High Court has been swayed away by the passion of mercy in applying the principle that payment of compensation is a factor for reduction of sentence to 24 days. It is absolutely in the realm of misplaced sympathy. It is, in a way mockery of justice. Because justice is "the crowning glory", "the sovereign mistress" and "queen of virtue" as Cicero had said. Such a crime blights not only the lives of the victims but of many others around them. It ultimately shatters the faith of the public in judicial system. In our view, the sentence of one year as imposed by the trial Magistrate which has been affirmed by the appellate court should be reduced to six months

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

scrutinize, relook and revisit the sentencing policy in Section 304-A IPC, so with immense anguish."

24. After giving my thoughtful consideration to the law cited by Mr. Vivek Singh Thakur, Advocate representing the accused in the present case, I am of the view that same cannot be made applicable in the present case for granting the benefit of Section 4 of probation of Offenders Act, 1958. The Hon'ble Apex Court in the judgment cited above has deprecated the practice of courts in settling the matter by awarding compensation or releasing the accused by giving the benefit of Probation of Offenders Act, 1958. In the facts and circumstances of the present case, where there is overwhelming evidence to suggest that vehicle was driven by the accused in most rash and negligent manner, no leniency can be shown to the accused.

25. Consequently in view of the above, the judgments passed by the courts below are upheld as the same are based upon correct appreciation of evidence available on record. However, after noticing the fact that this incident had occurred on 17.3.1993 about 23 years back and keeping in mind the age of the petitioner, this court deems it fit to modify the sentence as imposed by the courts below to fifteen days in toto for all the offences and petitioner-accused is directed to surrender himself before the learned trial Court forthwith to serve the sentence as awarded by learned Judicial Magistrate, Ist Class, Kangra, vide separate order dated 21.9.2002 and further modified by this Court vide this judgment. Needless to say that order dated 7.12.2007, passed by this Court, whereby sentence imposed by the Court below was suspended, shall stand vacated automatically. Pending applications, if any, stand disposed of.

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

Shri Vijay Kumar & others. .....Appellants.

Versus

Shri Anant Ram alias Nantu. .....Respondents.

RSA No. 514 of 2006
Reserved on: 22.09.2016
Decided on: 03.10.2016

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that defendant had executed a sale deed in their favour for a consideration of Rs. 2,000/-- possession was also delivered to the plaintiffs- subsequently, defendant filed an application for partition and it was found that defendant is recorded to be the owner of half share, which is not correct- the suit was dismissed by the trial Court- an appeal was filed, which was also dismissed- held, in second appeal that defendant had admitted the sale of entire land to the plaintiffs but he subsequently clarified that he had sold only half share to the plaintiffs- it was never represented by defendant to the plaintiffs that defendant could sell half share of his sister- therefore, provisions of Section 43 of Transfer of Property Act are not available to the plaintiffs – appeal dismissed. (Para-9 to 11)

For the appellants: Mr. D.P. Chauhan, Advocate.
For the respondent: Mr. Janesh Gupta, 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 (Forest), Shimla, in Civil Appeal No. 65-S/13 of 2005, dated 02.09.2006, whereby the learned District Judge, Chamba, has up held the judgment and decree dated

14.09.2004, passed by learned Civil Judge (Junior Division) Theog, District Shimla, in Civil Suit No. 165-1 of 2001.

2. Brief facts giving rise to the present appeal are that the plaintiffs filed a suit for declaration against the respondent/defendant (hereinafter referred to as "the defendant") seeking declaration to the effect that the plaintiffs be declared owners-in-possession of the land comprised in Khasra No. 61, measuring 2 bighas and 12 biswas, situated in Chak Sarog, Tehsil Theog, District Shimla H.P. (hereinafter referred to as "the suit land"). The plaintiffs also prayed that the revenue entries depicting the defendant co-owner in possession to the extent of half share be declared wrong and illegal. The plaintiffs, as a consequential relief, also prayed for restraining the defendant and his family members from claiming any right in the suit land and also from interfering with the same in any manner. As per the plaintiffs, the defendants in the year 1974 represented that he wanted to sell the suit land and also professed that he has the authority to transfer whole of the land. The plaintiffs agreed to purchase the suit land. Pursuant to the representation, the defendant executed the sale deed in their favour qua the suit land on 12.02.1974, registered in the office of Sub Registrar on the same day, as Deed No. 22 for consideration of Rs.2000/-. At the time of sale deed, possession of the entire suit land was delivered to the plaintiffs and thereafter the suit land was developed by the plaintiffs by investing in it. It is further contended by the plaintiffs that their possession over the suit land is continuous on and w.e.f. February, 1974. The plaintiffs were surprised on receipt of summonses from the office of A.C. 1st Grade, Theog, that defendant has filed an application under Section 123 of the H.P. Land Revenue Act contending therein that he is co-owner to the extent of half share. On ascertaining, it was unearthed that on the basis of aforesaid sale deed the plaintiffs were recorded owners to the extent of half share and another half share was recorded in the name of Begmu, sister of the defendant and after her death the defendant is recorded owner to the extent of half share. The defendant alleged to have inherited the estate of deceased Begmu. As per the plaintiffs, the defendant, by his act and conduct, is estopped to allege any right qua the suit land and they are also protected under the provisions contained in Section 43 of the Transfer of Property Act.

3. The defendant, by filing the written statement, resisted the claim of the plaintiffs and took preliminary objections viz., limitation and cause of action. On merits it is contended that the defendant had only sold half share in the suit land, as the other half share was belonging to Smt. Begmu. The defendant had denied that he had made false representation to sell whole of the suit land and it has also been denied that he professed that he had authority to transfer the entire land. In the year 1978-79 said Begmu died and the defendant succeeded her half share, as such, become co-owner in joint possession to the extent of half share with the plaintiffs. The defendant has further denied that possession of the entire land was delivered in favour of the plaintiffs at the time of execution of the alleged sale deed. The defendant subsequently filed an application for partition as a matter of right. The plaintiffs are not entitled for the benefit as provided under Section 43 of the Transfer of property Act, as alleged. Lastly the defendant prayed for dismissal of the suit.

4. The learned Trial Court on 21.06.2002 framed the following issues for determination and adjudication:

> "1. Whether the plaintiffs are liable to be declared as owners in possession of the suit land, as alleged. If so, its effect/ OPP.
>
> 2. If issue No. 1 is proved in affirmative, whether the plaintiff is entitled to the relief of permanent prohibitory injunction, as prayed for? OPP.
>
> 3. Relief."

After deciding issue No. 1 partly in favour of the plaintiffs and issue No. 2 against the plaintiffs, the suit was dismissed. The learned Trial Court has held that title to the extent of only half share has been passed to the plaintiffs. Against the said findings, the appeal was filed, which was

dismissed by the learned Lower Appellate Court on 02.09.2006, hence the present regular second appeal, which was admitted for hearing on the following substantial question of law:

> "1. Whether the findings of the learned Appellate court below that the appellants are not entitled to be declared owners-in-possession of the suit land are contrary to the provisions of Section 43 of the Transfer of Property Act?
>
> 2. Whether the learned Courts below have ignored the material evidence and admissions of the defendant/respondent with regard to conveyance and handing over the possession of the entire land measuring 2 bighas and 12 biswas to the appellants consequent to sale deed, Ex. PC?
>
> 3. Whether the scope of Section 43 of the Transfer of Property Act is wholly inapplicable to the case of plaintiffs/appellants?"

5. Heard. The learned counsel for the appellant/plaintiffs has argued that the learned Courts below have failed to interpret the sale deed, Ex. PC, to its true perspective and also has not taken into consideration Section 43 of the Transfer of Property Act into consideration, as to whether half share has fallen to the share of the defendant, even this share also passes to the plaintiff when he has executed the sale deed qua the whole property. On the other hand, the learned counsel for the respondent/defendant has argued that only half share was sold by the defendant to the plaintiffs and there is no illegality in the judgments passed by the learned Courts below.

6. In order to appreciate the rival contentions of the parties, I have gone through the record in detail.

7. Sale deed, Ex. PC, stands duly proved on record. From the perusal of sale deed, Ex. PC, it is clear that the parties have read-over the contents thereof. From the close scrutiny of the entire evidence it is emanating that the defendant had even fraudulently or erroneously not represented that he had the authority to sell half share of Smt. Begmu to the plaintiffs. The possibility of delivering possession of the entire suit land to the plaintiffs cannot be ruled out, however, it is highly unimaginable that there was any act on the part of the defendant which gave an impression to the plaintiffs that defendant was authorized to sell the share of Smt. Begmu too. Thus, benefit of Section 43 of the Transfer of Property Act cannot be extended to the appellants/plaintiffs.

8. Shri Vijay Kumar (PW-1) has deposed that defendant had made a representation that he is authorized to sell the entire suit land to the plaintiffs, thus the plaintiffs purchased the suit land. This witness, in his cross-examination, has deposed that sister of the defendant, Smt. Begmu, had half share in the suit land and no authority had been given by Smt. Begmu to the defendant to sell her share. Shri Rama Nand (PW-2) has stated that the possession of the entire suit land is with the plaintiffs.

9. Defendant, Shri Anant Ram, while appearing in the witness-box has deposed that he had sold only half share of the suit land to the plaintiffs and possession of only that half share of the suit land was given to the plaintiffs. The defendant, in his cross-examination, while replying a suggestion, has admitted that the plaintiffs had sold 2.12 bighas, that is, entire suit land to the plaintiffs, but later on he has stated that he had sold only half share to the plaintiffs. On close scrutiny of cross-examination of the defendant, it is emanating that he admitted that he had sold the entire suit land to the plaintiffs, but later on he corrected himself.

10. From the above facts, it is clear that the findings, as recorded by the learned Courts below, suffers from no infirmity and the substantial question of law No. 1 is answered holding that the plaintiff is not entitled to any benefit under Section 43 of the Transfer of Property Act, as it was never represented by the defendant to the plaintiff that he can sell the other half share also, which belongs to his sister. Substantial question of law No. 2 is answered holding that sale deed, Ex. PC, shows that the defendant was owner of his half share, which he has sold,

therefore, the document has been properly appreciated by the learned Courts below. As has been held above, while answering substantial question of law No. 1, in the facts of the present case, as the defendant never represented fraudulently that he has the authority to sell the share of his sister, therefore, the provisions of Section 43 of the Transfer of property Act are not attracted. Substantial question of law No. 3 is answered accordingly.

11. The net result of the above discussion is that the judgments and decrees passed by the learned Courts below are just, reasoned and after appreciating the facts, which have come on record, so no interference of this Court is required for.

12. In view of the above, the appeal being devoid of merits deserves dismissal and is accordingly dismissed. However, with no orders as to costs. The 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 TARLOK SINGH CHAUHAN, J.

Smt. Bakhshish Kaur Sarkaria ...Appellant.

Versus

Smt. Murtoo Devi and others ...Respondents.

LPA No. 169 of 2014
Reserved on: 26.09.2016
Decided on: 4.10.2016

Constitution of India, 1950- Article 226- Petitioners filed a suit under Section 58(3)(e) of H.P. Tenancy and Land Reforms Act, 1972, which was decreed – an appeal was filed before the Collector along with an application for condonation of delay- the application was dismissed and the appeal was also dismissed as barred by limitation – a revision petition was filed, which was allowed and the order of Collector was set aside- petitioners filed a writ petition against the order- the writ petition was allowed and the case was remanded to the Financial Commissioner (Appeals)- an appeal was filed, which was disposed of with a direction to decide the revision petition within six months- Financial Commissioner (appeals) allowed the revision- Another writ petition was filed, which was allowed - held in appeal, the fact that appellant has contested all the proceedings shows that her plea that she was not aware of the ex-parte proceedings is genuine – delay of 215 days cannot be made a ground to throw out the appeal– delay cannot be a sole ground to dismiss the claim– sufficient cause in Section 5 of Limitation Act should be given liberal interpretation-rules of interpretation are not meant to destroy the rights of the party - the delay of 215 days was not on account of any dilatory tactics – revisional Court had rightly condoned the delay- order of Writ Court set aside. (Para-8 to 28)

Cases referred:

Brij Kishore S. Ghosh versus Jayantilal Maneklal Bhatt and another, AIR 1989 Gujarat 227

Ram Nath Sao alias Ram Nath Sahu and others versus Gobardhan Sao and others, AIR 2002 Supreme Court 1201

Balwant Singh (Dead) versus Jagdish Singh & Ors., AIR 2010 Supreme Court 3043

Maniben Devraj Sahu versus Municipal Corporation of Brihan Mumbai, 2012 AIR SCW 2412

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

For the appellant: Mr. Ajay Kumar, Senior Advocate, with Mr. Dheeraj K. Vashisht, Advocate.

For the respondents: Mr. Bhupender Gupta, Senior Advocate, with Mr. Janesh Gupta, Advocate, for respondents No. 1 to 8.

Mr. Romesh Verma & Mr. Varun Chandel, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondent No. 9.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

This Letters Patent Appeal is directed against judgment and order, dated 28th July, 2014, made by the learned Single Judge/Writ Court in CWP No. 1232 of 2009, titled as Smt. Murtoo Devi and others versus Financial Commissioner (Appeals) and another, whereby the writ petition filed by private respondents herein came to be allowed and order, dated 23rd July, 2008, made by the Financial Commissioner (Appeals), i.e. respondent No. 9, in revision petition filed by the appellant was set aside (for short "the impugned judgment").

2. The appellant and private respondents are in litigation right from 15th May, 1993, which was outcome of the entries made in the revenue record by the then revenue officials. The private respondents filed a suit in terms of the mandate of Section 58 (3) (e) of the H.P. Tenancy and Land Reforms Act, 1972 (for short "the Act") before the Assistant Collector 1st Grade-cum-Land Reforms Officer, Tehsil Kasauli, District Solan, H.P. (for short "Assistant Collector") against the appellant, which was decreed vide order, dated 3rd March, 1997 (Annexure P-1 annexed with the writ petition), constraining the appellant to file appeal (Annexure P-2 annexed with the writ petition) before the District Collector, Solan, alongwith an application for condonation of delay (Annexure P-3 annexed with the writ petition). The application for condonation of delay was dismissed and consequently, the appeal was dismissed as time barred vide order, dated 25th September, 2001 (Annexure P-5 annexed with the writ petition). Feeling aggrieved by the said order, the appellant filed revision petition before the Financial Commissioner (Appeals), which was allowed on 18th October, 2005 and the orders made by the Assistant Collector and the District Collector came to be set aside.

3. Being dissatisfied by the order made by the Financial Commissioner (Appeals), the private respondents invoked the jurisdiction of this Court by the medium of CWP No. 1222 of 2005, titled as Smt. Murtu Devi & others versus Smt. Bakshish Kaur, which was allowed vide order, dated 30th November, 2007 (Annexure P-6 annexed with the writ petition), order, dated 18th October, 2005, made by the Financial Commissioner (Appeals) came to be quashed and set aside, the Financial Commissioner (Appeals) was directed to decide the revision afresh in accordance with law and the parties were directed to appear before him on 12th December, 2007. It is apt to reproduce the operative portion of the judgment in CWP No. 1222 of 2005 herein:

> *"Consequently, in view of the observations made herein above, the writ petition is allowed. The order dated 18.10.2005 is quashed and set aside. The matter is remanded back to the Financial Commissioner (Appeals) to decide the revision afresh in accordance with law. To avoid delay, the parties are directed to appear before the Financial Commissioner (Appeals) on 12.12.2007."*

4. Appellant questioned the judgment made by the Writ Court in CWP No. 1222 of 2005 by the medium of LPA No. 4 of 2008, titled as Smt. Bakshish Kaur versus Smt. Murtu Devi and others, which came to be disposed of vide order, dated 4th April, 2008 (Annexure P-7 annexed with the writ petition) with a direction to the Financial Commissioner (Appeals) to decide the revision petition within a period of six months from the date of production of the certified copy of the said order before him.

5. Parties appeared before the Financial Commissioner (Appeals), who, after hearing the parties, allowed the revision petition, set aside the order of the District Collector and condoned the delay vide order, dated 23rd July, 2008 (Annexure P-8 annexed with the writ petition), with a direction to the Collector to decide the appeal on merits after giving opportunity to both sides. It is apt to reproduce operative portion of the said order herein:

"The ratio of the law laid down by the Hon'ble Apex Court as reproduced above is therefore applicable to this case and it would be in the interest of justice, equity and fairplay to condone the delay. I therefore allow the revision and condone the delay. The matter is remanded to the Collector to hear/decide the same on merits after giving opportunity to both sides."

6. The private respondents questioned the said order by the medium of CWP No. 1232 of 2009, which came to be allowed by the Writ Court and the order of the Financial Commissioner (Appeals) was set aside vide impugned judgment, which has given rise to the appeal in hand.

7. The moot question is – whether the impugned judgment is legally tenable? The answer is in the negative for the following reasons:

8. It pains to record herein that the parties are in the lis right from the year 1993, which is outcome of the entries made in the revenue record by the then revenue authorities. The private respondents approached the Assistant Collector for correction of entries in the revenue record, was treated as suit in terms of Section 58 (3) (e) of the Act. Appellant, namely Smt. Bakhshish Kaur Sarkaria, who was resident of Delhi, was contesting the said suit. During the pendency of the suit, ex-parte proceedings were drawn against her and an ex-parte decree was passed by the Assistant Collector vide order, dated 3rd March, 1997.

9. Appellant filed an appeal before the District Collector alongwith application for condonation of delay in terms of the mandate of Section 5 of the Limitation Act. The grounds urged by the appellant in the application were that she was residing at official residence in New Delhi, had to vacate the said residence prior to passing of the order by the Assistant Collector, was not aware about the ex-parte order because of the communication gap with her counsel and when she came to know about the same, an application for supply of certified copy of the order was filed, which was supplied to her. It was also averred in the application for condonation of delay that the delay was not intentional or willful, was outcome of the circumstances disclosed in para 1 of the application.

10. The appellant has rigorously and with all the weapons in her armoury contested the order made by the Assistant Collector before the District Collector, Financial Commissioner (Appeals), the Writ Court and the Division Bench of this Court. The parties were relegated to the Financial Commissioner (Appeals) by this Court and again order came to be passed by the Financial Commissioner (Appeals) in favour of the appellant. Thereafter, second round of litigation was drawn before this Court by the private respondents by the medium of CWP No. 1232 of 2009, was allowed by the Writ Court. Hence, the instant appeal.

11. The appellant has contested these proceedings also, is suggestive of the fact that the appellant has contested the lis before all the Courts bonafidely and with interest in order to protect her rights. Her conduct and interest assumes great importance. Thus, it cannot be said that the delay was intentional and willful.

12. Admittedly, the appellant, i.e. respondent in the main suit before the Assistant Collector, was contesting the case, issues were framed and the parties were directed to lead evidence, had failed to appear, was set ex-parte and the suit was decreed. 215 days' delay had crept-in in filing the appeal before the District Collector.

13. Such delay cannot be made a ground to throw the appeal out of the Court on mere technicalities in view of the fact that the appellant had rigorously and keenly contested the proceedings with effect from the year 1993 till today. She had tendered explanation as to what were the reasons for not filing the appeal within time. The Financial Commissioner had rightly taken in view the conduct of the appellant read with the fact that she was contesting the lis right from the year 1993 and condoned the delay.

14. The Writ Court has, in fact, taken away the right of appeal and revision available to the appellant on account of delay, which was rightly condoned by the revisional authority, i.e. the Financial Commissioner (Appeals), for the reasons to be recorded hereinafter.

15. It is the duty of every authority, i.e. the appellate authority, revisional authority, Writ Courts and the Appellate Courts, to see that the rights of the parties are finally determined. It is not the object of the legislation to take away the rights of the parties on account of delay. Delay cannot be made the only ground to dismiss the claim as time barred for the reason that the facts of each case are to be taken into consideration and weighed.

16. It should be the effort of all the Courts and authorities to advance substantial justice and decide matter(s) on merits. The decision on technicalities should be avoided unless it is carved out, rather established that the party is caught by inordinate delay, which has taken away its remedy to enforce its rights.

17. The High Court of Gujarat in the case titled as **Brij Kishore S. Ghosh versus Jayantilal Maneklal Bhatt and another,** reported in **AIR 1989 Gujarat 227,** has held that the words 'sufficient cause' used in Section 5 of the Limitation Act are to be interpreted liberally and the Courts/authorities have to determine as to whether the delay was deliberate. It is apt to reproduce para 6 of the judgment herein:

> *"6. After referring to the aforesaid decisions, the learned District Judge has observed :*
>
> *"When no negligence or inaction is imputable to the party, then sufficient cause has to be liberally construed." (Emphasis supplied)*
>
> *With utmost respect, the learned District Judge adopted literal approach and missed the central idea by which the Supreme Court had laid emphasis on substantial justice. As per the decision of the Supreme Court and this High Court, absence of negligence or inaction on the part of the party seeking to condone delay is not a precondition, for interpreting 'sufficient cause' in liberal manner. The underlying principle to be kept in mind is that the ultimate object of the procedural laws is to see that substantial justice is done to the parties. Hence it should be the endeavour of the court to see that the disputes are resolved as far as possible on merits in just, fair and reasonable manner. Victory or defeat on technical grounds should ordinarily be avoided and discouraged. That is the reason why the question to be asked should be-Is there deliberate delay ? Is it on account of culpable negligence or on account of mala fides ? Is it on account of any ulterior motive so that it can reasonably be pointed out that by resorting to delay the litigant was likely to be benefited ? To achieve the goal of substantial justice, the words 'sufficient cause' occurring in section 5 of the Limitation Act are required to be interpreted liberally.."*

18. The Apex Court in the case titled as **Ram Nath Sao alias Ram Nath Sahu and others versus Gobardhan Sao and others,** reported in **AIR 2002 Supreme Court 1201,** held that the Courts should adopt liberal approach while dealing with Section 5 of the Limitation Act or any other similar provision in order to advance substantial justice. It is apt to reproduce paras 7 to 11 of the judgment herein:

> *"7. The expression 'sufficient cause' within the meaning of Section 5 of the Limitation Act, 1963 (hereinafter referred to as 'the Act'), Order 22, Rule 9 of the Code of Civil Procedure (hereinafter referred to as 'the Code') as well as similar other provisions and the ambit of exercise of powers thereunder have been subject matter of consideration before this Court on numerous occasions. In the case of The State of West Bengal v. The Administrator, Howrah Municipality and others, (1972) 1 Supreme Court Cases 366, while considering scope of the expression 'sufficient cause' within the meaning of Section 5 of the Act, this Court laid down that the said*

expression should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party.

8. In the case of Sital Prasad Saxena (dead) by LRs v. Union of India and others, AIR 1985 Supreme Court 1, the Court was dealing with a case where in a second appeal, appellant died and application for substitution after condonation of delay and setting aside abatement filed after two years by the heirs and legal representatives was rejected on the ground that no sufficient cause was shown and the appeal was held to have abated. When the matter was brought to this Court, the appeal was allowed, delay in filing the petition for setting aside the abatement was condoned, abatement was set aside, prayer for substitution was granted and High Court was directed to dispose of the appeal on merits and while doing so, it was observed that once an appeal is pending in the High Court, the heirs are not expected to keep a constant watch on the continued existence of parties to the appeal before the High Court which has a seat far away from where parties in rural areas may be residing inasmuch as in a traditional rural family the father may not have informed his son about the litigation in which he was involved and was a party. It was further observed that Courts should recall that "What has been said umpteen times that rules of procedure are designed to advance justice and should be so interpreted and not to make them penal statutes for punishing erring parties." (Emphasis added).

9. In the case of Rama Ravalu Gavade v. Sataba Gavadu Gavade (dead) through LRs. and another, (1997) 1 SCC 261, during the pendency of the appeal, one of the parties died. In that case, the High Court had refused to condone the delay in making an application for setting aside abatement and set aside abatement, but this Court condoned the delay, set aside abatement and directed the appellate Court to dispose of appeal on merit observing that the High Court was not right in refusing to condone the delay as necessary steps could not be taken within the time prescribed on account of the fact that the appellant was an illiterate farmer.

10. In the case of N. Bala-krishnan v. M. Krishnamurthy, (1998) 7 Supreme Court Cases 123, there was a delay of 883 days in filing application for setting aside ex parte decree for which application for condonation of delay was filed. The trial Court having found that sufficient cause was made out for condonation of delay, condoned the delay but when the matter was taken to the High Court of Judicature at Madras in a revision application under Section 115 of the Code, it was observed that the delay of 883 days in filing the application was not properly explained and it was held that the trial Court was not justified in condoning the delay resulting into reversal of its order whereupon this Court was successfully moved which was of the view that the High Court was not justified in interfering with order passed by trial Court whereby delay in filing the application for setting aside ex parte decree was condoned and accordingly order of the High Court was set aside. K. T. Thomas, J. speaking for the Court succinctly laid down the law observing thus in paras 8, 9 and 10 :

> *"8. The appellant's conduct does not on the whole warrant to castigate him as an irresponsible litigant. What he did in defending the suit was not very much far from what a litigant would broadly do. Of course, it may be said that he should have been more vigilant by visiting his advocate at short intervals to check up the progress of the litigation. But during these days when everybody is fully occupied with his own avocation of life an omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his responsibilities, and to visit him with drastic consequences.*
>
> *9. It is axiomatic that condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion*

can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the Court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior Court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first Court refuses to condone the delay. In such cases, the superior Court would be free to consider the cause shown for the delay afresh and it is open to such superior Court to come to its own finding even untrammeled by the conclusion of the lower Court.

10. .....

The primary function of a Court is to adjudicate the dispute between the parties and to advance substantial justice. The time limit fixed for approaching the Court in different situations is not because on the expiry of such time a bad cause would transform into a good cause."

(Emphasis added)

The Court further observed in paragraphs 11, 12 and 13 which run thus :-

"11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the Courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12. A Court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the Court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide Shakuntala Devi Jain v. Kuntal Kumari, (1969) 1 SCR 1006 and State of W. B. v. Administrator, Howrah Municipality, (1972) 1 SCC 366.

13. It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the Court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the Court should lean against

acceptance of the explanation. While condoning the delay, the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses." (Emphasis added)

11. Thus it becomes plain that the expression "sufficient cause" within the meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will be dependant upon facts of each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the Courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal an exception more so when no negligence or inaction or want of bona fide can be imputed to the defaulting party. On the other hand, while considering the matter the Courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine like manner. However, by taking a pedantic and hyper technical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, Courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way." (Emphasis added)

19. In the case titled as **Balwant Singh (Dead) versus Jagdish Singh & Ors.,** reported in **AIR 2010 Supreme Court 3043,** held as under:

"15. We feel that it would be useful to make a reference to the judgment of this Court in Perumon Bhagvathy Devaswom (AIR 2009 SC (Supp) 886 : 2008 AIR SCW 6025) (supra). In this case, the Court, after discussing a number of judgments of this Court as well as that of the High Courts, enunciated the principles which need to be kept in mind while dealing with applications filed under the provisions of Order 22, CPC along with an application under Section 5, Limitation Act for condonation of delay in filing the application for bringing the legal representatives on record. In paragraph 13 of the judgment, the Court held as under:-

"13 (i) The words "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words 'sufficient cause' in Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant."

(ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decided the matter on merits. The courts tend to set aside

abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.

(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in re-filing the appeal after rectification of defects.

(v) Want of "diligence" or "inaction" can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal.

We may also notice here that this judgment had been followed with approval by an equi-bench of this Court in the case of Katari Suryanarayana (AIR 2009 SC 2907 : 2009 AIR SCW 4640) (supra).

16. Above are the principles which should control the exercise of judicial discretion vested in the Court under these provisions. The explained delay should be clearly understood in contradistinction to inordinate unexplained delay. Delay is just one of the ingredients which has to be considered by the Court. In addition to this, the Court must also take into account the conduct of the parties, bona fide reasons for condonation of delay and whether such delay could easily be avoided by the applicant acting with normal care and caution. The statutory provisions mandate that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing the legal representatives on record, should be rejected unless sufficient cause is shown for condonation of delay. The larger benches as well as equi-benches of this Court have consistently followed these principles and have either allowed or declined to condone the delay in filing such applications. Thus, it is the requirement of law that these applications cannot be allowed as a matter of right and even in a routine manner. An applicant must essentially satisfy the above stated ingredients; then alone the Court would be inclined to condone the delay in the filing of such applications." *(Emphasis added)*

20. The Apex Court in another case titled as **Maniben Devraj Sahu versus Municipal Corporation of Brihan Mumbai,** reported in **2012 AIR SCW 2412,** has held that the expression 'sufficient cause' used in Section 5 of the Limitation Act is elastic enough to enable the Courts to apply the law in a meaningful manner which serves the ends of justice. It is apt to reproduce paras 12 to 14 of the judgment herein:

"12. We have considered the respective arguments/submissions and carefully scrutinized the record. The law of limitation is founded on public policy. The Limitation Act, 1963 has not been enacted with the object of destroying the rights of the parties but to ensure that they approach the Court for vindication of their

rights without unreasonable delay. The idea underlying the concept of limitation is that every remedy should remain alive only till the expiry of the period fixed by the Legislature. At the same time, the Courts are empowered to condone the delay provided that sufficient cause is shown by the applicant for not availing the remedy within the prescribed period of limitation. The expression 'sufficient cause' used in Section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable the Courts to apply the law in a meaningful manner which serve the ends of justice. No hard and fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years this Court has advocated that a liberal approach should be adopted in such matters so that substantive rights of the parties are not defeated merely because of delay.

13. In Ramlal v. Rewa Coalfields Ltd, AIR 1962 SC 361, this Court while interpreting Section 5 of the Limitation Act, laid down the following proposition:

> *"In construing Section 5 (of the Limitation Act), it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired, the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be light-heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown, discretion is given to the court to condone delay and admit the appeal. This discretion has been deliberately conferred on the court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice."*

14. In Collector, Land Acquisition, Anantnag v. Mst. Katiji, (AIR 1987 SC 1353) (supra) this Court made a significant departure from the earlier judgments and observed:

> *"The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on "merits". The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice - that being the lifepurpose for the existence of the institution of courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:*
>
> *1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.*
>
> *2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.*
>
> *3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.*

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the "State" which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a step-motherly treatment when the "State" is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file-pushing and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant-non-grata status. The courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do evenhanded justice on merits in preference to the approach which scuttles a decision on merits."

21. In the case titled as **Brijesh Kumar and others versus State of Haryana and others,** reported in **2014 AIR SCW 1831,** held that the Rules of Limitation are not meant to destroy the rights of the parties and the Courts should not adopt an injustice-oriented approach in rejecting the application for condonation of delay and while allowing such applications, have to draw a distinction between delay and inordinate delay for want of bona fides of an inaction or negligence. Further held that the conduct of the parties is also to be taken into consideration. It is apt to reproduce paras 7 to 11 of the judgment herein:

"7. The issues of limitation, delay and laches as well as condonation of such delay are being examined and explained every day by the Courts.

The law of limitation is enshrined in the legal maxim "Interest Reipublicae Ut Sit Finis Litium" (it is for the general welfare that a period be put to litigation). Rules of Limitation are not meant to destroy the rights of the parties, rather the idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

8. The Privy Council in General Fire and Life Assurance Corporation Ltd. v. Janmahomed Abdul Rahim, AIR 1941 PC 6, relied upon the writings of Mr. Mitra in Tagore Law Lectures 1932 wherein it has been said that "a law of limitation and prescription may appear to operate harshly and unjustly in a particular case, but if the law provides for a limitation, it is to be enforced even at the risk of hardship to a particular party as the Judge cannot, on applicable grounds, enlarge the time

allowed by the law, postpone its operation, or introduce exceptions not recognised by law."

9. .....

10. While considering a similar issue, this court in Esha Bhattacharjee v. Raghunathpur Nafar Academy & Ors., (2013) 12 SCC 649 : (AIR 2014 SC (Civ) 67) laid down various principles inter alia:

> *" x x x*
>
> *v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact*
>
> *vi) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play*
>
> *x x x*
>
> *ix) The conduct, behavior and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.*
>
> *x x x*
>
> *xvii) The increasing tendency to perceive delay as a non-serious mater and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters."*
>
> *(See also: Basawaraj v. Land Acquisition Officer, 2013 14 SCC 81)*

11. The courts should not adopt an injustice-oriented approach in rejecting the application for condonation of delay. However the court while allowing such application has to draw a distinction between delay and inordinate delay for want of bona fides of an inaction or negligence would deprive a party of the protection of Section 5 of the Limitation Act, 1963. Sufficient cause is a condition precedent for exercise of discretion by the Court for condoning the delay. This Court has time and again held that when mandatory provision is not complied with and that delay is not properly, satisfactorily and convincingly explained, the court cannot condone the delay on sympathetic grounds alone." (Emphasis added)

22. Keeping in view the discussion made hereinabove, the facts of the case and the tests laid down by the Apex Court, it can safely be held that the delay of 215 days, which had crept-in in filing the appeal before the District Collector, was not on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant for the reason that the appellant, who is an old lady and had to vacate the official residence during the pendency of the suit before the Assistant Collector, is rigorously contesting the case for the last about 23 years.

23. It appears that the revisional Court, i.e. the Financial Commissioner (Appeals) with the judicious approach condoned the delay, but, unfortunately, the Writ Court has fallen in an error in setting aside the order made by the Financial Commissioner, granting the writ petition and has lost sight of the facts of the case and conduct of the parties, as discussed hereinabove.

24. The impugned judgment, on the face of it, is not in accordance with the law, rather, is aimed at to deprive the appellant-an old lady from a remedy, which is her right, that too, before the revenue authorities, in terms of the mandate of the Act, where it was to be decided whether the private respondents, i.e. the applicants before the Assistant Collector, were non-occupancy tenants or not, which has, directly or indirectly, affected the rights of the appellant.

25. Viewed thus, the Financial Commissioner (Appeals), after hearing the parties, has rightly set aside the order made by the appellate authority, i.e. District Collector rejecting the limitation petition and directed it to decide the appeal on merits.

26. Having said so, the impugned judgment merits to be set aside. Accordingly, the impugned judgment is set aside, the appeal is allowed and the writ petition is dismissed with a command to the appellate authority, i.e. the District Collector, to decide the appeal within one month with effect from 1st November, 2016, after hearing the parties.

27. It is made clear that any observation(s) made by this Court shall not influence the appellate authority in any way while determining the appeal and shall not cause any prejudice to the right of the parties.

28. Parties are directed to appear before the appellate authority, i.e. the District Collector, on 1st November, 2016.

29. Pending applications, if any, are also 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.

Bhupinder Singh .....Petitioner.

Versus

Sports Authority of India .....Respondent.

CWP No.4318 of 2011
Reserved on: 27.09.2016
Pronounced on: 4.10.2016

Constitution of India, 1950- Article 226- Petitioner and one G were appointed as Hockey Coaches – G was shown junior to the petitioner in the seniority list – petitioner and G were promoted to Grade-I, however, the pay of G was fixed more than the pay of petitioner- the petitioner filed a representation, which was rejected and original application was filed before the Tribunal, which was dismissed- held, that the petitioner had not exercised the option to have additional increment in accordance with the recommendation of 4th pay commission, whereas, such option was exercised by G- the petitioner was drawing less pay than his junior even on 1.7.1982, prior to promotion - representation and application were rightly rejected – writ petition dismissed. (Para-5 to 11)

Case referred:
Union of India and another vs. R. Swaminathan and others, (1997) 7 SCC 690

For the Petitioner: Mr.R.P. Singh, Advocate.
For the Respondent: Mr.Ashok Sharma, Assistant Solicitor General of India, with Mr.Nipun Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

Subject matter of this writ petition is the order, dated 28th January, 2011, passed by the Central Administrative Tribunal, Chandigarh Bench, (for short, Tribunal), in Original Application No.766-HP-2009, titled Bhupinder Singh vs. Sports Authority of India, whereby the Original Application was dismissed, (for short, the impugned order).

2. Petitioner and one G.B. Dangwal were appointed as Hockey Coach in the respondent-Authority. According to the petitioner, said G.B. Dangwal was junior to him. The petitioner has placed on record the seniority list, dated 30th November, 1999, issued by the respondent-Authority, (Annexure P-2 with the writ petition), which does disclose that the writ petitioner was figuring at Sl.No.84 and said G.B. Dangwal was at Sl.No.90.

3. It has been pleaded by the petitioner that he and G.B. Dangwal came to be promoted to Grade-I post on 28th February, 1992. On promotion, pay of the petitioner was fixed at Rs.3,100/-, whereas the pay of G.B. Dangwal was fixed at Rs.3,200/-. After noticing the said facts, it appears that the petitioner approached the Tribunal by the medium of Original Application No.571/HP/2008, came to be disposed of vide order dated 23rd October, 2008, with a direction to the respondent to examine and decide the representation of the petitioner.

4. Upon directions having been passed by the Tribunal in the aforesaid Original Application, the concerned Authority examined the representation of the petitioner and rejected the same by a speaking order, dated 7th August, 2009, (Annexure P-11), containing details how the petitioner was not entitled to the said relief, constraining the petitioner to question the same by the medium of Original Application No.766-HP-2009, which came to be dismissed vide the order impugned in the instant writ petition.

5. The question involved in the writ petition is – Whether consideration order Annexure P-11 and the impugned order Annexure P-12 are legally correct. Answer is in the affirmative for the following reasons.

6. Petitioner has pleaded in paragraph 3 of the writ petition that he was promoted to Grade II post in the pay scale of Rs.2200-75-4000 w.e.f. 1st January, 1986. It has further been pleaded by the petitioner that as per the recommendations of 4th Pay Commission, an option was to be exercised within 30 days in order to have additional increment, which he did not exercise, though the petitioner has pleaded that no communication in this regard was ever addressed to him by the respondent-Authority. On the other hand, his junior G.B. Dangwal exercised such option and got additional increment, while fixing his pay in the revised pay scale of Rs.2200-4000/-. Thereafter, on 28th February, 1992, petitioner and his junior G.B. Dangwal came to be promoted to Grade-I post in the pay scale of Rs.3,000-100-4500 and pay of the petitioner was fixed at Rs.3100/- on the basis of last pay drawn at the time of promotion, while the pay of his junior G.B. Dangwal was fixed at Rs.3200/-.

7. Thus, the claim of the petitioner is that a person junior to him cannot be allowed to draw pay higher than the petitioner and that his pay has to be stepped up accordingly in terms of FR 22(I)(a)(1).

8. Respondent, while passing the order Annexure P-11, has given details how the petitioner was not entitled to stepping up. It is also admitted case of the petitioner that additional increment was not granted to him as he had not exercised any option, as required, and his junior G.B. Dangwal exercised the said option, as discussed hereinabove. The petitioner did not raise any finger till 1992. The Tribunal has discussed all these facts in paragraphs 6 and 7 of the impugned order and rightly held that the case of the petitioner does not fall within the ambit of FR 22(1)(a)(1). The petitioner is caught by the doctrine of delay, waiver and acquiescence. Thus, no case for stepping up of pay is made out.

9. The Tribunal also observed in the impugned order that the writ petitioner was drawing less pay than his junior as on 1st July, 1982. It is apt to reproduce paragraphs 6 and 9 of the impugned order hereunder:

> *"6. The case of the respondents is that an anomaly had arisen consequent upon the implementation of recommendation of IVth Pay Commission. At that time, Sh. G.B. Dengwal exercised option to fix his pay in the revised pay scale from the due date of his increment in the pre-revised scale. Accordingly, his pay in the revised pay scale of Rs.2200-4000 was fixed at Rs.2650/- as on 1.7.1987 and applicant was drawing*

Rs.2575/- as on 1.7.1987. Resultantly, the pay of Sh.G.B. Dengwal was Rs.3000 and that of applicant was Rs.2900 as on 28.2.1992 (the date of promotion to Grade I) in the lower pay scale of Rs.2200-4000. Accordingly, his pay was fixed at Rs.3200/- and that of applicant was fixed at Rs.3100/- on 28.2.1992 in the higher pay scale of Rs.3000-4500.

9. To remove the confusion in the matter, we had called for the service record of the applicant as well as his junior. It is apparent that Shri G.B. Dangwal Hockey Coach was appointed in the pay scale of Rs.700-40-1100 and he was drawing pay of Rs.820/- as on 1.7.1982 whereas applicant was promoted to Grade II in the pay scale of Rs.700-40-1100 on 9.7.1982 and his pay was fixed at the minimum of Rs.700/-. Thus, in July, 1982, the applicant was drawing less pay than his junior. Obviously, if his junior was drawing pay at a higher stage in 1982, it will have consequential effect on fixation of pay on 1.7.1987 also when pay of junior was fixed at higher stage."

10. The Tribunal has rightly applied the ratio of the judgment of the Apex Court in **Union of India and another vs. R. Swaminathan and others, (1997) 7 SCC 690,** wherein the Apex Court has dilated upon FR 22(I)(a)(1) and held in paragraph 10 as under:

"10 According to the aggrieved employees, this has resulted in an anomaly. Government Order bearing No. F. 2(78)-E.III(A)/66 dated 4th of February, 1966, has been issued for removal of anomaly by stepping up of pay of a senior on promotion drawing less pay than this junior. It provides as follows :

> *"10 Removal of anomaly by stepping up of pay of Senior on promotion drawing less pay than his junior.- (a) As a result of application of F.R. 22-C.- In order to remove the anomaly of a Government servant promoted or appointed to a higher post on or after 1-4-1961 drawing a lower rate of pay in that post than another Government servant junior to him in the lower grade and promoted or appointed subsequently to another identical post, it has been decided that in such cases the pay of the senior officer in the higher post should be stepped up to a figure equal to the pay as fixed for the junior officer in that higher post. The stepping up should be done with effect from the date of promotion or appointment of the junior officer and will be subject to the following conditions, namely:-*
>
> > *(a) Both the junior and senior officers should belong to the same cadre and the posts in which they have been promoted or appointed should be identical and in the same cadre;*
> >
> > *(b) The scale of pay of the lower and higher posts in which they are entitled to draw pay should be identical;*
> >
> > *(c) the anomaly should be directly as a result of the application of F.R. 22-C. For example if even in the lower post the junior officer draws from time to time a higher rate of pay than the senior by virtue of grant of advance increments the above provisions will not be invoked to step up the pay of the senior Officer.*
>
> *The orders refixing the pay of the senior officers in accordance with the above provisions shall be issued under F.R. 27. The next increment of the senior officer will be drawn on completion of the requisite qualifying service with effect from the date of refixation of pay."*

As the order itself states, the stepping up is subject to three conditions : (1) Both the junior and the senior officers should belong to the same cadre and the posts in which they have been promoted should be identical and in the same cadre; (2) the scales of pay of the lower and higher posts should be identical and; (3) anomaly should be directly as a result of the application of fundamental Rule 22-C which is now Fundamental Rule 22(I)(a)(1). We are concerned with the last condition. The difference in the pay of a junior and a senior in the cases before us is not a result of the application of Fundamental Rule 22(I)(a)(1). The higher pay received by a junior is on account of his earlier officiation in the higher post because of

local officiating promotions which he got in the past. Because of the proviso to Rule 22 he may have earned increments in the higher pay scale of the post to which he is promoted on account of his past service and also his previous pay in the promotional post has been taken into account in fixing his pay on promotion. It is these two factors which have increased the pay of the juniors. This cannot be considered as an anomaly requiring the stepping of the pay of the seniors."

11. Applying the tests to the instant case, the respondent-Authority has passed a well reasoned consideration order Annexure P-11 and the impugned order made by the Tribunal is also reasoned, factually and legally correct.

12. Having said so, no interference is required in the impugned order, the same is upheld and the writ petition is dismissed, alongwith pending CMPs, if any.

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

Muskan Dhiman & another. .....Petitioners.

Versus

Kapil Dhiman. .....Respondent.

Cr.MMO No. 310 of 2015
Reserved on: 28.09.2016
Decided on: 04.10.2016

Code of Criminal Procedure, 1973- Section 125- Petitioners along with their mother were compelled to leave their house – petitioner No. 2 was sent to Kota for coaching and was subsequently selected in J.P. University, Vakanaghat – mother of petitioner No. 1 spent Rs. 20,000/- per month on the education of petitioner No. 1- respondent No. 1 did not provide any money- hence, the application was filed for seeking maintenance – the application was allowed and maintenance @ Rs. 8,000/- per month was awarded to petitioner No. 1 – maintenance was also awarded to the petitioner no. 2 at the rate of Rs. 11,500/- a revision was preferred and the Court set aside the order granting maintenance to petitioner No. 2 and upheld the order granting maintenance to the petitioner No. 1- held, that petitioner No. 2 has attained the age of 18 years and is unmarried – petitioner No. 2 is entitled to maintenance under Hindu Adoption and Maintenance Act, 1956- therefore, respondent No. 1 ordered to pay the amount of Rs. 30,000/- towards litigation expenses to maintain a petition under Hindu Adoption and Maintenance Act- the maintenance awarded by the Magistrate ordered to be continued till a period of three months or till the payment of the litigation expenses whichever is later (Para-8 to 16)

Cases referred:

Mansi Vohra vs. Ramesh Vohra, 2013(3) Criminal Court Cases 556 (Delhi)
Amarendra Kumar Paul vs. Maya Paul & others, 2009(3) RCR (Criminal)
Jagdish Jugtawat vs. Manju Lata & others, 2003(2) Criminal Court Cases 565 (S.C.)
Pathumma vs. Cholamarakkar, 2009(1) Civil Court Cases 453 (Kerala) (DB)
Teejan Bai Chandrakar vs. Rajeshwari Chandrakar, 2009(1) Civil Court Cases 253 (Chhattisgarh)

For the petitioners: Mr. Sudhir Thakur, Advocate.
For the respondent: Mr. Abhishek Kaushik, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioners under Section 482 Criminal Procedure Code (hereinafter referred to as 'the Code') laying challenge to the order, dated

18.08.2015, passed by learned Additional Sessions Judge-I, Solan, H.P. in Criminal Revision No. 3-S-10 of 2013, whereby maintenance was declined to petitioner No. 2, Akansha Dhiman and the order dated 19.12.2012, in Criminal Case No. 53/4 of 2009, passed by the learned Chief Judicial Magistrate, Solan, H.P., was partly modified. The petitioners are also seeking enhancement of the maintenance amount by altering the order passed by the learned Chief Judicial Magistrate, Solan

2. Briefly stating the facts giving rise to the present petition are that, as per the petitioners (daughters of the respondent), the respondent herein and their mother are the husband and wife. The petitioners maintained a petition under Section 125 Cr.P.C. before the learned Chief Judicial Magistrate, Solan, seeking maintenance from the respondent, on account of barbarous behaviour towards the petitioners and their mother, being meted out by the respondent. The petitioners, alongwith their mother, were compelled to leave the house of the respondent. Petitioner No. 2 was sent for coaching at Kota (Rajasthan) and subsequently she was selected for Engineering course at J.P. University, Vaknaghat, and for that her mother spent Rs.2.5 lac annually. When petitioner No. 1 was studying in 10th standard in Saint Luke's School, Solan, all expenses, viz., fee, day to day expenses, tuition fee, expenditure etc. were around Rs.20,000/- per month and the expenses were likely to increase as petitioner No. 1 was likely to pursue higher studies. As per the petitioner, the respondent did not pay a single penny to them since they were ousted and respondent is posted as Assistant Drug Licensing Authority at Solan and is getting salary to the tune of Rs.70,000/- per month.

3. The respondent, by filing reply to the petition, refuted the allegations made in the petition and raised preliminary objection qua maintainability of the petition, as petitioner No. 2 attained the age of majority, hence she is not entitled for maintenance. On merits, it is denied that the behaviour of the respondent was not barbarous towards the mother of the petitioner and it is also denied that he is earning Rs.70,000/- per month. However, it is averred that his salary is Rs.42,428/- per month. The respondent had admitted that petitioner No. 2 is studying in J.P. University, but, as she has attained majority, she is not entitled for maintenance. As per the respondent, earlier he was paying the fee of petitioner No. 2. The respondent has denied that petitioners require maintenance @ Rs.20,000/- per month and it is averred that expenditure of petitioner No. 1 is not more than Rs.4,000/- per month. The respondent prayed for dismissal of the petition.

4. The learned Trial Court framed the following points on 03.11.2012 for determination

"1. Whether the respondent has neglected and refused to maintain the petitioners, as alleged? OPP.
2. Whether the petitioners are unable to maintain themselves, as alleged? OPP.
3. Whether the petitioners are entitled for maintenance, as prayed for? OPP.
4. Whether the petition of the petitioners is not maintainable in the present form? OPR.
5. Whether petitioner No. 2, being major, is not entitled for maintenance, as alleged? OPR.
6. Relief."

After deciding points No. 1 to 3 in favour of the petitioner and points No. 4 and 5 against the respondent, the petition was partly allowed and the respondent was directed to pay maintenance @ Rs.8000/- per month to petitioner No. 1 and Rs.11,500/- per month to petitioner No. 2, totaling Rs.17,500/- per month from the date of filing of the petition, that is 22.09.2012. The respondent assailed the above order of the Trial Court. The learned Lower Revisionary Court partly allowed the revision and set aside the order of the learned Trial Court granting maintenance to petitioner No. 2, whereas order granting maintenance to minor petitioner No. 1 was confirmed, hence the present petition.

5. I have heard the learned counsel for the parties.

6. The learned counsel for the petitioners has argued that the learned Revisionary Court has awarded the maintenance amount without taking into consideration the fact that petitioner No. 2, Akansha Dhiman, has attained majority. On the other hand, learned counsel for the respondent has argued that as the petitioners are not yet married and are dependant upon the respondent, the remedy for the petitioners seeking maintenance is available under The Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as "the Act") and the respondent is not liable to pay maintenance under Section 125 Cr.P.C. Therefore, the order passed by the learned Revisionary Court is just, reasoned and needs no interference. The leaned counsel for the petitioners, in rebuttal, has argued that the liability of the respondent does not end merely because petitioner No. 1 attained the age of 18 years.

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

8. Admittedly, petitioner No. 2, Akansha Dhiman, has attained the age of 18 years and she is unmarried. It has also come on record that respondent, Kapil Dhiman, is earning handsomely and enjoying good status in the society, being Senior Class-1 Officer, in the State of Himachal Pradesh. It has further come on record that petitioner No. 2, Akansha Dhiman, since the very beginning has studied from good institutions and she has good life style, like her parents. Now, in these circumstances, the question is whether order passed by the learned Revisionary Court, by setting aside the order of the learned Magistrate granting maintenance under Section 125 of the Code to the daughter of the petitioner (Akansha Dhiman), is required to be interfered with and the order of the leaned Magistrate is required to be restored? On the above aspect, I have gone through the law in detail.

9. The Hon'ble Delhi High Court in ***Mansi Vohra vs. Ramesh Vohra, 2013(3) Criminal Court Cases 556 (Delhi),*** has held as under:

> *"6. This Court is also of the opinion that even in Jagdish Jugtawat (supra), the Supreme Court has held that maintenance petition filed by the major daughter even if she does not fall in one of the exceptions mentioned in Section 125(1)(c) Cr. P.C., would be still maintainable on a combined reading of both Sections 125 Cr.P.C. and Section 20(3) of Hindu Adoptions and Maintenance Act, 1956.*
>
> *7. Moreover, to ask the petitioner to now file an independent petition before the Family Court under Section 20(3) of Hindu Adoptions and Maintenance Act, 1956 would not only cause her inconvenience but would also defeat her right to claim maintenance for the period Section 125 Cr.P.C. proceeding was pending before the Metropolitan Magistrate. Such an interpretation would, in certain cases where both Sections clearly overlap, create multiplicity of litigation.*
>
> 8. *In any event, it has been held in a catena of cases that nomenclature of a petition is irrelevant so long as a party is entitled to relief under any other section. Consequently, this Court is of the view that the impugned order passed by the ASJ is untenable in law. Accordingly, the same is set aside."*

10. The Hon'ble Supreme Court in ***Amarendra Kumar Paul vs. Maya Paul & others,*** 2009(3) RCR (Criminal, has held as under:

> *"18. It is clear from the order of the learned Magistrate that no order of maintenance was passed in favour of the children after they attained majority. In that view of the matter, the question of recovery of any amount from the petitioners towards the maintenance granted to the children after they had attained majority does not arise. In this case the direction has been issued to recover the amount of maintenance only for the period prior to the sons' attaining majority and the daughters getting married and hence no interference with the impugned judgment, in this behalf, is called for."*

11. The Hon'ble Supreme Court in another case titled ***Jagdish Jugtawat vs. Manju Lata & others, 2003(2) Criminal Court Cases 565 (S.C.),*** has held as under:

> *""Thus, in view of the above, though it cannot be said that the order impugned runs counter to the law laid down by the Hon'ble Supreme Court, the provisions of Section 125 Cr.P.C. are applicable irrespective of the personal law and it does not make any distinction whether the daughter claiming maintenance is a Hindu or a Muslim. However, taking an over all view of the matter, I, with all respect to the Hon'ble Court, am cease to have the benefit of the provisions under Section 125 Cr.P.C. on attaining majority, though she would be entitled to claim the benefits further under the statute/personal law. But the Court is not inclined to interfere, as the order does not result in miscarriage of justice, rather interfering with the order would create great inconvenience to Respondent 3 as she would be forced to file another petition under sub-section (3) of Section 20 of the act of 1956 for further maintenance etc. Thus, in order to avoid multiplicity of litigations, the order impugned does not warrant interference."*
>
> *… … … … … … …*
>
> *4. Applying the principle to the facts and circumstances of the case in hand, it is manifest that the right of a minor girl for maintenance from parents after attaining majority till her marriage is recognized in Section 20(3) of the Hindu Adoptions and Maintenance Act. Therefore, no exception can be taken to the judgment/order passed by the learned Single Judge for maintaining the order passed by the Family Court which is based on a combined reading of Section 125, Cr.P.C. and Section 20(3) of the Hindu Adoptions and Maintenance Act. For the reasons aforestated we are of the view that on facts and in the circumstances of the case no interference with the impugned judgment order of the high Court is called for."*

12. The Hon'ble High Court of Kerala in ***Pathumma vs. Cholamarakkar, 2009(1) Civil Court Cases 453 (Kerala) (DB),*** has held as under:

> *"11. The next question to be analyzed, in the facts as pleaded in the claim for maintenance, is whether the second petitioner is entitled to claim maintenance. As we have already stated above, unless it is established that the inability to maintain herself is on account of the physical or mental abnormality or injury, she will not be entitled to claim maintenance. From the pleadings, we find that more stress is given to the mental injury leading to the situation of the child remaining unmarried, on account of the dispute on paternity. That is not the requirement. Unless it is pleaded and established before the court that on account of such mental injury, the child is unable to maintain itself, she cannot maintain a valid claim before the court for maintenance. Since the Family Court has not addressed the issues in the proper perspective, we set aside the order in M.C. No.413/2002 and remit the matter to the Family Court for fresh consideration, in accordance with law. We make it clear that it will be open to the parties to amend the pleadings and adduce fresh evidence."*

13. The Hon'ble High Court of Chhattisgarh in ***Smt. Teejan Bai Chandrakar vs. Rajeshwari Chandrakar, 2009(1) Civil Court Cases 253 (Chhattisgarh),*** has held as under:

> *"11. Proceeding under Section 125 of the Code is summary and provisional in nature for the purpose of speedy disposal of such matter in the interest of society. The object is not to punish a person for neglect to maintain those whom he is bound to maintain. The section provides only a speedy remedy by a summary procedure to enforce liability in order to avoid vagrancy. Its primacy object is to give social justice to women and children and to prevent them from destitution and vagrancy by compelling those who can support those who are unable to support themselves. These provisions provide a speedy remedy to those who are in distress."*

14. From the above, it is amply clear that:

(a) that petitioner No. 2, Akansha Dhiman, was entitled for maintenance from her father under Section 125 Cr.P.C., till she attained the majority, as she was unable to maintain herself, being a student;

(b) that petitioner No. 2, Akansha Dhiman, is entitled for maintenance under section 125 Cr.P.C. till she attained majority, which she has now attained;

(d) that petitioner No. 2, Akansha Dhiman, is unable to maintain herself;

(e) that the respondent is having a very good income and he is also having two daughters, that is, the petitioners, as his children; and

(f) that the mother of the petitioners is maintaining herself, as she is also working as Class-1 Officer.

15. Now the question arises whether in these circumstances when petitioner No. 2, Akansha Dhiman, has attained majority, the liability of the respondent comes to an end or not. Learned counsel for the respondent has argued that the petitioners have right of maintenance under The Hindu Adoptions and Maintenance Act, 1956, and the same can be enforced by the competent Court and Magistrate has no powers to grant maintenance under the said Act. From the above, it is correct that order of the learned Revisionary Court holding the Magistrate was not having power to grant maintenance when petitioner No. 2, Akansha Dhiman, attained the age of majority, is as per the intent of the Legislature. But the intent of the Legislature, while framing The Hindu Adoptions and Maintenance Act, 1956, is also that the daughter above the age of 18 eyars, who is unable to maintain herself, is to be maintained by the father, if he has sufficient means.

16. In the case in hand, the father of the petitioners has sufficient means to maintain the petitioners. Now relegating to petitioner No. 2, Akansha Dhiman, if she is to be ordered to go to the competent Court under The Hindu Adoptions and Maintenance Act, 1956, this Court has to consider whether she will be in a position to maintain that petition, as she is unable to maintain herself. Therefore, this Court finds that the interests of justice would be met in case the respondent is directed to pay an amount of Rs.30,000/- (rupees thirty thousand) to petitioner No. 2, Akansha Dhiman, towards the litigation expenses to maintain a petition before a competent Court of law under Section 20 of the Hindu Adoptions and Maintenance Act, 1956, by way of a cross bank draft, issued in her name within a period of one month from the date of disposal of the present petition. The respondent is further held liable to pay maintenance, as awarded by the learned Magistrate to petitioner No. 2, till three months from today or till the time the litigation expenses are paid to the petitioner to maintain petition for maintenance under The Hindu Adoptions and Maintenance Act, 1956, whichever is later. The arrears of maintenance, if any, will be paid by the respondent to the petitioner/daughter within a period of two months from today, positively, by way of a bank draft.

17 Accordingly, the petition stands disposed of, so also pending application(s), if any.

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

Nand Kishore ....Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Criminal Revision No.151 of 2011
Date of Decision: 04.10.2016

Indian Penal Code, 1860- Section 279 and 337- Accused hit the brother of the informant by driving the scooter in a high speed – accused was tried and convicted by the trial Court- an

appeal was preferred, which was dismissed- held, in revision that the Court has limited power to re-appreciate the evidence- the Court can interfere to prevent the abuse of the process, miscarriage of justice or to correct irregularities committed by the Courts below – statements of the informant and injured were sufficient to prove rashness and negligence – there is no infirmity in the judgment of the Court and accused was rightly convicted- however, considering the time elapsed from the incident, the benefit of Probation of Offenders Act granted to the accused- report of the Probation Officer called. (Para-14 to 23)

Cases referred:

Shlok Bhardwaj versus Runika Bhardwaj and others, 2015 (2) SCC 721
Sanjaysinh Ramrao Chavan versus Dattatray Gulabrao Phalke and others, 2015 (3) SCC 123
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case241
Yudhbir Singh versus State of Himachal Pradesh 1998(1)S.L.J. 58
Ramesh Kumar @ Babla versus State of Punjab 2016 AIR (SC) 2858
Hari Kishan and State of Haryana versus Sukhbir Singh 1988 AIR (SC) 2127

For the Petitioner	:	Mr. Inder Sharma, Advocate.
For the Respondent	:	Mr. Rupinder Singh Thakur, Additional Advocate General, with Mr.Rajat Chauhan, Law Officer.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral)

Instant Criminal Revision Petition filed under Section 397 read with Section 401 of the Code of Criminal Procedure, is directed against the judgment dated 7.7.2011, passed by learned Additional Sessions Judge, Mandi, (camp at Karsog) District Mandi, H.P. in Criminal Appeal No.37 of 2010, affirming the judgment dated 16.4.2010, passed by learned Judicial Magistrate Ist Class, Karsog, District Mandi, H.P. in Police Challan No. 158-1 of 2007, whereby the petitioner (in short "accused') was convicted under Sections 279 and 337 of IPC and sentenced as under:-

279 IPC	S.I. for one month and to pay fine of Rs.500. In default of payment of fine to undergo S.I. for 15 days.
337 IPC	S.I. for one month and to pay fine of Rs.500. In default of payment of fine to undergo S.I. for 15 days.

2. Briefly stated facts, as emerged from the record are that complainant Dhani Ram(PW-1) alongwith his brother Bar Chand (PW-3) on 9.4.2007 at about 7:30 PM, was on his way to Mamel Bazar, for purchasing vegetable etc. At the relevant time, accused came on his scooter bearing registration No. HP-24-2453 in a high speed and hit brother of the complainant namely Sh. Bar Chand(PW-3), as a result of which, he fell down on the road and sustained injuries. Thereafter, injured person was taken to hospital by the accused on the same scooter. The accident had taken place due to rash and negligent driving of the accused. Complainant, Dhani Ram (PW-1) reported the matter to the police and accordingly statement of the complainant under Section 154 Cr.P.C was recorded, on the basis of which, FIR Ex.PW8/C was registered at police Station, Karsog. After registration of the FIR, Investigating officer (PW-8), prepared the spot map Ex.PW8/A and recorded the statements of the witnesses under Section 161 Cr.P.C as per their version. During the investigation, investigating officer procured the MLC Ex.PW7/A of the injured. The photographs of the spot Ex.PW8/D to Ex.PW8/H, whose negatives are Ex.PW8/J and Ex.PW8/K, were taken. The mechanical examination of the scooter was also got conducted by Keshav Ram(PW-4), who vide his report Ex.PW4/A, stated that there was no mechanical defect in the vehicle in question. Police after completion of the investigation came to the conclusion that the petitioner-accused is guilty of having committed the offence punishable under Sections 279,

337 of I.P.C and 181 of the Motor Vehicles Act, and accordingly presented the challan in the competent Court of law.

3. Learned trial Court after satisfying itself that a prima-facie case exists against the accused, framed notice of accusation under Sections 279, 337 of IPC and 181 of the Motor Vehicles Act against the accused, to which accused pleaded not guilty and claimed trial.

4. In the present case, prosecution with a view to prove its case beyond reasonable doubt examined as many as 8 witnesses. The statement of accused under Section 313 Cr.P.C was also recorded, wherein he denied the prosecution case in its entirety. However, he did not lead any evidence in his defence.

5. Thereafter, learned trial Court on the basis of the evidence made available on record by the prosecution, found accused guilty of having committed the offence punishable under Sections 279, 337 of IPC and accordingly convicted and sentenced the accused, as per the description given hereinabove.

6. Feeling aggrieved and dissatisfied with the impugned judgment dated 16.4.2010, passed by learned trial Court, present petitioner-accused filed an appeal under Section 374(3) of the Code of Criminal Procedure before the learned Additional Sessions Judge Mandi(camp at Karsog), which was also dismissed vide judgment dated 7.7.2010 Hence, the present criminal revision petition, praying therein for quashing and setting-aside the impugned judgment of conviction, passed by learned trial Court and further upheld by learned Additional Sessions Judge, Mandi(camp at Karsog).

7. Mr. Inder Sharma, learned counsel representing the petitioner, vehemently argued that the impugned judgment passed by both the Courts below are not sustainable as the same are not based upon the correct appreciation of the evidence available on record. He forcibly contended that bare perusal of the judgment passed by both the Courts below suggest that learned Courts below have not appreciated the evidence in its right perspective, rather judgments are based on conjectures and surmises and as such, same cannot be allowed to sustain.

8. With a view to substantiate his aforesaid arguments, Mr. Sharma, made this Court to travel through the depositions made by the prosecution witnesses, to demonstrate that there are major contradictions with regard to time and place of occurrence. Mr. Sharma, also contended that the prosecution was not able to prove the ingredients of Sections 279 & 337 of IPC and as such, no conviction, if any, could be recorded on the basis of material made available on record by the prosecution. Mr. Sharma, while concluding his arguments strenuously argued that Courts below have miserably failed to take note of the fact that complainant Dhani Ram and injured Bar Chand were related to each other and as such, their testimonies could not be relied upon in the absence of some independent witness. He further stated that in the absence of some independent witness, learned Courts below ought to have dealt with the statements of complainant as well as injured Bar Chand with great caution, but in the instant case, learned Courts below while solely relying upon the statements of the complainant and injured Bar Chand, recorded the conviction against the petitioner-accused and as such, great prejudice has been caused to the present petitioner-accused. He also stated that both the Courts below, while rejecting the prayer made on behalf of the petitioner for the grant of benefit of Section 4 of the Probation of Offenders Act, failed to take note of the fact that immediately after the accident injured was taken to the hospital by the petitioner-accused himself.

9. Apart from above, Mr. Sharma, stated that this is a fit case where benefit of Section 4 of the Probation of Offenders Act, can be granted, especially in view of the fact that the petitioner-accused himself took the injured to the hospital after the accident. Mr. Sharma, also stated that, in case, after hearing the submissions having been made by him, still this Court comes to conclusion that accused is guilty of the offence punishable under Sections 279 and 337 of IPC, in that eventuality, accused may be given the benefit of probation under Section 4(b) of the Probation of Offenders Act, 1958, keeping in view the fact that the accused is first offender. Moreover, he is the sole bread earner and has family to support and if at this stage, the

petitioner-accused is convicted, his family shall have to face the humiliation in the village/society. He also stated that mitigating circumstances in this case is that more than 9 years have passed after having the incident and more than six years after passing of the judgment dated 16.4.2010, whereby accused was convicted and he has already suffered agony during the pendency of the appeal in the court of learned Additional Sessions Judge as well as before this Court.

10. In support of arguments, Mr. Inder Sharma, also invited the attention of this Court to the judgments of Hon'ble Apex Court titled as ***Shlok Bhardwaj versus Runika Bhardwaj and others, 2015 (2) SCC 721 and Sanjaysinh Ramrao Chavan versus Dattatray Gulabrao Phalke and others, 2015 (3) SCC 123***.

11. On the other hand, Mr. Rupinder Singh Thakur, learned Additional Advocate General, duly assisted by Mr. Rajat Chauhan, Law Officer, supported the judgment passed by both the Courts below. Mr. Thakur, vehemently argued that bare perusal of the judgment, passed by both the Courts below, clearly suggests that the same are based upon the correct appreciation of the evidence led on record by the prosecution and as such, no interference, whatsoever, of this Court is warranted in the present facts and circumstances of the case.

12. Lastly, Mr. Thakur, reminded this Court of its limited jurisdiction, while exercising powers under Section 397 Cr.P.C. He stated that this Court enjoys very limited powers under Section 397 Cr. P.C. to re-appreciate the evidence adduced on record by the prosecution to prove its case, especially when it stands proved on record that both the Courts below have dealt with each and every aspects of the matter very meticulously. In the aforesaid background, Mr. Thakur prayed for the dismissal of the revision petition.

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

14. True, it is that while exercising the power under Section 397 of Criminal Procedure Code, this Court has very limited power to re-appreciate the evidence available on record. But in the present case, where accused has been convicted and sentenced under Sections 279, 337 of the Indian Penal Code, this Court solely with a view to ascertain that the judgments passed by both the Courts below are not perverse and the same are based upon correct appreciation of evidence available on record, undertook an exercise to critically examine the evidence available on record to reach fair and just decision in the case.

15. 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 Case241**; 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."

16. In the present case, this Court had an occasion to go through the entire evidence led on record by the prosecution as well as statement of the accused recorded under section 313 Cr.P.C and this Court has no hesitation to conclude that there is no error apparent on the face of the judgment passed by both the Courts below, rather same appears to be based upon correct appreciation of the evidence adduced on record by the prosecution. During arguments, learned counsel representing the parties made this Court to travel through the entire evidence, perusal whereof leaves no doubt in the mind of the Court that the prosecution was able to prove its case beyond reasonable doubt and as such, this Court sees no reasons to interfere with well reasoned judgment passed by both the Courts below. Learned counsel representing the petitioner, while arguing in the present criminal revision petition on behalf of the petitioner, nowhere disputed the accident, rather only arguments advanced by him was that no independent witness was associated by the prosecution to prove its case beyond reasonable doubt. This Court, after perusing the statements of the prosecution witnesses, is fully convinced that the statements of complainant Dhani Ram and injured Bar Chand were sufficient to conclude that at the relevant time, scooter was being driven by the accused in rash and negligent manner, as a result of which, injured namely Sh. Bar Chand suffered minor injuries.

17. Apart from above, learned counsel representing the petitioner was not able to point out any perversity, if any, in the judgment passed by both the Courts below, which could compel this court to re-examine the entire evidence led on record by the prosecution to prove its case beyond reasonable doubt. Accordingly, judgment passed by both the Courts below deserves to be upheld.

18. However, this Court taking into consideration the fact that after the accident, petitioner-accused had taken the injured to the hospital coupled with the fact that more than six years have already passed after passing of the judgment and during this period petitioner-accused already suffered mental agony, deems it fit to consider the case of the petitioner-accused for the grant of probation under Section 4 of the Act. Mr. Sharma, also stated before the Court that petitioner accused being first offender deserve to be granted benefit of Probation of Offenders Act. This Court also found that the petitioner- accused is young person approximately 30 years of age.

19. Consequently, in view of the aforesaid discussion made herein above, this court has no hesitation to conclude that Courts below have rightly appreciated the evidence available on record, hence, the judgments passed by the Courts below are upheld. Accordingly, the present petition is dismissed being devoid of any merit.

20. However, keeping in view the facts and circumstances as well as submissions having been made by the counsel representing the petitioner-accused for grant of the benefit of Section 4 of Probation of Offenders Act, this Court is of the view that this is a fit case where a benefit of Section 4 of Probation of Offenders Act can be extended in favour of accused person, especially, keeping in view the fact that accused is first offenders and have family to support. Perusal of record suggests that alleged incident had occurred in the year 2007 i.e. 9 years back, meaning thereby accused have already suffered agony of long litigation, which remained pending in the Courts and during this period he remained under trauma and apprehension of being punished. Learned counsel representing the petitioner also submitted that accused is young and has a long career ahead and, in case, he is not extended the benefit of Probation of Offenders Act, great prejudice would be caused to him. In support of the aforesaid arguments, learned counsel for the petitioner-accused also invited the attention of this Court to the judgment passed by this Hon'ble Court in ***Yudhbir Singh*** *versus* ***State of Himachal Pradesh 1998(1)S.L.J. 58***, wherein it has been held as under:

> "9. The only mitigating circumstance that appears to be there is that the time gap of about six years between the date of occurrence as well as the date of decision of this revision petitioner. During this entire period sword of present case looming over the head of the petitioner was always there. That being so, this court is of the view that instead of sending the petitioner to jail as ordered by the courts below, he is given the

benefit of Section 4 of the Probation of Offenders Act. Accordingly, it is ordered that he shall furnish personal bond in the sum of Rs. 5,000/- to the satisfaction of the trial Court within a period of four weeks from today to keep peace and to be of good behavior for a period of one year from the date of execution of the bond before the court below as well as not to commit any such offence. In addition to being given benefit of Section 4 of the Probation of Offenders Act, petitioner is further directed to pay a sum of Rs. 3,000/- each to PWs Baldev Singh and Dilbagh Singh injured as compensation. Shri R.K. Gautam submitted that this amount of compensation be deposited with the trial Court on or before 31.8.1997, who will thereafter pay the same to said persons."

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

"7. Accordingly the appeal is allowed in part by converting appellant's conviction under Section 307 IPC to one under Section 324 IPC. On the question of sentence, it is pertinent to note that the occurrence took place in 1997. In his statement under Section 313 of the code of Criminal Procedure the appellant gave his age in 2002 as 36 years. He claimed that he and others went to the place of occurrence on getting information that his brother Sanjay Kumar was assaulted by Ramesh Kumar (Complainant). He brought his brother to Police Station and lodged a report. As noticed by trial court, parties are involved in civil as well as criminal litigation from before. High Court has noted that appellant, as per custody certificate, is not involved in any other case. In such circumstances, it is not deemed necessary to send the appellant immediately to Jail custody after about 19 years of the occurrence when he appears to be 50 years of age and fully settled in life.

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

22. The reliance is also placed upon Hon'ble Apex Court judgment ***Hari Kishan and State of Haryana versus Sukhbir Singh 1988 AIR (SC) 2127***, wherein it has been held as under:

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

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

"357. Order to pay compensation:

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

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

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

Xxxxxxxxxxxxxx

Xxxxxxxxxxx

Xxxxxx

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation. Such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been sentenced.

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

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

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

23. In view of the aforesaid law as well as submissions having been made by Mr. Sharma, learned counsel appearing on behalf of the petitioner, after taking into consideration the facts and circumstances of the present case, I am of the considered opinion that the present petitioner-accused can be granted benefit of Section 4 of the Probation of Offenders Act, 1958 subject to payment of adequate compensation, which would be determined after the receipt of the report of Probation Officer.

Accordingly, Registry is directed to call for the report of the Probation Officer, Mandi, District Mandi, H.P. on or before **15th November, 2016**. Registry to list this matter on **18th November, 2016.**

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

Nand Lal .....Appellant.

Versus

Mitter Dev (since deceased) through his LRs .....Respondents.

RSA No.577 of 2006

Date of Decision: 4.10.2016

Specific Relief Act, 1963- Section 5 and 38- Plaintiff pleaded that he is owner in possession of the suit land- the defendant extended his construction towards the suit land – hence, he filed a suit for seeking possession and injunction- the suit was partly decreed by the trial Court- an

appeal was filed, which was dismissed- held, in second appeal that ownership of the plaintiff was duly proved- demarcation was conducted, in which encroachment was detected – defendant also admitted his possession but claimed adverse possession – the plea of adverse possession was not proved satisfactorily- the suit was rightly decreed by the trial Court- appeal dismissed.

(Para-10 to 22)

Cases referred:

Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264
Chati Konati Rao and Ors. V. Pale Venkata Subba Rao, (2010) 14 SCC 316
P.T. Munichikkanna Reddy v. Revamma (2007) 6 SCC 59

For the Appellant: Mr. Sanjeev Kuthiala, Advocate.
For the respondent: Mr. Subhash Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant regular second appeal filed under Section 100 of CPC is directed against the judgment and decree dated 6.11.2006, passed by the learned District Judge, Mandi, HP, in Civil Appeal No. 16 of 2005, affirming the judgment and decree dated 29.12.2004, passed by learned Civil Judge (Jr. Div.) Chachiot at Gohar, District Mandi, HP, in Civil Suit No. 20/2004 (1995), whereby suit of the plaintiff-respondents (hereinafter referred to as the 'plaintiff') was partly decreed for vacant possession of land measuring 0-0-8 bighas of the suit land with direction to the defendant-appellant (hereinafter referred to as the 'defendant') to give vacant possession of the land described herein above of the suit land to the plaintiff by removing the construction. However, learned trial Court did not hold plaintiff entitled to the decree of permanent prohibitory injunction.

2. Briefly stated facts as emerged from the record are that the plaintiff filed suit for permanent prohibitory injunction and also for vacant possession against the defendant to the effect that the defendant should not raise an construction over the suit land and also not to remove protection wall and block the drain/nallah situated adjacent to protection wall and further not to block the flow of water either by himself or through his agents or family members etc. Plaintiff also prayed for decree for vacant possession in his favour and against the defendant directing him to remove encroachment made by him over the suit land. Similarly, plaintiff also prayed that defendant be restrained from interfering in any manner whatsoever, in the suit land either by himself or through his agents or family members etc by passing a decree for permanent prohibitory injunction in his favour and against the defendant. Plaintiff averred that land comprised in khata khatauni No. 92/127 khasra No. 248, measuring 0-4-1 bigha situated in mauja Chail/51, Teshil Chahiot, District HP, is owned and possessed by the plaintiff. He also stated that he constructed his residential house over the suit land and remaining part of the suit land is vacant and is being used as Sehan and kitchen garden etc. Plaintiff further averred that adjoining to the suit land, there is khasra No. 247 measuring 0—18 bigha and the defendant is having 280/1120 shares in the said land. Plaintiff further contended in the plaint that prior to consolidation, old khasra numbers of khasra No. 247 were 298 and 299, which were owned by Smt. Promila Kumari and these khasra numbers were given in exchange by her to the plaintiff in lieu of the khasra No. 572/296, which was converted into khasra No. 246 during the consolidation proceedings. He further prayed that plaintiff has raised a protection wall over old khasra No. 298 and there is a drain by the side of the wall since long. He further averred that the defendant started construction over khasra No. 247 by raising new building and later on the said construction was extended by the defendant towards khasra No. 248 i.e. suit land and also towards the drain. Plaintiff further alleged that the defendant forcefully removed the protection wall which was constructed by him for the protection of his residential house. It is also averred in the plaint that defendant has also encroached upon the portion of khasra No.248 by raising

building thereon in the month of January, 1991. Plaintiff alleged that defendant despite several requests made by him, failed to obtain demarcation before raising construction. Cause of action arose to the plaintiff in the month of January, 1991, when defendant made encroachment and thereafter on 13.8.1995 when the defendant started digging portion of the suit land and blocked the drain.

3. Defendant by way of detailed written statement refuted the claim put forth by the plaintiff by taking preliminary objection of valuation, maintainability and non-joinder of parties. On merits, defendant while refuting the averments contained in the plaint stated that over part of khasra No. 241/1 measuring 0-0-8 bigha, there existed a house, which was previously in possession of S/sh. Rajinder Pal, Tek Chand, Hem Raj and Devender, Son of Ludermani. Defendant also stated that the said house was double storeyed and was over the land comprised in khasra No. 241/1 measuring 0-0-8 bigha i.e in the land comprised in khasra Nos. 297/298, 299, 300 and 303 kitas 5 measuring 0-5-19 bighas situated in mauja Chail. Defendant further claimed that co-owners vide registered sale deed dated 22.12.1978 sold the residential house along with kitchen to the defendant for sale consideration of Rs. 10,000/- and the possession was also delivered to him of part of khasra No. 248/1 measuring 0-0-8 bigha and thereafter, he renovated the existing structure over khasrsa No. 241/1 and has raised construction of three storeyed building. Defendant further claimed that his possession over khasra No 248/1 measuring 0-0-8 bigha is from the time of previous owners which is continuous, open, peaceful and is in hostile possession to the knowledge of the plaintiff and the defendant has acquired the title in the month of December, 1991, by way of adverse possession. The defendant also denied other averments made in the plaint and alleged that Promila Kumari has got no right title or interest in the suit land and he is owner in possession of khasra No. 247 and two shops of the defendant are over khasra No.247. The defendant specifically denied that he started any construction over the part of the Khasra No. 248 as alleged by the plaintiff nor he has removed the protection wall. Rather defendant stated that he has not encroached upon khasra No. 247 by raising building thereon in the month of 1991 and has also not started any digging operation for the construction of house on 13.8.1995. Plaintiff by way of replication reiterated the stand taken in the plaint and denied the defence taken by defendant in the written statement in toto.

4. Learned trial Court on the basis of aforesaid pleadings and evidence, be it ocular or documentary adduced on record by the respective parties, framed issues and partly decreed the suit of the plaintiff, whereby the plaintiff was held entitled to decree of vacant possession of the land measuring 0-0-8 bighas of the suit land and defendant was ordered to give vacant possession of the land measuring 0-0-8 bighas to the plaintiff by removing construction however, learned trial Court dismissed the suit of the plaintiff for decree of permanent prohibitory injunction.

5. Being aggrieved and dis-satisfied with the aforesaid judgment and decree, passed by the learned trial Court, defendant filed an appeal before the learned District Judge, Mandi. However, fact remains that the learned District Judge, vide judgment and decree dated 6.11.2006 dismissed the appeal by the defendant. Hence, this second appeal before this Court by the plaintiff.

6. This Court vide order dated 8.5.2008 admitted the present appeal on following substantial questions of law:-

1. *Where there has been misreading of evidence by the courts below in regard to sale deed Ext. DA as well as report of demarcation Ext. C-1 to C-3?*
2. *Whether the learned first appellate Court while maintaining doubt about the correctness of the demarcation report had erred in not exercising its jurisdiction in appointing of a fresh court commission or making a spot memorandum in terms of Order 26 Rule 9 and Order 18 Rule 18 CPC and whether without such application being rejected the judgment so pronounced was proper?*

7. Mr. Sanjeev Kuthiala, Advocate, appearing for the appellant vehemently argued that the judgments and decree passed by both the courts below are not sustainable in the eye of law as the same are not based upon the correct appreciation of evidence adduced on record by the respective parties. He contended that bare perusal of the impugned judgments suggests that learned courts below have not dealt with evidence as well as pleadings available on record in its right perspective and judgments are purely based upon the conjectures and surmises and as such, same cannot be allowed to sustain. With a view to substantiate his aforesaid plea, Mr. Kuthiala, made this Court to travel through the evidence adduced on record by the parties to demonstrate that courts below misread and mis-appreciated the pleadings available on record, especially statement of PW-1, PW-4, PW-5, Ext. PA to Ext. PD, Ext.PW5/A, statement of DW-1, Ext.DA, Ext.C-1,Ext.C-2 and Ext.P-3 and argued that once learned first appellate Court had dis-believed the report and tatima Ext.PW5/A prepared by PW5 being not in consonance with the HP High Court Rules and orders and standing instructions of the Financial Commissioner and vide order dated 5.7.2006 directed the local Commissioner to demarcate the suit land and the land of the defendant in khasra No. 247, he had no option but to set-aside the judgments and decree passed by the learned trial court which was entirely based upon the aforesaid report submitted by PW5. Mr. Kuthiala further contended that the learned court below failed to take into consideration the material fact that as per the defendant vide sale deed Ext.DA, he had bought land in khasra Nos. 297, 298, 299 300 and 303 (old) from the previous owners vide sale deed dated 22.12.1997 and the construction dispute was already existing when he had bought the land. He further contended that since there was purely boundary dispute between the parties, whereby entire area comprising khasra No. 241, 247, 248 as also the land given in exchange comprised in khasra No. 246, was to be demarcated, only question of encroachment was to be determined, but both the courts below failed to do so and as such, demarcation on the basis of which the findings were given was wrong and as such, judgment passed by both the courts below deserves to be quashed and set-aside. Mr. Kuthiala, forcefully contended that first appellant Court failed to exercise its jurisdiction vested in it under Order 18 Rule 18 CPC despite there being application moved before the learned first appellate Court and as such, it has fallen in grave error. Mr. Kuthiala further stated that keeping in view the contrary reports given by the local commissioner, court below ought to have exercised its jurisdiction under Order 18 Rule 18 CPC and get prepared on spot inspection memorandum alongwith the demarcation to decide the controversy for all times to come and as such, present judgment deserves to be quashed and set-aside. Mr. Kuthiala, further argued that bare perusal of the pleadings as well as evidence adduced on record suggests that appellant proved beyond reasonable doubt that he acquired the status of ownership qua the suit land by way of adverse possession but both the courts below without assigning plausible reasons rejected the aforesaid plea of adverse possession raised on behalf of the defendants. He stated that courts below failed to take into consideration that as per sale deed Ext.DA and the pleadings, there was a double storyed pre-existing house along with the vacant land sold to the appellant vide sale deed and on the double storeyed house, fresh construction had been done, but despite aforesaid learned courts below came to conclusion that appellant defendant encroached upon khasra No. 248 which fact/finding being contrary to record deserves to be quashed and set-aside. Similarly, with a view to substantiate his arguments qua the plea of adverse possession, Mr. Kuthiala invited attention of this Court to the pleadings available on record to demonstrate the appellant in unambiguous terms had pleaded that he has acquired statutes of ownership by way of adverse possession since he was in open and peaceful possession and in this regard, appellant-defendant had led cogent and convincing evidence to prove that he is in adverse possession of the property to the knowledge of the true owner. While concluding his arguments Mr. Kuthiala contended that there is no evidence much less positive evidence available on record to suggest that appellant defendant made any kind of encroachment over the suit land and finding returned by the learned trial Court which is based upon spot map Ext.PW5/A deserves to be quashed and set-aside because admittedly it is not a document of title. He also stated that learned first appellate Court while relying upon the report of local Commissioner i.e. Tehsildar Chachiot, has fallen in grave error because he also submitted two contrary reports and as such, no findings could be returned placing reliance upon the report

submitted by him. In the aforesaid background, Mr. Kuthiala, prayed that the present appeal may be allowed and the impugned judgment be quashed and set-aside.

8. Per contra, Mr. Subhash Sharma, Advocate, appearing on behalf of the respondent-plaintiff supported the judgments passed by the courts below. Mr. Sharma strenuously argued that the judgments passed by both the courts below are based upon the correct appreciation of the evidence available on record and as such, no interference, whatsoever, of this Court is warranted in the present facts and circumstances and same deserves to be upheld. With a view to substantiate his aforesaid argument, Mr. Sharma, made this Court to travel through the judgments passed by the courts below to demonstrate that learned trial Court while ascertaining the genuineness and correctness of the findings recorded by the court below has dealt with each and every aspect of the matter very meticulously and as such, there is no reason to interfere in the well reasoned concurrent findings of facts and law recorded by both the courts below. Mr. Sharma, invited attention of this Court to the pleadings, especially written statement filed on behalf of defendant to state that there is clear cut admission on the part of the appellant-defendant, wherein he claimed himself to be owner in possession by way of adverse possession, meaning thereby, encroachment upon the land, as averred in the plaint, was admitted and as such, there is no illegality and infirmity in the judgment passed by both the courts below. Mr. Sharma, while concluding his arguments vehemently argued that this Court has very limited scope to re-appreciate the evidence especially when there are concurrent findings recorded by the courts below. In this regard, he invited attention of this Court to the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,* (2015)4 SCC 264.**

9. I have heard learned counsel for the parties as well carefully gone through the record.

10. Perusal of the judgment (supra), suggests that in exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the finding so recorded are shown to be perverse. There can be no quarrel (dispute) with regard to aforesaid observation made by the Court and true, it is that in normal circumstances High Courts, while exercising powers under Section 100 CPC, are restrained from re-appreciating the evidence available on record, but as emerges from the case referred above, there is no complete bar for this Court to upset the concurrent findings of the Courts below, if the same appears to be perverse.

11. Careful perusal of the pleadings as well as evidence adduced on record by the respective parties, clearly suggests that the plaintiff is owner in possession of the suit land bearing khasra No. 248/1 measuring 0-0-8 bighas. During proceedings of the case, this Court had an occasion to peruse the entire evidence led on record by the respective parties, perusal whereof clearly suggests that plaintiff by way of leading cogent and convincing evidence was able to prove on record that defendant encroached upon the suit land comprising of khasra No.248/1 measuring 0-0-8 bighas by raising construction over the same. Though, defendant by way of pointing discrepancy in the demarcation report submitted by the PW5 Mohan Lal made an attempt to demonstrate that learned trial Court committed grave illegality while placing reliance upon the deposition made by PW5 as well as demarcation report submitted by him. Since the report was not carried out in accordance with the HP High Court Rules and Orders and standing instructions of the Financial Commissioner, careful perusal of the judgment passed by the learned trial Court leaves no doubt in my mind that learned trial Court while decreeing the suit preferred by the plaintiff nowhere relied upon the statement of PW5 or report submitted by him. Learned trial Court heavily relied upon admission made by the defendant in his written statement, where he claimed himself to be owner by way of adverse possession. He admitted the claim of the plaintiff that he has encroached upon the land comprising Khasra Nno. 248 measuring 0-0-8 bighas.

12. Careful perusal of the written statement clearly suggests that defendant has encroached upon the suit land bearing khasra No. 248, whereupon he has raised construction,

as has been unequivocally stated by all the prosecution witnesses. Cross examination conducted upon the PWs by the defendants nowhere suggests that defendants at any point of time, was able to extract anything contrary to what they stated in their examination in chief. Since perusal of the judgment passed by the learned trial Court nowhere suggests that learned trial Court while decreeing the suit of the plaintiff placed reliance, if any, on the demarcation report submitted by PW5, this Court sees no force in the contention put forth by the learned counsel for the appellant defendant that since PW5 failed to carry out demarcation in accordance with HP High Court Rules and Orders and standing instructions of the Local Commissioner, there was no occasion for the learned trial Court to place reliance on the same.

13. At the cost of repetition, it may be again stated that there was no requirement if any, for the trial Court to refer to the report of Local Commissioner in the teeth of admission made on behalf of the defendant that he is in possession of the suit land by way of adverse possession. Though, defendant raised plea of adverse possession but there is no evidence available on record to suggest the fact that he was able to prove on record that he has acquired ownership by way of adverse possession and as such, this Court sees no illegality in the judgments passed by the courts below. Careful perusal of the judgment passed by the learned first appellate Court clearly suggests that keeping in view the boundary dispute involved in the matter, learned first appellate Court appointed the Teshildar Chachiot as Local Commissioner to demarcate the suit land, who in his two separate reports specifically reported that defendant encroached upon the suit land bearing khasra No. 248/1 bearing 0-0-8 bighas. Record further reveals that demarcation by the Tehsildar Chachiot was carried out in accordance with law in the presence of both the parties.

14. In view of the factum qua the encroachment as alleged by the plaintiff further proved on record by the Local Commissioner appointed by the court, this Court sees no force in the contention put forth by the counsel representing the appellant that learned first appellate Court erred in placing reliance upon the report submitted by the Local Commissioner appointed by it during the pendency of the appeal. Careful perusal of the judgments passed by the learned first appellate Court, nowhere suggests that it only placed reliance on the report of the Tehsildar Chachiot rather, learned first appellate Court also relied upon the admission having been made on behalf of the defendant in the written statement, where he claimed ownership as well as possession by way of adverse possession and as such, this Court sees no illegality and infirmity in the judgment passed by the courts below, rather same are based upon correct appreciation of the material available on record.

15. This Court solely with a view to explore answer the substantial questions of law as stated above, perused the sale deed Ext.DA as well as demarcation report Ext.C-1 to C-3, perusal whereof, nowhere suggests that defendant was able to establish his possession over the suit land. Though, house existing upon khasra No. 247 was sold to the appellant but interestingly, no specific information/description disclosing therein the area of constructed house stands mentioned in the same. Similarly, this Court also perused the Ext.C1 to C3 which clearly suggests that defendant encroached upon the suit land by raising construction over the same, as has been discussed earlier, which may not have much relevance as far as controversy at hand is concerned, especially in view of the admission made by the defendant while claiming the ownership and possession by way of adverse possession and as such, there is no illegality and infirmity committed by courts below while decreeing the suit.

16. Once in written statement, defendant claimed himself to be owner in possession of the suit land by way of adverse possession, there was nothing required for plaintiff to prove on record that defendant has encroached upon the suit land bearing khasra No. 248/1, the onus was upon the defendant to prove on record by leading cogent and convincing evidence that he has procured his title by way of adverse possession. But in the instant case, as stated supra, there is no evidence available on record suggestive of the fact that plaintiff acquired the title of ownership by way of adverse possession. None of the defendant witnesses including defendant himself stated nothing qua the adverse possession as claimed by the defendant. Though, defendant in his

written statement claimed that he is in possession of khasra No. 248/1 measuring 0-0-8 bighas from the time of the previous owner w.e.f. 22nd December, 1978 openly, peacefully and in hostile possession of the property to the knowledge of the plaintiff but no evidence, be it ocular or documentary, was placed on record by the defendant to prove that he has acquired titled by way adverse possession and plaintiff has no right title interest in the same

17. It is well settled law that to acquire title by adverse possession, one needs to prove that he is in hostile possession over the suit land which is known to the true owner. Whosoever claims adverse possession, he/she needs to prove that he/she is in continuous, open, peaceful and hostile possession, uninterrupted possession of the same without any hindrance that too to the knowledge of original owner. There must be overt act to suggest that he is in continuous possession of the suit land. While claiming the adverse possession, it is incumbent upon the party so claiming, to adequately plead the constituents of adverse possession. The hostile character of the possession is gauzed by the animus of the person setting up adverse possession but as has been observed above in the present case, there is nothing on record which suggests that defendant is in the adverse possession of the suit land. To prove adverse possession, it is necessary to prove that possession is peaceful, uninterrupted and hostile to the title of the actually true owner. But in the present case, all the aforesaid ingredients are missing, rather, there is ample evidence available on record that defendant is encroacher upon the suit land. Hence, it could be safely concluded that defendant has not been having adverse possession of the suit land as has been claimed by him. The reliance is placed on the judgments rendered by the Hon'ble Apex Court in **Chati Konati Rao and Ors. V. Pale Venkata Subba Rao, (2010) 14 SCC** 316 (Para-14), which is as under:-

> *"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."*

18. The Hon'ble Apex Court, while reiterating the above ingredients, has further held in ***P.T. Munichikkanna Reddy*** *v.* ***Revamma (2007) 6 SCC 59*** as under:-

> "5. *Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows*

that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. [See Downing v. Bird, 100 So. 2d 57 (Fla. 1958), Arkansas Commemorative Commission v. City of Little Rock, 227 Ark. 1085, 303 S.W.2d 569 (1957); Monnot v. Murphy, 207 N.Y. 240, 100 N.E. 742 (1913); City of Rock Springs v. Sturm, 39 Wyo. 494, 273 P. 908, 97 A.L.R. 1 (1929).]

6. Efficacy of adverse possession law in most jurisdictions depend on strong limitation statutes by operation of which right to access the court expires through efflux of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time, but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or color of title. (See American Jurisprudence, Vol. 3, 2d, Page 81). It is important to keep in mind while studying the American notion of Adverse Possession, especially in the backdrop of Limitation Statutes, that the intention to dispossess cannot be given a complete go by. Simple application of Limitation shall not be enough by itself for the success of an adverse possession claim."

19. Admittedly, in the instant case, present appellant has been not able to prove necessary ingredients as has been discussed above, to claim title by way of adverse possession and mere statement that he was in continuous possession of the land is not sufficient to claim title by way of adverse possession. Animus-possidendi as is well known ingredient of adverse possession. It is now well settled that mere possession of the land would not automatically convert into possessory title until possessor holds property adverse to the title of the true owner.

20. It clearly emerges from the judgment passed by the first appellate Court that the Tehsildar Chachiot was appointed as Local Commissioner , who as per directions of the Court conducted the demarcation of land in question twice and in his report unambiguously, stated that defendant has encroached upon the suit land bearing khasra No. 248/1 measuring 0-0-8 bighas. Since Court had appointed local Commissioner in the shape of Tehsildar Chachiot during the pendency of the appeal, this Court sees no force in contention on behalf of the appellant defendant that learned first appellate Court erred in not allowing the application moved by the defendant under Order 26 Rule 9. Once Court itself had appointed the Local Commissioner, it cannot be said that any prejudice or injustice was caused to the defendants by rejection the application under Order 26 Rule 9 CPC.

21. 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 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."

22. Consequently, In view of the detailed discussion made herein above, this Court after perusing the entire evidence available on record is of the view that there is no illegality and infirmity in the judgment passed by the learned courts below, rather perusal of impugned judgments suggests that same is based upon correct appreciation of the evidence available on record and the substantial questions of law are answered accordingly. Hence, the instant regular second appeal is dismissed being devoid of any merit.

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

New India Assurance Company .....Appellant.
Versus
Nayajudin & another ....Respondents.

FAO No. 35 of 2008.
Decided on : 4th October, 2016.

Workmen Compensation Act, 1923- Section 4- Deceased was taking the machineries to N.J.P.C. – he died by the fall of the tree when he had parked his vehicle and had come outside- the claim petition was allowed by the Commissioner- held, that employment and death were not disputed – the vehicle was insured – a plea was taken that the claim petition was filed after the period of limitation but no such plea was taken in the reply and is deemed to have been waived especially when Commissioner is empowered to condone the delay on the proof of sufficient cause- appeal dismissed. (Para- 4 to 7)

Case referred:
Saberabibi Yakubbhai Shaikh and others versus National Insurance Company Limited and others, (2014)2 SCC 298

For the Appellant: Mr. B.M. Chauhan, Advocate.
Respondents are already proceeded against ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal arises from the impugned order of the learned Commissioner, under the Workmen's Compensation Act, 1923, Rampur, District Shimla, H.P. (for short the "Commissioner"), whereby he allowed the application preferred thereat by the claimant/respondent No.1 for the grant of compensation under the Workmen Compensation Act (for short the "Act").

2. The Insurance company-appellant herein standing aggrieved by the rendition of the learned Commissioner hence concerts to assail it by preferring an appeal therefrom before this Court.

3. Briefly stated the facts of the case are that the claimant being quite old and poor fellow was fully dependent upon his son, namely, late Sh. Abdul Majid. His son had died on 24.11.1997 when he was employed as trolla driver by respondent No.2 herein. During the course

of such employment, when the deceased was taking the machineries to NJPC in his trolla bearing No. HP-38-3935 and reached at Seglata near Narkanda, Tehsil Kumarsain, District Shimla at about 4.30 PM, he was not allowed to go ahead as the crane was lifting another trolla rolled down earlier. When, he after getting down from the said trolla looking the process of lifting of another trolla by crane, suddenly a big kail tree got uprooted and struck on the head of said Abdul Mahjid and resulted into his death on the spot.

4. The 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. When the appeal came up for admission on 29.05.2008, this Court, admitted the appeal instituted herebefore by the Insurance company/appellant against the order of the learned Commissioner, on the hereinafter extracted substantial questions of law:-

a) Whether in the facts and circumstances of the case, the claimant was entitled to interest of Rs.1,89,290/- when the amount was determined on 10.10.2007 in view of the judgment of this High Court and Apex Court.

b) Whether the compensation of Rs.1,61,460/- is sustainable in law hen there was no privity of contract with the appellant and the claim petition was filed in collusion with the respondent No.1?

Substantial questions of law No.1 and 2.

5. The contest qua the tenacity of the impugned rendition as stands projected herebefore by the learned counsel for the appellant is qua the rate of interest levied on the compensation amount assessed vis-a-vis the claimant by the learned Commissioner standing erroneously calculated from the date of accident whereas it was enjoined to be calculated from the date of the relevant adjudication. However, the aforesaid submission suffers dilution in the face of a verdict pronounced by the Hon'ble Apex Court in a case titled as ***Saberabibi Yakubbhai Shaikh and others versus National Insurance Company Limited and others, (2014)2 SCC 298,*** wherein, the Hon'ble Apex Court has pronounced qua the relevant date for levying interest on the compensation amount determined under the Act by the Commissioner is the date of accident and not the date of the relevant adjudication.

6. The learned counsel appearing for the appellant has not contested the factum of the predecessor-in-interest of the claimant standing employed by respondent No.2 herein also he does not contest the factum of his suffering his demise during the course of his performing employment in the relevant capacity under his employer. The learned counsel appearing for the appellant has pressed before this Court qua non occurrence of privity of contract inter se the insured and the insurer whereupon he contends qua the impugned rendition of the learned Commissioner whereupon it stood fastened with liability to indemnify the insured qua the compensation amount besides qua the interest levied thereon warranting interference. However, the aforesaid submission falters, in the face of existence of a photo copy of insurance cover executed qua the relevant vehicle inter se the appellant and respondent No.2 herein, efficacy whereof remained unrepudiated. However, the counsel for the appellant yet contends of the respondent concerned holding any leverage to derive any benefit therefrom, in the trite factum of the insured not defraying to the insurer the relevant premium whereupon obviously it stood not enjoined to comply with the relevant contract of insurance. However, in substantiation of the aforesaid factum, as aptly concluded by the learned Commissioner no cogent evidence stands adduced. In sequel, the aforesaid submission of the learned counsel appearing for the insurance company holds no merit.

7. Furthermore, the learned counsel appearing for the appellants submits qua with the claimant/respondent instituting before the learned Commissioner a petition for claiming compensation under the Act from his employer after two years elapsing since the ill-fated whereupon his son suffered his end rendered it to be not maintainable before the Commissioner, its standing preferred therebefore after elpase of the statutorily enjoined period of limitation for its preferment, significantly, when its preferment therebefore by the claimant was statutorily

enjoined, by the mandate of sub section (1) to Section 10 of the Act, provisions whereof stand extracted hereinafter, to occur within two years from the date of accident. However, the aforesaid plea stands not raised by the appellants/insurance company in its reply furnished to the apposite petition nor an apposite issue in regard thereto stands struck. Consequently, the appellant/Insurance Company is deemed to waive the aforesaid objection qua hence the non maintainability of the apposite petition before the learned Commissioner. Also with the proviso existing in Section 10 of the Act, whereupon the learned Commissioner, on sufficient cause as evidently exists before him in display of the claimant thereupon standing deterred to within the aforesaid period of time institute his petition before him, holding jurisdiction to condone the delay, did not enjoin the claimant for gaining capitalization thereof to file a separate petition for seeking condonation of delay in the belated preferment of the apposite petition before him nor also a separate order was enjoined to be passed in respect thereto. The combined effect, of omission of the insured to project the aforesaid ground qua non maintainability of the apposite petition before the Commissioner in its reply also when no issue qua it stood struck nor any evidence thereupon stood adduced alongwith the aforestated underlying nuance carried by the engraftment of the aforesaid proviso in Section 10 of the Act whereupon the rigor of sub section (1) of Section 10 of the Act stands relaxed on satisfaction standing drawn by the Commissioner qua sufficiency of cause deterring him to within time institute an application therebefore, is of the Commissioner concerned in ultimately pronouncing his adjudication upon the apposite petition, his hence standing satisfied with the sufficiency of cause which deterred the claimant to within time prefer the petition before him, imperatively when his pronouncing an adjudication upon the apposite petition is significatory qua an implied besides a deemed satisfaction drawn within the ambit of proviso to sub section (1) of Section 10 of the Act by the Commissioner qua sufficiency of cause qua the relevant purpose also when hence he was not enjoined to explicitly pronounce qua the aforesaid facet in his rendition. Relevant provisions of Section 10 of the Act read as under:-

> **"10. Notice and claim.-** (1) No claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof and unless the claim is preferred before him within [2] two years] of the occurrence of the accident or, in case of death, within [2] two years] from the date of death:] Provided that, where the accident is the contracting of a disease in respect of which the provisions of sub- section (2) of section 3 are applicable, the accident shall be deemed to have occurred on the first of the days during which the workman was continuously absent from work in consequence of the disablement caused by the disease: [3] Provided further that in case of partial disablement due to the contracting of any such disease and which does not force the workman to absent himself from work, the period of two years shall be counted from the day the workman gives notice of the disablement to his employer: Provided further that if a workman who, having been employed in an employment for a continuous period, specified under sub- section (2) of section 3 in respect of that employment, ceases to be so employed and develops symptoms of an occupational disease peculiar to that employment within two years of the cessation of employment, the accident shall be deemed to have occurred on the day on which the symptoms were first detected:] [4] Provided further that the want of or any defect or irregularity in a notice shall not be a bar to the [5] entertainment of a claim]--
>
> (a) if the claim is [6] preferred] in respect of the death of a workman resulting from an accident which occurred on the premises of the employer, or at any place where the workman at the time of the accident was working under the control of the employer or of any person employed by him, and the workman died on such premises or at such place, or on any premises belonging to the employer, or died without having left the vicinity of the premises or place where the accident occurred, or
>
> (b) if the employer [1] or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which

the injured workman was employed] had knowledge of the accident from any other source at or about the time when it occurred: Provided further, that the Commissioner may [2] entertain] and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been [3] preferred], in due time as provided in this sub- section, if he is satisfied that the failure so to give the notice or [4] prefer] the claim, as the case may be, was due to sufficient cause."

8. For the reasons recorded hereinabove, there is no merit in the instant appeal and it is accordingly dismissed. Both the substantial questions of law are answered in favour of the respondents and against the appellant. In sequel, the order impugned hereat is maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Smt. Pratibha Kaushik ...Petitioner.

Versus

Shri R.D. Dhiman and another ...Respondents.

COPC No. 188 of 2016
Date of order: 04.10.2016

Contempt of Courts Act, 1971- Section 12- It was stated that the respondent had gone outside the State and therefore, he was unable to appear before the Court - held, that it is not permissible for the contemnor to leave the jurisdiction of the Court, where contempt proceedings are pending without seeking exemption – Chief Secretary directed to ensure that all the Officers who have been arrayed as respondents in contempt petition remain present on the date fixed or otherwise they should seek exemption from the Court. (Para-2 and 3)

Present: Mr. Bipin C. Negi, Senior Advocate, with Mr. Yashwardhan Chauhan, Advocate, for the petitioner.
Mr. Anup Rattan & Mr. M.A. Khan, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals, for respondent No. 1.
Mr. Ashok Sharma, Assistant Solicitor General of India, with Mr. Ajay Chauhan, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

It is stated that respondent-Shri R.D. Dhiman, Secretary (Education) to the Government of Himachal Pradesh, is not present in the Court for the reason that he has gone outside the State.

2. We wonder how he has gone outside the State without permission of the Court, i.e. without seeking exemption. We have noticed that the officers of the State are either at Delhi or are going abroad for tours/trainings and are not causing presence before the Court on the date fixed.

3. The Chief Secretary to the Government of Himachal Pradesh is directed to ensure that all those officers, who have been arrayed as party-respondents in the contempt petitions or who have to remain present before the Court in the case(s) on the date(s) fixed, have to seek exemption/ permission from the Court before leaving for Delhi or outside the State. Any deviation shall be seriously viewed.

4. Shri Rakesh Sharma, who is holding the charge of Secretary (Education), is present in person.

5. Mr. Anup Rattan, learned Additional Advocate General, stated at the Bar that they have revised the pension of the petitioner and the matter has gone to the Accountant General.

6. In the given circumstances, we deem it proper to array Accountant General, Himachal Pradesh at Shimla, as party-respondent, shall figure as respondent No. 2 in the array of the respondents. Registry to carry out necessary correction in the cause title. Fresh memo of parties be filed within one week.

7. Issue notice to newly added respondent No. 2. On asking, Mr. Ajay Chauhan, Advocate, waives notice on behalf of the said respondent. Reply/status be filed within four weeks.

8. List on **21st November, 2016.**

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE TARLOK SINGH CHAUHAN, J.

Rajiv Sood & Ors. .....Appellants.

Versus

Ashit Kumar .....Respondent.

LPA No.130 of 2008
Decided on: October 04, 2016.

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- An application for interim order was allowed by the Single Judge – held, that the single Judge had not made the discussion regarding the prima facie case, balance of convenience and irreparable loss and injury – order set aside and trial Court directed to hear the application afresh and pass an appropriate order in accordance with law. (Para-2 to 4)

For the Appellants: Mr.K.D. Sood, Senior Advocate, with Ms.Ranjana Chauhan, Advocate.
For the Respondent: Mr.Ajay Kumar, Senior Advocate, with Mr.Dheeraj K. Vashista, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

This appeal is directed against the order, dated 19th September, 2008, passed by a learned Single Judge of this Court, whereby OMP Nos.517 of 518 of 2007, filed by the defendants in Civil Suit No.56 of 2005, were rejected, and OMP No.312 of 2006, filed by the plaintiffs was granted by making the interim orders, dated 9th October, 2006 and 17th October, 2006, were made absolute, (for short, the impugned order).

2. In terms of Order 39 Rules 1 and 2 read with Section 94 of the Code of Civil Procedure, three ingredients - i) prima facie case, ii) balance of convenience and, iii) irreparable loss - are sine qua non for granting interim relief. No such discussion has been made by the learned Single Judge while passing the impugned order.

3. The defendants/appellants can prove the contents of the compromise deed during trial, if they choose so.

4. Having said so, the impugned order, so far as it pertains to making interim orders, dated 9th October, 2006 and 17th October, 2006, absolute, is set aside and the trial Court is directed to hear the said application i.e. OMP No.312 of 2006 afresh and pass appropriate order as warranted under law. Rest of the impugned order is maintained.

5. The appeal is disposed of accordingly, so also the pending CMPs, if any.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE TARLOK SINGH CHAUHAN, J.

Rajiv Sood & Ors. .....Appellants.

Versus

Ashok Kumar and others .....Respondents.

LPA No.131 of 2008
Decided on: October 04, 2016.

Code of Civil Procedure, 1908- Order 23 Rule 1- An application for recording the compromise and passing decree on the basis of the same was rejected – held, that a Civil Suit can be decreed after recording satisfaction that compromise executed between the parties was lawful – the defendants had disputed the compromise, therefore, the application was rightly dismissed- appeal dismissed. (Para-2 and 3)

For the Appellants: Mr.K.D. Sood, Senior Advocate, with Ms.Ranjana Chauhan, Advocate.
For the Respondent: Mr.Ajay Kumar, Senior Advocate, with Mr.Dheeraj K. Vashista, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

This appeal is directed against the order, dated 19th September, 2008, passed by a learned Single Judge of this Court, whereby OMP Nos.464 of 2006 and 423 of 2007, filed by the plaintiffs in Civil Suit No.15 of 2003 for recording compromise entered into between the parties and passing decree accordingly, came to be rejected.

2. A Civil Suit can be decreed in terms of Order 23 of the Code of Civil Procedure after recording satisfaction that the compromise entered into between the parties is lawful. In the instant case, the defendants had disputed the compromise deed. Therefore, we are of the opinion that the learned Single Judge has rightly dismissed the applications.

3. The plaintiffs/appellants can prove the contents of the compromise deed during trial, if they choose so.

4. Having said so, the impugned order is upheld and the appeal is dismissed, alongwith pending CMPs, if any, with liberty to the parties to seek appropriate remedy.

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

Sanjay Sood and another ..Appellants/plaintiffs.

Versus

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

RSA No. 67 of 2007
Reserved on: 27/09/2016
Date of decision: 4/10/2016

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs filed a civil suit pleading that M was tenant of the suit land and proprietary rights were conferred upon him – he created tenancy in favour of defendants No. 2 and 3 and predecessor-in-interest of defendants No. 4 and 5- daughters of M sold the suit land to K- defendants No. 2 to 5 were conferred proprietary right- they sold their share in favour of the plaintiffs- the land was ordered to be vested in favour of State of H.P., which is wrong – the suit was decreed by the trial Court- an appeal was preferred and the order was partly modified – held in second appeal that M was recorded to be a non-occupancy tenant- proprietary rights were conferred upon him- he inducted K, C and M as tenants within three years of the conferment of proprietary right, which is in violation of Section 113 of H.P. Tenancy and Land Reforms Act- however, no proceedings were initiated and the mutation was attested- proprietary rights were conferred upon the tenants – Appellate Court held that Civil Court does not have jurisdiction in view of Section 115 of H.P. Tenancy and Land Reforms Act- the tenants had participated in the proceedings before the Collector and no grievance can be raised on this ground- Appellate Court had rightly delivered the judgment- appeal dismissed. (Para-7 to 9)

For the appellants: Mr. R.K.Bawa, Sr. Advocate with Mr. Amit Kumar, Advocate.
For the respondents: Mr. R.S.Thakur, Additional Advocate General 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 Additional District Judge, Sirmaur District at Nahan, H.P. whereby, he set aside the verdict recorded by the learned trial Court whereby the plaintiffs and proforma defendants No. 4 and 5 stood declared to be the owners of the suit land besides the orders passed by the learned Collector on 14.1.1997 whereby the suit land stood vested in the State of Himachal Pradesh and consequent attestation of mutation No. 855 of 19.9.1998 was declared to be illegal. However, the granting by the learned trial Court the relief of permanent prohibitory injunction vis.a.vis. the plaintiffs whereupon the defendants through its agents and servants stood permanently restrained from causing any interference in the peaceful possession of the plaintiffs and proforma defendants No. 4 and 5 till they stand evicted therefrom in due course of law stood maintained and affirmed.

2. The facts necessary for rendering a decision on the instant appeal are that the plaintiffs filed suit for declaration and permanent prohibitory injunction against the defendants/State of H.P. The case of the plaintiffs is that one Shri Mehru was tenant of suit land situated at village Kolwa, Tehsil Renuka Ji, who was conferred the proprietary rights under H.P.Tenancy and Land Reforms Act and the mutation to this effect was also attested in his favour on 11.01.1976. Shri Mehru after few years, created tenancy of suit land in favour of defendants No. 2 and 3 and predecessor in interest of defendants No. 4 and 5. They remained in possession of the suit land as tenants without any let or hindrances. That Mehru expired and he was survived by his two daughters Smt. Ram Devi and Smt. Minki and widow Smt. Jivni who subsequently sold the suit land to one Shri Krishan Kumar Sood vide registered sale but he could not get possession of the same as the possession remained with the proforma defendants. That defendants No. 2 to 5 were also conferred proprietary rights of suit land under Section 104 of the H.P.Tenancy and Land Reforms Act and the mutation of conferment of proprietary rights No. 808 was also attested in their favour on 22.07.1992. That proforma defendants No. 2 and 3 thereafter vide sale deed dated 01.12.1996 sold their 2/3rd share in suit land to the plaintiffs for a consideration of Rs.16,500/- and the possession of the suit land was also delivered to them and the mutation No. 854 was also attested in their favour on 27/08/1998. That in the month of June, 2000, the Patwari Halqa and field kanungo approached the plaintiffs and asked them to vacate the suit land and on enquiry they came to know that the suit land has been vested in the

State of H.P. by order of District Collector as the appeal preferred by Krishan Lal Sood against proforma defendants was dismissed by the Collector, Sirmaur District at Nahan in view of breach of Section 113 of H.P.Tenancy and Land Reforms Act. The plaintiffs alleged that the impugned order passed by the Collector, Sirmaur District at Nahan dated 14.01.1997 is without jurisdiction, void abinitio and legally unenforceable, as under Section 113 of the H.P.Tenancy and Land Reforms Act the land could not vest in the State of H.P. That they are enjoying peaceful possession over the suit land and the defendant No.1 State of H.P. has no legal right to cause any sort of interference in their possession over the suit land. Hence, the plaintiffs per force filed the present suit for declaration and permanent prohibitory injunction against the defendants.

3. The suit of the plaintiffs was resisted and contested by the defendant No.1 by raising preliminary objections, inter alia, that the suit is not maintainable under the Act and that the trial Court had no jurisdiction to try it and that neither the plaintiffs, including proforma defendants, had locus-standi and cause of action to file the suit which was also bad for non joinder of necessary parties and also for want of notice under Section 80 CPC. The case of the contesting defendant/State is that Shri Mehru created tenancy in favour of Kundhu, Chetu and Malku in violation of legal provision of Section 113 of the H.P.Tenancy and Land Reforms Act, wherein it has been clearly provide that no land in respect of which proprietary rights have been acquired under this Chapter shall be transferred by sale, mortgage, gift or otherwise. That Krishan Kumar filed an appeal under Section 114 of the H.P.Tenancy and Land Reforms Act against the orders of the Land Reforms Officer passed on mutation No. 818, whereby mutation has been attested in favour of S/Sh. Ved Prakash, Sat Pal, Chetu and Malku. That the Collector, Sirmaur District at Nahan vide order of 14.01.1997 dismissed the appeal preferred by Krishan Kumar and held that creating a tenancy implies a transfer of land and no owner can transfer the land within ten years of acquiring ownership and thus the suit land was vested in the State of H.P. but the defendants No. 2 and 3 on 1.12.1996 tried to alienate the suit land by way of sale. The contesting defendant/State alleged that the suit land has been vested in the State of H.P. vide mutation No.855 of 19.09.1998 free from all encumbrances and this mutation was also attested on the basis of order passed on 14.01.1997 after observing the mandatory lawful procee and in accordance with legal provisions. Hence, the defendant/State of H.P. sought dismissal of suit with costs.

4. On the pleadings of the parties, the trial Court struck following issues inter-se the parties at contest:-

(1) Whether the plaintiffs and proforma defendants No. 4 and 5 are owners in possession of suit land, as alleged? OPP.

(2) Whether the order dated 14.01.1997 and mutation No. 855 of 19.09.1998 based on this order are illegal, void abinito, if so its effect? OPP

(3) Whether the defendant NO.1 is causing interference over the suit land, as alleged? OPP.

(4) Whether the plaintiffs are entitled to relief of injunction, as prayed? OPD.

(5) Whether the suit is not maintainable under H.P.Tenancy and Land Reforms Act, 1972, as alleged? OPD.

(6) Whether the plaintiffs and proforma defendants have no locus standi to file the present suit, as alleged? OPD.

(7) Whether the plaintiffs have no cause of action to file the present suit against reply respondent, as alleged? OPD.

(8) Whether this Court has no jurisdiction to try the suit under H.P.Tenancy and Land Reforms Act, 1972, as alleged? OPD.

(9) Whether no notice under Section 80 CPC has been served on replying defendant, as alleged, If so its effect? OPD

(10) Whether the suit is bad for non joinder of necessary parties, as alleged? OPD

(11) Relief.

5. On an appraisal of evidence, adduced before the learned trial Court it decreed the suit of the plaintiffs whereas the learned First Appellate Court partly modified its decree.

6. Now the plaintiffs/appellants herein instituted herebefore the instant Regular Second Appeal for assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 08.04.2008, this Court admitted the appeal on the hereinafter extracted substantial questions of law:-

1. Whether once it is found that the Statutory authority (District Collector) envisaged by the H.P.Tenancy and Land Reforms Act had not acted in conformity with the fundamental principles of judicial procedure as no notice was issued to the plaintiffs in the appeal pending before it and the plaintiffs were not the party respondents in the said appeal and further as the statutory authority/District Collector has failed to comply with the provisions of H.P.Tenancy and Land Reforms Act, the civil Court has jurisdiction to try the suit?

2. Whether once it is found that the orders of 14.1.1997 i.e. Ext.PB passed by the learned District Collector are in violation to the provisions of the H.P.Tenancy and Land Reforms Act and the said orders are illegal and ultra vires of the law, the learned first appellate Court has erred by holding that the civil Court had no jurisdiction to grant the declaration as prayed for by the plaintiffs/appellants.

Substantial questions of law.

7. Prior to coming into force the H.P.Tenancy and Land Reforms Act one Mehru held the suit land as 'Gair Marusee'. Under a statutory enactment nomenclatured as H.P.Tenancy and Land Reforms Act (hereinafter referred to as the Act) wherein a 'Gair Marusee' tenant stood conferred a right qua automatic conferment of proprietary rights vis.a.vis. the land whereon he hitherto was recorded a 'Gair Marusee', in sequel, whereof one Mehru a recorded 'Gair Marusee' qua the suit land stood foisted with an indefeasible statutory right qua automatic conferment of proprietary rights vis.a.vis him qua the suit land in respect wheroef he hitherto stood recorded as 'Gair Marusee', in consonance wherewith the relevant proprietary rights vis.a.vis. him qua the suit land stood bestowed upon him under a mutation attested on 11.1.1976. However, subsequent to conferment of statutory proprietary rights upon Mehru vis.a.vis. the suit land, he within three years thereafter in 1979, inducted Kundia, Chetu and Malku as tenants vis.a.vis the suit land. The aforesaid creation of tenancies by Mehru upon the suit land within three years since conferment of proprietary rights vis.a.vis. him obviously when constituted its alienation by him vis.a.vis. lessees/tenants inducted thereon naturally hence invited the bar constituted in 113 of the H.P.Tenancy and Land Reforms Act, which stands extracted hereinafter:

> "113. Bar of teransfer of ownership rights- No land in respect of which proprietary rights have been acquired under this Chapter shall be transferred by sale, mortgage, gift or otherwise during a period of ten years by a person from the date he acquires proprietary rights:
>
> "Provided that nothing contained in sub-section (1) shall apply to the transfer of land made for a productive purpose with the prior permission of the State Government in a prescribed manner."
>
> Provided further that nothing in this sub-section shall apply to the land mortgaged with the Co-operative Societies established under the Himachal Pradesh Co-operative Societies Act, 1968 or with a [8] bank. (3 of 1969).
>
> (2) Any transfer of land made in contravention of sub-section (1) shall be void and no registering authority shall register any document evidencing such transfer under the Indian Registration Act, 1908."

wherewithin a statutory embargo stands constituted against a hitherto 'Gair Marusee' whereupon statutory vestment of proprietary rights stand bestowed not upto 10 years therefrom making its

alienation whereas with Mehru within three years of occurrence of bestowment upon him of statutory proprietary rights qua the suit land alienating it by inducting tenants thereon rendered the relevant bar qua him to stand squarely attracted vis.a.vis him besides qua the suit land. However, at that stage no proceedings stood initiated by the competent revenue officer for materializing the effect of Section 113 of the Act rather on his demise under a mutation bearing No. 740 attested on 14.2.1981 the suit land stood mutated vis.a.vis his legal heirs wherefrom-whom one Krishan Kumar acquired title qua the suit land under a sale deed executed by them vis.a.vis. him. Subsequently, proprietary rights qua the suit land stood also conferred upon the persons who during the life time of Mehru stood inducted as tenants upon the suit land whereas creation of tenancy vis.a.vis them stood statutorily interdicted also constituted alienation thereof vis.a.vis them, alienation whereof entailed qua the suit land the statutory consequences constituted in Section 113 of the Act besides hence stirred the statutory consequences arising from infraction of its provisions, yet the aforesaid consequence spurring from the relevant statutory embargo standing infracted remained unawakened rather remained un-materialized merely for inaction of the relevant revenue agency concerned. Nonetheless occurrence of stark infractions for reasons aforestated, of the statutory mandate embodied in Section 113 of the Act per se render invalidated the alienation of the suit land by Mehru vis.a.vis. tenants inducted thereon by him significantly when its alienation occurred within the statutorily interdicted period since conferment of proprietary rights thereon upon him also rendered invalidated the attestation of mutation No. 740 whereupon his legal heirs stood conferred title qua the suit land wherefromwhom one Krishan Kumar acquired under a sale deed executed by them vis.a.vis. him title qua the suit land. However, significantly, when despite grave statutory infractions for reasons aforestated occurring qua the mandate of Section 113 of the Act, infractions whereof occurred during the life time of Mehru whereupon the revenue officers concerned stood concomitantly barred to on his demise attest the mutation of inheritance qua his legal heirs vis.a.vis the suit land also barred them to confer proprietary rights upon the tenants inducted upon the suit land by Mehru induction whereof whom occurred within three years of his standing conferred proprietary rights qua the suit land besides barred the competent Registering Authority to accept the apposite sale deed executed by the legal heirs of deceased Mehru vis.a.vis. Krishan Kumar, yet the aforesaid misdemeanours visibly occurred whereas initiation of motion by the Revenue Officer concerned for materializing the consequences of infraction of the provisions of Section 113 of the Act was enjoined to erupt, conspicuously when for reasons aforestated, infraction of its mandate evidently surgesforth. Furthermore the persons who stood inducted as tenants vis.a.vis. the suit land by Mehru during his life time continued to hold its possession whereupon they recorded its alienation vis.a.vis. the plaintiffs. However, one Krishan Kumar an alinee of the legal heirs of Mehru despite a sale deed qua the suit land standing executed vis.a.vis. him by the legal heirs of Mehru did not obtain possession of the suit land. An incisive scanning of the records unveils of under Ext.PA comprising a registered deed of conveyance executed vis.a.vis. the suit land by defendants No. 2 and 3 with the plaintiffs the latter acquiring title to the suit land. However, the relevant mutation whereby proprietary rights stood conferred upon the suit land vis.a.vis. the vendors of the plaintiffs stood subjected to an assault before the District Collector by one Krishan Kumar alinee of the legal heirs of one Mehru whereupon he under an order pronounced on 14.1.1997 comprised in Ext.PB set-aside mutation 818 recorded on 28.2.1994 whereby proprietary rights stood attested vis.a.vis. the vendors of the plaintiffs. Also thereunder the suit land was ordered to be vested in the State of Himachal Pradesh. In sequel thereto mutation No. 855 ordering for the vestment of the suit land vis.a.vis. the State of Himachal Pradesh stood attested, imperatively hence the title of the plaintiffs qua the suit land has come under a cloud whereupon they stand constrained to institute a suit for setting aside mutation No. 855 whereby the suit land was ordered to be mutated vis.a.vis. the State of Himachal Pradesh.

8. The learned First Appellate Court had while meteing deference to Section 115 of the Act, which stands extracted hereinafter:-

> "115. Bar Of Jurisdiction. :- Save as otherwise expressly provided in this Chapter, every order made by the Collector, Commissioner or Financial Commissioner shall be deal, and no proceeding or order token or made under this Chapter, shall be called in question by any Court or before any officer or authority."

recorded a conclusion of the order of the Collector comprised in Ext.PB whereupon the suit land when for reasons aforestated begetting infraction of the mandate of Section 113 of the Act hence stood ordered to be vested in the State of Himachal Pradesh, attracting the relevant bar constituted therewithin significantly when it stood pronounced on culmination of proceedings embarked upon by him as a Revenue Officer under Chapter III of the Act whereupon Ext.PB stood statutorily rendered to be unamenable for standing questioned in any Civil Court on anvil thereof he concluded qua hence the Civil Court holding no jurisdiction to try the suit of the plaintiffs wherein it stands assailed, contrarily it concluded of the relevant jurisdiction for assailing it standing vested under Section 61 of the Act in the Commissioner. The tenacity of the aforesaid conclusion formed by the learned First Appellate Authority stands assailed, by the learned counsel for the plaintiffs on the ground that the reasons propounded by the Collector for attracting qua the suit land the statutory bar constituted in Section 115 of the Act, suffering from legal enfeeblement. To strengthen his submission he espouses qua a plethora of judicial verdicts relaxing the rigour of the relevant bar against a Civil Court trying the suit of the plaintiffs when evident display emerges qua non adherence, by the relevant statutory authority constituted under the Act vis.a.vis the principles of natural justice, principles whereof when imminently stand infracted herebefore comprised in the plaintiffs' not participating in the relevant proceedings which culminated in the pronouncement of Ext.PB, rendered them to be condemned unheard also hence constituted transgression of the principle of audi alteram partem. The aforesaid submission would hold vigour in case Ext.PB dehors the non participation of the plaintiffs in the proceedings which occurred before the Collector concerned, only when the vendors of the plaintiffs also did not record their participation therein. However, a perusal of the relevant record makes a vivid disclosure of the vendors of the plaintiffs recording their active participation in the relevant application instituted before the Collector whereupon a relief stood ventilated for setting aside mutation No. 808 of 22.7.1992 attested qua the suit land vis.a.vis. the tenants inducted thereon during the life time of Mehru. Since the vendors of the plaintiffs' actively participated in the proceedings embarked upon by the Collector on the aforesaid application instituted therebefore by the Vendee from the legal heirs of Mehru wherefromwhom he precedingly vis.a.vis the plaintiffs acquired title to the suit land, fosters an inevitable sequel of theirs also concerting to validate the relevant mutation preeminently when in course thereof they under Ext.PA alienated the suit land vis.a.vis. the plaintiffs. Since alienation of the suit land occurred during the pendency of the aforesaid application preferred by the vendee of the legal heirs of deceased Mehru rather aggravatingly enjoined them to seek impleadment of the plaintiffs' in the apposite application preferred by one Krishan Kumar before the Collector. However, the vendors of the plaintiffs omitted to do so. Dehors the factum of the vendors of the plaintiffs making the aforesaid omission yet cast an onerous obligation upon them to thereat concert to validate Ext.PA. Since they recorded their active participation in the proceedings embarked upon by the Collector concerned upon an application preferred by the vendee of the legal heirs of Mehru palpably hence their active participation therein is to be construed qua theirs hence discharging their obligation vis.a.vis. the plaintiffs qua theirs efficaciously concerting to validate Ext.PA also hence their participation therein being construable to be also participation on behalf of the plaintiffs, conspicuously when they had qua the suit land received sale consideration from the latter whereupon hence they are to be construed to be making a pro active concert to validate it moreso, when their title qua the suit land was under a cloud in sequel whereto the relevant order pronounced by the Collector comprised in Ext.PB, is amenable to a construction of it standing not rendered behind the back of the plaintiffs dehors their non participation in the proceedings culminating in making Ext.PB nor it stands infected with any vice of its infracting the principle of audi alteram partem. Erection of the aforesaid inference reiteratedly stands founded upon the trite factum of the vendors of the plaintiffs recording their participation therein whereupon they

are construed to be also defending therein the interest of the latter. Consequently, the statutory bar as envisaged under Section 115 of the Act, as relied upon by the learned First Appellate Court to non suit the plaintiffs stands aptly attracted. Since grave pervasive infraction of the mandate of Section 113 of the Act, for reasons aforesated surgesforth herebefore also when its attraction vis.a.vis. the plaintiffs evidently is anchored upon sinewed evidentiary material, the mere factum of non participation of the plaintiffs in the relevant proceedings may not erode its vigour imperatively when flagrant evident transgression of the mandate of law occurs also when hence the relevant evident statutory infraction would be unamenable to suffer any erosion even by participation of the plaintiffs in the relevant proceedings. Consequently, the mere factum of their non participation therein cannot give them any leverage to contend of hence the principles of natural justice standing infracted also they hold no empowerment to thereupon contend of the statutory bar as stood invoked by the learned First Appellate Court for non suiting them being unattractable qua them, tritely when an evident flagrant transgression of the mandate of law occurs also when evident vicarious representation for defending therein the interest of the plaintiffs' entwined with the interest in the suit land of their vendors manifestly emerges, obviously comprised in the vendors of the plaintiffs recording their participation in the relevant proceedings whereupon the effect of non participation therein of the ultimate victim of statutory consequences arising from attraction of the statutory bar qua the suit land would not stain the relevant proceedings nor the verdict recorded in culmination thereof would stand stained with any vice of its infracting the principles of natural justice nor would the relevant statutory bar against the Civil Court trying the lis, suffer any emasculation.

9. 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 questions of law are answered against the plaintiffs. Decree sheet be prepared accordingly. 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.

State of Himachal Pradesh and another ..... Appellants

Vs.

Virendra Kumar .... Respondent

LPA No. 193 of 2012
Judgment reserved on: 26.9.2016.
Date of decision: 4.10.2016

Constitution of India, 1950- Article 226- Petitioner was appointed as a lecturer – he was promoted as Principal in the year 1987- he sought voluntarily retirement, which was granted – the petitioner filed a writ petition seeking the benefit of higher pay scale, which was transferred to Tribunal – the Tribunal allowed the petition and directed the fixation of the pay on a higher scale – another application was filed, which was dismissed on the ground that the benefit had already been granted to the petitioner – he again filed an original application, which was transferred to the High Court and was allowed by Single Judge – held, in appeal that earlier dismissal was not challenged by the petitioner and the same had attained finality- identical reliefs have been sought and the present application is barred- the application was filed after 7 years of the retirement and is barred by delay and laches – writ Court had not gone into the question of delay – petition dismissed. (Para-12 to 18)

Cases referred:

Gulabchand Chhotalal Parikh v. State of Gujarat AIR 1965 SC 1153

Babubhai Muljibhai Patel vs. Nandlak Khodidas Barot (1974) 2 SCC 706

Sarguja Transport Service vs. STAT (1987) 1 SCC 5

For the Appellants Mr. Romesh Verma, Mr. Varun Chandel, Addl. Advocate Generals with Mr. J.K. Verma and Mr. Kush Sharma, Deputy Advocate Generals.

For the Respondent In person.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This Letters Patent Appeal is directed against the judgment rendered by the learned writ Court on 02.11.2010 whereby it allowed the writ petition filed by the respondent herein and directed the appellants herein to consider his case for fixation of pay under FR 22 (a) (i) on 1.3.1986 in the pay scale of Rs. 2100-3700, for re-fixation of his pay on 1.1.1987 under FR 22-C, for fixation of his pay under FR 22 (a) (i) on 4.4.1987 in the pay scale of Rs. 2400-4000 and for re-fixation on 1.1.1988 under FR 22-C.

2. Before proceeding any further, it would be necessary to set out in brief the undisputed facts.

3. The respondent/writ petitioner (hereinafter referred to as the 'writ petitioner') on 31.12.1965 was appointed as Lecturer with the respondent. In the year 1986 the Higher Secondary System of School Education was done away with and instead Senior Secondary School stood established. The writ petitioner continued to work on the post of Lecturer till 3.4.1987 and it was thereafter that he was appointed and posted as Principal and joined as such on 4.4.1987 at Govt. Senior Secondary School, Banikhet, District Chamba. However, the writ petitioner sought volunteer retirement which was granted by the appellants/ writ respondents (hereinafter referred to as the 'writ respondents') and he accordingly retired on 16.3.1991.

4. The writ petitioner initially filed CWP No.598 of 1984 which upon creation of the Administrative Tribunal came to be transferred to the said Tribunal and was assigned T.A. No. 81/1987, wherein he claimed the following substantive reliefs:

> *(a) That the respondent may be directed to modify the pay scale of Rs.825-25-850-30-1000-40-1200-50-1400-60-1580 to Rs.825-25-850-30-1000-40-1200-50-1400-60-1880 by increasing the maximum of pay scale by 5 increments.*
>
> *(b) That the respondent may be directed to fix the pay of the petitioner in the higher pay scale of Rs.400-800 under Fundamental Rule 22-C.*

5. However, before the above petition could be decided and after the petitioner having stood voluntarily retired from service, again approached this Court by way of CWP No. 680 of 1994, which too was transferred to the Administrative Tribunal and registered as T.A. No.85/1987 and the substantive relief claimed therein reads thus:

> *(a) That the petitioners be held entitled to the award of pay scale of Rs.400-800 on the basis of 25% of their strength from 1.11.1966 instead of 31.12.1977.*
>
> *(b) That the respondent may kindly be directed to award the pay scale of Rs. 700-1100 to 15% Lecturers of Government Higher Secondary Schools with effect from the date it was awarded to the Headmasters/Headmistresses of Government High Schools.*

6. Both the aforesaid T.As. No.81/1987 and 85/1987 were decided by the Tribunal on 8.1.1992 by a common judgment, the operative portion whereof read thus:

> *"TA -81/87 and TA 85/87 have been filed by Shri Virender Kumar. Initially, inTA-85/87 Shri Ganga Parshad was also one of the co-petitioner with Shri Virender Kumar, whose name was deleted vide order dated May 23, 1986 and as such, the petitioner Virender Kumar is entitled to the relief only in one of the petitions and we*

award the same to him in TA-81/87 on the basis of TA-83/87 in which we direct the respondent to fix the petitioner in the revised pay scale of Rs.700-1580/- with effect from January 1, 1978. Shri Ram Prakash in TA-83/87 and Virender Kumar in TA-81/87 were both Lecturers posted in Government Higher Secondary School, Matiana and as such in the case of Virender Kumar TA-81/87 and TA-85/87 we direct the respondent to fix the petitioner in the revised pay scale of Rs.700-1580/- with effect from January 1, 1978 and pay him the arrears to which he may be found entitled to within a period of three months in view of the directions given and accordingly the petitioner is entitled to all the consequential benefits to which he may be found eligible with no order as to costs."

7. The writ petitioner thereafter again approached the learned Administrative Tribunal by way of O.A. No. 941 of 1996 wherein he prayed for the following reliefs:

(i) Respondents be directed to fix the pay of the applicant in the pay scale of Rs.700-1580 w.e.f. 1.1.1978 in terms of the judgment of the Hon'ble Admn. Tribunal in T.A. Nos. 83/87 and 85/87 delivered on 8.1.1992.

(ii) Respondent be directed to treat the applicant as Lecturer w.e.f. 31.12.1965 to 7.4.1987 and grant him 2 Prop. Increments of Rs.100/- each on 1.1.1986 as the applicant has worked as Lecturer since 31.12.1965 to 3.4.1987.

(iii) Respondent be directed to fix the pay of the applicant in the next promotion grade of Rs.2100-3700 by applying FR 22 (c) on 4.4.1987 the date the applicant got the Class II (gazetted) post and started discharging the duties in the higher Class II post (gazetted).

(iv) Respondent be directed to award the revised pay scale of Rs.2400-4000 of Principal to the applicant w.e.f. 1.3.1990 and fixing the pay under FR 22-C.

(v) Respondents be directed to treat Rs.150/- Sp. Pay as pay in calculating the applicant's pension.

(vi) Respondent be directed to revise the applicant's pension and pay him the enhanced pension and other consequential retirement benefits like gratuity, leave encashment, commuted value of pension with all arrears due.

(vii) Direct the respondent to pay penal interest to the applicant at market value to the applicant under sub para (i) to (iv) and w.e.f. 29.12.1995 on amount which become payable to the applicant under sub paras (v) and (vi) till the date of realisation."

8. However, the learned Administrative Tribunal dismissed the Original Application No. 941 of 1996 on 8.8.1996 by observing as under:

"We have heard the petitioner in person. The claim sought for by him has already been granted to him in the earlier applications TA-81/87 and TA-85/87 with consequential benefits as detailed in the operating part of the decision of this Tribunal dated January 8, 1992. His grouse is that the said order has not been implemented as arrears arisen from the consequential benefits therein have not been paid. The applicant is entitled to move an application for execution in terms of Section 27 of the Administrative Tribunal Act but he cannot claim the benefits herein as the earlier judgment dated January 8, 1992 has become final. This application thus is not maintainable on the same cause of action seeking the same relief. Accordingly this application is dismissed in limine.

Before parting we may observe that this dismissal shall not in any way bar the applicant from getting the earlier judgment of this Tribunal dated January 8, 1992 implemented through this Tribunal in terms of Section 227 of ATA to above."

9. Admittedly, the writ petitioner did not assail the said decision, but surprisingly, filed another O.A. No. 759 of 1998 before the learned Tribunal claiming therein virtually the same

reliefs as had been earlier claimed by him in O.A. No. 941 of 1996 as is evident from the relief clause which is extracted below:

(i) The pay of the applicant be fixed under F.R. 22 (a) (i) on 01.03.1986 in the pay scale of Rs.2100-3700 and refixed on 01.01.1987 under F.R. 22-C.

(ii) The pay of the applicant be fixed under F.R. 22 (a) (i) on 04.04.1987 in the pay scale of Rs.2400-4000 and re-fixed on 01.01.1988 under F.R. 22-C.

(iii) The respondent be directed to pay the arrears of higher salaries to the applicant.

(iv) Interest be paid to the applicant @ 18% per annum on the amount of arrears on account of fixation of his pay, when he was deemed to have been appointed to the higher post of Lecturer, Senior Secondary School, beginning three months after pay-revision order dated 23.03.1989, that is from 23-06-1989 to date of payment.

(v) Interest be paid to the applicant @ 18% per annum on the amount of arrears of higher salaries on account of fixation of pay, when he was appointed to the post of Principal, Senior Secondary School from the lower post of Lecturer, Senior Secondary School, beginning three months of joining of the said higher post on 04.04.1987, that is from 04.07.1987 to date of payment.

(vi) Further grant the applicant all consequential benefits.

(vii) Cost in the case be awarded to the applicant."

10. It is this petition, which upon closure of the Tribunal came to be transferred to this Court and was registered as CWP (T) No. 5053 of 2008 and has been allowed by the learned Single Judge of this Court.

11. The respondents filed their reply raising preliminary submissions regarding non-maintainability of the petition on the ground that the writ petitioner had sought the same relief in O.A. No. 941/1996 which had already been rejected by the learned Tribunal. In addition to that, it was averred that on account of the writ petitioner having filed Contempt Petition No. 1/2001 in Execution Petition No. 15/96 in TA No. 1/87 and 85/87 and contempt petition No.55/97 in Execution Petition No. 15/96 in TA No. 81/87 and 85/87 and both the contempt petitions having been withdrawn by the writ petitioner on 28.03.2001 the instant petition was not maintainable. Lastly, the maintainability of the petition was further questioned on the ground of delay and laches.

12. It is evidently clear from the aforesaid sequence of events that the reliefs now claimed in O.A. No. 759 of 1998 which was registered as CWP (T) No. 5053 of 2008, were identical and same to those sought for in OA No. 941 of 1996, which was dismissed by the learned Tribunal and such dismissal has attained finality and thus was barred by principles of *res judicata*.

13. It is well settled that cause of action once agitated leaves no scope for fresh proceedings to be initiated as the same are barred by the principles of *res judicata*. Although, the Code of Civil Procedure, does not apply but the principles enshrined therein would certainly supply as held by the Hon'ble Supreme Court in ***Gulabchand Chhotalal Parikh v. State of Gujarat AIR 1965 SC 1153, Babubhai Muljibhai Patel vs. Nandlak Khodidas Barot (1974) 2 SCC 706 and Sarguja Transport Service vs. STAT (1987) 1 SCC 5***).

14. The position of law being settled, leaves no manner of doubt that the O.A. No.759 of 1998 registered as CWP (T) No. 5053 of 2008 was in fact not maintainable.

15. In addition to above, it would be noticed that though the writ petitioner sought volunteer retirement on 16.3.1991, however, the instant petition was filed only in the year 1998 and was thus clearly barred by limitation as prescribed under Section 21 of the Administrative Tribunals Act, 1985 (for short 'Act'), which reads as thus:

"21. Limitation. -(1) A Tribunal shall not admit an application,—

(a) *in a case where a final order such as is mentioned in clause (a) of sub-section (2) of section 20 has been made in connection with the grievance unless the application is made, within one year from the date on which such final order has been made;*

(b) *in a case where an appeal or representation such as is mentioned in clause (b) of sub-section (2) of section 20 has been made and a period of six months had expired thereafter without such final order having been made, within one year from the date of expiry of the said period of six months.*

(2) Notwithstanding anything contained in sub-section (1), where—

(a) *the grievance in respect of which an application is made had arisen by reason of any order made at any time during the period of three years immediately preceding the date on which the jurisdiction, powers and authority of the Tribunal becomes exercisable under this Act in respect of the matter to which such order relates; and*

(b) *no proceedings for the redressal of such grievance had been commenced before the said date before any High Court,*

the application shall be entertained by the Tribunal if it is made within the period referred to in clause (a), or, as the case may be, clause (b), of sub-section (1) or within a period of six months from the said date, whichever period expires later.

(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), an application may be admitted after the period of one year specified in clause (a) or clause (b) of sub-section (1) or, as the case may be, the period of six months specified in sub-section (2), if the applicant satisfies the Tribunal that he had sufficient cause for not making the application within such period."

16. While considering the aforesaid Section, the Hon'ble Supreme Court in ***D.C.S. Negi*** vs. ***Union of India and others,*** decided on 07.03.2011 in SLP (C) No.7956 of 2011, has very clearly delineated the powers of the Tribunal in respect of limitation and it was held that Section 21 of the Act unambiguously mandates the period within which Government employee has to agitate before the Tribunal for consideration and adjudication of his case and it is apt to reproduce the following observations:

"A reading of the plain language of the above reproduced Section makes it clear that the Tribunal cannot admit an application unless the same is made within the time specified in clauses (a) and (b) of Section 21 (1) or Section 21 (2) or an order is passed in terms of sub-section (3) for entertaining the application after the prescribed period. Since Section 21 (1) is couched in negative form, it is the duty of the Tribunal to first consider whether the application is within limitation. An application can be admitted only if the same is found to have been made within the prescribed period or sufficient cause is shown for not doing so within the prescribed period and an order is passed under Section 21 (3).

In the present case, the Tribunal entertained and decided the application without even adverting to the issue of limitation. Learned counsel for the petitioner tried to explain this omission by pointing out that in the reply filed on behalf of the respondents, no such objection was raised but we have not felt impressed. In our view, the Tribunal cannot abdicates its duty to act in accordance with the statute under which it is established and the fact that an objection of limitation is not raised by the respondent / non-applicant is not at all relevant."

17. In the present case, the learned writ Court entertained and decided the application (petition) without even adverting to the issue of limitation, though it had been specifically raised. This course obviously was not permissible in the teeth of the provisions contained in Section 21 of the Act.

18. As we have already held that the Original Application No. 759 of 1998 (CWP [T] No. 5053 of 2008) to be not maintainable, therefore, there was no jurisdiction vested in the learned Writ Court to have proceeded to determine the case on merits and decide the same, more particularly when the petition on the same cause of action had already been dismissed by the learned Tribunal on 8.8.1996 and the said order had attained finality.

19. In view of the aforesaid discussion, we find merit in this appeal and the same is accordingly allowed and the order passed by the learned writ Court dated 02.11.2010 is set-aside and O.A. No. 759 of 1998 (CWP [T] No. 5053 of 2008) filed by the writ petitioner is ordered to be dismissed, so also the pending application(s) if any, leaving the parties to bear their own costs.

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

State of Himachal Pradesh .....Appellant.
Vs.
Vishal .....Respondent.

Cr. Appeal No.213 of 2008.
Reserved on : 27.09.2016.
Decided on : 04.10.2016.

Indian Penal Code, 1860- Section 279 and 337- Informant was driving a motorcycle – a scooter being driven by the accused at a high speed hit a lady due to which she suffered injuries – the accused was tried and acquitted by the trial Court- held, in appeal that there are contradictions in the statements of prosecution witnesses- lots of people had gathered at the spot but none was joined in the investigation – link evidence is missing- prosecution has failed to prove its case beyond reasonable doubt - the accused was rightly acquitted by the trial Court- appeal dismissed. (Para-7 to 13)

Cases referred:
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the appellant Mr. Virender Kumar Verma, Addl. AG with Mr. Pushpinder Singh Jaswal, Dy. Advocate General.
For the respondent Mr. Varun Chauhan, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant-State of Himachal Pradesh against the judgment of acquittal of the accused in a case under Sections 279 and 337 of the Indian Penal Code passed by the learned Judicial Magistrate 1st Class, Court No.V, Shimla, District Shimla, dated 12.11.2007, in Criminal Case No.12-2 of 2005.

2. Briefly stating facts giving rise to the present appeal are that statement under Section 154 Cr. P.C of complainant Hari Krishan (PW-4) was recorded by the Police that he was driving Motorcycle on 18.11.2004, at about 1:15 PM, when he reached near Victory Tunnel, Shimla, a Scooter bearing No.CH-01X-7681 LML Vespa was being driven by the accused (hereinafter referred to as 'the accused') at a high speed. Gurprit Singh was also sitting on the scooter as a pillion rider. Due to the rash and negligent driving of the accused, he struck against his scooter with a lady Kabo Devi. The handle of the Scooter struck with the lady, due to which, she fell upon the STD Board erected on the side of the road. The complainant immediately reported the matter to Head Constable, who was on duty on the spot, who took the injured,

namely, Kabo Devi (PW-8) to DDU Hospital, Shimla, for medical examination. During the course of investigation, the Police took into possession the Scooter bearing No. CH-01X-7681, prepared site plan and also procured the MLC of the injured Kabo Devi.

3. The prosecution, in order to prove its case, examined as many as 09 witnesses. Statement of the accused was recorded under Section 313 Cr. P.C, wherein he has denied the prosecution case and claimed innocence. No defence evidence was led by the accused.

4. Learned Additional Advocate General appearing on behalf of the appellant has argued that the learned Court below has not appreciated the fact that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt.

5. On the other hand, learned counsel appearing on behalf of the accused has argued that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt. There is no evidence that the accused was guilty so, no interference is required for in the well reasoned judgment passed by the learned Court below, therefore, the accused was rightly acquitted.

6. To appreciate the arguments of learned Additional Advocate General and learned counsel for the accused, this Court has gone through the record in detail and minutely scrutinized the statements of the witnesses.

7. PW-4 Hari Krishan is the eye witness of the occurrence. He has stated that the injured (PW-8) suffered injuries on her leg. PW-5 Dr. Manjula Gupta, has proved on record MLC Ex.PW5/A and found the following injuries on the person of PW-8 :

"1. Swelling on left leg with tenderness.

2. About one inch transverse wound lacerated at the site of swelling.

3. Fresh bleeding was present from the wound.

4. 1 m.m abrasion below right elbow.

5. X-ray of left leg was advised. As per MLC, X-ray report Ex.PA no fracture. B detected hence all injuries were simple in nature. Probation of injury was fresh and caused with blunt weapon."

8. PW-3 Gian Chand, Mechanic, has found that there was no mechanical defect in the Scooter. The injured Kabo Devi, has appeared as PW-8. She has stated through Smt. Vinay Kumari, Principal in Speech and Hearing School, Dhali, District Shimla, H.P, that on the fateful day, while she was coming from her house, a Scooter driver struck against her, due to which she suffered injuries on her leg. The Scooter driver has also taken her to the hospital. She has also stated that she can identify the driver of the Scooter. She has also stated that the accused was driving the Scooter at a high speed.

9. The statement of other eye witnesses i.e PW-2 and PW-4, it is evident that there are material contradictions in their statements. PW-4 stated that the accused was driving the scooter in a normal speed of 40/50. On the other hand, PW-2 has stated that he was driving the scooter at a very high speed. PW-2 has stated that the scooter hit with the STD board erected on the side of the road due to which the lady suffered injuries. As per the prosecution case, the scooter hit the injured lady and she fell upon the STD board erected on the side of the road. How it comes that when the scooter was driven in the middle of the road and then it hit a lady and she collided with the STD Board erected in the side of the road. PW-4 Hari Krishan, in his statement, has stated that the scooter has not hit the injured lady directly, but instead of it hit firstly with the STD board, which in turn hit the injured lady and due to this she suffered injuries. There are material contradictions in the statements of both these witnesses *inter se,* as well as with the prosecution story also. Both these witnesses are also Police Officials. As per PW-2, at the time of occurrence, a lot of people gathered on the spot, but none has been joined in the investigation by the Police. As per the prosecution, the accused was also accompanied by a pillion rider. This

pillion rider has also not been examined by the prosecution. The prosecution has failed to prove the guilt of the accused conclusively and beyond the shadow of reasonable doubt.

10. From the above, it is difficult to conclude that the accident has taken place due to rash and negligent driving of the accused. Further, the conduct of the accused shows that he took the injured to the hospital and got her treated after serving water. Though, as per the Police witnesses, the accused has not taken her (injured) to the hospital and there is no murmur that the accused has taken her to the hospital, which the injured has otherwise stated. So, the link evidence is missing in this case.

11. It has been held in **K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258,** that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/misappreciation of evidence on record, reversal thereof by High Court was not justified.

12. The Hon'ble Supreme Court in **T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

13. So, in my considered view the prosecution has failed to prove the guilt of the accused conclusively and beyond reasonable doubt. There is no illegality and infirmity in the findings, so recorded by the learned trial Court.

14. In view of the aforesaid decisions of the Hon'ble Supreme Court and discussion made hereinabove, I find no merit in this appeal and the same is accordingly dismissed. Record of the learned trial Court be sent back forthwith.

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

Union of India and another ....Appellants-defendants.
Versus
Bhagat Ram Chauhan .....Respondent-plaintiff.

RSA No. 651 of 2015.
Reserved on: 27.09.2016.
Date of Decision :4th October, 2016.

Specific Relief Act, 1963- Section 5- Plaintiff filed a suit for possession pleading that he is exclusive owner in possession of the suit land- the defendants had raised construction of three storeyed building and in the process encroached upon the suit land- defendants denied the encroachment- the suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held in second appeal that ownership of the plaintiff was corroborated by the revenue record- defendants claimed that construction was raised on the acquired land – however, the award pronounced by Land Acquisition Collector qua the suit land was not brought on record- further, it was not established that money was paid to the predecessor of the plaintiff- the presumption of correctness was not rebutted- report of the Local Commissioner established the encroachment- the suit was rightly decreed by the Courts- appeal dismissed. (Para-9 to 14)

For the Appellants: Mr. Ashok Sharma, Assistant Solicitor General of India with Mr. Angrez Kapoor, Advocate.
For the Respondent: Mr. B.S. Chauhan, Senior Advocate with Mr. Dinesh Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Plaintiff's suit for possession qua the suit land comprised in Khewat/Khatauni No.80/86, Khasra No.419/266/1, measuring 10 biswas, located at Village Mashobra, Pargana Shohawali, Tehsil and District Shimla, H.P. stood decreed by the learned trial Court. The defendants standing aggrieved by the apposite rendition of a decree of possession qua the suit land vis-a-vis the plaintiff preferred an appeal therefrom before the learned District Judge, Shimla, who in his rendition rendered a verdict in affirmation to the verdict recorded by the learned trial Court. The defendants/appellants herein are aggrieved by the judgment and decree of the learned District Judge, Shimla, wherefrom they hence for assailing it prefer an appeal herebefore.

2. Briefly stated the facts of the case are that the plaintiff has filed suit for possession regarding the land bearing khewat khatauni No. 80/86, khasra No.419/266/1, measuring 10 biswas, situated at village Mashobra, Pargana Shohawali, Tehsil and District Shimla, H.P. The plaintiff has also sought the decree of possession on the ground that the defendants may kindly be directed to remove the construction/structure and handover the vacant possession of the suit land to the plaintiff. The suit has been filed on the ground that he is in exclusive owner in possession of the suit land. According to him, the defendants had raised the construction of three storeyed building for running post office and staff quarter about 5-6 years ago and taking the undue advantage of the absence of the plaintiff from the spot, the defendants have encroached upon the suit land. The factum of above encroachment came to the notice of the plaintiff during the settlement proceedings. When the plaintiff came to know about the illegal possession of the defendants over the suit land, then he lodged his protest to the concerned authorities who assured the plaintiff that the construction would be removed or the suit land would be acquired, but when they failed to keep their words then plaintiff served a legal notice upon them on 26.7.2003. Despite service of the notice, neither the construction was removed nor the possession was handed over to the plaintiff. Hence the suit.

3. The defendants contested the suit and filed written statement. The defendants in their written statement have taken the preliminary objections inter alia cause of action, locus standi, estoppel, limitation, maintainability and mis joinder and non joinder of necessary parties. On merits, It has been pleaded that the defendants had opened a post office at Mashobra to provide the postal facilities to the general public. Earlier, the post office was functioning in rented building and lateron a case for acquisition of plot measuring 11 biswas from khewat No.5, Khatauni No.5, khasra No.266 was taken up with the H.P. State Government. The acquisition proceedings were finalized in the year 1956 and the land, upon which building of the post office is situated was acquired. It has been also pleaded that the value of the land was assessed as Rs.2,645/- which was paid to the H.P. State government vide cheque No.005892/509153 dated 23.12.1957. Thereafter, the possession of the land was taken by the department on 17.03.1959. Thereafter the construction work of the building of the post office was started. During the period when the construction work was going on, no objection has been raised. They have also pleaded that the suit land has not been encroached upon by the defendants, as such, the question of giving any assurance to the plaintiff regarding payment of market value of the land or removal of the structural does not arise. Other contents of the plaint have also been denied and the defendants have prayed for dismissal of the suit.

4. The plaintiff/respondent herein filed replication to the written statement of the defendants/appellants, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

5. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties in contest:-

1. Whether the plaintiff is entitled for the decree of possession, as alleged? OPP.

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

3. Whether the suit is barred by limitation? OPD

4. Whether the plaintiff is guilty of suppressing material facts, if so, its effect? OPD

5. Whether the plaintiff has no cause of action? OPD.

6. Whether the present suit is not maintainable, as alleged? OPD

7. Whether the suit is bad for want of notice under Section 80 CPC? OPD

8. Whether the plaintiff is estopped from filing the suit by his own act, omission and commissions? OPD

9. Whether the suit is not valued for the purpose of court fee and jurisdiction? OPD.

10. Whether the suit is not properly and legally verified as per rules? OPD

11. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the respondent/plaintiff. In an appeal, preferred therefrom by the appellants/defendants before the learned first Appellate Court, the learned first Appellate Court dismissed the appeal.

7. Now the defendants/appellants have instituted the instant Regular Second Appeal before this Court assailing the findings recorded by the learned first Appellate Court in its impugned judgement and decree.

8. I have heard the learned counsel appearing for the parties at length and have also carefully perused the entire record.

9. The plaintiff had acquired title as owner to the suit land from one Chidu its hitherto owner. The plaintiff averred qua the defendants subjecting the suit land to construction whereupon he stood constrained to institute the instant suit qua restoration of its possession. Revenue records qua the suit land comprised in Exts.PW1/D to Ex.PW1/M make visible disclosures therein qua the plaintiff holding title as owner to the suit land. However, though the apposite portrayals held in Ex.PW1/D to Ex.PW1/M do hold a presumption of truth yet the presumption of truth garnered by the revenue entries held in Ex.PW1/D to Ex.PW1/M is rebuttable besides is displaceable by cogent evidence standing adduced by the defendants wherein bespeakings occur of the suit land during the life time of its hitherto owner one Chidu standing subjected to acquisition by the relevant competent authority also his receiving compensation in sequel to an award qua the suit land standing pronounced by the relevant competent authority. In the event of the rebuttable presumption of truth garnered by the apposite reflections occurring in Exts. PW1/D to Ex.PW1/M qua the plaintiff holding title to the suit land standing hence displaced, the decrees of possession qua the suit land concurrently rendered by both the learned Courts below would suffer the fate of theirs being amenable for reversal by this Court.

10. The defendants to substantiate the factum of the suit land during the life time of Chindu wherefrom the plaintiff acquired title thereto, standing subjected to acquisition, placed reliance upon notifications issued for acquisition of the suit land, notifications whereof stand comprised in Ext. DW-Z-1 and Ext. DW-Z-2. However, the concert of the defendants to thereupon strip the vigour of the plaintiff's assertion qua a decree for possession of the suit land being renderable qua him, is rendered infirm in the evident trite factum of the defendants not placing on record the best evidence comprised in the competent authority in pursuance thereto pronouncing an award under Section 11 of the Land Acquisition Act whereupon the suit land stood brought to acquisition wherefrom the apposite aspiration of the defendants would formidably spur. Since the pronouncement of an award under Section 11 of the Land Acquisition

Act by the relevant competent authority was imperative for holding a firm conclusion qua during the life time of Chidu, the suit land standing acquired whereupon hence Chidu stood divested of title qua the suit land also concomitantly hence the defendants stood vested with title thereto. In sequel, its non adduction into evidence by the defendants whereupon thereupon they stood empowered to proclaim with vigour the factum of presumption of truth foisted to the relevant revenue entries comprised in Ex.PW1/D to Ex.PW1/M suffering rebuttal, coaxes an Invincible inference of the relevant authority concerned not under Section 11 of the Land Acquisition Act pronouncing an award qua the suit land nor also hence any divestment of title of Chidu vis-a-vis the suit land occurring nor also any vestment of title thereon standing bestowed upon the defendants. Consequently, the ensuing inference is of Chidu holding valid title vis-a-vis the suit land also his hence holding empowerment to make its valid alienation vis-a-vis the plaintiff, as a corollary, also the plaintiff holds title to the suit land as its owner besides holds empowerment to institute a suit for recovery of its possession. Significantly also the concert of the defendants to on the anvil of the apposite notifications issued under the relevant sections of the Land Acquisition Act comprised in Ex.DW-Z-1 and Ex.DW-Z-2 to hence bely the presumption of truth qua the relevant revenue entries held in the apposite jamabandis qua the suit land, jamabandis whereof stand comprised in Exts. PW1/D to PW1/M holds no vigour besides no probative sinew. Consequently, the presumption of truth qua the apposite manifestations held in Ext. PW1/D to Ex.PW1/M personificatory of the plaintiff holding title qua the suit land, remain, for want of cogent evidence for belying them, both undisplaced besides undislodged, wherefrom the inevitable sequel is of the relevant reflections occurring therein holding conclusivity.

11. The learned counsel appearing for the defendants/appellants herebefore strives to canvass of the presumption of truth garnered by the apposite reflections occurring in the aforesaid jamabndis comprised in Ex.PW1/D to Ex.PW1/M stands belied by Ex.DW1/A and Ex.DW1A2. Ex.DW1/A wherewithin recitals occur qua the suit land standing purchased for a sum of Rs.3068/-. However, the reference therein qua the suit land standing acquired for construction of Telephone Exchange at Mashobra cannot hold any co-relation vis-a-vis the suit land. Conspicuously, when there occurs no recital therein qua the khasra number of the suit land, obviously, for want of any allusion occurring therein qua the khasra number as stands borne by the suit land, any reliance by the defendants upon Ex.DW1/A to displace the presumption of truth acquired by the apposite reflections existing in the apposite jamabandis qua the suit land wherein the plaintiff is depicted to be its owner, is wholly misplaced. Also, in the absence of adduction into evidence by the defendants, the relevant pronouncement under Section 11 of the Land Acquisition Act by the Land Acquisition Collector concerned, whereas it constituted the best evidence to succor its claim qua the suit land standing subjected to acquisition also for clinching its espousal qua its hitherto owner Chidu standing divested of title thereto besides hence stood rendered disempowered to transfer it to the plaintiff whereupon the latter would obviously hold no clout to canvass the relief as asserted in the plaint, does with renewed vigour constrain a firm conclusion from this Court qua apart from the aforesaid infirmity griping it whereupon it holds no tenacity to strip the vigour of the apposite reflections held in the apposite jamabandis qua the suit land, its probative tenacity, if any, held therewithin standing emasculated in its entirety. Consequently, reliance placed thereupon by the defendants to displace the presumption of truth acquired by the apposite reflections held in the apposite jamabandis is unworthwhile. Ex.DW1A2 wherewithin recitals occur qua land measuring 11 biswas, situated in Village Mashobra, District Mahasu standing acquired by the State of Himachal Pradesh for a sum of Rs.2,645/- also occurrence of recitals therein of the aforesaid amount standing disbursed by cheques bearing the numbers reflected therein also lose their sway for want of (a) any firm recital standing held therewithin qua the aforesaid amount standing disbursed vis-a-vis Chidu; (b) absence of enunciation therein qua the khasra number of the suit land. Consequently any reflections held therewithin qua disbursement of an amount of Rs.2645 as compensation through cheques bearing numbers reflected therein cannot be construable to be a disbursement thereto vis-a-vis the suit land to Chidu. Absence of the aforesaid portrayals, for reasons aforestated, in Ex.PW1A2 concomitantly do not foist any right in the defendant to thereupon stake qua theirs ousting the presumption of truth held by the apposite reflections

existing in the apposite jamabandis qua the suit land, reflections whereof vividly display of the plaintiff holding title thereto. In sequel, the apposite reflections in the jamabandis aforesaid acquire conclusivity.

12. The determination aforesaid by this Court qua the defendants not adducing any cogent evidence for belying the presumption of truth held by the revenue entries existing in the apposite jamabandis qua the suit land whereupon conclusivity is to be hence imputed to them, whereupon the plaintiff holds a right to stake a tenable claim for rendition of a decree for possession qua the suit land yet the plaintiff was also enjoined to adduce the apposite best evident connotative of the defendant utilizing the suit land for raising construction thereon. The apposite best evidence stood embedded in a valid demarcation conducted qua the suit land by the competent revenue agency. The aforesaid apposite best evidence stands unfolded in the report of the local commissioner tendered before the Appellate Court on 22.08.2014. The report of the local commissioner, who stood appointed by the Appellate Court on 22.07.2014 for holding demarcation of the suit land unfolds of his relevant demarcation standing conducted in consonance with the relevant canons prescribed in the apposite rules. Moreover, the report of the Local Commissioner stood not objected to by any of the contesting parties. Consequently, all the disclosures which occur therein in display of the defendants/appellants holding possession of the suit land by raising construction thereon holds immense vigour. As a sequitur, the decree for possession of the suit land concurrently pronounced by both the learned Courts below warrants vindication.

13. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have not excluded germane and apposite material from consideration. Consequently, no substantial question of law much less a substantial question of law arises for determination in the instant appeal.

14. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgements and decrees rendered by both the learned Courts below are maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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

Bhavak Parasher. .....Petitioner

Versus

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

Cr.MMO No. 38 of 2016.
Reserved on: 29.8.2016
Decided on: 5th October, 2016.

Code of Criminal Procedure, 1973- Section 319- An FIR was registered against the second respondent at the instance of the petitioner for the commission of offences punishable under Section 302 and 341 read with Section 34 of I.P.C – a cross case was registered at the instance of respondent No. 2 against the petitioner- an application for impleadment of 'I' and brothers-in-law of petitioner was filed, which was dismissed – held, that mere presence of 'I' will not implicate her - there must be a prima facie case against the person sought to be arrayed as an accused – the Sessions Judge had not committed any illegality and irregularity while dismissing the application - petition dismissed. (Para- 7 to 15)

Cases referred:

Hardeep Singh versus State of Punjab and others, (2014) 3 Supreme Court cases 92

Babubhai Bhimabhai Bokhiria and another versus State of Gujarat and others, (2014) 5 Supreme Court Cases 568
Joginder Yadav & Ors. vs. State of Bihar and Anr. (2015) Cr.L.J. 4186

For the petitioner	Mr. Ranjan Lakhanpal, Advocate with Mr. Susheel Gautam, Advocate.
For the respondents	Mr. Virender Verma, Addl. AG for respondent No. 1.
	Mr. Tara Singh Chauhan, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

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

In this order the legality and validity of the order dated 1.2.2016 Annexure P-11 passed by learned Sessions Judge, Una in an application under Section 319 of the Code of Criminal Procedure registered as application No. 223/2015 (Sessions case No. 12 of 2015, titled State of H.P. versus Ram Prakash Singh alias Moni) has been challenged by Bhavak Parasher, the petitioner at whose instance FIR No.260/14 under Sections 302 331, read with Section 34 of the Indian Penal Code has been registered in Police Station Sadar, Una, against aforesaid Ram Prakash Singh @ Moni, accused respondent No.2, herein is under challenge.

2. Since vide impugned order learned Sessions Judge has dismissed the application, therefore, the petitioner complainant has challenged the legality and validity thereof on the grounds inter alia that the involvement of One Indu Bala wife of accused Ram Prakash Singh alias Moni (respondent No. 2 herein) and also Rakesh, Rajiv and Sanjiv (brothers-in-law of complainant-petitioner Bhavak Parasher) is established in the commission of the offence from the evidence recorded by learned trial Court in the case, hence they should have been summoned as accused and cognizance of the offence taken against them. Learned trial Court however, has erroneously dismissed the application. The application Annexure P-3 moved by the petitioner for reinvestigation of the case was also dismissed by the trial Court illegally vide order Annexure P-4. Not only this, but the application Annexure P-5 filed under Section 193 of the code of Criminal Procedure also stands dismissed. The revision Annexure P-6 filed in this Court also stands dismissed vide order Annexure P-7. Not only this, but he moved another application Annexure P-8 before the competent authority for further investigation of the case. On the said application, SIT was formed to reinvestigate the matter. During reinvestigation phone calls detail Annexure P-9 was taken in possession which form part of the police record. The present being a case of conspiracy and motive writ large on the face of the record the police has chosen not to file challen against aforesaid Indu Bala, Rakesh, Rajiv and Sanjiv. No reasons therefor have been assigned. The police, as per further allegation in the petition, is stated to be siding with aforesaid Indu Bala and others, proposed to be arrayed as accused. It is pointed out that the principal accused, respondent No. 2 had a motive to kill Aditya Parasher son of the petitioner because mother-in-law of the petitioner had bequeathed her property in the name of the deceased and as his brothers-in-law (wife's brother), Rakesh Rajiv and Sanjiv aforesaid were not in favour of deceased Aditya Parasher to share the property of their mother (maternal grand mother of deceased Aditya Parasher) and as the principal accused Ram Prakash Singh, husband of Indu Bala aforesaid tenant of aforesaid brothers-in-law of the petitioner was in possession of part of the property in the capacity of tenant and interested to acquire the same and as it is deceased Aditya Parasher to whom the property was bequeathed by his maternal grand mother, being a hurdle in their way the principal accused had stabbed the deceased brutally and killed him in connivance with Indu Bala and brothers-in-law of the petitioner.

3. It has been argued that irrespective of cogent and reliable evidence suggesting the involvement of the said accused has come on record by way of the testimony of the prosecution witnesses including that of the petitioner who is complainant in the case, learned trial Court has erroneously refused to take cognizance against Indu Bala Rakesh, Rajiv and

Sanjiv who allegedly conspired with principal accused-respondent No. 2 and murdered Aditya Parasher, the son of the petitioner.

4. The facts as disclosed from the record in a nutshell are that FIR No. 260 of 2014 was registered against second respondent under Section 302, 341 read with Section 34 of the Indian penal code on 2.9.2014 in Police Station, Sadar Una at the instance of the petitioner herein. The allegations in a nutshell against respondent No. 2 were that he assaulted Aditya Prashar son of the petitioner on railway bridge Una at such a time when they were coming back after paying obeisance in the temple of Baba Kumbh Dass. Accused-respondent No. 2 appeared there in white coloured Fortuner car. The front seat adjoining to the driver's seat was occupied by his wife Smt. Indu Bala. The accused stopped the vehicle without any provocation and prevented the petitioner and other occupants of his car from proceeding ahead. He alighted from his car in a ferocious mood and started hurling abuses to the petitioner as well as his deceased son Aditya Parasher. On this the petitioner also alighted from his car. The accused started fighting with him. Deceased Aditya Parasher and three workers working in the swimming pool of the petitioner and occupying the rear seat of the car of the petitioner also alighted therefrom and came to his rescue. Hot exchanges took place between both parties. The deceased and the workers accompanying the petitioner have boarded their car. Since deceased Aditya Parasher wanted to leave that place, therefore, he occupied the driver's seat and when about to drove the car ahead, the accused on seeing that the petitioner and other occupants of his car are leaving that place went to his car parked nearby and taken out a knife there from. He opened the door of driver's side window of the car of the petitioner and stabbed the deceased at his chest in left side. The injury inflicted by the accused on the chest of the deceased started profusely bleeding. On seeing all this, the petitioner came out of his car and administered beating to the accused with kicks and fisticuffs. He also snatched a Danda which was in the hands of Indu Bala his wife and beaten up the accused with Danda also. The petitioner finding his son badly injured removed him to hospital, however, before leaving the place of occurrence he hit the car of the accused with his car twice and thrice to ensure that some defect is developed and the accused is not able to flee away from that place. The deceased though was removed to hospital, however he succumbed to the injuries he received in the occurrence.

5. It is seen that accused-respondent No. 2 herein has also registered a cross case vide FIR No. 273/2014 against the petitioner herein and other occupants of his car under Sections 147,149,325,201 and 504 of the Indian penal Code in Police Station, Sadar Una on the same day with the allegation that on 2.9.2014 on an information received from his nephew Karan Singh that some one is breaking open lock of his showroom, he accompanied by his wife Smt. Indu Bala rushed to the spot. There only one glass was found broken and shutter of the showroom was in-order. Since his wife was suffering from throat infection, therefore, they went to market in his vehicle PB-10-ER-Temp 4032 for bringing medicine for her from medical store. Around 10:25 P.M. when they were crossing railway bridge near Shani Dev temple. He noticed an Indica car being driven in a high speed coming from Malahat road side. On seeing the said car, he stopped his car. The moment he alighted from his car the petitioner herein started hurling filthy abuses to him. The other occupants of the car also alighted there form and started beating him. He was beaten by them with sticks and fisticuffs and on account of which he received injuries in his right leg and on his face below right side eye as well as his head. The investigation in FIR No. 273 of 2014 is also complete and the challan stand filed against the petitioner and his co-accused. The same is also pending disposal in the Court of learned Sessions Judge, Una being cross-case. Charge against the petitioner and his co-accused also stands framed under Sections 147, 149, 325, 201 and 504 of the Indian Penal Code.

6. Be it stated that the petitioner herein had approached this Court by fling Cr.MMO No. 200 of 2015 for quashing criminal proceedings initiated against him consequent upon FIR No. 273/14 registered at the instance of respondent No. 2 herein, however, the said petition stand dismissed vide judgment dated August 16, 2016. Therefore, the petitioner herein along with his co-accused is also facing trial in the cross case registered at the instance of respondent No. 2 herein.

7. The fate of this petition has to be decided in the light of this backdrop. However, before that it is desirable to point out at the out set as to under what circumstances a person who has not been named as an accused in the FIR nor arrayed as an accused in the challan filed in the case. The law on this point is no more res integra because the Apex Court in ***Hardeep Singh*** versus ***State of Punjab and others, (2014) 3 Supreme Court cases 92*** after taking into consideration the law laid down in various judicial pronouncements has held that at the time of taking cognizance against the person who is not an accused the Court has to see as to whether a prima facie case is made out to array such person as accused. The only test is the existence of prima facie case against such person of course the degree of satisfaction of the Court must be higher i.e. if the evidence appears against such person goes unrebutted would lead to his conviction. This judgment reads as follow:-

> "106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the Court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more that prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "*for which such person could be tried together with the accused*". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused."

8. Similar is the ratio of the judgment of the apex Court in ***Babubhai Bhimabhai Bokhiria and another*** versus ***State of Gujarat and others, (2014) 5 Supreme Court Cases 568*** which reads as follow:

> "8. Section 319 of the Code confers power on the trial court to find out whether a person who ought to have been added as an accused has erroneously been omitted or has deliberately been excluded by the investigating agency and that satisfaction has to be arrived at on the basis of the evidence so led during the trial. On the degree of satisfaction for invoking power under Section 319 of the Code, this Court observed that though the test of prima facie case being made out is same as that when the cognizance of the offence is taken and process issued, the degree of satisfaction under Section 319 of the Code is much higher."

9. It is seen from the impugned order that learned trial Judge has not only taken into consideration the given facts and circumstances but also the entire case law including the judgment supra of the Apex Court. Learned trial Judge has also taken notice of the judgment of the Apex Court in ***Joginder Yadav & Ors***. vs. ***State of Bihar and Anr. (2015) Cr.L.J. 4186*** in which the legal principle that extra ordinary power vested in the Court under Section 319 of the Code of Criminal Procedure can be exercised only if a strong and cogent evidence appears during the course of trial against the person who is not arrayed as an accused and that the standard of proof required for summoning such person as an accused under Section 319 Cr.P.C. is higher than the standard of proof required for framing charge against the accused.

10. Analyzing the grievances brought to this Court in the present petition in the light of the legal position discussed hereinabove and also the given facts, the FIR Annexure P-1 registered at the instance of the petitioner against accused-respondent No.2 reveals that the wife of accused Smt. Indu Bala was also with him at the time of occurrence. Besides, while reporting the motive behind the murder of his son Aditya Parasher, the same is stated to be in pending Civil Litigation with his brothers-in-law Sanjiv Kumar and Rakesh Kumar with them. Also that, the accused-respondent has killed the deceased because he is in league with the above said

brothers-in-law of the petitioner. It is on account of the enmity of the accused respondent, he and his wife killed deceased Aditya Parasher. It is seen that the FIR only discloses the presence of Indu Bala on the spot and not attributes any overt and covert act towards her. Even if it is believed that Danda was in her hand, though it has come on record that the Danda has been recovered from the own car of the petitioner herein, in that event also mere holding of Danda by Indu Bala in her hand without any overt and covert act on her part, is not sufficient to infer that she is also an accused and should have been added as accused in the pending criminal case.

11. Without lamenting much on the merits and elaboration of the case as put forth by both parties in cross cases registered at their instance as in that event prejudice is likely to be caused to their case, suffice would it to say that as per own case of the petitioner in FIR No.274/2014, he was accompanied not only by his son deceased Aditya Parasher, but also three workers, he deployed in his swimming pool. The explanation though is that they were coming after paying obeisance to Baba Kumbh Dass, however, was it a coincidence that respondent-accused, his wife and the petitioner and his companion met with each other at the place of occurrence would establish after holding full trial. However, the fact remains that the petitioner was accompanied by three labourers and his son the deceased whereas respondent-accused and his wife were alone. Enmity of the petitioner or his deceased son, if any, was with his brothers-in-law. Whether respondent No.2 was in league with brothers-in-law of the petitioner or not is also a fact, which may substantiate on record during the course of trial. However, mere presence of Indu Bala at the place of occurrence cannot be taken to assume that she having conspired with her husband, respondent No.2 joined hand with him in the commission of offence and as such should have been added as an accused in this case. The possibility of she was suffering from throat infection and coming with her husband to market for buying medicine cannot be ruled out. When the petitioner-complainant in FIR Annexure P-1 has not attributed any allegations except that he had snatched Danda from her hand, it lies ill in his mouth to claim that she has also joined hand with her husband to kill deceased Aditya Parasher.

12. There may be litigation going on between deceased Aditya Parasher, son of the petitioner and his wife and his brothers-in-law Sanjiv, Rajiv and Rakesh and his mother-in-law may also have filed a civil suit against deceased Aditya Parasher pertaining to some property dispute, however, such pending litigation cannot be made basis to array aforesaid Rakesh, Sanjiv and Rajiv, brothers-in-law of the petitioner also as accused nor on the basis of such allegations, if taken as it is, are sufficient to bring guilt home to them.

13. As already pointed out spura, the mere presence of Smt. Indu Bala, the wife of accused respondent on the spot can not be made basis to hold her guilty for the commission of the offence. Even if the petitioner's claim is believed to be true, she was not fighting with the complainant party. It is rather the complainant party and her husband respondent No.2 were fighting with each other. Therefore, she cannot also be added as an accused in the case.

14. The present, therefore, is a case where the involvement of either Indu Bala or brothers-in-law of the petitioner has not been established even prima facie what to speak of the satisfaction to an extent that the evidence which has been pressed into service against them, if goes un-rebutted would lead to their conviction. The test in terms of the ratio of the judgment in Hardeep Singh's case supra to be applied at the stage of arraying a person as an accused, who has not been named in the FIR nor challan filed against him is, therefore, not satisfied in this case.

15. Learned Sessions Judge, therefore, has not committed any illegality or irregularity while dismissing the application under Section 319 of the Code of Criminal Procedure filed by the petitioner with a prayer to summon Smt. Indu Bala, wife of the respondent-accused and his brothers-in-law, Rakesh, Rajiv and Sanjiv as accused in the case and to take cognizance of offence against each of them. The order under challenge as such cannot be termed as legally and factually sustainable.

16. For all the reasons hereinabove, there is no merit in this petition and the same is accordingly dismissed.

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

Court on its own motion ...Petitioner.

Versus

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

CWPIL No. 16 of 2016
Date of order: 05.10.2016

Constitution of India, 1950- Article 227- P was washed away with high flow of water released by respondent No. 3 without any warning- held, that the incident had taken place due to rashness and negligence of the employee of respondent No. 3- the parents cannot be compensated for the loss sustained by them- however, the Court can make an interim order required in the facts and circumstances of the case - interim compensation of Rs. 2 lacs awarded to be paid by respondent No. 3. (Para-6 to 15)

Case referred:
Chief Engineer & Ors. versus Mst. Zeba, II (2005) ACC 705

Present: Ms. Jyotsna Rewal Dua, Senior Advocate, as Amicus Curiae, with Ms. Shalini Thakur, Advocate.
Mr. M.A. Khan, Mr. Anup Rattan & Mr. Varun Chandel, Additional Advocate Generals, and Mr. Kush Sharma, Deputy Advocate General, for respondents No. 1, 2, 4 and 5.
Mr. Sunil Mohan Goel, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

The Secretariat of the Chief Justice had received a letter/complaint on 2nd August, 2016, from Shri Javier Topo, father of eight years' old boy, namely Master Praveen Topo, with the allegations that on 24th July, 2016, his son, Master Praveen Topo, was collecting logs alongside Sutlej River, but, unfortunately, he swept away with the high flow of water, which was released by respondent No. 3-authorities and thereafter his body was not recovered.

2. After noticing the said complaint, it was ordered to be diarized as Public Interest Litigation and Ms. Jyotsna Rewal Dua, learned Senior Counsel, was requested to assist the Court as Amicus Curiae.

3. The respondents were directed to file status reports. Respondents No. 1, 2, 4 and 5 have filed reply and status report. In para 1 of the reply filed by respondents No. 1, 2, 4 and 5, it has been admitted that on 24th July, 2016, Master Parveen Topo, aged 8 years and Master Parmveer aged about 10 years had gone alongside River Sutlej and at that time water was suddenly released from Karchham Dam and Parveen Topo was swept away with the high current of water. Thus, there is admission on the part of respondents No. 1, 2, 4 and 5 qua cause of the death of Master Praveen Topo.

4. It is also stated that they have taken all steps to recover the body, but the same has not been recovered so far despite the fact that they have taken the assistance of a dog handler alongwith a tracker dog of State CID.

5. The Investigating Officer is directed to take the investigation to its logical end as early as possible and to file fresh status report within four weeks.

6. It is apt to record herein that *prima facie,* it is established that the occurrence is outcome of rashness and negligence of the employees of respondent No. 3. Thus, keeping in view the fact that the parents have lost their eight years' old budding son, which is so painful and cannot be redressed by any relief, rather no substitute is available, we deem it proper to exercise inherent powers to grant interim relief to the unfortunate parents, who are hapless, helpless, are broken and shaken. They are on thorns and the said incident is pricking them every second. We are conscious that money is not a substitute, but may be just to ameliorate their pains and sufferings.

7. The cases relating to liability to pay compensation is the realm of Common Law based on proof of negligence.

8. The question is – whether the interim compensation can be granted, at this stage? The answer is in the affirmative for the following reasons:

9. The introduction of the concept of grant of interim compensation based on no fault liability is outcome of the pronouncements of judgments made by the Apex Court. The purpose is to offer prompt financial relief to the sufferers. The niceties of law and facts have no role to play.

10. It is the duty of the Courts to make such interim orders which are required at the relevant point of time in view of the facts and circumstances of the case read with development of law from time to time.

11. 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 maybes.

12. 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.

13. Our this view is fortified by the judgment rendered by the Apex Court in **Civil Appeal No. 11466 of 2014,** titled as **Raman versus Uttar Haryana Bijli Vitran Nigam Ltd. & Ors.,** decided on 17.12.2014, wherein the Apex Court 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 a case titled as **Chief Engineer & Ors. versus Mst. Zeba,** reported in **II (2005) ACC 705.**

14. This Court has 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,** 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 order, dated 25.06.2014, herein:

> "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."

15. Keeping in view the discussions made hereinabove, we deem it proper to award, by way of interim measure, ₹ 2,00,000/- in favour of the parents of Master Praveen Topo, which shall be borne by respondent No. 3. The amount be deposited before the Registry of this Court within four weeks.

16. List on 9th November, 2016. Copy **dasti.**

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

RFA No. 263 of 2008 along with
RFA No. 264 and 279 of 2008.
Decided on : 5th October, 2016.

1. RFA No. 263 of 2008.
Shri Digvijay Singh .....Appellant.
Versus
Suresh Kumar & others .....Respondents.
2. RFA No. 264 of 2008.
Baldev Singh .....Appellant.
Versus
Suresh Kumar and others .....Respondents.
3. RFA No.279 of 2008.
Suresh Kumar & others .....Appellants.
Versus
Digvijay Singh & others .....Respondents.

Code of Civil Procedure, 1908- Order 22 Rule 4- One of the respondents died during the pendency of the appeal – her estate is duly represented by her legal representatives – hence, her name ordered to be deleted from the array of the respondents- another respondent had also died – an application for condonation of delay and bringing on record his legal representatives filed, which is allowed- two respondents had died before the trial Court but the legal representatives were not brought on record- the decree passed by the trial Court is a nullity- hence, appeal allowed and the case remanded to the trial Court for a fresh decision.

For the Appellant(s): Mr. Neeraj Gupta, Advocate for the appellants in RFA No. 263 and 264.
Mr. Mohan Singh, Advocate, for the appellants in RFA No. 279 of 2008.

For the Respondents : Mr. Mohan Singh, Advocate, for respondents No.1 to 4, 6 to 8, 10 to 14, 17 to 20, 23, 24, 26 to 30, 33 to 38, 40 to 42, 44, 46, 47, 49, 50, 58 to 62 in RFA No. 263 and 264.
Mr. Imran Khan, Advocate, for respondent No.65 and Mr. Vijay Chaudhary,Advocate, for respondent No.63 in RFA No.263 and 264.
Mr. Neeraj Gupta, Advocate, for respondent No.1 in RFA No. 279.
Mr. Vijay Chaudhary, Advocate, for respondent No.2 in RFA No. 279.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

CMP No.8255 of 2016 in RFA No.263 of 2008 and CMP No.8259 of 2016.

Smt. Gangawati, respondent No.9 (in both the aforementioned appeals), died during the pendency of the instant appeals before this Court on 18.01.2016. Since, it stands averred in the applications aforesaid qua hers legal representatives standing already impleaded as

co-respondents No.7 and 8, hence, when on her demise, her estate stands sufficiently represented, consequently, her name is ordered to be deleted from the array of respondents in both the aforementioned appeals. Both the applications stand disposed of.

CMP(M) No. 1724 of 2016 in RFA No. 263 of 2008 and CMP(M) No. 1725 of 2016 in RFA No. 264 of 2008.

Co-respondent No.45 Jai Dev Singh during the pendency of the aforementioned appeals died on 31.03.2011. However, the instant applications for begetting his substitution by his legal representatives stand belatedly instituted yet the application contains an explication for the belated institution of the applications at hand. The explication purveyed in the apposite applications for their belated institution before this Court is sound besides tenable, whereupon this Court is constrained to accept it also is constrained to conclude of the delay which has occurred in the institution of the applications at hand warranting its standing condoned. Accordingly, the delay is condoned. Abatement, if any, is also set aside. Since, for the continuation of the aforementioned appeals, the substitution of co-respondent No. 45 by his legal representatives is imperative, as such, his legal representatives as reflected in paragraph(s) No.1 of the applications at hand are ordered to be substituted in place of co-respondent No. 45 Jai Dev Singh. Both the applications stands disposed of.

RFA Nos. 263, 264 and 279 of 2008.

S/Sh. Bansa Ram and Braham Dutt, who stand arrayed in RFA No. 279 as proforma respondents No.18 and 20 respectively died on 15.08.2005 and 21.01.2008. The demise of the aforesaid occurred during the pendency of the civil suit before the learned trial Court. However, no application stood preferred therebefore by the counsel for the plaintiffs to beget their substitution by their legal representatives, obviously, their names continued to be reflected in the array of co-plaintiffs also when on their demise they remained unsubstituted by their legal representatives, yet the learned trial Court partly decreed the suit of the plaintiffs, despite the factum of the aforesaid deceased co-plaintiffs remaining unsubstituted by their legal representatives. The renditions of apposite decrees by the learned trial Court in Civil Suit No. 1-S/1 of 2008/05 and Civil Suit No. 2-S/1 of 2008/05 wherein the aforesaid were impleaded as co-plaintiffs are a nullity significantly when they stand pronounced against dead co-plaintiffs aforesaid. Also the applications preferred herebefore for begetting substitution of deceased co-plaintiffs/respondents No.18 and 20 are not maintainable hereat given the candid expostulation of law of the apposite application being preferable only before the Court whereat the demise of any party to the lis occurs also the Court whereat demise of any party to the lis occurs alone standing vested with jurisdiction to both, entertain and render an adjudication thereupon. Consequently, given the occurrence of demise of proforma respondent No.15 Bansa Ram and of proforma respondent No.20 Braham Dutt, co-plaintiffs in civil suits, during the pendency of the civil suits aforementioned before the learned Additional District Judge, Solan, H.P., in sequel, the instant applications bearing CMP(M) Nos. 1726 and 1727 of 2016 preferred herebefore at the instance of the plaintiffs/appellants/applicants for begetting substitution of deceased proforma respondents Bansa Ram and Braham Dutt by their legal representatives are not maintainable herebefore. In sequel, CMP (M) Nos. 1726 and 1727 are dismissed theirs being not maintainable before this Court. Also since, the impugned renditions of the learned Additional District Judge, Solan stand rendered against deceased proforma respondent Nos.15 Bansa Ram and proforma respondent No. 20 Shri Braham Dutt, co-plaintiffs in civil suits, consequently, the impugned renditions of the learned Additional District Judge, Solan, stand ingrained with a vice of nullity theirs standing rendered against deceased co-plaintiffs. In aftermath, the impugned judgments and decrees rendered by the learned Additional District Judge, Solan are quashed and set aside. The matter is remanded to the learned Additional District Judge, Solan to after rendering an adjudication in accordance with law upon applications preferred before it by the plaintiffs for begetting substitution of deceased proforma respondents No.15 Shri Bansa Ram and proforma respondents No.20 Braham Dutt, co-plaintiffs in civil suits, by their legal representatives proceed to decide both the civil suits aforesaid afresh. The parties are directed to appear before the learned Additional District Judge, Solan on 10th November, 2016. Records be sent back forthwith.

Accordingly, the instant appeals stands disposed of. All pending applications also stand disposed of.

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

LPA No. 391 of 2011 alongwith connected matters.
Judgment reserved on 29.9.2016
Date of decision:5th October, 2016.

1.	**LPA No.391 of 2011.**	
	Inderjeet Singh	.....Appellant
	Versus	
	H.P. State Pollution Control Board	.....Respondent.
2.	**LPA No.366 of 2011.**	
	Vijay Kumar	.....Appellant
	Versus	
	H.P. State Pollution Control Board	.....Respondent.
3.	**LPA No.413 of 2011.**	
	Tota Ram	.....Appellant
	Versus	
	H.P. State Pollution Control Board	.....Respondent.
4.	**LPA No.445 of 2011.**	
	Surat Singh	.....Appellant
	Versus	
	H.P. State Pollution Control Board	.....Respondent.

Constitution of India, 1950- Article 226- Petitioners were appointed as Field Assistants-cum-Operators- the petitioners contended that the duties performed by them are of skilled nature and cannot be equated with those performed by class-IV employees- however, they were regularized in the pay scale of class-IV employees – respondents stated that petitioners were appointed as class-IV employees on daily wages – they claimed the salary of class-III employees – their writ petitions were dismissed - held, that the petitioners are seeking pay parity on the analogy of pay scale of the Field Assistants working in other bodies – the petitioners have not given detail as to how they are entitled to pay scale and whether the duties and responsibilities discharged by them are similar to their counter parts- the petitioners were engaged on daily wage basis and were paid salary as such – they were regularized as class-IV employees- this was accepted by the petitioners for three years- the petitioners are caught by waiver, estoppel and acquiescence – a delayed writ petition should not be accepted – the writ petition was rightly dismissed- appeal dismissed. (Para-11 to 33)

Cases referred:

State of Haryana and others versus Charanjit Singh and others etc. etc., AIR 2006 Supreme Court 161

New Delhi Municipal Council versus Pan Singh & Ors., 2007 AIR SCW 1705

State of Madhya Pradesh and others versus Ramesh Chandra Bajpai, (2009) 13 Supreme Court Cases 635

State of Punjab & Anr. versus Surjit Singh & Ors., 2009 AIR SCW 6759

Steel Authority of India Limited and others versus Dibyendu Battacharya, (2011) 11 Supreme Court Cases 122

Union Territory Administration, Chandigarh and others versus Manju Mathur and another, (2011) 2 Supreme Court Cases 452
Hukum Chand Gupta versus Director General, Indian Council of Agricultural Research and others, (2012) 12 Supreme Court Cases 666,
R & M Trust versus Koramangala Residents Vigilance Group and others, (2005) 3 Supreme Court Cases 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
Madras Institute of Development Studies and another versus K. Sivasubramaniyan and others, (2016) 1 Supreme Court Cases 454

For the appellant(s): Mr. Sanjeev Bhushan, Sr. Advocate with Mr. Malkiyat Singh, Advocate.
For the respondent(s): Mr. Tara Singh Chauhan, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice .

These Letters Patent Appeals are outcome of a common judgment thus; we deem it proper to determine all these appeals by this common judgment.

2. In order to determine the issue involved in these appeals, it is necessary to give a brief resume of relevant facts herein.

3. The petitioners-appellants herein were engaged as Field Assistant-cum-Operator by the respondent-Board somewhere in the year 1987. It is stated that the duties performed by the appellants are those of skilled nature and only the designation as given to the appellants is Field Assistant–cum-Operator and cannot be equated with Class-IV employee. It is averred that initially the petitioners-appellants were engaged on daily wage basis and after completion of 10 years of service, their services were regularized as Field Assistant-cum-Operator, in terms of the Office Memorandum dated 13.8.1997, 18.3.1998 and 1.2.1999, Annexure R1, in all the petitions, in the pay scale of Rs.750-1410, which, in fact, is stated to be the pay scale of Class-IV employee. Petitioners/appellants claim themselves to be entitled to the scale of Class-III employee on the parity of scales given to the Field Assistants, engaged by other autonomous bodies. It is apt to reproduce relevant portion of one of the office memorandums Annexure R-1 in CWP(T) No. 3060 of 2008, herein.

"OFFICE MEMORANDUM"

> *On the approval of Hon'ble Chairman/Screening committee as well as completion of 10 years of service as a daily wages worker under the NAAQM Project in HP State Pollution Control Board, Sh. Inderjit Singh S/o Sh. Bhagvan Singh is hereby offered a temporary post of Field Assistant-cum-Operator under the same project in the Pay Scale of Rs.750-30-950-35-1160-40-1320-45-1410 with initial start of Rs.770 from the date of completion of 10 years of service i.e. 31.7.1997 on the following terms and conditions. The appointee will also be entitled for dearness allowance at the rates admissible under State Govt. and subject to the conditions and orders governing the grant of such allowance in force in the Board from time to time:……."*

4. The writ petitioners-appellants herein are stated to have made several requests to the respondent-Board and also served legal notices upon the respondent-Board, but all these failed to yield any result.

5. The petitioners/appellants herein filed Original Applications before the State Administrative Tribunal on 2.8.2000, which came to be registered as CWPs(T) as mentioned hereinafter.

6. The Original Applications filed by petitioner(s) Tota Ram came to be registered as ***CWP(T) No. 6846 of 2008***, Inderjeet Singh as ***CWP(T) No. 3060 of 2008,*** Surat Singh as ***CWP(T) No. 6847 of 2008*** and by Vijay Kumar as ***CWP(T) No. 6848 of 2008.*** The petitioners, in all the petitions, prayed for mainly the following reliefs.

> *"(i) That the respondent department may very kindly be directed to grant the scale of Rs. 3120/- to the applicant from the date of his service were regularized as Field Assistant-cum-Operator, with all consequential benefits accrued to the applicant, like pay, arrears, etc.etc. alongwith an interest of Rs. 18% P.A.*
>
> *(ii) That the respondent department may very kindly be directed to frame the R&P Rules for the post of Field Assistant-cum-Operator."*

7. Respondent-Board filed the same reply to all the writ petitions. It is apt to reproduce para 3 of the reply filed in CWP(T) No. 3060 of 2008, subject matter of LPA No. 391 of 2011, on merits herein.

> *"3. That the contents of para 3 of the petition are wrong as stated, hence denied. It is submitted that the petitioner/applicant was initially engaged as a daily wage helper in the year 1987 and was paid daily wages as Class-IV employee which were increased as per Govt. Policy from time to time. Subsequently the petitioner/applicant was regularized w.e.f.31.7.1997 in accordance with the Govt. policy of regularizing all daily wagers who had put in 10 years continuous service as daily wagers vide office Memorandum No. HP.PCB/Estt. /127/ Regularization/ 96-3285-89 dated 13.8.1987.Annexure R1. He admitted the said appointment without demur and has since been working as such till this day. He is therefore, estopped by his act and conduct to demand any higher scale."*

8. The said writ petitions came to be dismissed vide a common judgment dated 6th April, 2011 in CWP(T) No. 6846 of 2008, alongwith connected matters, hereinafter referred to as "the impugned judgment", for short. It is apposite to reproduce concluding para of the impugned judgment herein.

> *"9. Petitioners claim for payment of salary in the pay scale of Class-III employees cannot be said to be based on any substantive right or legal foundation. Claim of parity, based on rules of another autonomous body, in the absence of any material to show similarity with regard to the eligibility, nature of duties, responsibilities etc. also does not even merit consideration. No legally enforceable right of the petitioners stand violated. Consequently present petitions devoid of merit stand dismissed."*

9. Feeling aggrieved, the appellants herein filed the present appeals details of which are being given hereinafter.

10. CWP (T) No. 3060 of 2008 titled ***Indeerjeet Singh versus H.P. State Pollution Control Board,*** is subject matter of LPA No. 391 of 2011, CWP(T) No. 6848 of 2008 titled ***Vijay Kumar versus H.P. State Pollution Control Board***, is subject matter of LPA No. 366 of 2011, CWP(T) No. 6846 of 2008 titled ***Tota Ram versus H.P. State Pollution Control Board*** is subject matter of LPA No. 413 of 2011 and CWP(T) No. 6847 of 2008 titled ***Surat Singh versus H.P. State Pollution Control Board*** is subject matter of LPA No. 445 of 2011.

11. The appellants/writ petitioners are virtually seeking pay parity on the analogy of pay scale of the Field Assistants working in other autonomous bodies/departments of the State.

12. The writ petitioners/appellants have not given details as to how they are entitled to the said pay scales and whether duties and responsibilities discharged by them are similar to that of their counterparts, in order to determine the claim of parity.

13. The Apex Court in a case titled as **State of Haryana and others** *versus* **Charanjit Singh and others etc. etc.,** reported in **AIR 2006 Supreme Court 161,** held that the principle of 'equal pay for equal work' has no mechanical application in every case. It is apt to reproduce para 17 of the judgment herein:

> *"17. Having considered the authorities and the submissions we are of the view that the authorities in the cases of Jasmer Singh, Tilak Raj, Orissa University of Agriculture & Technology and Tarun K. Roy lay down the correct law. Undoubtedly, the doctrine of "equal pay for equal work" is not an abstract doctrine and is capable of being enforced in a Court of law. But equal pay must be for equal work of equal value. The principle of "equal pay for equal work" has no mechanical application in every case. Article 14 permits reasonable classification based on qualities or characteristics of persons recruited and grouped together, as against those who were left out. Of course, the qualities or characteristics must have a reasonable relation to the object sought to be achieved. In service matters, merit or experience can be a proper basis for classification for the purposes of pay in order to promote efficiency in administration. A higher pay scale to avoid stagnation or resultant frustration for lack of promotional avenues is also an acceptable reason for pay differentiation. The very fact that the person has not gone through the process of recruitment may itself, in certain cases, make a difference. If the educational qualifications are different, then also the doctrine may have no application. Even though persons may do the same work, their quality of work may differ. Where persons are selected by a Selection Committee on the basis of merit with due regard to seniority a higher pay scale granted to such persons who are evaluated by competent authority cannot be challenged. A classification based on difference in educational qualifications justifies a difference in pay scales. A mere nomenclature designating a person as say a carpenter or a craftsman is not enough to come to the conclusion that he is doing the same work as another carpenter or craftsman in regular service. The quality of work which is produced may be different and even the nature of work assigned may be different. It is not just a comparison of physical activity. The application of the principle of "equal pay for equal work" requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job may entail may differ from job to job. It cannot be judged by the mere volume of work. There may be qualitative difference as regards reliability and responsibility. Functions may be the same but the responsibilities made a difference. Thus normally the applicability of this principle must be left to be evaluated and determined by an expert body. These are not matters where a writ court can lightly interfere. Normally a party claiming equal pay for equal work should be required to raise a dispute in this regards. In any event the party who claims equal pay for equal work has to make necessary averments and prove that all things are equal. Thus, before any direction can be issued by a Court, the Court must first see that there are necessary averments and there is a proof. If the High Court, is on basis of material placed before it, convinced that there was equal work of equal quality and all other relevant factors are fulfilled it may direct payment of equal pay from the date of the filing of the respective Writ Petition. In all these cases, we find that the High Court has blindly proceeded on the basis that the doctrine of equal pay for equal work applies without examining any relevant factors."*

14. It would also be profitable to reproduce para 13 of the judgment rendered by the Apex Court in **New Delhi Municipal Council versus Pan Singh & Ors.,** reported in **2007 AIR SCW 1705,** herein:

> *"13. They, thus, formed a class by themselves. A cut-off date having been fixed by the Tribunal, those who were thus not similarly situated, were to be treated to have formed a different class. They could not be treated alike with the others. The High Court, unfortunately, has not considered this aspect of the matter."*

15. The Apex Court in cases titled as **State of Madhya Pradesh and others** *versus* **Ramesh Chandra Bajpai,** reported in **(2009) 13 Supreme Court Cases 635,** and **State of Punjab & Anr.** *versus* **Surjit Singh & Ors.,** reported in **2009 AIR SCW 6759,** has discussed the development of law right from the year 1960 till 2009. It is apt to reproduce para 30 of the judgment delivered in ***Surjit Singh'***s case supra, herein:

> *"30. Mr. Swarup may or may not be entirely correct in projecting three purported different views of this Court having regard to the accepted principle of law that ratio of a decision must be culled out from reading it in its entirety and not from a part thereof. It is no longer in doubt or dispute that grant of the benefit of the doctrine of 'equal pay for equal work' depends upon a large number of factors including equal work, equal value, source and manner of appointment, equal identity of group and wholesale or complete identity."*

16. The Apex Court in the case titled as **Steel Authority of India Limited and others versus Dibyendu Battacharya,** reported in **(2011) 11 Supreme Court Cases 122,** has discussed the development of law and the judgments made by the Apex Court right from the year 1968, in paras 18 to 29 of the judgment. It is apt to reproduce paras 30 and 31 of the judgment herein:

> *30. In view of the above, the law on the issue can be summarised to the effect that parity of pay can be claimed by invoking the provisions of Articles 14 and 39(d) of the Constitution of India by establishing that the eligibility, mode of selection/recruitment, nature and quality of work and duties and effort, reliability, confidentiality, dexterity, functional need and responsibilities and status of both the posts are identical. The functions may be the same but the skills and responsibilities may be really and substantially different. The other post may not require any higher qualification, seniority or other like factors. Granting parity in pay scales depends upon the comparative evaluation of job and equation of posts. The person claiming parity, must plead necessary averments and prove that all things are equal between the concerned posts. Such a complex issue cannot be adjudicated by evaluating the affidavits filed by the parties.*
>
> *31. The onus to establish the discrimination by the employer lies on the person claiming the parity of pay. The expert committee has to decide such issues, as the fixation of pay scales etc. falls within the exclusive domain of the executive. So long as the value judgment of those who are responsible for administration i.e. service conditions etc., is found to be bonafide, reasonable, and on intelligible criteria which has a rational nexus of objective of differentiation, such differentiation will not amount to discrimination. It is not prohibited in law to have two grades of posts in the same cadre. Thus, the nomenclature of a post may not be the sole determinative factor. The courts in exercise of their limited power of judicial review can only examine whether the decision of the State authorities is rational and just or prejudicial to a particular set of employees. The court has to keep in mind that a mere difference in service conditions does not amount to discrimination. Unless there is complete and wholesale/ wholesome identity between the two posts they should not be treated as equivalent and the Court should avoid applying the principle of equal pay for equal work.*

17. The Apex Court in **Union Territory Administration, Chandigarh and others versus Manju Mathur and another,** reported in **(2011) 2 Supreme Court Cases 452,** held that similarity of designation or nature or quantum of work is not determinative of entitlement to equality in pay scales.

18. The Apex Court in **Hukum Chand Gupta versus Director General, Indian Council of Agricultural Research and others,** reported in **(2012) 12 Supreme Court Cases 666,** held as to how parity can be claimed or granted. It is apt to reproduce relevant portion of para 20 of the judgment herein:

> *20. ..... There cannot be straitjacket formula for holding that two posts having the same nomenclature would have to be given the same pay scale. Prescription of pay scales on particular posts is a very complex exercise. It requires assessment of the nature and quality of the duties performed and the responsibilities shouldered by the incumbents on different posts. Even though, the two posts may be referred to by the same name, it would not lead to the necessary inference that the posts are identical in every manner. These are matters to be assessed by expert bodies like the employer or the Pay Commission. Neither the Central Administrative Tribunal nor a writ court would normally venture to substitute its own opinion for the opinions rendered by the experts. The Tribunal or the writ court would lack the necessary expertise to undertake the complex exercise of equation of posts or the pay scales."*

19. A Division Bench of this Court in a case titled as **Roshan Lal versus Hon'ble High Court of Himachal Pradesh and another,** being **CWP No. 873 of 1993,** decided on 27th October, 1994, held that even if a post of one cadre is created in two departments and different pay scales are granted, that cannot be a ground to claim parity. In order to claim parity, the writ petitioners have to indicate that their jobs, duties, responsibilities and functions are similar. In this case, the Court has examined whether the post of Book Binder sanctioned in the High Court and Secretariat of the State Government and in other departments are entitled to same pay scale? No doubt, the post of Book Binder was created in all these departments, but it was held that it is for the writ petitioner to plead and prove that he was performing the same type of work and responsibilities and other factors are similar. This Court, after discussing all facts and factors, rejected the plea for grant of parity and the writ petition was dismissed. It is apt to reproduce relevant portion of the judgment herein:

> *"Having heard the learned counsel for the petitioner, we find no justification in the submission. It is too much of the employee of the High Court to claim that the High Court should be equated with the Printing and Stationery Department of the State Government. Even on the basis of job, there would be no similarity. The Printing and Stationery Department would have continuous and different varieties of work needing a different type of Book-Binder than the Book-Binder in the High Court."*

20. A similar view has been taken by this Court in case titled as **Himachal Pradesh State Electricity Board versus Rajinder Upadhaya & others,** being **LPA No. 51 of 2009,** decided on 11th September, 2014, ***LPA No. 11 of 2012***, titled as ***The Principal Secretary (Personnel) & another versus Pratap Thakur***, decided on 22nd September, 2014 and ***CWP No. 4184 of 2010*** decided on 17.10.2014 titled ***Beli Ram*** versus ***Hon'ble High Court of Himachal Pradesh and another***.

21. A similar view has also been taken by the apex Court while setting aside the judgment made by this Court in a latest judgment reported in ***2014 AIR SCW 6581*** titled ***State of Himachal Pradesh and another*** versus ***Tilak Raj***. It is apt to reproduce para 22 of the said judgment herein.

> *"22. It is also clear that disputed question of facts were involved in the petitions because according to the respondents, who were petitioners before the High Court, nature of work done by them was similar to that of the work of other Laboratory*

Attendants or Laboratory Assistants. Without looking at the nature of work done by persons working in different cadres in different departments, one cannot jump to a conclusion that all these persons were doing similar type of work simply because in a civil suit, one particular person had succeeded after adducing evidence. There is nothing on record to show that the High Court had examined the nature of work done by the respondents and other persons who were getting higher pay scale. The High Court had also not considered the fact that qualifications required for appointment to both the posts were different. In our opinion, the High Court should not have entertained all these petitions where disputed questions of fact were required to be examined. Without examining relevant evidence regarding exact nature of work, working conditions and other relevant factors, it is not possible to come to a conclusion with regard to similarity in the nature of work done by persons belonging to different cadres and normally such exercise should not be carried out by the High Court under its writ jurisdiction. It is settled law that the work of fixing pay scale is left to an expert body like Pay Commission or other similar body, as held by this Court in several cases, including the case of S.C. Chandra v. State of Jharkhand, 2007 8 SCC 279. Moreover, qualifications, experience, etc. are also required to be examined before fixing pay scales. Such an exercise was not carried out in this case by the High Court."

22. The petitioners/appellants have specifically pleaded that they were engaged on daily wage basis as Field Assistant-cum-Operator and were paid salary as such. It is also the case of the parties that no post was sanctioned in the cadre of Field Assistant-cum-Operator in the year 1987 when they came to be engaged as daily wage basis. In terms of office memorandum referred to supra, their services were regularized in terms of the policy made by the Government to the effect that the daily wagers who had completed 10 years of service are to be regularized. It is apt to reproduce para 6 (i) of the Original Application filed by Inderjeet Singh, subject matter of LPA No. 391 of 2011 herein.

"(i) That the services of the applicant were engaged as Field Assistant-cum-Operator by the respondent in the year 1987. It is submitted that initially the services were engaged on daily wage basis. Be it stated here that applicant worked to the entire satisfaction of the respondent and further diligently and efficiently and there is no complaint of any kind whatsoever against the applicant. A certificate to this extent is annexed as Annexure A-1."

23. After considering the grievance of the petitioners/appellant, office memorandum was prepared and it was decided to appoint them on regular basis as Class-IV employees. The petitioners/appellants accepted the said office memorandum without any murmur, enjoyed the benefits at least for three years and in the year 2000, after three years, came to the Administrative Tribunal by the medium of Original Applications. They are caught by waiver, estoppel, and acquiescence, except otherwise, their petitions were barred by time also.

24. 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.

25. 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."

26. Similar principles of law have been laid down by the apex Court in **Bhakra Beas Management Board versus Kirshan Kumar Vij & Anr.,** reported in **AIR 2010 Supreme Court 3342.**

27. 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."

28. 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.

29. The Apex Court in a latest judgment in the case titled as **Madras Institute of Development Studies and another versus K. Sivasubramaniyan and others,** reported in **(2016) 1 Supreme Court Cases 454,** has discussed how a person can be said to be caught by estoppel, acquiescence and waiver.

30. It appears that respondents have constituted a Committee, perhaps in terms of the order passed by this Court, the report of which has been reproduced in para 4 of the impugned judgment by the learned Single Judge whereby and where under, the claim of the petitioners was rejected and we deem it proper not to reproduce the same in this judgment.

31. The petitioners have not questioned the said report/consideration order. It is specifically mentioned in the said report that the petitioners were rightly placed in Class-IV

category on account of their initial engagement against Class-IV category in view of Govt. HP policy mentioned above instead of the claimed Class-III category. Further, the petitioners already have two types of promotional avenues as per R& P Rules of Class-III category, i.e., of clerk and Lab. Assistants.

32. At the time of regularization of the petitioners, there was no such policy in vogue whereby and where under they could have been appointed against the posts of Class-III. The report referred to supra does contain that the petitioners have two avenues of promotion, i.e., Clerk and Lab. Assistant.

33. The Writ Court has noticed and discussed all aspects and has rightly made the conclusion.

34. Having said so, no interference is called for.

35. Viewed thus, the LPAs are dismissed and the impugned judgment is upheld.

36. Accordingly, the appeals are disposed of along with pending applications, if any.

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

Jasvinder Singh son of Shri Pritam Singh & others ...Revisionists/Tenants

Versus

Kedar Nath son of late Shri Khushi Ram & others ...Non-Revisionists/Landlords

Civil Revision No. 77 of 2007
Order Reserved on 20th July 2016
Date of Order 5th October 2016

H.P. Urban Rent Control Act, 1987- Section 14- Landlord filed an eviction petition pleading that tenants are in arrears of rent, they have impaired value and utility of the premises, they have constructed new rooms on vacant land and have installed a saw machine, they have converted the premises into residential premises and the premises are bona fide required for the purpose of construction, which cannot be carried out without vacating the building – the petition was allowed on the ground of bona fide reconstruction - appeal and cross-objections were filed, which were dismissed by the Appellate Authority – held, in revision, other co-owners are necessary parties for effectual and complete adjudication of the eviction petition- if some of the co-owners are permitted to raise construction, then the rights of other co-owners will be adversely affected – revision petition allowed and case remanded to the trial Court with the direction to implead the other co-owners and to decide the matter afresh. (Para- 12 to 17)

Cases referred:

Sant Ram Nagina Ram vs. Daya Ram and others, AIR 1961 Punjab 528
M/s Aliji Monoji & company vs. Lalji Mavji and others, AIR 1997 SC 64
Ramesh Hirachand Kundanmal v Municipal Corp. of Greater Bombay & ors (1992)2 SCC 524
New Redbank Tea Co.Pvt. Ltd. vs. Kumkum Mittal and others, (1994)1 SCC 402

For the Revisionists: Mr. Bhupinder Gupta Sr. Advocate with Mr.Janesh Gupta Advocate
For the Non-Revisionists: Mr. Ajay Kumar Sr. Advocate with Mr.Dheeraj K.Vashishat Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present civil revision petition is filed under Section 24(5) of H.P. Urban Rent Control Act 1987 against the order passed by learned Appellate Authority Shimla in Civil

Miscellaneous Appeal No. 90-S/14 of 2005 dated 2.4.2007 whereby learned Appellate Authority affirmed order of learned Rent Controller (2) Shimla.

Brief facts of the case

2. Shri Onkar Chand and others filed eviction petition under Section 14 of H.P. Urban Rent Control Act 1987 for eviction of tenants pleaded therein that premises is non-residential and water and electricity connections are provided in premises. It is pleaded that premises is situated in 5-5/1 Upper Kaithu Shimla and it is pleaded that monthly rent is Rs.350/- per annum. It is pleaded that premises let out to Shri Pritam Singh in the year 1959. It is pleaded that after death of Shri Pritam Singh his widow Smt. Mohinder Kaur became tenant in premises and she used to pay rent. It is pleaded that Smt. Mohinder Kaur died on 10.8.1984 and tenants who were residing with her became tenants. It is pleaded that tenants are in arrears of rent along with interest to the tune of Rs.10373/-. It is pleaded that tenants have impaired the value and utility of premises and have unauthorisedly and illegally constructed new rooms on vacant land and have also installed saw machine. It is pleaded that tenants have converted the premises into residential purpose whereas premises given to them only for commercial purpose. It is pleaded that landlords intend to raise new structure and new construction could not be carried out without eviction of tenants. Prayer for acceptance of petition sought.

3. Per contra response filed on behalf of tenants pleaded therein that present petition is bad for non-joinder of necessary parties. It is pleaded that tenancy rights have been inherited along with four sisters and they have not been impleaded as co-party. It is pleaded that petition is also barred on principle of resjudicata. It is pleaded that predecessors-in-interest of tenants have filed the eviction petition on same ground which was dismissed on merits and it is pleaded that present petition is not maintainable. It is also pleaded that landlords are estopped by their act, conduct and acquiescence to file the present petition. It is pleaded that present petition is barred under Order 9 Rule 9 CPC. It is pleaded that nature of premises from inception is non-residential. It is pleaded that from inception of tenancy one family member of tenants used to stay in premises during night just to keep watch and ward of furniture business. It is pleaded that manufactured furniture is kept in open sheds and it is necessary to keep one family member or servant at night in premises for keeping watch and ward on goods and material lying therein. It is pleaded that no part of business has been converted into residence permanently. Prayer for dismissal of eviction petition sought.

4. Landlords filed rejoinder and re-asserted the allegations mentioned in petition. As per pleadings of parties following issues framed by learned Rent Controller on 5.1.1996:-

1. Whether respondents have committed such act which has impaired the value and utility of the rented premises in question? ....OPP
2. Whether respondents have changed the user in the rented premises in question? .....OPP
3. Whether petitioners require the suit premises for bonafide requirement?....OPP
4. Whether petition is bad for non-joinder of necessary parties? ....OPR
5. Whether there is no relationship of landlord and tenants between the landlords and tenants as alleged? ...OPR
6. Whether petition is barred by principle of resjudicata? .....OPR
7. Whether petition is barred under Order 9 Rule 9 CPC? ....OPR
8. Whether landlords are estopped from filing the present petition by their act, deed,commission and acquiescence?.....OPR
9. Relief.

5. Learned Rent Controller decided issues Nos. 1, 2, 4, 5,6,7 and 8 in negative and learned Rent Controller decided issue No. 3 in affirmative. Learned Rent Controller partly allowed

the eviction petition. Learned Rent Controller evicted the tenants from premises on the basis of bonafide requirement of landlords for the purpose of rebuilding which could not be carried out without eviction of tenants. Learned Rent Controller also directed the tenants to deliver possession of premises to landlords within one month w.e.f. 15.6.2005. Learned Rent Controller dismissed rest of claim of landlords.

6. Feeling aggrieved against order of learned Rent Controller Shimla tenants filed appeal before learned Appellate Authority Shimla and landlords also filed cross objections against issues Nos. 1 and 2. Learned Appellate Authority on 2.4.2007 dismissed appeal and cross objections.

7. Feeling aggrieved against order of learned Appellate Authority tenants filed present revision petition.

8. Court heard learned Advocate appearing on behalf of parties and Court also perused entire record carefuly.

9. Following points arise for determination in civil revision petition:-

1. Whether learned Rent Controller and learned first Appellate Authority have committed material irregularity by way of non-impleading other owners of land recorded in Misal Hakiyat settlement Ext. DX placed on record comprised in Khata No. 1 min, Khatauni No. 8, Khasra No. 96 min old, 67 new measuring 24-67 upon which structure of premises in dispute bearing No. 5-5/1 upper Kaithu Shimla is situated when relief of reconstruction of premises was granted and whether owners mentioned in Ext. DX are necessary parties under order 1 Rule 10 (2) Code of Civil Procedure 1908 in order to enable Court effectively and completely to adjudicate upon and to settle all questions involved in eviction petition?

2. Relief.

10. ***Findings upon point No.1 with reasons***

10.1. PW1 Onkar Chand has stated that landlords are owners of premises. He has stated that premises was given upon tenancy in the year 1959-60 to Partap Singh. He has stated that total area of premises is five biswas and landlords are paying tax to municipal corporation. He has stated that Pritam Singh died in the year 1970 and thereafter his wife namely Mohinder Kaur remained as tenant. He has stated that Mohinder Kaur died in the year 1984 and after death of Mohinder Kaur her legal representatives acquired the tenancy rights. He has stated that he is general attorney of other owners and copy is Ext.PA. He has stated that tenants have changed the nature of premises without consent of landlords and sale deed of premises is Ext.PQ and Hindi translation is Ext.PQ/T. He has stated that he also filed civil suit against tenants and Local Commissioner was appointed who visited the spot and prepared site plan. He has stated that landlords intend to raise new construction over the premises and site plan has also been prepared. He has denied suggestion that landlords of structure have no legal right to raise new construction. He has denied suggestion that landlords have simply purchased structure rights and did not purchase ownership rights of land over which demised premises is situated. He has denied suggestion that tenants have not altered the nature of premises. He has denied suggestion that landlords are only owners of structure and are not owners of land over which premises in dispute is situated.

10.2 PW2 Vishaw Nath has stated that he has seen the disputed premises. He has stated that tenancy was inducted in the year 1959-60. He has stated that tenants are also residing in premises. He has denied suggestion that tenants have not altered the nature of premises. He has admitted that petitioners are his relatives.

10.3 PW3 Inder Singh Jr. Assistant has stated that he has brought record of case file No. 174/1 of 1995/90 title Onkar Chand vs. Hardev decided on 8.12.1995 by learned Civil Judge Shimla (H.P.).

10.4 PW4 Deepak Advocate has stated that he was appointed as Local Commissioner in civil suit No. 174/1 of 1995/90 on 27.11.1995. He has stated that he visited the spot on 28.11.1995 and submitted his report on 1.12.1995. He has stated that certified copy of local commissioner report is Ext.PW4/A. He has stated that site plan is Ext.PW4/B which is correct as per original record. He has admitted that at the spot there was no permanent structure. He has stated that there was no new construction at the spot.

10.5 PW5 Balbir Singh Kanwar has stated that he retired as Executive Engineer in the year 1994 from IPH department. He has stated that he has obtained the civil engineering diploma and he visited the spot at the instance of Onkar Chand etc. and submitted technical report Ext.PW5/A. He has stated that he also submitted site plan Ext.PW5/B. He has stated that report was prepared by him as per factual position. He has stated that suit premises is situated in core area. He has denied suggestion that construction is banned in core area. He has stated that he does not know the name of owner of premises. He has denied suggestion that he has prepared report Ext.PW5/A as per instance of landlords. He has denied suggestion that he did not prepare report Ext.PW5/A as per factual position.

10.6 PW6 B.K. Tanganu has stated that he retired in the year 1992 after serving thirty years. He has stated that site plan Ext.PW6/A has been prepared by him which is correct as per original record. He has stated that he also received letter Ext.PW6/B from committee. He has stated that he has prepared site plan at the instance of landlords. He has stated that he has also perused revenue record. He has stated that he could not state that there are other co-owners also. He has stated that he could not state that Onkar Chand has only possessory rights and did not own ownership rights. He has admitted that premises is situated in core area. He has admitted that above cart road construction is banned.

10.7 RW1 Kalyan Singh Civil Ahlmad has stated that there is no entry of case No. 242/2 of 1976 and case No. 473/2 of 1976 in register. He has stated that he has brought the rent register for the year 1974-1976.

10.8 RW2 Ram Singh Criminal Clerk GRR Shimla has stated that civil suit No. 242/2 of 1976 title Geeta Devi s. Mohinder Kaur was decided on 12.6.1978 and original record of case was destroyed on 22.2.1988. He has stated that certificate of destruction is Ext.RW2/A. He has produced file No. 174/1 of 1995/90 title Onkar Chand vs. Hardev decided on 8.12.1995. He has stated that file No. 473/2 of 1976 decided on 30.7.1977 title Geeta Devi and Mohinder Kaur and file of case No. 189 of 1976 title Geeta Devi vs. Mohinder Kaur decided on 13.6.1977 and file of civil suit No. 24/1 of 1986 title Geeta Devi vs. Jasbinder Singh decided on 7.12.1990 could not be traced.

10.9 RW3 Jasvinder Singh has stated that his father Pritam Singh was inducted as tenant in premises and premises is used for commercial purpose for sale of furniture. He has stated that premises was given upon tenancy in the year 1959 at the rate of Rs.375/- per annum. He has stated that after death of Pritam Singh his mother became tenant. He has stated that condition of premises is not bad. He has stated that no addition or alteration was conducted in premises. He has stated that there are about 25-30 owners of premises as per jamabandi Ext.DX. He has stated that eviction petition was filed earlier also. He has stated that partition did not take place between owners relating to premises. He has stated that landlords are not in need of premises because landlords also owned other premises in city. He has stated that eviction petition has been filed just to harass the tenants. He has stated that landlords have not approved site plan of construction. He has stated that tenants have deposited the rent in Court of Rent Controller vide receipt Ext.DX-2. He has stated that his father expired in the year 1970. He has stated that rent was paid to Khushi Ram and his successors. He has stated that Ext.PB, Ext.PC, Ext.PD and Ext.PH are photographs. He has stated that landlords are not owners of premises in dispute.

10.10 RW4 Sunil Khera JE MC Shimla has stated that he has not brought summoned record because same is not traceable and certificate is Ext.RW4/A.

10.11 RW5 Gurcharan Singh has stated that Hardev Singh and his brothers are known to him and they remained as tenants w.e.f. 1984.1994. He has stated that tenants were evicted.

10.12 RW6 Daljeet Singh has stated that he has obtained civil engineering diploma and retired from IPH department as Engineer. He has stated that at the spot he did not observe any new construction, addition or alteration in premises and his spot inspection report is Ext.RW6/A. He has stated that construction is possible without eviction of tenants. He has stated that his report Ext.RW6/B is correct as per factual position. He has stated that he did not give any notice prior to inspection. He has stated that he did not check the record of Municipal Corporation. He has admitted that new buildings have been constructed nearby the premises in dispute and further admitted that age of structure of premises in dispute is 50-60 years. He has denied suggestion that new construction is not possible without eviction of tenants.

11. Following documentries evidence placed on record by parties. (1) Ext.RW4/A is certificate issued by Architecture Planner MC Shimla. (2) Ext.RW2/A is the certificate that file No. 242/2 of 1976 title Geeta Devi vs. Mohinder Kaur decided on 12.6.1978 has been destroyed on 22.2.1988 as per Rules. (3) Ext.DX-2 is receipt relating to Rs.11760/- given by Onkar Chand. There is recital that Onkar Chand has received Rs.11760/- from Sh. Hardev Singh and Jaswinder Singh son of late Shri Pritam Singh on account of tax and interest @ 9% per annum w.e.f. 1.5.1978 to 31.12.1995 relating to premises qua which eviction petition filed. (4) Ext.DX is copy of Missal Hakiyat settlement relating to khata No.1 min khatauni No. 08 khasra No. 96 min old 67 new over which premises in dispute is situated. (5) Ext.DX-1 is copy of jambandi for the year 1982-83 relating to land upon which premises in dispute is situated. (6) Ext.R-1 is notice issued to Smt. Mohinder Kaur by learned Rent Controller Shimla in case title Geeta Devi vs. Mohinder Kaur. (7) Ext.PW6/B is letter issued by Town and Country Planning to Onkar Chand. (8) Ext.PW4/A is Local Commissioner report submitted by Deepak Bhasin Advocate in case No. 174/1 of 95/90. (9) Ext.DX-5 is spot inspection site plan filed in case title Onkar Chand vs. Hardev Singh. (10) Ext.PW5/A is technical inspection report submitted by Balbir Singh Kanwar. (11) Ext.PW5/B is site plan. (12) Ext.PS is document submitted by Stock Holding Corporation of India Limited. (13) Ext.PB, PC, PO, PH, PJ, PL are photographs (14) Ext. PA is general power of attorney. (15) Ext.PQ is sale deed in Urdu language dated 19.12.1941. (16) Ext.PQ/T is Hindi translation of sale deed dated 19.12.1941. (17) Ext.RW6/A is inspection report submitted by Daljit Singh Kalsi. (18) Ext.RW6/B is site plan. (19) Ext.PA/1 is copy of jamabandi for the year 1998-99.

12. Submission of learned Advocate appearing on behalf of revisionists that learned Rent Controller and learned first Appellate Authority have committed material irregularity by way of non-impleading other owners of land comprised in Khata No.1 min, Khatauni No. 8 Khasra No. 96 old min new 67 as mentioned in copy of Misal Hakiyat settlement Ext.DX placed on record in new construction case is accepted for the reasons hereinafter mentioned. It is proved on record that premises in dispute is situated upon khata No. 1 min Khatauni 8 Khasra No. 96 old min new 67 situated at Kaithu Tehsil and District Shimla (H.P.) as per copy of Misal Hakiyat settlement Ext.DX placed on record. Court has carefully perused the copy of Misal Hakiyat settlement Ext.DX placed on record. Copy of Misal Hakiyat settlement placed on record has been prepared by public servant in discharge of his official duty and is relevant fact under Section 35 of Indian Evidence Act 1872. Copy of Misal Hakiyat settlement Ext.DX has been prepared by revenue official under H.P. Land Revenue Act 1954.

13. As per copy of Misal hakiyat Ext. DX placed on record Onkar Chand, Kedar Nath, Kuldeep, Sudesh Kumari, smt. Sudhir Kumari, Smt. Brij Bala, Smt. Sushma, Smt. Madhu Kumari are LRs of Khushi Ram. Court has also carefully perused sale deed Ext. PQ in Urdu language placed on record and also carefully perused Hindi translation of sale deed Ext. PQ/T. It is proved on record that predecessor-in-interest of Onkar Chand etc. namely Khushi Ram had purchased ½ (Half) share of premises in dispute from Padam Pal Singh by way of registered sale deed in the month of December 1941 in sale consideration amount of Rs. 500/- (Five hundred). Khushi Ram predecessor-in-interest of Onkar etc. did not purchase entire premises in dispute

No. 5-5/1 by way of sale deed executed in the month of December 1941 in consideration amount of Rs. 500/- (Five hundred) but only purchased ½ (Half share) of premises in dispute from Padam Pal Singh. Court is of opinion that other co-owners of premises No. 5 and 5/1 are necessary parties for effectual and complete adjudication of eviction petition in reconstruction case. It is held that in reconstruction of premises case other co-owners of premises No. 5 and 5/1 are necessary parties.

14. It is well settled law that Court can implead necessary parties at any stage of case despite the fact that non-revisionists are *dominus litis* of their case.

15. As per copy of Misal Hakiyat settlement Ext.DX placed on record following persons are other co-owners of land relating to Khata No. 1 min Khatauni No. 8 Khasra No. 96 old min new 67 over which demised premises bearing No.5-5/1 is situated. (i) Smt. Pushpa Devi, Smt. Sneh Lata Devi, Smt. Prem Lata Devi, Susham Lata Devi, Savita Rani, Vijay Kumar, Ajay Kumar sons of Rattan Lal son of Lachhi Ram. (ii) Maksudan Lal, Karam Chand sons of Lachhi Ram son of Jodhu Mal.(iii) Gurcharan Dass son of Roshan Lal son of Beli Ram.(iv) Narender Kumar son, Smt. Parveen Kumari, Neena Kumari, Anita Kumari daughters and Smt. Shanti Devi widow of Shri Kishori Lal son of Shri Beli Ram. (v) Sunil Kumar, Arvind Kumar sons and Smt. Nisha Kumari, Sawrsa Kumari daughters and Smt. Sarla Devi widow, Banwari Lal.(vi) Smt. Champa Devi widow and Jaisi Ram son of Shri Shiv Ram. (vii) Kailash Chand Kapil and Smt. Neelam Kumari, Ranjana daughters of Fakir Chand son and Raghu.(viii)Raj Kumar son of Sown Chand.(ix) Krishan lal son of Prabhu Dayal son of Pala. Above stated persons are not LRs of Khushi Ram. Khushi Ram only purchased ½ (Half share) of premises in dispute from Padam Pal Singh vendor in the year 1941 by way of sale deed Ext.PQ in consideration amount of Rs.500/- (Five hundred). If LRs of Khushi Ram are allowed to raise new constrcution without consent of other co-owners by way of judicial order then legal rights of other co-owners of premises in dispute will be adversely effected. It is well settled law that no co-owner can raise new construction in joint property without consent of other co-owners. ***See AIR 1961 Punjab 528 title Sant Ram Nagina Ram vs. Daya Ram and others.***

16. Submission of learned Advocate appearing on behalf of non-revisionists that learned Rent Controller and learned first Appellate Authority did not commit material irregularity in present case and other owners of land comprised in Khata No. 1, Khatauni No. 8 Khasra No. 96 old min new 67 over which demised premises bearing No.5-5/1 is situated are not necessary parties in eviction petition of reconstruction is rejected being devoid of any force for the reasons hereinafter mentioned. Learned Rent Controller and learned first Appellate Authority have given the relief of reconstruction upon land comprised in Khata No. 1 min Khatauni No. 8 Khasra No. 96 old min new 67 over which demised premises bearing No.5-5/1 is situated by way of demolition of old premises. Predecssor-in-interest of Onkar Chand etc. namely Khushi Ram did not purchase entire premises No. 5 and 5/1 which is in dispute for reconstruction purpose by way of demolition but purchased only ½ (Half) share of premises in dispute by way of sale deed Ext.PQ persons who are co-owners of half premises No.5-5/1 cannot be allowed to demolish entire premises No. 5 and 5/1 for reconstruction purpose without consent of other co-owners of demised premises. There is no evidence on record that partition of demised premises took place inter se all co-owners of demised premises in accordance with law. It is well settled law that Court can implead necessary parties at any stage of case suo moto under Order 1 Rule 10(2) of Code of Civil Procedure 1908. It is held that other co-owners of premises No. 5-5/1 ought to have been joined as co-party. It is held that presence of other co-owners of premises No. 5 and 5/1 is necessary in order to decide eviction petition effectively and completely and to adjudicate upon and settle all questions involved in eviction petition. ***See AIR 1997 SC 64 title M/s Aliji Monoji & company vs. Lalji Mavji and others. See (1992)2 SCC 524 title Ramesh Hirachand Kundanmal vs. Municipal Corporation of Greater Bombay and others. See (1994)1 SCC 402 title New Redbank Tea Co.Pvt. Ltd. vs. Kumkum Mittal and others.*** In view of above stated facts point No.1 is answered accordingly.

Point No. 2 (Relief)

17. In view of findings upon point No.1 order passed by learned Rent Controller dated 15.6.2005 and order passed by learned first Appellate Authority dated 2.4.2007 are set aside and present case is remitted back to learned Rent Controller for limited purpose only. Learned Rent Controller will implead owners of land mentioned in Misal Hakiyat Ext.DX placed on record and mentioned in paras Nos. 15(i) to (15(ix) of this order as co-respondents in eviction petition being necessary parties as co-owners of premises No.5 and 5/1 of demised premises as per Order 1 Rule 10(2) CPC suo motu. Thereafter notices will be issued to newly added respondents by learned Rent Controller and thereafter learned Rent Controller will give opportunity to newly added co-party to file response. Thereafter learned Rent Controller will frame additional issues as per pleadings of parties. Thereafter learned Rent Controller will give opportunity to both parties to lead oral and documentary evidence in accordance with law upon additional issues framed by learned Rent Controller as per pleadings of parties. Evidence already recorded will form part and parcel of record inter se original parties subject to right of cross examination of witnesses by newly added respondents. Thereafter learned Rent Controller will pass fresh order on eviction petition. As eviction petition is pending since 1994 learned Rent Controller will dispose of rent petition within three months. Sale deed Ext.PQ and Hindi translation of sale deed Ext.PQ/T and copy of Misal Hakiyat settlement Ext.PX placed on record would form part and parcel of order. Parties are directed to appear before learned Rent Controller on ***24.10.2016.*** Parties are left to bear their own costs. Observations will not effect the merits of case in any manner. Record of learned Rent Controller and learned first Appellate Authority 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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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Neel Kant Saxena & others ....Petitioners.

Versus

State of H.P. ....Respondent.

Cr.MMO No. 341 of 2015
Decided on : 5.10.2016

Factories Act, 1948- Section 92 and 106- A complaint was filed under Section 92 of Factories Act- the complaint was filed beyond the period of 90 days laid down in the statute- it was contended that the time spent in obtaining the sanction has to be excluded- held, that Section 106 does not provide that the time spent in obtaining the sanction has to be excluded – there is no requirement for the inspector to obtain sanction for the prosecution- the Court could not have taken the cognizance of the same- petition allowed and complaint quashed. (Para-2)

For the Petitioners: Mr. Ramakant Sharma, Sr. Advocate with Mr. Basant Thakur, Advocate.
For the Respondent: Mr. R.S Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The Deputy Director (Factories), Una, District Una, H.P. instituted a complaint, Annexure P-2, against the petitioners herein/accused for contravention of the provisions of Section 92 of the Factories Act, 1948. The complaint at the instance of the Deputy Director (Factories), Una stood instituted before the Criminal Court of competent jurisdiction beyond the period mandated and prescribed in Section 106 of The Factories Act, 1948, provisions whereof stand extracted hereinafter, significantly transgression of the mandate enshrined in Section 106

of The Factories Act, 1948 arose on the apposite complaint standing instituted therebefore beyond the period of three months prescribed therein. The provisions of Section 106 of the Factories Act, 1948 read as under:-

> "106. Limitation of prosecutions.—No Court shall take cognizance of any offence punishable under this Act unless complaint thereof is made within three months of 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.
>
> 1[Explanation.—For the purposes of this section,—
>
> (a) in the case of a continuing offence, the period of limitation shall be computed with reference to every point of time during which the offence continues;
>
> (b) where for the performance of any act time is granted or extended on an application made by the occupier or manager of a factory, the period of limitation shall be computed from the date on which the time so granted or extended expired.]"

2. Uncontrovertedly the complainant instituted the apposite complaint beyond a period of 90 days since the acquisition of knowledge by him qua the commission of offence at the instance of the petitioners herein rendering hence the Criminal Court of competent jurisdiction incapacitated to take cognizance thereon. However, the learned Addtional Advocate General contends that the time spent for obtaining sanction to launch prosecution against the petitioners is excludable from the period of three months. Nonetheless, the said submission has no force and stands subdued by a prescription embodied in Section 106 of the Factories Act, 1948 qua the apposite complaint being institutable within three months from the date of acquisition of knowledge by an Inspector qua commission of offence. Now with the complainant being an Inspector within the ambit of provisions of Section 8(2B) of the Factories Act, 1948 besides when the mandate of Section 106 of the Factories Act which is a Special Legislation omits to exclude the time spent, if any, in obtaining sanction for prosecution of the accused rather it makes mandatorily obligatory upon an Inspector to not beyond a period of three months from the date of acquisition of knowledge qua the commission of offence at the instance of the petitioners herein lodge a complaint against the petitioners qua purported contravention of the provision of Section 92 of the Factories Act, 1948. Consequently, when it is uncontrovertedly established that the complaint at the instance of the respondent stood instituted beyond a period of three months/90 days since acquisition of knowledge by an Inspector qua commission of an offence whereupon the statutory mandate of Section 106 of the Factories Act stood contravened, in sequel it barred the learned Additional Chief Judicial Magistrate, Nalagarh to take cognizance thereon. In aftermath, the time spent by the respondent in obtaining the approval/sanction from the competent authority for prosecution of the petitioners herein is neither condonable nor excludable from the period of 90 days, besides it was not necessary at all for the Inspector concerned to obtain sanction for prosecuting the accused/petitioners in the face of the specific mandate of Section 106 of the Factories Act whereupon he stood enjoined to as a complainant to within a period of 90 days from the date of acquisition of knowledge institute a complaint qua commission of an offence at the instance the petitioners herein, even without receiving any approval/sanction for prosecution of the petitioners from the appropriate government. More so, when the necessity for obtaining approval/sanction for prosecution of the petitioners herein/accused is neither an indispensable requirement nor a sine qua non for an Inspector as a complainant, to institute a complaint within the statutorily ordained period of 90 days since the acquisition of knowledge by him qua the commission of offence at the instance of the petitioners herein, as such its being awaited and the time spent in obtaining it was not excludable. Accordingly, the present petition is allowed and the complaint Annexure P-2 instituted before the learned Additional Chief Judicial

Magistrate, Nalagarh is quashed and set aside. All the pending applications also stand disposed of.

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

Sunish Aggarwal ...Petitioner

Versus

State of HP & anr ...Respondents

CWP No.3174 of 2014
Reserved on: 14.9.2016
Decided on: 5.10.2016.

Constitution of India, 1950- Article 226- Petitioner was appointed as Civil Judge (Junior Division)- he was ordered to be discharged from service during the probation period- it was contended that order of discharge is not simple but punitive based upon the complaint filed against him- held, that transitory character of probation means that the service is terminable at any time – the probationer, whose services have been terminated for unsuitability, cannot complain about such termination- a discreet inquiry was conducted into the complaint- however, the decision not to continue the petitioner on probation and his consequent discharge is neither stigmatic nor punitive – the inquiry was not a motive for discharge of the officer- the decision of the full Court should not be judicially reviewed unless the Court is convinced that some monstrous thing was taking place- simply because other view is possible, the decision cannot be judicially reviewed – petition dismissed. (Para-10 to 41)

Cases referred:

Samsher Singh Vs. State of Punjab & anr, (1974) 2 SCC 831(Constitution Bench)
Union of India & ors Vs. Mahaveer C.Singhvi, (2010) 8 SCC 220
Pradip Kumar Vs. Union of India & ors (2012) 13 SCC 182
State Bank of India & ors Vs. Palak Modi & anr (2013) 3 SCC 607
Registrar General, High Court of Gujarat & anr Vs. Jayshree Chaman Lal Buddhbhatti (2013) 16 SCC 59
The State of Orissa & anr Vs.Ram Narayan Das AIR 1961 SC 177 (Constitution Bench); Nepal Singh Vs. State of U.P.& ors (1980) 3 SCC 288
Radhey Shyam Gupa Vs U.P.State Agro Industries Corporation Ltd & anr (1999) 2 SCC 21
Chandra Prakash Shahi Vs. State of U.P. & ors (2000) 5 SCC 152
Mathew P. Thomas Vs. Kerala State Civil Supply Corpn Ltd & ors (2003) 3 SCC 263
Registrar, High Court of Gujarat & anr Vs. C.G. Sharma (2005) 1 SCC 132
Jai Singh Vs. Union of India & ors (2006) 9 SCC 717

For the Petitioner: Mr.Ramakant Sharma, Senior Advocate with Ms. Devyani Sharma, Advocate.

For the Respondents: Mr.J.S. Guleria, Assistant AdvocateGeneral for respondent No.1
Mr. Dilip Sharma, Senior Advocate with Ms. Sunita Sharma, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, J.

This writ petition takes exception to the decision dated 17.9.2013 taken by the Administrative Committee of three Hon'ble Judges, whereby the petitioner during his probation

period was ordered to be discharged from service. It further takes exception to the order dated 18.9.2013 of the Hon'ble Full Court, whereby decision of the Administrative Committee dated 17.9.2013 was ratified and lastly it takes exception to the notification issued by the State government on 19.9.2013, whereby the petitioner was ordered to be discharged from the service.

2. The petitioner after undergoing a selection process came to be appointed as a Civil Judge (Junior Division) and joined as such on 26.3.2010 at H.P. Judicial Academy, Boileauganj, Shimla. After completion of the requisite training, he was posted as Civil Judge (Junior Division)-cum-Judicial Magistrate, 1st Class, Dharamshala, District Kangra and thereafter transferred to Anni, District Kullu, where he joined on 3.12.2012.

3. It is the case of the petitioner that on 10.5.2013, while he was travelling with his family and cousins to Jawalamukhi temple in District Kangra, he was stopped by Sh.Rajesh Tomar, who was then serving as Civil Judge (Senior Division)-cum-Chief Judicial Magistrate, Kangra and later on submitted some complaint against the petitioner alleging therein certain misconduct and indecent misbehaviour on the part of petitioner. This information was gathered by the petitioner under the Right to Information Act.

4. In addition to that, said Sh. Rajesh Tomar had also lodged an FIR with the police at Anni regarding threatening calls being received by him over his official telephone. Such action was though imputed to the petitioner, however, later on these calls were traced and it was found that one Kapil Mohan Sood, Advocate, had been making these calls and he was even arrested on 10.7.2013 pursuant to FIR dated 3.7.2013.

5. It is the further case of the petitioner that on the complaint submitted by Sh. Rajesh Tomar, a discreet inquiry was ordered to be conducted by the Registrar (Vigilance) of this court, who submitted his report dated 26.8.2013 on 16.9.2013. The aforesaid report was placed before the Hon'ble Administrative Judge, who directed the report to be placed before Hon'ble the Chief Justice, who in turn directed the matter to be placed before the Administrative Committee the same day. Consequently, the matter was placed before the Administrative Committee of three Hon'ble Judges on 17.9.2013, wherein a decision was taken to discharge the petitioner from service during his probation period. The decision was ratified by the Hon'ble Full Court on 18.9.2013 and same led to a formal notification by the State government on 19.9.2013, whereby he was discharged from service.

6. The grievance of the petitioner is that the order of discharge is not simpliciter, but is punitive and based upon the complaint submitted by Sh.Rajesh Tomar, which culminated into a discreet inquiry and, therefore, without affording an opportunity of being heard as also defend himself, the order of discharge is illegal and violative of the provisions of the Constitution of India.

7. Respondent State has filed its reply wherein it is averred that the notification dated 19.9.2013 (Annexure P-8),whereby petitioner was ordered to be discharged from service, was issued by the replying respondent on the basis of the recommendations made by the High Court and save and except issuing this order, it had no role in the instant case.

8. The High Court in its reply has contested the petition by claiming therein that the petitioner was rightly discharged from service during the period of his probation as he was not found suitable to hold the post of Civil Judge (Junior Division).

9. The petitioner in rejoinder has reiterated that his discharge from service cannot be termed to be a discharge simpliciter and being punitive, deserves to be set aside.

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

10. Learned counsel for the petitioner would vehemently argue that the order of discharge is punitive and contrary to the principles of natural justice and in support of such contention has placed heavy reliance upon the following judgments*;* ***Samsher Singh Vs. State of***

Punjab & anr, (1974) 2 SCC 831(Constitution Bench); Union of India & ors Vs. Mahaveer C.Singhvi, (2010) 8 SCC 220; Pradip Kumar Vs. Union of India & ors (2012) 13 SCC 182; State Bank of India & ors Vs. Palak Modi & anr (2013) 3 SCC 607 and Registrar General, High Court of Gujarat & anr Vs. Jayshree Chaman Lal Buddhbhatti (2013) 16 SCC 59.

11. On the other hand, learned Senior counsel, appearing on behalf of High Court has stated that a discreet inquiry conducted on the petitioner on the complaint of Sh.Rajesh Tomar could, at best, be a motive, but definitely not foundation of his discharge and in support of his contention, has relied upon the following judgments of the Hon'ble Supreme Court; ***The State of Orissa & anr Vs.Ram Narayan Das AIR 1961 SC 177 (Constitution Bench); Nepal Singh Vs. State of U.P.& ors (1980) 3 SCC 288; Radhey Shyam Gupa Vs U.P.State Agro Industries Corporation Ltd & anr (1999) 2 SCC 21; Chandra Prakash Shahi Vs. State of U.P. & ors (2000) 5 SCC 152; Mathew P. Thomas Vs. Kerala State Civil Supply Corpn Ltd & ors (2003) 3 SCC 263; Registrar, High Court of Gujarat & anr Vs. C.G. Sharma (2005) 1 SCC 132 and Jai Singh Vs. Union of India & ors (2006) 9 SCC 717.***

12. Now, I will proceed to discuss one by one the judgments relied upon by the petitioner.

13. In ***Samsher Singh Vs. State of Punjab & anr, (1974) 2 SCC 831,*** a Constitution Bench of the Hon'ble Supreme Court held that a probationer has no right to continue to hold the post and, therefore, the termination of his service does not operate as forfeiture of any right and is to be distinguished from dismissal, removal or reduction in rank. It is punishment only when the termination is founded on misconduct, negligence or inefficiency the motive being irrelevant. It was further held that services of the petitioner can be terminated when the authority is satisfied regarding his inadequacy for the job or unsuitability for temperamental or other reasons not involving moral turpitude or when his conduct may result in dismissal or removal but without a formal enquiry. The fact of holding an inquiry is not always conclusive. What is decisive is whether the order is really by way of punishment. The substance of the order and not the form would be decisive.

14. In ***Union of India & ors Vs. Mahaveer C.Singhvi, (2010) 8 SCC 220;*** Hon'ble three Judges Bench of the Hon'ble Supreme Court has held that if finding against the probationer is arrived at his back on the basis of inquiry conducted into the allegations made against him/her and if same formed foundation of discharge order, same would be bad and liable to be set aside. While, on the other hand, if no inquiry is held or contemplated and allegations were merely a motive for passing order of discharge without giving him a hearing, same would be valid. This position was reiterated in another Hon'ble three Judges Bench decision in ***Pradip Kumar Vs. Union of India & ors (2012) 13 SCC 182.***

15. In ***State Bank of India & ors Vs. Palak Modi & anr (2013) 3 SCC 607,*** it was reiterated that the probationer has no right to hold post and his services can be terminated at any time on the grounds of unsuitability. It was further held that where competent authority holds an inquiry or test or other evaluation method for judging the suitability of probationer for confirmation and such inquiry or test or other evaluation method forms basis for termination order, even then, action of the competent authority cannot be castigated as punitive. However, if an allegation of misconduct constitutes the foundation of the action taken, the ultimate decision taken by the competent authority can be nullified on the ground of violation of the rules of natural justice. Moreover, in such cases, though termination order, *prima facie,* is non stigmatic, court can lift veil and examine whether in garb of termination simpliciter, employer had in fact punished employee for misconduct.

16. In ***Registrar General, High Court of Gujarat & anr Vs. Jayshree Chaman Lal Buddhbhatti (2013) 16 SCC 59,*** the Hon'ble Supreme Court was dealing with the case where services of a probationer Civil Judge had been terminated on the ground of unsuitability for the post. This order was actually based on prior discreet inquiry and later a preliminary inquiry was also conducted into the adverse allegations against the Civil Judge without affording

her an opportunity of hearing. It was held that although the inquiry was justified for the purpose of ascertaining suitability for the post, but the termination was not a termination simpliciter. It was held as under:

> *"20. The question, therefore, comes for consideration, as stated earlier, as to whether this is a case of termination simpliciter of the services of a probationer on account of her unsuitability for the post that she was holding, or whether it is a termination of her services after holding an inquiry behind her back, and without giving her an opportunity to defend.*
>
> *31. Having gone through the salient judgments on the issue in hand, one thing which emerges very clearly is that, if it is a case of deciding the suitability of a probationer, and for that limited purpose any inquiry is conducted, the same cannot be faulted as such. However, if during the course of such an inquiry any allegations are made against the person concerned, which result into a stigma, he ought to be afforded the minimum protection which is contemplated under Article 311 (2) of the Constitution of India even though he may be a probationer. The protection is very limited viz. to inform the person concerned about the charges against him, and to give him a reasonable opportunity of being heard."*

17. Now coming to the judgments relied upon by the respondents, it would be noticed that in ***The State of Orissa & anr Vs.Ram Narayan Das AIR 1961 SC 177,*** a Constitution Bench of the Hon'ble Supreme Court held that in case an inquiry is conducted against a probationer to ascertain his fitness for confirmation, then the discharge on such inquiry does not amount to punishment. It was held that the probationer can always be discharged in any manner provided under the rules and mere termination of employment does not carry with it 'any evil consequences, such as forfeiture of pay or allowances, loss of seniority, stoppage or postponement of future changes of promotion etc. An order discharging a public servant, even if a probationer, in an enquiry on charges of misconduct, negligence, inefficiency or other disqualification, may appropriately be regarded as one by way of punishment, but an order discharging a probationer following upon an inquiry to ascertain whether he was fit to be confirmed, is not of that nature and to such a case, Article 311 (2) of the Constitution of India does not apply.

18. In ***Nepal Singh Vs. State of U.P.& ors (1980) 3 SCC 288***, the Hon'ble Supreme Court held that an order terminating the services of a temporary government servant and ex facie innocuous in that it does not cast any stigma on the government servant or visits him with penal consequences, must be regarded as effecting a termination simpliciter, which will not attract Article 311. It was further held that an order is not punitive if the material against the government servant on which the superior authority has acted constitutes the motive and not the foundation of the order. The function of the court is to discover the nature of the order by attempting to ascertain what was the motivating consideration in the mind of the authority which prompted the order. The intent behind the order can be discovered and proved, like any other fact, from the evidence on the record. In each case, it is necessary to examine the entire range of facts carefully and consider whether in the light of those facts the superior authority intended to punish the government servant or, having regard to his character, conduct and suitability in relation to the post held by him, it was intended simply to terminate his services. The circumstance that disciplinary proceeding had been instituted against him earlier does not in itself lead to the inference that the impugned order was by way of punishment.

19. The law on the subject has been lucidly explained with impeccable erudition by the Hon'ble Supreme In ***Radhey Shyam Gupa Vs U.P.State Agro Industries Corporation Ltd & anr (1999) 2 SCC 21*** wherein it was held as under:

> *"33. It will be noticed from the above decisions that the termination of the services of a temporary servant or one on probation, on the basis of adverse entries or on the basis of an assessment that his work is not satisfactory will not be punitive*

inasmuch as the above facts are merely the motive and not the foundation. The reason why they are the motive is that the assessment is not done with the object of finding out any misconduct on the part of the Officer, as stated by Shah, J. (as he then was) in Ram Narayan Das's case. It is done only with a view to decide whether he is to be retained or continued in service. The position is not different even if a preliminary inquiry is held because the purpose of a preliminary inquiry is to find out if there is prima facie evidence or material to initiate a regular departmental inquiry. It has been so decided in Champaklal's case. The purpose of the preliminary inquiry is not to find out misconduct on the part of the Officer and if a termination follows without giving an opportunity, it will not be bad. Even in a case where a regular departmental inquiry is started, a charge memo issued, reply obtained, and an enquiry Officer is appointed - if at that point of time, the inquiry is dropped and a simple notice of termination is passed, thee same will not be punitive because the enquiry Officer has not recorded evidence nor given any findings on the charges. That is what is held in Sukh Raj Bahadur's case and in Benjamin's case. In the latter case, the departmental inquiry was stopped because the employer was not sure of establishing the quilt of the employee. In all these cases the allegations against the employee merely raised a cloud on his conduct and as pointed by Krishna Iyer, J. in Gujrat Steel Tubes case, the employer was entitled to say that he would not continue an employee against whom allegations were made the truth of which the employer was not interested to ascertain. In fact, the employer, by opting to pass a simple order of termination as permitted by the terms of appointment or as permitted by the rules was conferring a benefit on the employee by passing a simple order of termination so that the employee would not suffer from any stigma which would attach to the rest of his career if a dismissal or other punitive order was passed. The above are all examples where the allegations whose truth has not been found, and were merely the motive.

34. But in cases where the termination is preceded by an inquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the Officer and where on the basis of such a report, the termination order is issued, such an order will be violative of principles of natural justice inasmuch as the purpose of the inquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental inquiry. In such cases, the termination is to be treated as based or founded upon misconduct and will be punitive. These are obviously not cases where the employer feels that there is a mere cloud against the employees conduct but are cases where the employer has virtually accepted the definitive and clear findings of the Inquiry Officer, which are all arrived at behind the back of the employee - even though such acceptance of findings is not recorded in the order of termination. That is why the misconduct is the foundation and not merely the motive, in such cases."

20. In ***Mathew P. Thomas Vs. Kerala State Civil Supply Corpn Ltd & ors (2003) 3 SCC 263,*** Hon'ble Supreme Court was dealing with the case of a probationer against whom allegations of repeated dereliction of duty tantamounting to unsatisfactory performance and against whom show cause notice containing serious allegations of misconduct had been levelled, but the ultimate order of termination that was passed only recorded unsatisfactory performance and it was held that the order was not punitive but was simpliciter .

21. In ***Registrar, High Court of Gujarat & anr Vs. C.G. Sharma (2005) 1 SCC 132,*** services of a probationer Civil Judge had been terminated by the High Court on being satisfied about his working of being unsatisfactory on evaluation of overall performance considering the confidential reports, complaints questioning his integrity, vigilance report etc and it was held that no opportunity of hearing needs to be given in such matters as it is purely a matter of subjective satisfaction. It shall be apt to reproduce the following observations:

> *"43. But the facts and circumstances in the case on hand is entirely different and the administrative side of the High Court and the Full court were right in taking the decision to terminate the services of the respondent, rightly so, on the basis of the records placed before them. We are also satisfied, after perusing the Confidential Reports and other relevant Vigilance files etc. that the respondent is not entitled to continue as a Judicial officer. The order of termination is termination simplicitor and not punitive in nature and, therefore, no opportunity needs to be given to the respondent herein. Since the overall performance of the respondent was found to be unsatisfactory by the High Court during the period of probation, it was decided by the High Court that the services of the respondent during the period of probation of the respondent be terminated because of his unsuitability for the post. In this view of the matter, order of termination simplicitor cannot be said to be violative of Arts. 14, 16 and 311 of the Constitution of India. The law on the point is crystalised that the probationer remains probationer unless he has been confirmed on the basis of the work evaluation. Under the relevant Rules under which the respondent was appointed as a Civil Judge, there is no provision for automatic or deemed confirmation and/or deemed appointment on regular establishment or post, and in that view of the matter, the contentions of the respondent that the respondent's services were deemed to have been continued on the expiry of the probation period, are misconceived.*
>
> *"47.In our opinion, what is to be considered in such matters is the examination of overall entries of the officer concerned and not the entry here and there. It may well be in some cases that in spite of satisfactory performance still the authority may desire to not to extend the Probation of an employee in public interest, as in the opinion of the said authority, the post has to be manned by more efficient and dynamic person. There is no denying of the fact that in all organizations there is great deal of dead-wood and, more so in Government and Judicial departments, which has to be replaced in public interest. Therefore, as pointed out by many Courts in India and of this Court it is purely a matter of subjective satisfaction of the High Court. In such case, the record so considered would naturally include the entries in the Confidential Reports/Character Rolls/Vigilance Reports, both favourable and adverse. There cannot be any justification for interference by this Court in such cases."*

22. Similar reiteration of law with regard to the termination order being punitive or simpliciter has been reiterated in ***Jai Singh Vs. Union of India & ors (2006) 9 SCC 717.***

23. It would be evidently clear from the judgments relied upon by either of the sides that the Hon'ble Supreme Court has clearly laid down two lines of authority. In certain cases of temporary service and probationers, it has taken a view that if an *ex parte* inquiry or a report is the motive for the termination order, then the termination is not to be called punitive, merely because principles of natural justice have not been followed.

24. Whereas in other line of decision, Hon'ble Supreme Court has clearly ruled that if the facts revealed in the inquiry are not the motive but the foundation for the termination of the services of the temporary servant or probationer, it would be punitive and the principles of natural justice are bound to be followed and failure to do so, would make the order legally unsound.

25. It can be taken to be settled that the transitory character of probationer appointment carries with it by necessary implication the consequences that it is terminable at any time. It has, therefore, been consistently held that a probationer whose services have been terminated for unsuitability of the job, cannot complain about such termination as the same is simpliciter termination.

26. Adverting to the facts, it would be noticed that as regards as the complaint filed by Sh. Rajesh Tomar, whereby certain allegations had been levelled against the petitioner, a discreet inquiry into the complaint was conducted by the Registrar (Vigilance) of this court and such inquiry was then placed before the Hon'ble Administrative Judge, who on 16.9.2013 observed as under:

> *"From the perusal of the discreet inquiry report, it cannot be said that the allegations levelled by the complainant against the erring officer are either false or baseless. In my considered view, the matter should be taken to its logical end and prompt appropriate action be taken in accordance with law.*
>
> *As such, the matter be placed before Hon'ble the Chief Justice for further necessary action."*

27. When the matter was placed before Hon'ble the Chief Justice on 17.9.2013, Hon'ble the Chief Justice directed the matter to be placed before the Administrative Committee on 17.9.2013 itself and the relevant agenda items and decision thereupon reads as under:

> Item No.3
>
> Consideration of the matter regarding misconduct and indecent behaviour of Sh. Sunish Aggarwal, Civil Judge (Junior Division)-cum-Judicial Magistrate 1st Class, Anni.
>
> Subject to decision taken on item No.5.
>
> Item No.5.
>
> Consideration of the matter to consider the continuation, confirmation or suitability of Shri Suneesh Aggarwal, Civil Judge (Junior Division)-cum JMIC, Anni, in service.
>
> Considered as aspects of the matter. We are of the considered view not to allow Shri Suneesh Aggarwal, Civil Judge (Junior Division)-cum JMIC, Anni to continue in service on probation. He be discharged from service forthwith.

28. The decision of the Hon'ble Administrative Committee in turn was placed before the Hon'ble Full Court meeting held on 18.9.2013 and the agenda item pertaining to the petitioner and decision thereupon reads as under:

> *" Item No.3.*
>
> *Consideration of the decision of Hon'ble Administrative Committee for ratification.*
>
> *The decision of the Hon'ble Administrative Committee taken on 17.9.2013 in respect of Shri Suneesh Aggarwal, Civil Judge (Junior Division)-cum JMIC, Anni to not continue him on probation and to be discharged forthwith ratified."*

29. As regards, the order passed by the State Government on 19.9.2013 (Annexure P-8), the same reads thus:

> *"Government of Himachal Pradesh*
>
> *H.P. Secretariat, Home Department*
>
> *No.Hom B(B)14-1/2013-43 Dated, Shimla-2, 19/09/2013.*
>
> ***N O T I F I C A T I O N***
>
> *Whereas the matter of Shri Suneesh Aggarwal, presently working as Civil Judge (Junior Division)-cum-JMIC, Anni, District Kullu, H.P. for his continuation confirmation or suitability in service was considered and after considering all aspects of the matter, the Hon'ble High Court of Himachal Pradesh has decided and recommended not to allow him to continue in service on probation and to discharge him from service forthwith.*
>
> *Therefore, the Governor, Himachal Pradesh, on the recommendation of the Hon'ble High Court of Himachal Pradesh, is pleased to discharge Shri Suneesh Aggarwal, presently working as Civil Judge (Junior Division)-cum-JMIC, Anni, District Kullu, H.P. from service, with immediate effect.*

By Order
Sudripta Roy
Chief Secretary,(Home) to the
Government of Himachal Pradesh

No.Home B(B)14-1/2013 Dated, Shimla-2, 19/09/2013.

Copy forwarded for information and necessary action to:-

1. *The Secretary to the Her Excellency the Governor of H.P.,Shimla-2.*
2. *The Registrar General, Himachal Pradesh High Court, Shimla-1 with reference to his letter No. HHC/GAZ/14-314/2010-66 dated 17th September, 2013.*
3. *The above named Judicial Officer.*
4. *The Controller, Printing and Stationery,H.P., Shimla-5 for publication in Government Gazette.*
5. *Guard file.*

(D.K.Manta)
Deputy Secretary(Home) to the
Government of Himachal Pradesh,
Tel.(Off) 01772628503."

30. It would be noticed that in the meeting of the Administrative Committee held on 17.9.2013, the issue relating to petitioner appeared at item No.3 and item No.5 respectively. As regards item No.3, the same was with regard to misconduct and indecent behaviour of the petitioner, whereas item No.5 only pertained to consideration regarding the continuation, confirmation or suitability of the petitioner.

31. At this stage, learned Senior Counsel for the petitioner would vehemently argue that the decision taken by the Hon'ble Full Court, has in fact been taken on item No. 3 and not on item No.5. Therefore, it was the alleged misconduct and mis-behaviour which weighed with the Hon'ble Full Court while ratifying the decision of the Administrative Committee and thus the order so passed by the Hon'ble Full Court cannot be termed to be a mere simpliciter, rather the same is punitive. To say the least, this contention of the petitioner is fallacious and palpably erroneous as would be clear from the relevant agenda extracted above and mere assigning of the same number i.e. item No.3 to both the agendas is purely co-incidental.

32. It is clear from the decision taken by the Administrative Committee, which in turn has been ratified by the Hon'ble Full Bench that the decision taken not to continue the petitioner on probation and his consequent discharge is neither stigmatic nor punitive in nature, but is rather simpliciter. Even if some inquiry was conducted, the same was not a motive much less a foundation for the discharge of the petitioner during the period of his service on probation.

33. As observed earlier, it is not in dispute that it was pursuant to the aforesaid decision of the Hon'ble Full Court that a notification dated 19.9.2013 (Annexure P-8) was issued by the government whereby petitioner was ordered to be discharged from service.

34. In the given circumstances, the further question that falls for consideration is the scope of judicial review in matters which have been approved by the Hon'ble Full Court.

35. 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.

36. 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."

37. 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."

38. 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.

39. 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."

40. 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.

41. In view of the aforesaid detailed discussion I am of the firm opinion that the order of discharge is simpliciter and not punitive in nature and therefore, no opportunity was required to be afforded to the petitioner before discharging him from service. Further the order is ex facie innocuous and it does not cast any stigma on the petitioner or visit him with penal consequences and it does not attract Article 311 of the Constitution of India. Accordingly, there is no merit in this petition and the same is dismissed, so also the pending application(s), if any, leaving the parties to bear their own costs.

****

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

RSA No. 396 of 2004 alongwith
RSA No. 397 of 2004
Reserved on: 22.09.2016
Date of decision: 05.10.2016

1. RSA No. 396 of 2004

Smt. Surinder Kaur ... Appellant

Versus

Manjit Singh and others ... Respondents

2. RSA No. 397 of 2004

Manjit Singh and others ... Appellants

Versus

Smt. Surinder Kaur and others ... Respondents

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for declaration that they were owners in possession of the suit land, auction of the suit land and sale certificate in favour of the defendant No. 1 is illegal- defendant No. 2 had taken an exparte decree against N, predecessor of the plaintiffs, N had died and his LRs were not impleaded in the execution – the sale was not valid – defendant No. 1 contested the suit pleading that it was not maintainable in view of Order 21 Rule 90- the suit was dismissed by the trial Court- an appeal was preferred, which was partly allowed- held, in second appeal that plaintiffs had not approached the Civil Court for setting aside the auction of the suit land in execution petition- plaintiffs are the legal heirs of the judgment debtor - no application to set aside the sale was filed before the Executing Court- all questions relating to execution are to be decided by the executing Court- the suit is hit by Section

47 of Code of Civil Procedure- once the suit was not maintainable, no relief could have been granted by the Court- the Court has to see the justiciability only when there is maintainability – appeal allowed- judgment of the Appellate Court set aside. (Para-22 to 34)

Cases referred:

Kumar Sudhenu Narain Deb Vs. Mrs. Renuka Biswas and others, AIR 1992 Supreme Court 385
Jaunda Ram Vs. Dola Ram and others, AIR 1995 Himachal Pradesh 123
Athmanathaswami Devasthanam Vs. K. Gopalaswami Ayyangar, AIR 1965 Supreme Court 338

RSA No. 396 of 2004:

For the appellant: Mr. K.S. Kanwar, Advocate.
For the respondents: Mr. Neeraj Gupta, Advocate, for respondents No. 1(a) to 1(e) and 3.
Mr. K.D. Sood, Senior Advocate with Mr. Rajnish K. Lal, Advocate, for respondent No. 4.

RSA No. 397 of 2004:

For the appellants: Neeraj Gupta, Advocate, for Appellants No. 1(a) to 1(e).
For the respondents: Mr. K.S. Kanwar, Advocate, for respondent No. 1.
Mr. K.D. Sood, Senior Advocate with Mr. Rajnish K. Lal, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

Both these Regular Second Appeals are being decided by a common judgment as these appeals arise out of the judgment passed by the Court of learned District Judge, Sirmaur District at Nahan in Civil Appeal No. 58-CA/13 of 2003 dated 03.06.2004.

2. Brief facts necessary for adjudication of the present appeals are that a suit was filed by the plaintiffs (appellants in RSA No. 397 of 2004) against the defendants (appellants in RSA No. 396 of 2004) for declaration to the effect that the plaintiffs were owners in possession of the land bearing khata khatauni No. 48/78, khasra No. 7, measuring 8 bighas 19 biswas and khasra No. 258/106 measuring 2 bighas 15 biswa situated in mouja Bherewala, Tehsil Paonta Sahib, Distt. Sirmaur (HP) and the auction of the suit land dated 31.12.1987 in the execution petition No. 6/10 of 87 and the sale certificate on the basis of said sale in favour of defendant No. 1 of the suit land is illegal and void and not binding on the rights of the plaintiffs and the mutation No. 638 dated 19.12.1992 attested in favour of defendant No. 1 on the basis of aforesaid sale certificate was also illegal and void and the defendant No. 1 had no right, title or interest in the suit, with consequential relief of permanent injunction restraining the defendant No. 1 from interfering in the possession of the plaintiffs over the suit land herself, through her servants or agents in any manner with costs of the suit, be passed in favour of the plaintiffs and against the defendants. As per the plaintiffs, their father Narain Singth was owner in possession of the suit land and plaintiffs received a letter dated 01.12.1990 from defendant No. 2 from which they came to know that their father had taken a loan from defendant No. 2 Bank. For recovery of loan, defendant No. 2 filed recovery suit No. 93/1 of 1979 and obtained an ex parte decree on 12.01.1982. Narain Singh died on 02.02.1983. Defendant No. 2 filed execution petition No. 43/10 of 1984/6/10 of 1987 titled SBI Vs. Narain Singh etc., in which plaintiffs were not served nor they came to know about the pendency of the said execution petition. As per plaintiffs, defendant No. 1 was wife of plaintiff No. 2 and was residing with her brother Shri S.S. Gill, Advocate, because of strained relations between husband and wife. It was further the case of the plaintiffs that Shri S.S. Gill and defendant No. 1 in connivance with defendant No. 2 obtained an exparte decree against late Narain Singh and in order to transfer the suit land in the name of defendant No. 1 in connivance with the Bailiff of the Court, secretly showed public auction of the suit land

in favour of defendant No. 1, whereas no such auction in fact took place on 31.12.1987 nor any person participated in the same. Further, as per the plaintiffs, defendant No. 1 did not deposit 25% of auction amount/purchase money with the Bailiff, who conducted the auction immediately after declaring her the purchaser which was mandatory under the provisions of Order 21 Rule 84 C.P.C. On these basis, it was contended by the plaintiffs that the auction sale in favour of defendant No. 1 was null and void. It was further the case of the plaintiffs that the sale in favour of defendant No. 1 of the suit land was collusive, fraudulent, illegal and not binding on the rights of the plaintiffs. As per plaintiffs execution petition No. 6/10 of 1987 came for hearing before the Court of learned Sub Judge, Paonta Sahib on 08.01.1988 on which date the said Court dismissed the execution petition as fully satisfied but did not confirm the sale dated 31.12.1987. Learned Court thereafter issued sale certificate in favour of defendant No. 1 without confirming the same which was illegal. It was also the case of the plaintiffs that said certificate did not confer any title upon defendant No. 1 and she had no right, title or interest over the suit land and mutation No. 638 dated 19.12.1992 attested on the basis of said sale certificate in favour of defendant No. 1 was illegal and void and not binding on the rights of the plaintiffs. On these basis, suit was filed by the plaintiffs.

3. The suit so filed by the plaintiffs was contested by defendant No. 1, inter alia, on the ground that the suit was not maintainable in view of the provisions of Order 21 Rule 90 C.P.C. and the filing of the suit was specifically barred under the provisions of Order 21 Rule 92(3) of C.P.C.

4. Defendant No. 1 besides contesting the suit on maintainability, denied the case of the plaintiffs as was set up by the plaintiffs even on merit. As per defendant No. 1 filing of the suit by the Bank against Narain Singh was in the knowledge of the plaintiffs and they had information and due notice of the proceedings of the execution petition as they were duly served by the orders of the Court in the said proceedings. It was further contended by defendant No. 1 that the suit land was publically auctioned only after the refusal of the plaintiffs to pay the loan amount and public auction of the suit land was conducted in their presence. It was further mentioned by defendant No. 1 that after Narain Singh defaulted in the payment of loan, defendant No. 2 called upon Narain Singh and the guarantors to make the payment. Narain Singh executed revival letter i.e. acknowledgment of the liability on 12.10.1978 and similarly, Ujagar Singh, Kanshi Ram and Arjun Singh also executed the documents to repay the amount. It was only on failure of Narain Singh to pay the loan amount, that Suit No. 93 of 1979 was instituted by defendant No. 2 on 19.09.1979 which was decreed against Narain Singh, Ujagar Singh and others on 12.01.1982. It was mentioned in the written statement that summons of the said suit issued by learned Senior Sub Judge were served upon Ujagar Singh on 15.10.1979 alongiwth Arjun Singh and on Narain Singh on 23.10.1979. However, as they did not put in appearance before the learned Court, accordingly they were proceeded exparte and suit was decreed on 12.01.1982. It was further mentioned in the written statement by defendant No. 1 that defendant No. 2 filed execution petition in Suit No. 93 of 1979 and Ujagar Singh was served on 14.01.1987 and proceeded exparte and as judgment debtor Narain Singh died, accordingly, an application was moved by defendant No. 2 to implead his legal representatives in the execution petition which was allowed by the learned Court and the plaintiffs were duly served for 25.08.1987, however, they deliberately absented themselves from appearance in the Court and in these circumstances, learned trial Court had no other alternative to proceed them exparte.

5. The suit was also contested by defendant No. 2. It was categorically stated by defendant No. 2 in the written statement that in the execution petition plaintiffs were duly served but they intentionally did not appear. It was also contended by defendant No. 2 that the plaintiffs in fact had knowledge with regard to mutation as well as the suit having been decreed in favour of the Bank. It was further the case of defendant No. 2 that the auction was conducted by the Bailiff as per law.

6. Accordingly, on these basis, claim filed by the plaintiffs in the suit was contested by the defendants.

7. On the basis of the pleadings of the parties, learned trial Court framed the following issues:-

1. Whether the judgment & decree passed in civil suit No. 93/1 of 79 titled SBI Vs. Narain Singh is collusive as alleged? ... OPP
2. Whether the plaintiffs were not served in the execution petition No. 43/10 of 1984 as alleged? ... OPP
3. Whether the defendant No. 1, in connivance with the bailiff of the court secretly showed the public auction of the suit land in favour of defendant No. 1 as alleged, if so, its effect? ... OPP
4. Whether the plaintiffs are owners in possession of the suit land, as alleged? ... OPP
5. Whether the auction sale of suit land in favour of defendant No. 1 is collusive, fraudulent and illegal & is not binding on the plaintiffs as alleged? ... OPP
6. Whether the plaintiffs were not having the knowledge of the judgment and decree passed in the civil suit No. 93/1 of 79 as alleged, if so, its effect? ... OPP
7. Whether the auction sale having not been confirmed by the Court and the consequent sale certificate issued qua the suit land is illegal and not binding on the plaintiffs, as alleged? ... OPP
8. Whether mutation No. 638 dated 19-12-92 is illegal and void, as alleged? ... OPP
9. Whether the suit is not maintainable as alleged? ... OPD 1 & 2
10. Whether the suit is barred by Order 21 Rule 92(3) CPC, as alleged? ... OPD 1
11. Whether the suit is barred by limitation as alleged? ... OPD 1 & 2
12. Whether the plaintiffs are guilty of suppression and have levelled false allegations to their knowledge against the defendant No. 1 and others as alleged? ... OPD-1
13. Whether the defendant No. 1 is entitled for special costs u/s 35-A, CPC, as alleged?...OPD1&2
14. Whether the plaintiffs have no cause of action as alleged? ... OPD 1 & 2
15. Whether the plaintiffs have no locus-standi to file the suit as alleged? ... OPD 1 & 2
16. Whether the suit is not properly valued as alleged? ... OPD2

8. On the basis of the evidence led 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: No
Issue No. 4: No
Issue No. 5: No
Issue No. 6: No
Issue No. 7: No
Issue No. 8: No
Issue No. 9: Yes

Issue No. 10:		Yes
Issue No. 11:		Yes
Issue No. 12:		No
Issue No. 13:		No
Issue No. 14:		No
Issue No. 15:		No
Issue No. 16:		Not pressed.
Relief	:	Suit dismissed as per operative part of judgment.

9. Learned trial Court dismissed the suit of the plaintiffs by returning the following findings:-

(a) Suit filed by defendant No. 2 against Narain Singh was not collusive with defendant No. 1.

(b) It stood proved on record that the plaintiffs were duly served in the execution petition filed by defendant No. 2 while executing the judgment and decree passed in Civil Suit No. 93/1 of 1979.

(c) Plaintiffs could not establish that any secret sale was effected during the course of execution of decree as far as the suit property was concerned.

(d) Valid procedure was followed by the Court as prescribed in the Code of Civil Procedure while by conducting the public auction of the suit property which was duly conducted by way of public auction by the Bailiff and several persons had participated in the said public auction and had given different bids in which the bid of defendant No. 1 was the highest which was accordingly accepted and suit property was sold in favour of defendant No.1 in public auction.

(e) Before issuance of sale certificate, Executing Court was fully satisfied about the genuineness of the sale.

(f) There was no violation of the provisions of Order 21 Rule 84 of the Code of Civil Procedure.

(g) Executing Court had not committed any irregularity in any manner whatsoever and order of confirmation of sale may be implied and no express order of confirmation of sale was necessary as no prejudice was caused to the judgment debtors.

(h) Mutation sanctioned in favour of defendant No. 1 did not suffer from any illegality since defendant No. 1 had become owner in possession of the suit land under law by purchasing the same in public auction.

(i) Suit in its present form was not maintainable being barred by the provisions of Order 21 Rule 92(3) C.P.C. as well as Section 47 C.P.C. as the remedy available to the plaintiffs to assail the Court auction was by filing objection under Section 47 C.P.C. before Executing Court.

(j) Suit filed by the plaintiffs was time barred as relevant final order was passed by Executing Court on 08.01.1988 and the same could not have been challenged by filing a suit after a gap of eight years in view of the fact that the order passed by Executing Court was not void for want of jurisdiction nor any objections were filed.

10. Feeling aggrieved by the judgment and decree passed by learned trial Court, plaintiffs filed an appeal.

11. Learned Appellate Court framed the following points for determination:-

1. Whether the auction sale dated 31-12-1987 (Ext. PW1/G) in execution petition No. 43/10 of 1984/6/10 of 1987 and the sale certificate (Ext. PW1/E) as well as mutation No. 638 (Ext. PW1/D) are null and void and, as such, the findings of the learned trial Court on issues No. 1 to 8 are erroneous and are liable to be reversed?

2. Whether the suit is maintainable and the findings of the learned trial Court to the contrary, on issues No. 9 and 10, are erroneous and liable to be reversed?

3. Whether the suit is within limitation and the findings of the learned trial Court to the contrary, on issue No. 11, are erroneous and are liable to be reversed?

4. Final Order.

12. Learned Appellate Court returned the following findings on the points so framed by it:-

Point No. 1:	Yes, decided accordingly.
Point No. 2:	Decided accordingly.
Point No. 3:	Yes.
Final Order:	The appeal is partly allowed, per operative part of the judgment.

13. Accordingly, learned Appellate Court allowed the appeal filed by the plaintiffs in the following terms:-

" In view of my findings on points No. 2 and 3 above, the appeal is partly allowed for the relief of permanent injunction only. With the result, the plaintiffs' suit for permanent injunction seeking to restrain the defendant No. 1 from interfering in the possession of the plaintiffs over the suit land till the plaintiffs are evicted in due course of law is decreed. The impugned judgment and decree of the learned trial Court, dated 30-6-2003, stand modified to this extent. However, the parties are left to bear their own costs. Decree sheet be drawn-up accordingly. File be completed and consigned to the record room. Lower Court's record be returned with a copy of this judgment."

14. Feeling aggrieved by the said judgment passed by learned Appellate Court, both plaintiffs as well as defendants have filed these appeals. RSA No. 396 of 2004 has been filed by the defendants and RSA No. 397 of 2004 has been filed by the plaintiffs.

15. RSA No. 396 of 2004 was admitted on 23.03.2006 on the following substantial questions of law:-

"(1) Whether the first appellate Court erred in granting the injunction to the plaintiffs-respondents after holding that the suit was not maintainable?

(2) When the first appellate Court was of the view that suit was not maintainable, could the first appellate Court have proceeded to give a finding that the same was illegal?"

16. RSA No. 397 of 2004 was admitted on 23.03.2006 on the following substantial question of law:-

"(1) Whether the first appellate Court erred in holding that suit for declaration was not maintainable, in view of the provisions of Section 47 and Order 20 of the Code of Civil Procedure?"

17. I will be dealing with all these substantial questions of law together.

18. Mr. K.S. Kanwar, learned counsel for the appellant/defendant in RSA No. 396 of 2004 argued that the judgment passed by learned Appellate Court was perverse and not sustainable in law because when learned Appellate Court concluded, and rightly so, that Section 47 of the Code of Civil Procedure creates a block in the way of plaintiffs to have had instituted a civil suit then learned Appellate Court erred in returning its findings on the point as to whether auction sale dated 31.12.1987, sale certificate as well as mutation No. 638 were null and void or not. Mr. Kanwar argued that the issue raised by the plaintiffs in the plaint was barred for the purposes of adjudication by way of civil suit in view of the specific provisions of Section 47 C.P.C. and Order 21 Rule 92(3) C.P.C. He further argued that remedy if any to challenge the auction before the plaintiffs was under the provisions of Order 21 of the Civil Procedure Code which remedy admittedly was not exhausted by the plaintiffs. Mr. Kanwar further argued that the factum of civil suit being barred by the provisions of Section 47 of C.P.C. was in fact concurrently decided against the plaintiffs by both the Courts below. In this background, according to Mr. Kanwar, once Civil Court was not having the jurisdiction to adjudicate the issue which was raised by the plaintiffs in the civil suit, learned Appellate erred in returning the findings on the merits of the case with regard to the validity of the auction sale dated 31.12.1987 while it was simultaneously held by learned Appellate Court that the suit filed by the plaintiffs was not maintainable. Accordingly, on these grounds, it was urged by Mr. Kanwar that the judgment passed by learned Appellate Court to this effect that auction sale dated 31.12.1987, sale certificate as well as mutation No. 638 were null and void, were perverse and liable to be set aside. Mr. Kanwar further argued that once the Civil Court was not having any jurisdiction to adjudicate upon the case, learned Appellate Court further erred in decreeing the suit of the plaintiffs to the extent that defendant No. 1 was restrained from interfering in the possession of the plaintiffs over the suit land till the plaintiffs were evicted in due course of law. Accordingly, on these basis, he prayed that the judgment passed by learned Appellate Court to this extent be set aside.

19. Mr. K.D. Sood, learned Senior Advocate, for respondent No. 4 submitted that there was no illegality in the auction sale which was carried out on 31.12.1987 and he also prayed that there was merit in the contention raised by appellant/defendant No. 1.

20. Mr. Neeraj Gupta, learned counsel appearing for the respondents/plaintiffs argued that while there was no merit in the appeal filed by defendant No. 1 against the judgment and decree passed by learned Appellate Court, however, according to him, once learned Appellate Court had come to the conclusion that the auction sale dated 31.12.1987, sale certificate as well as mutation No. 638 were null and void, thereafter, learned Appellate Court should have had decreed the suit of the plaintiffs in totality and as per him, learned Appellate Court erred in coming to the conclusion that the suit filed by the plaintiffs was hit by the provisions of Section 47 C.P.C. Accordingly, he argued that while appeal filed by defendant No. 1 against the judgment passed by learned Appellate Court be dismissed, the appeal of the plaintiffs be allowed and judgment passed by learned Appellate Court to the extent that the suit filed by the plaintiffs was not maintainable, be set aside and the suit of the plaintiffs be decreed as prayed for.

21. I have heard learned counsel for the parties and have also gone through the records of the case as well as judgments passed by learned Appellate Court and learned trial Court.

22. A perusal of the plaint filed by the plaintiffs demonstrates that the plaintiffs had approached the Civil Court praying for setting aside auction of suit land dated 31.12.1987 in execution petition No. 43/10 of 1984/6/10 of 1987 and sale certificate issued on the basis of said sale in favour of defendant No. 1 as well as against mutation No. 638 dated 19.12.1992 attested in favour of defendant No. 1 on the basis of aforesaid sale certificate.

Section 47 C.P.C. envisages as under:-

> "**47. Questions to be determined by the Court executing decree**. – (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of

the decree, shall be determined by the Court executing the decree and not by a separate suit.

[***]

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

[Explanation I. – For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II. – (a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) All questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]"

23. Plaintiffs who filed the civil suit admittedly are legal heirs of late Narain Singh against whom decree was passed in Civil Suit No. 93/1 of 1979 and in the execution of which decree, auction sale dated 31.12.1987 took place. It is a matter of record that Narain Singh expired on 02.02.1983 and the plaintiffs were impleaded in execution petition as judgment debtors and were duly served but did not appear in the Court even after service and were thereafter proceeded against exparte.

24. Admittedly, no application to set aside the sale either on the ground of irregularity or on the ground of fraud was filed by the plaintiffs under Order 21 Rule 90 C.P.C. before learned Executing Court. There is no plausible explanation given by the plaintiffs as to why no such application was filed especially when it stands proved on record that they were duly impleaded as judgment debtors in place of Narain Singh in the execution petition and were also served in the same though they chose not to put in appearance before learned Executing Court. It has also come on record that the plaintiffs was aware of the auction which was conducted by the Court orders and the same took place in their presence.

25. Therefore, in my considered view, in the light of the provisions of Section 47 C.P.C. as well as Rule 90 of Order 21 C.P.C. and the remedy if any available to the plaintiffs for setting aside the sale on the grounds of irregularity or fraud was by way of filing application under the provisions of Order 21 Rule 90 C.P.C. and for the said purpose, a civil suit could not have been filed.

26. In fact, a perusal of the judgment passed by learned Appellate Court also demonstrates that while deciding Point No. 2 it was held by learned Appellate Court. and rightly so. that the suit filed by the plaintiffs was not for seeking a relief of declaration challenging the decree in execution of which the suit property was put to auction. However, while learned Appellate Court rightly concluded that the civil suit filed by the plaintiffs was not maintainable and was hit by the provisions of Section 47 C.P.C. it erred in adjudicating on the issue as to whether auction sale dated 31.12.1987 and sale certificate Ext. PW1/E as well as mutation No. 638 which was entered on the basis of sale certificate were null and void or not. This is for the reason that whether or not auction sale dated 31.12.1987 was null and void, was to be decided by the Executing Court itself as prescribed under Section 47 C.P.C. and as per the procedure contemplated under Order 21 Rule 90 C.P.C. Learned Appellate Court erred in not appreciating that once it was not having the jurisdiction to adjudicate upon the issue raised by the plaintiffs in the civil suit then it could not have ventured to decide any of the issues which had been raised by the plaintiffs in the said civil suit on merit which otherwise were to be decided as per the provisions of Section 47 C.P.C. and Order 21 Rule 90 of the same. Therefore, the findings returned by the learned Appellate Court to the effect that the auction sale deed dated 31.12.1997

Ext. PW1/G in execution petition No. 43/10 of 1984/6/10 of 1987 and sale certificate Ext. PW1/E as well as mutation No. 638 Ext. PW1/D are null and void, are perverse, not sustainable in law being beyond jurisdiction and are accordingly set aside.

27. There is no merit in the arguments of Mr. Neeraj Gupta, learned counsel appearing for the plaintiffs that once learned Appellate Court had come to the conclusion that the auction sale dated 31.12.1987 and sale certificate issued subsequently as well as mutation No. 638 as entered subsequently, were null and void, learned Appellate Court should have decreed the suit of the plaintiffs in totality. This is for the reason that I have already held above that the findings returned by learned Appellate Court to the effect that the auction sale dated 31.12.1987 Ext. PW1/G and sale certificate Ext. PW1/E as well as mutation No. 638 Ext. PW1/D were null and void, are perverse findings.

28. The Hon'ble Supreme Court in ***Kumar Sudhenu Narain Deb*** Vs. ***Mrs. Renuka Biswas and others***, ***AIR 1992 Supreme Court 385***, has held that all questions arising between the parties to the suit in which the decree was passed and their representatives and relating to the execution, discharge or satisfaction of the decree are required to be determined by the Court executing the decree and not by a separate suit.

29. In ***Jaunda Ram*** Vs. ***Dola Ram and others***, ***AIR 1995 Himachal Pradesh 123***, this Court has also held that question which could have been considered by raising objections under Section 47 read with Order 21 Rule 90 of the Code of Civil Procedure cannot be raised by way of a separate civil suit.

30. As far as the relief which has been granted by learned Appellate Court to the plaintiffs to the extent that the plaintiffs should not be dispossessed from the suit property except in accordance with law is concerned, in my considered view, learned Appellate Court should have had restrained from granting this relief in favour of the plaintiffs keeping in view the fact that neither any issue in this regard was framed for adjudication before learned trial Court nor learned Appellate Court should have had granted any relief to the plaintiffs once it had come to the conclusion that the suit filed by the plaintiffs was not maintainable. Accordingly, the judgment and decree passed to this effect by learned trial Court in favour of the plaintiffs and against defendant No. 1 is set aside.

31. Each and every case has got two elements involved in it. These elements are (a) maintainability and (b) justiciability. Before entering into the justiciability, it has to be decided whether the *lis* is maintainable or not. Thereafter a Court ventures into adjudication of the case on merit which is known as "justiciability". When Court comes to the conclusion that the *lis* is not maintainable, then it does not enter into adjudication of the same on merit.

32. The Hon'ble Supreme Court in **Athmanathaswami Devasthanam** Vs. **K. Gopalaswami Ayyangar**, AIR 1965 Supreme Court 338 has held as under:-

> *"13. .....x x x x x When the Court had no jurisdiction over the subject matter of the suit it cannot decide any question on merits. It can simply decide on the question of jurisdiction and coming to the conclusion that it had no jurisdiction over the matter had to return the plaint."*

This very important principle of law has been ignored by the learned Appellate Court while returning the findings on merit after holding that the Civil Court had no jurisdiction to decide the civil suit.

33. Substantial questions of law are answered accordingly.

34. In view of above discussion, RSA No. 397 of 2004 is dismissed and RSA No. 396 of 2004 is allowed. Findings returned by learned Appellate Court to the effect that the auction sale dated 31.12.1987 Ext. PW1/G in execution petition No. 43/10 of 1984/6/10 of 1987 and sale certificate Ext. PW1/E as well as mutation No. 638 PW1/D are null and void, are set aside so also the decree passed by learned Appellate Court for permanent injunction in favour of the

plaintiffs and against defendant No. 1. Miscellaneous application(s) pending, if any, in both the appeals, stand disposed of. Interim order, if any, in both the appeals, also stands disposed of.

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

Tanuja Begum. .....Petitioner.

Versus

Union of India & others. .....Respondent.

CWP No. 4144 of 2015
Reserved on: 27.08.2016
Decided on: 05.10.2016

Constitution of India, 1950- Article 226- Petitioner scored 86.4% marks in 10+2 examination and thereafter took admission in B.Sc. (Physics) – respondent No. 1 started a scheme, which provided that the students securing position by virtue of their performance within 1% of the school board at 10+2 examination are entitled for scholarship of Rs. 80,000/-- petitioner claimed that she is entitled to the scholarship under the scheme but no scholarship was provided to her – respondent No. 1 stated that the student was supposed to apply directly through the web portal, which the petitioner had not done; therefore, she is not entitled for the scholarship- held that the petitioner could not get the scholarship due the negligence of the respondent No. 5 - direction issued to the respondent No. 5 to get the form filled and transmit it to respondent No. 1, who shall consider the same- respondent No. 5 also directed to pay cost of Rs. 10,000/- to the petitioner. (Para-9 to 15)

For the petitioner: Mr. Onkar Jairath, Advocate.

For the respondent: Mr. Ashok Sharma, ASGI, with Mr. Angrez Kapoor, Advocate, for respondent No. 1.
Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG, for respondents No. 2, 3 & 5.
Mr. Lovneesh Kanwar, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioner seeking the following substantial relief:

(1) *That a writ in the nature of mandamus may kindly be issued directing the respondents to release the "INSPIRE (SHE)" Scheme w.e.f. 2013 and continue to pay for 5 years as admissible under the "INSPIRE (SHE)" Scheme.*

2. As per the petitioner, she is being denied the benefit of scholarship under "INSPIRE (SHE)" (hereinafter referred to as "the Scheme"), wherein she is to get Rs.80,000/- (rupees eighty thousand) per annum for five years to pursue higher education, being meritorious student. However, the benefit of the above mentioned centrally sponsored scheme is being denied to her wrongly and illegally despite recommendation of respondent No. 4/Himachal Pradesh Board of School Education.

3. Brief facts giving rise to the present petition are that the petitioner in 10+2 examination, in the year 2013, appeared in Non-medical stream and scored 86.4% marks with distinction in all the subjects. Thereafter, the petitioner got admission in B.Sc (Physics) in Government Degree College, Daulatpur Chowk, Tehsil Amb, District, Una, H.P. Respondent No. 1 started a scheme, namely INSPIRE (SHE), which provided that the students, who secured position by virtue of their performance within 1% of the School Board at Plus 2 level in the examination

held by the concerned Board are entitled for Scholarship. Top 1% performers automatically qualified for scholarship for higher education of Government of India, annual amount whereunder is Rs.80,000/- (rupees eighty thousand) for five years. As per the list, prepared by respondent No. 4, the petitioner with 86.4% marks in plus two (+2) examination is figuring at serial No. 531, therefore, automatically entitled for the benefit under the Scheme. The Scheme further provides that the concerned Board of School Education (herein respondent No. 4) has to send a communication to the concerned candidate, depicting his/her status in the merit list with roll No and date of birth with further advise to the candidate to apply online to the Government of India for availing the benefit of scholarship for pursuing higher studies, provided a candidate has got admission in higher classes. As per the petitioner, respondent No. 4 did not issue such advisory to her. However, respondent No. 4 sent a list under the Scheme to respondent No. 1/Government of India on 16.07.2013, wherein name of the petitioner is figuring at serial no. 531 (Rank 50). On the basis of the said list scholarship was granted to the students other than the petitioner. The petitioner, by way of a representation, foregrounded her grievance to respondent No. 4, but to no avail and she was advised to take up the matter with Ministry of Science and Technology, New Delhi. Subsequently, the petitioner raised her claim before respondent No. 1, vide representation dated 28.02.2015, wherein she specifically alleged that due to inaction of respondent No. 4, in not issuing an advisory, she is being deprived scholarship. Lastly, the petitioner prays for issuance of writ of mandamus directing the respondents to release the benefits of the Scheme.

4. Respondent No. 1/Union of India, by filing reply to the writ petition, precisely contended that to avail the benefits of the Scheme in question the application must be filed directly by the candidate, through the web-portal, that is, www.onlineinspire.gov.in and merely figuring in the merit list of any Education Board does not entitle a candidate for the benefits of the Scheme. The application must be submitted through the web portal by the applicant/candidate. The petitioner did not apply online within the due date to the Department of Science and Technology (DST) and she moved her application directly to the State Education Board. The Scheme mandates for awarding annual scholarships for Higher Education for only 10,000 students and for the batch of 2013 the scholarships have been completed. Due to non-availability of provisions qua allocation for scholarships for the year 2013, the replying respondent is unable to consider any more applications form the batch of 2013 students. It is further contended that the replying respondent has no role to play in the matter, as the application was not submitted on time and the department has exhausted its awarded the scholarships as well as the budget.

5. Respondents No. 2 and 5 have filed a consolidated reply, wherein it is contended that the Scheme in question is being run by the Government of India, Ministry of Science and Technology, New Delhi, and the same is directly linked with the Himachal Pradesh School of education Board, Dharamshala, District Kangra. As per respondent No. 5/Principal Government Senior Secondary School, Ambota District Una, H.P., no information qua selection of the petitioner under the Scheme was received, whereas the other students, who were selected under the Scheme, received advisory/eligibility note from the Office of H.P. School Education Board, Dharamshala, at their home addresses. It is further contended that the benefit of the Scheme is being awarded to only those students who continue their studies as a regular Science students in the college on the basis of performance in plus two class for which H.P. Board of School Education issues advisory note/letter by post to every eligible candidate and on receipt of such note, the students have to apply online to DST after completing all codal formalities by the concerned college where the student is pursuing higher education. The replying respondents pray for dismissal of the writ petition.

6. Respondent No. 4, by filing reply to the writ petition, has averred that the replying respondent awards two hundred scholarships annually, that is, hundred to science group and hundred to other groups. The Ministry of Human Resource Development, Department of Higher Education (MHRD) awards 82000 fresh scholarships annually to the students securing minimum 80% marks in plus two or equivalent and not belonging to the creamy layer for pursuing regular courses. It is further averred by the replying respondent that the Ministry allots

scholarships to State Boards on the basis of population of the State in the age group of 18-25 distributing amongst the different streams. The replying respondent did receive the application of the petitioner for MHRD scholarship, however, she was not eligible, being lower in merit, therefore, her application was not forwarded to MHRD. As per respondent No. 4, the Board had sponsored the names of 940 candidates of science stream to respondent No. 1, during March, 2013, through email on 16.07.2013 and vide letter dated 16.07.2013. It is further averred that the respondent/Board issued eligibility certificate to the petitioner, whose name is figuring at serial No. 531 in the list, and the Principal, Government Senior Secondary School, Ambota, District Una, was supposed to handover that certificate to the petitioner, as the permanent address of the petitioner was available with the school. Consequent to the orders of the Government of Himachal Pradesh secretary of the respondent/Board is holding an inquiry into the matter.

7. During the pendency of the writ petition, vide order of this Hon'ble Court, dated 19.11.2015, the Principal, Government Senior secondary School, Ambota, Tehsil Amb, Distruct Una, H.P., was impleaded, as respondent No. 5.

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

9. Admittedly, respondent No. 1 invited applications from 1% top eligible candidate of plus two (Science stream) of each State/Central Board of Examination, having eligibility certificate/note issued by the respective Boards, for awarding scholarship for higher education, which was an element of Innovation in Science Pursuit for Inspired Research (INSPIRE). Consequently, respondent No. 4/Board sponsored names of 940 candidates to respondent No. 1, who had passed plus two examination during March, 2013 and also fall in the category of 1% top students of science stream through e-mail and letter dated 16.07.2013. The name of the petitioner was figuring at serial No. 531 in the list. Respondent No. 4/Board issued the eligibility certificate/note to the petitioner through Government Senior Secondary School Ambota, District Una, being regular student vide letter dated 16.07.2013. Respondent No. 1 grants the scholarship for higher education under INSPIRE scheme to top 1% students of science stream of each State and it was respondent No. 5/Principal, Government Senior Secondary School Ambota, District, Una, to handover the eligibility certificate/note to the petitioner, as permanent address of the petitioner was available with the said school, as she was the student of that School.

10. From the above, it is clear that it is the negligence on the part of the respondents and specifically respondent No. 5. Due to the inaction of respondent No. 5 scholarship was not granted to the petitioner, though she was at serial No. 531 out of the 940 candidates sponsored to respondent No. 1, respondent No. 5 did not fill in the form of the petitioner in whose school she was studying as a regular student and who was supposed to get the form filled in. As far as respondent No. 5 is concerned, he has filed the reply and has stated that no information was received by him. He has enclosed one envelop as Annexure R-1, which was issued to some other student at her home address by respondent No. 4/H.P. Board of School Education. Now there is a contradictory stand taken by respondents No. 4 and 5, as respondent No. 4 has specifically stated that Principal Government Senior Secondary School, Ambota, Amb, District Una, was supposed to issue eligibility certificate to the petitioner, as the home address of the student/candidate is available with the school and not with the Board. On the other hand, respondent No. 5 claims that no information qua selection of the petitioner under the Scheme was received, whereas other students, who were selected under the Scheme, received advisory/eligibility note from the office of H.P. School Education Board, Dharamshala, at their home addresses.

11. This Court finds that the petitioner could not get the scholarship to which she was entitled/eligible, due to the negligent act of respondent No. 5. As far as Union of India/respondent No. 1 is concerned, it was to grant the scholarship and it is submitted that to avail the benefits under the Scheme, the application must be filed directly by the candidate, through the web-portal, viz., www.onlineinspire.gov.in and merely figuring in the list of any

Education Board does not entitle a candidate for the benefits of the Scheme. The application must be submitted through the web portal by the applicant/candidate. In fact, the petitioner did not apply online within the prescribed time to the Department of Science and Technology (DST) and she moved her application directly to the State Education Board. Under the Scheme, for the year 2013, scholarship was to be granted to only 10,000 students, who were pursuing Higher Education and now the scholarships have been completed. Due to non-availability of provisions qua allocation for scholarships for the year 2013, the replying respondent is unable to consider any more applications form the batch of 2013 students.

12. In view of the above discussion, it can safely be held that respondent No. 5 is taking a stand that no advisory was received in the school. However, it is very strange that respondent No. 5, being the Principal of the school, was not aware that a student of his school is figuring the toppers' list and she is eligible for the scholarship. At the same point of time, respondent No. 4/Board has specifically stated in its reply that they had informed respondent No. 5, as the permanent address of the petitioner was not available with them and it was available only with respondent No. 5. Respondent No. 5 did not act on that advisory/information, however, he should have contacted the petitioner or at least informed the petitioner, who was the regular student of the school. Respondent No. 5, being the Principal of the School, should have taken care of the welfare of the petitioner. Due to the negligence of respondent No. 5, the petitioner suffered an uncalled for harassment, who could have used this time for the betterment of her studies which could have resulted in the betterment of the nation. This Court further finds that it is only because of the negligence on the part of respondent No. 5, in not being aware about his student's merit, that the petitioner has been put to harassment. Further it is clear that respondent No. 5 was informed by respondent no. 4 regarding place of the petitioner for scholarship, but respondent no. 5 kept sleeping over the matter.

13. As the petitioner is eligible, being at serial No. 531, out of 940 students, who were sponsored under the Scheme, she is entitled for scholarship under the Scheme. Therefore, it is ordered that respondent No. 5 will immediately do the needful and get the application of the petitioner, as required under the Scheme, properly filled in and transmit the same to respondent No. 1 within three weeks and thereafter respondent No. 1/Union of India will consider and grant the scholarship to the petitioner under the Scheme, as she was duly sponsored by respondent No. 4/H.P. Board of School Education and she is at serial No. 531 out of 940 students, who are entitled for the scholarship within four weeks thereafter.

14. As the petitioner has suffered harassment on account of the negligence/dereliction of duties on the part of respondent No. 5, respondent No. 5 is directed to compensate the petitioner by way of damages/costs of this petition quantified at 10,000/- (rupees ten thousand) to the petitioner as damages/cost of the petition.

15. In view of what has been discussed above, the present petition is allowed with a direction to respondent No. 5 to immediately fill in the application form of the petitioner, after contacting her at her residential address and transmit the same to respondent No. 1 within three weeks from today. Thereafter, respondent No. 1, will award the scholarship, as per the Scheme, to the petitioner within four weeks thereafter. Respondent No. 5 will pay the costs to the petitioner within three weeks. The writ petition is disposed of accordingly.

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

Vasu Soni and another ...Petitioners/Applicants

Versus

Amar Singh through his LRs

Ghinder @ Joginder Singh and others ...Respondents/Plaintiffs

CMPMO No. 100 of 2015

Reserved on: 29.9.2016

Date of decision: 5th October, 2016.

Code of Civil Procedure, 1908- Order 1 Rule 10- Plaintiff filed a civil suit seeking declaration that they are owners in possession of the land as Hissedar shamlat – the petitioners sought their impleadment on the ground that they had purchased the land adjoining to the suit land from one S who had a right in the shamlat Tikka Deh Hasab Rasab Malguzari – the application was rejected by the trial Court - held, that petitioners had not claimed themselves to be in possession as Hissedar Shamlat- if it is not mentioned in the deed of transfer that share in the Shamlat was also transferred and it cannot be presumed that shamlat was transferred – plaintiff is not bound to sue every possible adverse claim in the same suit and he may choose to implead only those persons against whom he wishes to proceed – petitioners cannot be considered to be a similarly situated as the plaintiff and cannot claim any interest in the suit – application dismissed.

(Para-6 to 10)

Case referred:

Bagga and others vs. Saleh and others AIR 1915 Privy Council page 106

For the Petitioners:	Mr. Ajay Sharma, Advocate.
For the Respondents:	Mr. K.D. Sood, Senior Advocate, with Ms. Ranjana Chauhan, Advocate, for respondents No. 1 (a) to 1(e), 2, 3 and 4.
	Ms. Meenakshi Sharma, Addl. A.G. with Mr. J.S. Guleria, Asstt. A.G. for respondent No.6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J

Aggrieved by the rejection of their application seeking impleadment in the suit instituted by the respondents/plaintiffs, the petitioners have filed this petition by invoking the jurisdiction of this Court under Article 227 of the Constitution of India.

2. The respondents/plaintiffs have filed a suit against the State of Himachal Pradesh claiming therein declaration to the effect that they are owners in possession of the land as they were in possession of the same as Hissadar Shamlat. The petitioners sought their impleadment by contending that they had purchased the land adjoining to the suit land from one Sundu Ram who was having the right in the land *Shamlat Tika Deh Hasab Rasab Malguzari* and were therefore, necessary parties to the suit.

3. The learned Court below rejected the application on the ground that the petitioners were neither necessary nor proper parties to the suit.

4. It is vehemently contended by Mr. Ajay Sharma, learned counsel for the petitioners that the order passed by the learned Court below is not at all sustainable in the eyes of law as the petitioners were claiming passage on the Government land in Khasra No. 1023 which passage leads to the school run by the petitioners.

5. On the other hand, Mr. K.D.Sood, learned Senior Counsel for the respondents would argue that no illegality or impropriety committed by the learned Courts below in dismissing the application filed by the petitioners.

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

6. Admittedly, the plaintiffs/respondents have filed the suit for declaration on the basis that they are in possession of the land by virtue of their being Hissadar Shamlat. Evidently, while seeking impleadment, no such claim has been put-forth by the petitioners and rather it has been claimed that they have purchased certain land adjoining to the suit land from Sundu Ram who was having his right in the Shamlat land. This is evident from para 3 of the application which reads thus:

"3. That the applicants have purchased the land adjoining to Khasra No. 1023 i.e. Khasra No. 1024 from one Shri Sundu Ram who was having his right in the land Shamlat Tika Deh Hasab Rasab Malguzari."

It is absolutely clear from the aforesaid averment that the petitioners have not claimed themselves to be in possession as Hissadar Shamlat.

7. Para 8.38 of the H.P. Land Records Manual provides that if a deed of transfer by sale, gift, mortgage or exchange does not specifically mention that a share of Shamlat is transferred with the land it should be presumed that the Shamlat is not transferred.

8. In addition thereto, para 224 of ***Sir W.H. Rattigan, K.C., LL D. A Digest of Customary Law*** clearly states as under:

"224. As a general rule, only proprietors of the village (malikan-deh) as distinguished from proprietors of their own holdings (malikan-makbuza khud) are entitled to share in the shamilat-deh."

9. In ***Bagga and others*** vs**. *Saleh and others AIR 1915 Privy Council page 106***, it was categorically held by the Hon'ble Privy Council that mere payment of Tirni (grazing dues) by a person who is not a proprietor paying land revenue does not confer upon him any right to share in the shamilat of a village.

10. It is settled law that plaintiff is dominus-litis and is not bound to sue every possible adverse claim in the same suit and he may choose to implead only those persons as defendants against whom he wishes to proceed, but the court at any stage of the suit, may direct addition of parties. The question of impleadment of a party has to be decided on the touchstone of Order 1 Rule 10 CPC, which provides that only a necessary or a proper party may be added. A necessary party is one without whom no order can be made effectively, while a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings. The addition of a party is generally not a question of initial jurisdiction of the court, but of judicial discretion, which has to be exercised in view of all the facts and circumstances of particular case. The court is empowered to join a person whose presence is necessary for the prescribed purpose and cannot under the rule direct addition of a person, whose presence is not necessary for that purpose.

11. Notably, the petitioners have nowhere alleged that they are in possession of the land as Hissadar Shamlat, rather it is their admitted case that Sundu Ram from whom they had purchased the land, in fact had right in the land. Thus, the petitioners cannot be considered to be similarly situated to those of the plaintiffs and cannot, therefore, claim any interest in the suit instituted by the plaintiffs/respondents.

12. Having said so, I find no merit in this petition and the same is accordingly dismissed, so also the pending application, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Ajay Kumar ...Appellant.
Versus
State of H.P. ...Respondent.

Criminal Appeal No.502 of 2005
Reserved on : 15.7.2016
Date of Decision : October 6, 2016

Indian Penal Code, 1860- Section 306 and 498-A read with Section 34- Accused A was married to deceased – accused A developed illicit relation with S, his sister-in-law- the deceased used to

object to the same, on which she was beaten - the deceased committed suicide by consuming poison- accused A was convicted, while other accused were acquitted by the trial Court- held, in appeal that death had taken place within 7 years – no dowry demand was made by the accused – no complaint was made regarding the illicit relationship – the harassment should be with the view to demand dowry- the evidence that the deceased was subjected to beating is not supported by medical record – therefore, the version that accused had subjected the deceased to cruelty has not been established beyond reasonable doubt- appeal allowed and accused acquitted of the charged offence. (Para-7 to 44)

Cases referred:
Lal Mandi v. State of W.B., (1995) 3 SCC 603
Girdhar Shankar Tawade vs. State of Maharashtra, (2002) 5 SCC 177
Ramesh Kumar vs. State of Chhattisgarh, (2001) 9 SCC 618
Sushil Kumar Sharma. Vs. Union of India & Ors., (2005) 6 SCC 281
State of West Bengal Vs. Orilal Jaiswal, (1994) 1 SCC 73
Arun Vyas & anr. Vs. Anita Vyas (1999) 4 SCC 690
Mohd. Hoshan A.P. & Anrs. Vs. State of A.P., (2002) 7 SCC 414
State of A.P. Vs. M. Madhusudhan Rao, (2008) 15 SCC 582
Balram Prasad Agrawal Vs. State of Bihar & Ors., (1997) 9 SCC 338
Arvind Singh Vs. State of Bihar, (2001) 6 SCC 407
Ramesh Kumar vs. State of Chhatisgarh, (2001) 9 SCC 618
Gananath Patnaik vs. State of Orissa, (2002) 2 SCC 619

For the Appellant : Mr. Vikrant Thakur, Advocate.
For the Respondent : Mr. R.S. Verma, Additional Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Accused Ajay Kumar, his father accused Gian Chand, brother accused Madan Lal, sister-in-law accused Sushma Kumari and relative Biasan Devi, were charged for having committed offences, punishable under the provisions of Sections 306 & 498-A, both read with Section 34 of the Indian Penal Code.

2. Vide judgment dated 30.11.2005, passed by Sessions Judge, Hamirpur, Himachal Pradesh, in Sessions Trial No.15 of 2005, titled as *State v. Ajay Kumar & others,* trial Court convicted only accused Ajay Kumar and sentenced him as under:

Offence	Sentence
306 IPC	Rigorous imprisonment for a period of five years and fine of Rs.1,000/-, and in default thereof to further undergo simple imprisonment for a period of three months.
498-A IPC	Rigorous imprisonment for a period of one year and fine of Rs.1,000/-, and in default thereof to further undergo simple imprisonment for a period of three months.

The sentences have been ordered to run concurrently. Hence, the present appeal by accused Ajay Kumar.

3. Against the acquittal of accused Gian Chand, Madan Lal, Sushma Kumari and Biasan Devi, in relation to all the charged offences, no appeal stands filed by the State.

4. In short, it is the case of prosecution that accused Ajay Kumar was married to deceased Neena in July 1998. During the subsistence of marriage, deceased gave birth to two children. Though initially relationship between the two was cordial, but however, later accused Ajay Kumar developed illicit relationship with his sister-in-law, i.e. accused Sushma Kumari, which act was unacceptable and objected to by the deceased. Despite the same, not only did the accused perpetuate such acts, but also physically assaulted the deceased. Repeated protests on the part of the deceased only got her physical assaults in return. Information of such act came to be received by her parents, and on 3.3.2004, Suhlan Devi (PW-2), mother of the deceased, visited the matrimonial house to confront the accused. Since accused Ajay Kumar and Gian Chand were not available, she returned assuring her daughter of visiting the following day. But unfortunately, on 4.3.2004, deceased consumed poison. Parents of the deceased were telephonically informed that their daughter was lying unconscious and upon visiting the matrimonial house, and found her dead.

5. Matter came to be investigated by Inspector Ramesh Chand (PW-11), who got conducted the postmortem from Dr. R.S. Dhatwalia, and on the basis of the statement made by Kishori Lal (PW-1), registered FIR No.74/04, dated 4.3.2004 (Ex.PW-11/C), for commission of offence under Section 306 of the Indian Penal Code, at Police Station, Sadar (Hamirpur), Himachal Pradesh.

6. Finding no iota of evidence against accused Gian Chand, Madan Lal, Sushma Kumari and Biasan Devi, trial Court acquitted them of all the charges.

7. Having heard learned counsel or the parties as also perused the record, one finds that the judgment is not based on correct and complete appreciation of testimonies of the witnesses and the material on record and more particularly the testimonies of the relatives of the deceased.

8. 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 an accused.

9. That death took place within seven years of marriage is not in dispute. It is equally true, as stands established on record through the testimonies of the witnesses that initially relationship between accused Ajay Kumar and the deceased was cordial. Also, deceased mothered two children through the loins of accused Ajay Kumar. It is also a matter of record that there was no dowry demand made by the accused. It is not that the accused would not take care or look after the deceased or the children. Deceased died on 4.3.2004, as a result of consumption of organo insecticide is also not in dispute.

10. For establishing charge of cruelty and abetment to suicide, prosecution seeks reliance upon testimonies of the relatives of the deceased, i.e. father Kishori Lal (PW-1), mother Suhlan Devi (PW-2), Aunt Kunta Devi (PW-6) and neighbours Bhagi Rath (PW-4), Madan Lal (PW-7) and a local resident Satya Galodha (PW-8).

11. Conjoint reading of the testimonies of these witnesses reveals that the only reason of discord between accused Ajay Kumar and the deceased was the alleged illicit relationship, which the said accused had developed with Sushma Kumari.

12. For establishing that charge, one finds that there is no documentary evidence. No complaint ever came to be lodged, in writing, with anyone. Also, no grievance was ever aired about such fact with anyone, save and except Smt. Satya Galodha, with whose statement I shall deal herein later.

13. Kishori Lal admits that accused Sushma Kumari is daughter of his sister and it has also come on record through the testimony of Suhlan Devi that relations between the two brothers are not good. Kishori Lal further admits that accused Sushma Kumari already stood married ten years prior to the marriage of his daughter and at that time, accused-convict Ajay Kumar was studying in class 8th. It is not the case of the parties that relations between accused Sushma and her husband were strained or that she was of loose character. Significantly, Kishori Lal admits having known the family from before and only thereafter married their daughter, that too after satisfying themselves of all aspects.

14. Kishori Lal and Suhlan Devi want the Court to believe that only after one year of marriage did accused Ajay Kumar develop such intimate relationship with Sushma Kumari, but then except for bald statement so made by these witnesses, there is nothing on record to establish such fact. Their ocular version is vague and unspecific as to date, time and place. Trial Court, while forming this opinion, has been too presumptuous. After all, parties were closely related to each other. Though relations were somewhat strained but not on this account. Significantly, deceased had given birth to two children during the subsistence of such alleged debauchery. She never made grievance to anyone. These witnesses also do not state in whose presence they had counseled accused Ajay Kumar, asking him to improve his conduct.

15. Smt. Satya Galodha (PW-8) is running an NGO. According to her, 1½ months prior to the death of the deceased, Suhlan Devi had complained against the accused. Significantly, according to this witness, nature of the complaint being "*it was stated that the accused persons had been treating the daughter of PW.2 with cruelty*". Now, even to this witness, nature of cruelty never came to be disclosed. In any case, her version of Suhlan Devi having contacted her is not corroborated by the said witness. Significantly, even this witness admits that no complaint ever came to be lodged by Suhlan Devi. Also, her version of having narrated the acts of cruelty does not find mention in her previous statement recorded by the police. In fact, this witness admits of having started an agitation for impleading all the members of the family of the accused in the crime, "*as it appeared to be a murder to her".* Also, police had booked her and Suhlan Devi for having committed an offence under Section 341/147 of the Indian Penal Code, pending trial before the appropriate Court.

16. Law with regard to cruelty as defined under Section 498-A of the Indian Penal Code and abetment to commit suicide, so as to fall within the scope of Section 306 of the Indian Penal Code is now well settled.

17. It is a settled position of law that there should be reasonable nexus between cruelty and suicide. It has to be substantiated, established and proved on record. Cruelty by itself would not amount to having committed an offence punishable under Section 498-A IPC. A reasonable nexus has to be established between cruelty and the suicide in order to make good the offence of cruelty under the penal laws. Cruelty has to be of such a gravity as is likely to drive a woman to commit suicide. Suicide alone would not establish that it was occasioned on account of cruelty which was of sufficient gravity so as to lead a reasonable person placed in similar circumstances to commit suicide. Mere assumption or demand of dowry by itself in given circumstances may not amount to cruelty. The harassment has to be with a definite object i.e. to meet any unlawful demand. Every act of cruelty is not punishable. There must be evidence to show that soon before the death the victim was subjected to cruelty or harassment. Prosecution has to rule out the possibility of natural or accidental death so as to prove that the death had occurred otherwise than in normal circumstances. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the concerned death. If the incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence.

18. In *Girdhar Shankar Tawade vs. State of Maharashtra*, (2002) 5 SCC 177, the Apex Court has held that "the basic purport of the statutory provision is to avoid 'cruelty' which stands defined by attributing a specific statutory meaning attached thereto. In order to ascribe a meaning to the word 'cruelty' as is expressed by the Legislatures: Whereas explanation (a)

involves three specific situations viz , (i) to drive the woman to commit suicide or (ii) to cause grave injury or (iii) danger to life, limb or health, both mental and physical, and thus involving a physical torture or atrocity, in explanation (b) there is absence of physical injury but the Legislature thought it fit to include only coercive harassment which obviously as the legislative intent expressed is equally heinous to match the physical injury whereas one is patent, the other one is latent but equally serious in terms of the provisions of the statute since the same would also embrace the attributes of 'cruelty' in terms of section 498 (A)." ....

> "Section 498-A is attributed only in the event of proof of cruelty by the husband or the relatives of the husband of the woman Admittedly, the finding of the trial court as regards the death negated suicide with a positive finding of accidental death. If suicide is left out, then in that event question of applicability of explanation (a) would not arise - neither the second limb to cause injury and danger to life or limb or health would be attracted in any event the willful act or conduct ought to be the proximate cause in order to bring home the charge under section 498 (A) and not de-hors the same. To have an event sometime back cannot be termed to be a factum taken note of in the matter of a charge under section 498-A.
>
> Explanation (b) of Section 498-A in no uncertain terms records harassment of the woman and the statute itself thereafter clarifies it to the effect that it is not every such harassment but only in the event of such a harassment being with a view to coerce her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand - there is total absence of any of the requirements of the statute in terms of section 498 (A)." ....
>
> ... ... "Charges under sections 306 and 498-A of the Indian Penal Code are independent of each other and acquittal of one does not lead to acquittal on the other."
>
> "To have an event sometime back cannot be termed to be a factum taken note of in the matter of a charge under section 498-A The legislative intent is clear enough to indicate in particular reference to explanation (b) that there shall have to be a series of acts in order to be a harassment within the meaning of explanation (b) The letters by itself though may depict a reprehensible conduct, would not however, bring home the charge of section 498-A against the accused Acquittal of a charge under section 306, as noticed hereinbefore, though not by itself a ground for acquittal under section 498-A, but some cogent evidence is required to bring home the charge of section 498-A as well, without which the charge cannot be said to be maintained."

19. In *Ramesh Kumar vs. State of Chhattisgarh*, (2001) 9 SCC 618, the Apex Court has also held that Sections 498-A and 306 IPC are independent and constitute different offences. Though, depending on the facts and circumstances of an individual case, subjecting a woman to cruelty may amount to an offence under section 498- A and may also, if a course of conduct, amounting to cruelty is established leaving no other option for the woman except to commit suicide, amount to abetment to commit suicide. However, merely because an accused has been held liable to be punished under section 498-A IPC it does not follow that on the same evidence he must also and necessarily be held guilty of having abetted the commission of suicide by the woman concerned.

20. In *Sushil Kumar Sharma. Vs. Union of India & Ors.*, (2005) 6 SCC 281, the Apex Court has held as under:

> "10. The object for which Section 498-A IPC was introduced is amply reflected in the Statement of Objects and Reasons while enacting the Criminal Law (Second Amendment) Act 46 of 1983. As clearly stated therein the increase in the number of dowry deaths is a matter of serious concern. The extent of the evil has been

commented upon by the Joint Committee of the Houses to examine the work of the Dowry Prohibition Act, 1961. In some cases, cruelty of the husband and the relatives of the husband which culminate in suicide by or murder of the helpless woman concerned, constitute only a small fraction involving such cruelty. Therefore, it was proposed to amend IPC, the Code of Criminal Procedure, 1973 (in short "CrPC") and the Evidence Act suitably to deal effectively not only with cases of dowry deaths but also cases of cruelty to married women by the husband, in-laws and relatives. The avowed object is to combat the menace of dowry death and cruelty.

11. One other provision which is relevant to be noted is Section 306 IPC. The basic difference between the two sections i.e. Section 306 and Section 498-A is that of intention. Under the latter, cruelty committed by the husband or his relations drag the woman concerned to commit suicide, while under the former provision suicide is abetted and intended.

19. The object of the provision is prevention of the dowry menace. But as has been rightly contended by the petitioner many instances have come to light where the complaints are not bona fide and have been filed with oblique motive. In such cases acquittal of the accused does not in all cases wipe out the ignominy suffered during and prior to trial. Sometimes adverse media coverage adds to the misery. The question, therefore, is what remedial measures can be taken to prevent abuse of the well-intentioned provision. Merely because the provision is constitutional and intra vires, does not give a licence to unscrupulous persons to wreak personal vendetta or unleash harassment. It may, therefore, become necessary for the legislature to find out ways how the makers of frivolous complaints or allegations can be appropriately dealt with. Till then the courts have to take care of the situation within the existing framework. As noted above the object is to strike at the roots of dowry menace. But by misuse of the provision a new legal terrorism can be unleashed. The provision is intended to be used as a shield and not as an assassin's weapon. If the cry of "wolf is made too often as a prank, assistance and protection may not be available when the actual "wolf appears. There is no question of the investigating agency and courts casually dealing with the allegations. They cannot follow any straitjacket formula in the matters relating to dowry tortures, deaths and cruelty. It cannot be lost sight of that the ultimate objective of every legal system is to arrive at the truth, punish the guilty and protect the innocent. There is no scope for any preconceived notion or view. It is strenuously argued by the petitioner that the investigating agencies and the courts start with the presumptions that the accused persons are guilty and that the complainant is speaking the truth. This is too wide and generalised a statement. Certain statutory presumptions are drawn which again are rebuttable. It is to be noted that the role of the investigating agencies and the courts is that of a watchdog and not of a bloodhound. It should be their effort to see that an innocent person is not made to suffer on account of unfounded, baseless and malicious allegations. It is equally undisputable that in many cases no direct evidence is available and the courts have to act on circumstantial evidence. While dealing with such cases, the law laid down relating to circumstantial evidence has to be kept in view."

21. In State *of West Bengal Vs. Orilal Jaiswal,* (1994) 1 SCC 73, the Apex Court has held as under:

"In a criminal trial the degree of proof is stricter than what is required in a civil proceedings. In a criminal trial however intriguing may be facts and circumstances of the case, the charges made against the accused must be proved beyond all reasonable doubts and the requirement of proof cannot lie in the realm of surmises and conjectures. The requirement of proof beyond reasonable

> doubt does not stand altered even after the introduction of S. 498A, I.P.C and S. 113A of Indian Evidence Act. Although, the court's conscience must be satisfied that the accused is not held guilty when there are reasonable doubts about the complicity of the accused in respect of the offences alleged, it should be borne in mind that there is no absolute standard for proof in a criminal trial and the question whether the charges made against the accused have been proved beyond all reasonable doubts must depend upon the facts and circumstances of the case and the quality of the evidences adduced in the case and the materials placed on record. The doubt must be of a reasonable man and the standard adopted must be a standard adopted by a reasonable and just man for coming to a conclusion considering the particular subject matter.
>
> The conscience of the court can never be bound by any rule but that is coming itself dictates the consciousness and prudent exercise of the judgment. Reasonable doubt is simply that degree of doubt which would permit a reasonable and just man to come to a conclusion. Reasonableness of the doubt must be commensurate with the nature of the offence to be investigated. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice, according to law."
>
> (Emphasis supplied)

22. In the very same decision the Apex Court further cautioned that the court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty.

23. In Arun Vyas & anr. Vs. Anita Vyas (1999) 4 SCC 690, the Apex Court has held that the essence of offence in Section 498-A is cruelty. It is a continuing offence and on each occasion on which the wife is subjected to cruelty, she would have a new starting point of limitation.

24. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact. The impact of complaints, accusations or taunts on a person amounting to cruelty depends on various factors like the sensitivity of the individual victim concerned, the social background, the environment, education etc. Further, mental cruelty varies from person to person depending on the intensity of sensitivity and the degree of courage or endurance to withstand such mental cruelty. In other words, each case has to be decided on its own facts to decide whether the mental cruelty was established or not. [Mohd. *Hoshan A.P. & Anrs. Vs. State of A.P.,* (2002) 7 SCC 414].

25. In *State of A.P. Vs. M. Madhusudhan Rao,* (2008) 15 SCC 582, the Apex Court has held as under:

> "It is plain that as per clause (b) of the Explanation, which, according to learned counsel for the State, is attracted in the instant case, every harassment does not amount to "cruelty" within the meaning of Section 498-A I.P.C. The definition stipulates that the harassment has to be with a definite object of coercing the woman or any person related to her to meet an unlawful demand. In other words, for the purpose of Section 498-A I.P.C. harassment simpliciter is not "cruelty" and it is only when harassment is committed for the purpose of coercing

a woman or any other person related to her to meet an unlawful demand for property etc., that it amounts to "cruelty" punishable under Section 498-A I.P.C."

26. In *Balram Prasad Agrawal Vs. State of Bihar & Ors.*, (1997) 9 SCC 338, the Apex Court has held cruelty to mean torture to be so unbearable in the common course of human conduct that a young lady having commitments to life could take a drastic steps to end her life leaving behind her infant children in the lurch and at the mercy of the accused husband who was found to be in contemplation of remarrying.

27. In *Arvind Singh Vs. State of Bihar,* (2001) 6 SCC 407, the Apex Court has held as under:-

28. "The word 'cruelty' in common English acceptation denotes a state of conduct which is painful and distressing to another. The legislative intent in Section 498-A is clear enough to indicate that in the event of there being a state of conduct by the husband to the wife or by any relative of the husband which can be attributed to be painful or distressing. The same would be within the meaning of the section. Torture is a question of fact. There must be a proper effort to prove it."

29. Instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of instigation though it is not necessary that actual words must be used to that effect or what constitutes instigation must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. The accused must by his acts or omission or by a continued course of conduct create such circumstances that the deceased is left with no other option except to commit suicide in which case an instigation may have been inferred. A word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation. [*Ramesh Kumar vs. State of Chhatisgarh*, (2001) 9 SCC 618]

30. The concept of cruelty and its effect varies from individual to individual, also depending upon the social and economic status to which such person belongs. "Cruelty" for the purposes of constituting the offence under the aforesaid section need not be physical. Even mental torture or abnormal behaviour may amount to cruelty and harassment in a given case. [*Gananath Patnaik vs. State of Orissa*, (2002) 2 SCC 619].

(Also: *Atmaram v. State of Maharashtra*, (2013) 12 SCC 286; and *Pinakin Mahipatray Rawal v. State of Gujarat*, (2013) 10 SCC 48)

31. Prosecution evidence has to be appreciated in the backdrop of the aforesaid legal position.

32. For establishing the act of abetment and cruelty soon before death, again attention is drawn to the testimonies of the relatives of the deceased.

33. Kishori Lal states that on 2.3.2004, deceased telephonically informed that she had been treated with cruelty. Accused had made her life miserable and she had been "belaboured" by the accused. Resultantly, on 3.3.2004, his wife (Suhlan Devi) visited the deceased, who complained against the accused persons. On physical examination, marks of violence, of blue colour, were noticed on the body of the deceased. Accused Ajay Kumar and Gian Chand were not available. Though she waited till late evening, but when they did not come from the market, she returned home only to visit the following day. However, on 4.3.2004 at about 5 am, on telephone, they were informed that deceased was lying motionless in the matrimonial house. Immediately, they rushed to see her daughter, but reaching the matrimonial house found that she had died. At that time, police was also present.

34. Version of Suhlan Devi is also to similar effect. She further states that the deceased wanted to return to her parental house, but only on her advice, stayed at the matrimonial house, only on the assurance that she would visit next day. Now significantly, what

was the cause of trouble on 2.3.2004 is nowhere disclosed by any one of the witnesses. Also, Suhlan Devi did not report the incident to anyone.

35. We find the version of marks of violence noticed on the body of the deceased to have been materially contradicted from the medical record, for according to Dr. R.S. Dhatwalia, no marks of struggle or injury were found on the body, at the time of conduct of postmortem, which was so done promptly on 4.3.2004 itself. Also, Suhlan Devi admits not to have told anyone, save and except her husband, as to what transpired between her and the deceased on 3.3.2004.

36. Hence, keeping in view the principle of law discussed above, it cannot be said that the prosecution has been able to establish, beyond reasonable doubt, that the accused abetted the deceased to commit suicide or that she had been subjected to cruelty, immediately before her death or prior thereto by anyone.

37. It is a common case of the parties, as is so admitted by Kishori Lal that he does not have a telephone in his house. Then the question is on whose telephone did the deceased call up her mother, narrating the incident of 2.3.2004. Kishori Lal and Suhlan Devi want the Court to believe that the telephone call was received at the house of Madan Lal son of Bhagirath, but then Bhagirath (PW-4) does not state such fact and Madan Lal (PW-7), who is not a son of Bhagrath but Anant Ram, does not even refer to the conversation, which took place on 2.3.2004. He only states that on 4.3.2004, he received a call from village Harned to the effect that daughter of Kishori Lal was serious and lying in a motionless state, which information he passed on to the family of the deceased. Hence, version of Kishori Lal and Suhlan Devi, with regard to the incident of 2.3.2004, is further rendered doubtful.

38. On this issue, one may also notice the version of Bhagirath, according to whom on 3.3.2004 itself, in the evening, Kishori Lal informed him that "without any rhyme and reason accused persons had been treating his daughter Smt. Neena with cruelty", and requested him to accompany to the house of the accused for settlement of the matrimonial dispute between the parties. But, then Court does not find such version to be inspiring in confidence, for it to have been narrated for the first time in Court, and not to have been disclosed to the police during the course of investigation. This witness is categorical that he never informed the police of having received any telephone call.

39. Kunta Devi (PW-6), Aunt of the deceased, states that deceased had been complaining about illicit relationship and misconduct of the accused, but then such version cannot be said to be inspiring in confidence. Police did not promptly record her statement and also her husband had been regularly visiting the house of the accused for treatment of their live stock. Significantly, it is not her case that the deceased ever made any grievance to this person nor did she ever disclose such fact to her husband, either for verification or improving the relationship between the parties. In fact, she admits it be true that she had "*started an agitation for implicating all the members of the family of accused persons No.1*".

40. This brings the Court to one more relevant fact and that being, in close vicinity, as is evident from the testimony of Ramesh Chand (PW-11), there were independent witnesses, namely Amin Chand, Rattan Chand and Kamlesh, from whom police made inquiries. In fact, they were the best persons to have disclosed the real cause of discord, if any, inter se the parties or the reason for the deceased to have consumed poison. What is significant is the admission of the police official that at no point in time, complainant made any grievance against accused Gian Chand, Madan Lal, Sushma Kumari and Biasan Devi, yet despite that, surprisingly he filed challan against them.

41. How did the trial Court come to the conclusion that the deceased was interested in carrying on the marriage; by the very nature of the act illicit relationship is carried out in isolation and secrecy; accused had "belaboured" the deceased; deceased was subjected to emotional torture, on account of infidelity, is not clear from the record. In fact, such findings are not borne out from the record.

42. It is true that the Court is required to judge the evidence by yardstick of probabilities, its intrinsic worth and the animus of the witnesses, but then mere suspicion alone cannot be a ground for convicting the accused. Prosecution is required to establish the case beyond reasonable doubt and when this Court adopts rational approach in evaluating the evidence, one finds that keeping in view the difference in age, the time when accused Ajay Kumar and Sushma Kumari were married to their respective spouses; Sushma Kumari being a family member of the complainant party; no previous complaint having been filed with anyone; no endeavour made by the parties to have the matter amicably resolved; no marks of violence found on the body of the deceased; and an attempt to falsely implicate all the family members, are reasons sufficient enough, rendering the testimonies of the prosecution witnesses to be extremely doubtful, uninspiring in confidence and the witnesses to be unbelievable.

43. 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.

44. Hence, for all the aforesaid reasons, the appeal is allowed and the judgment of conviction and sentence, dated 30.11.2005, passed by Sessions Judge, Hamirpur, Himachal Pradesh, in Sessions Trial No.15 of 2005, titled as *State v. Ajay Kumar & others* is set aside and the accused is acquitted of the charged offences. He is already on bail in this case. Bail bonds furnished by him are discharged. Amount of fine, if deposited by the accused, be refunded to him accordingly.

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

****

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

Smt. Davinder Parmar wd/o late Sh.Balbir Singh and another .....Plaintiffs.

Versus

Sh. Kulbir Singh s/o late Sh.Avtar Singh & Others ..... Defendants

C.S. No. 96/2009
Judgment reserved on: 03.10.2016
Date of judgment: 06.10.2016

Partition Act, 1893- Section 4- Plaintiffs filed a civil suit seeking partition of the joint property – the suit was opposed by pleading that the suit was bad for partial partition – held, that a co-owner can file a suit for partition at any point of time – the property situated at Hoshiarpur cannot be partitioned by the Courts in Shimla- suit decreed and preliminary decree of partition passed. (Para-8 to 22)

Cases referred:

Ram Saran Lall and others Vs. Mst. Domini Kuer and others, AIR 1961 Apex Court 1747
Sant Ram Nagina Ram Vs. Daya Ram Nagina Ram and others, AIR 1961 Punjab 528

For plaintiffs	:	Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate
For defendants No.1 & 5	:	Mr. G.D. Verma, Sr. Advocate with Mr. B. C.Verma, Advocate.
For defendants No.2,4&6	:	Mr. Bhupinder Gupta, Sr. Advocate with Mr. Neeraj Gupta, Advocate.
For defendant No.3	:	None
For defendant No.7	:	Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

P. S. Rana, J.

Present civil suit is filed for partition of structure and partition of vacant land situated over suit land comprised in khata No.129 khatoni No. 138 khasra Nos. 1439, 1440, 1441, 1442, 1443, 1444, 1445, 1446, 1447, 1448, 1449, 1450, 1451, 1452, 1458 & 1460 kita 16 measuring 11902.41 situated in Up Mohal Lakkar Bazar (Market) Ward Bara Shimla Tehsil and Distt. Shimla (H.P.) as shown in jamabandi for the year 2010-2011 Ext.DW-4/D placed on record. It is pleaded that plaintiffs are joint owners of suit property and defendants are also joint owners of suit property. It is pleaded that plaintiffs intend to partition their share. It is further pleaded that plaintiffs requested the defendants to partition the suit property but despite requests defendants did not partition the suit property. Prayer for decree of civil suit by way of partition sought.

2. Per contra written statements filed on behalf of co-defendants No.1, 2 & 4 to 6 pleaded therein that plaintiffs deliberately did not include joint land situated in villages Basiala and Binjon Tehsil Garhshankar Distt. Hoshiarpur (Punjab) in the present suit. It is further pleaded that suit is bad for non-joinder of necessary parties. It is further pleaded that correct name of co-defendant No.2 is Mrs. Inderjit Parmar and not Indu Parmar. It is further pleaded that suit has not been properly valued for purposes of Court fee and jurisdiction. It is further pleaded that plaintiffs are out of possession of suit land and they have no cause of action to file the partition suit. It is further pleaded that plaintiffs are estopped by their acts, deeds, conduct and acquiescences to file and maintain the present suit. It is further pleaded that plaintiffs have not approached the Court with clean hands. It is further pleaded that status of parties as co-sharers is not disputed. It is further pleaded that suit for partition of one property situated at Shimla is not maintainable on the ground of partial partition of joint property inter se parties.

3. Separate written statement filed on behalf of co-defendant No.7 Smt. Chander Kanta pleaded therein that suit is filed for partial partition of joint property and same is not maintainable. It is further pleaded that suit has been filed relating to immovable property situated at Shimla town. It is further pleaded that joint property situated at villages Basiala and Binjon Tehsil Garhshankar Distt. Hoshiarpur (Punjab) have not been included in the present partition suit. It is further pleaded that suit has not been properly valued for purposes of Court fee and jurisdiction. It is further pleaded that plaintiffs are estopped by their acts, deeds, conduct and acquiescences to file and maintain the present suit. It is further pleaded that plaintiffs did not approach the Court with clean hands. It is further pleaded that khasra Nos. 1439, 1443, 1451, 1458 and 1460 cannot be partitioned and same should be kept joint because area under above khasra numbers is land in relevant record but factually thick forest is situated at spot. It is further pleaded that area of khasra No.1452 is in the shape of path and same cannot be partitioned in accordance with law. It is further pleaded that area mentioned in khasra No.1445 is in the shape of apple orchard and same cannot be partitioned by the civil Court and same will be partitioned under H. P. Land Revenue Act by Assistant Collector Ist Grade of area. It is further pleaded that co-defendant No.7 Smt. Chander Kanta has carried out annual maintenance and repair of building situated over suit land and spent expenditure to the tune of Rs.30,000,00/- (Thirty lac) in connection with maintenance and repair work of the building situated over suit land and is entitled to annual maintenance and repair charges in accordance with law. It is further pleaded that present suit property cannot be divided on the basis of shares recorded in the record of right placed on record prepared by revenue official under H.P. Land Revenue Act 1954. It is further pleaded that shares of parties have not been properly recorded in the record of right prepared by revenue official under H.P. Land Revenue Act 1954. It is further pleaded that plaintiffs are out of possession of the suit land. It is further pleaded that suit property was acquired by late Dr. Avtar Singh out of income of joint Hindu family fund and suit property in ancestral property for all intents and purposes. It is further pleaded that when Dr. Avtar Singh purchased suit property in the name of (1) Balbir Singh (2) Gurdeep Singh (3) Kulbir

Singh (4) Sukhbir Singh (5) Satrajbir Singh at that time only Balbir Singh was major but he had no source of income and he was student only. It is pleaded that Gurdeep Singh, Kulbir Singh, Sukhbir Singh, Satrajbir Singh were minors at the time of sale deed of suit property. It is pleaded that after amendment in Hindu Succession Act Smt. Chander Kanta d/o late Sh. Avtar Singh became coparcener owner by way of birth in suit property. During pendency of suit co-defendant No.7 died and her LR namely Randeep Singh impleaded as co-party. Sh. Randeep Singh filed separate written statement under Order XXII Rule 4 sub clause (2) Code of Civil Procedure 1908 and reiterated pleadings of deceased Smt. Chander Kanta in toto. Prayer for dismissal of suit sought. Plaintiffs also filed replication and reasserted the allegations mentioned in the plaint.

4. As per pleadings of parties following issues framed on 26.08.2014:

1. Whether plaintiffs are entitled for preliminary decree of partition qua shares of parties as alleged? .....OPP.
2. Whether suit is not maintainable and competent as alleged ? OPDs 1,2 & 4 to 7.
3. Whether suit is bad for non-joinder of necessary parties ? OPDs 1,2 & 4 to 7.
4. Whether suit has not been properly valued for purposes of Court fee and jurisdiction .....OPDs 1,2 & 4 to 7.
5. Whether plaintiffs are estopped by their acts, deeds, conduct and acquiescenes to file and maintain the suit? .....OPDs 1,2 & 4 to 7.
6. Whether plaintiffs have not come to Court with clean hands and suppressed material facts? .....OPDs 1,2 & 4 to 7.
7. Whether plaintiffs are out of possession of suit property as alleged. If so its effect? ....OPDs 1,2 & 4 to 7.
8. Relief.

5. Court heard learned Advocate appearing on behalf of plaintiffs and learned Advocates appearing on behalf of defendants and Court also perused the entire records carefully.

6. **Findings upon issue No.1 with reasons:**

6.1 PW-1 Smt. Jasveera Anoop Minhas has stated that plaintiff No.1 is her mother and late Sh. Balbir Singh Parmar was her father. She has stated that plaintiff No.1 Smt. Davinder Parmar is residing at Jalandhar because of her old age she is not able to attend Court. She has stated that Sh. Balbir Singh owned property known as Monastary situated at Upper Mohal Lakkar Market Shimla (H.P.). She has stated that property was in the name of five brothers namely (1) Sh. Balbir Singh Parmar (2) Sh. Gurdeep Singh Parmar (3) Sh. Kulbir Singh Parmar (4) Sh. Sukhbir Singh Parmar (5) Sh. Satraj Bir Parmar. She has stated that Sh. Gurdeep Singh Parmar is not alive and defendants No.2 to 4 are his legal heirs. She has stated that suit property is joint inter se parties. She has stated that building known as Monastary is also situated over suit property. She has stated that kitchen block, cottage area, toilet block, stable area and open area are also situated over suit property. She has stated that entire property consists of an area measuring 11902.41 sq. mtrs. situated in khasra Nos. 1439 to 1452, 1458 and 1460. She has stated that all brothers have equal share in suit property. She has stated that her father Sh. Balbir Singh Parmar also died in the year 1983 and his share was inherited in three equal shares by plaintiffs and her grand mother Smt. Gurbachan Kaur. She has stated that Smt. Gurbachan Kaur was alive at the time of death of her father namely Balbir Singh. She has stated that Smt. Gurbachan Kaur died in the year 2005. She has stated that after death of Smt. Gurbachan Kaur her share devolved upon all children including Smt. Chander Kanta co-defendant No.7. She has stated that property was purchased in the month of September 1956 through registered sale deed. She has stated that certified copies of jamabandi for the year 2005-2006 are Ext.PW-1/A and Ext.PW-1/B. She has stated that there is no forest or orchard in the suit land. She has stated that she and her mother were in possession of two rooms in the built up house. She has stated that after the death of her grand mother possession was obtained by other co-sharers who

are residing there. She has stated that plaintiffs want partition of suit land. She has stated that before filing partition suit she requested defendants to separate shares of plaintiffs and hand over possession but her request was not accepted and her request was delayed on one pretext or other pretext and thereafter present suit for partition filed. She has stated that after death of her father his 1/5th share devolved upon plaintiffs and her grand mother in equal shares. She has admitted that parties to the present suit have joint property in villages Basiala and Binjon Tehsil Garhshankar Distt. Hoshiarpur (Punjab). She has stated that there is one house at village Basiala which is in joint ownership of parties. She has stated that there is also residential house at village Binjon comprised of two stories. She has denied suggestion that khasra No. 1445 is in the shape of apple orchard at the spot. She has stated that she could not state whether khasra Nos. 1439, 1443, 1451, 1458 and 1460 do not fall within definition of land. She has stated that she is not in possession of property situated at Shimla. She has admitted that co-defendant No.7 is residing at Monastary since long. She has denied suggestion that co-defendant No.7 is maintaining the Monastary property out of her own funds. She has denied suggestion that co-defendant No.7 has spent Rs.30 lac on the maintenance and repair of monastary property. She has stated that she could not state that funds for purchase of suit property were generated by late Dr. Avtar Singh from joint funds. She has stated that she does not know that Financial Commissioner Punjab has remanded the case to Assistant Collector vide order dated 30.08.2014. She has admitted that at the time of filing of suit plaintiffs were not in possession of any portion of suit property.

6.2 DW-1 Sh. Satnam Singh has stated that he is posted as Naib Tehsildar Garhshankar Distt. Hoshiarpur (Punjab) w.e.f. 29.12.2011. He has stated that he has brought the summoned record of case No.443 of 2010 title Devinder Parmar Vs. Kulbeer Singh. He has stated that application for partition of land Ext.DW1/A was filed by applicant Devinder Parmar. He has stated that copy of mode of partition is Ext.DW1/B. He has stated that all copies are correct as per original record.

6.3 DW-2 Sh. Vikas Kumar has stated that he is posted as Civil Ahlmad in the Court of Additional Civil Judge (Sr. Dvn.) Garhshankar Distt. Hoshiarpur (Punjab) w.e.f. 23.03.2013. He has stated that he has brought the summoned record. He has stated that attested copy of plaint is Ext.DW2/A, copy of written statement is Ext.DW2/B and attested copy of affidavit of Ranjodh Singh is Ext.DW2/C. He has stated that attested copy of counter claim is Ext.DW2/D and copy of order dated 11.11.2013 passed by Additional Civil Judge (Sr. Dvn.) Garhshankar Distt. Hoshiarpur (Punjab) is Ext.DW2/E and copy of application for striking of counter claim dated 23.8.2013 is Ext.DW2/F and copy of written statement on behalf of co-defendants No.3 & 4 is Ext.DW2/G. He has stated that all copies are true and correct as per original record.

6.4 DW-3 Sh. Gurparshad Banga has stated that he is posted as Ahlmad in the Court of Civil Judge (Jr. Dvn.) Garhshankar Punjab w.e.f. 1.7.2013. He has stated that he has brought the summoned record. He has stated that copy of plaint in C.S. No. 614 of 2013 is Ext.DW3/A, attested copy of written statement is Ext.DW3/B. He has stated that he has also brought the record of C.S. No.615 of 2013 title Devinder Parmar Vs. Kulbir Singh and others. He has stated that copy of plaint is Ext.DW3/C and attested copy of written statement is Ext.DW3/D. He has stated that all copies are true and correct as per original record.

6.5 DW-4 Sh. Partap Thakur Patwari has stated that he is posted as Patwari in the office of Patwar Circle Station Ward Barwa Shimla since March 2014. He has stated that he has prepared copy of missal hakiyat Ext.DW4/A. He has stated that jamabandi was prepared during the year 1950-51 but the same is in Urdu language and he does not know Urdu language . He has stated that copy of jamabandi for the year 2000-2001 is Ext.DW4/B and copy of jamabandi for the year 2005-2006 is Ext.DW4/C and copy of jamabandi for the year 2010-2011 is Ext.DW4/D. He has stated that all copies have been prepared by him and same are correct as per original record.

6.6 DW-5 Ms. Veena Negi Patwari has stated that she is posted as Patwari in Revenue Record Room D.C. Office Shimla. She has stated that she has brought copy of

jamabandi for the year 1949-1950 with respect to suit land but the same is in Urdu language and she does not know Urdu language and therefore she is unable to produce copy thereof.

6.7 DW-6 Sh. Hari Krishan has stated that he is posted as Clerk in the office of Sub Registrar (Rural) Shimla. He has stated that original record of sale deed No.44 registered in the office of Sub Registrar on 29.9.1956 is not available in the office because same was burnt in fire which took place in DC office Shimla in December 1972. He has stated that he has brought the certificate from Sub Registrar (Rural) Shimla to the effect that sale deed is not available in the office because same was burnt in fire which took place in December 1972. He has stated that certificate Ext.DW6/A has been issued by Sub Registrar (Rural) Shimla under whom he is working. He has admitted that entire record was not burnt in fire. He has denied suggestion that record summoned is available in the office of Sub Registrar (Rural) Shimla. He has also denied suggestion that certificate Ext.DW6/A is false certificate.

6.8 DW-7 Sh. Sukhbir Singh has stated that he has joint land and house with the plaintiffs at Shimla, Basiala and Binjon. He has stated that he also owned house at village Basiala but the agricultural land is joint with the plaintiffs and co-defendants. He has stated that area of agricultural land is 390 kanals. He has stated that at village Binjon parties had also ancestral land and same is joint. He has stated that market value of the house is about Rs.8 to 10 lacs. He has stated that at village Binjon there is also house and same is also joint and market value of the house is about Rs.3 to 4 lacs. He has stated that house over suit land known as Monastary Estate is about 9 biswas. He has stated that there is also another small house over suit land and there is also open area over suit land. He has stated that one cottage is also situated at the spot over suit land and servant quarters are also situated over suit land. He has stated that orchard is also situated over suit property. He has stated that remaining entire suit land is thick forest area and there are deodar, cheel and oak trees etc. He has stated that area of suit property is not used for cultivation purpose and is also not used for construction of house. He has stated that Dr. Avtar Singh was common ancestor. He has admitted that property at Binjon and Basiala is ancestral property and property in dispute in civil suit is personal property of parties. He has admitted that suit for partition and declaration with respect to suit property situated at Binjon and Basiala is already pending in civil Court at Garhshankar Punjab. He has also admitted that partition proceedings of agricultural land with respect to immovable land situated at Binjon and Basiala Distt. Hoshiarpur Punjab are also pending before revenue Court as well as civil Court. He has stated that in revenue record there is no entry of thick forest relating to suit property. He has stated that he did not file any application for correction in revenue record. He has stated that there are about 20 to 25 tenants in the property. He has stated that he has no dispute with respect to 1/5th share being owned by each parties in suit property. He has stated that he is not aware about the stage of proceedings of cases pending in revenue court and civil court at Garhshankar Punjab. He has denied suggestion that cases at Garhshankar Punjab have attained age of finality.

6.9 DW-8 Sh. Randip Singh has stated that suit property was purchased by Dr. Avtar Singh. He has stated that he was his maternal grand father. He has stated that Dr. Avtar Singh has five sons and he purchased suit property in the name of his sons. He has stated that at the time of purchase of suit property by Dr. Avtar Singh all his sons except Sh. Balbir Singh were minors. He has stated that Sh. Balbir Singh was student at that time. He has stated that money with which suit property was purchased was inherited by his maternal grand father from his father. He has stated that late Smt. Chander Kanta was his mother and was daughter of Dr. Avtar Singh. He has stated that his mother had 1/6th share in suit property. He has stated that after the death of his mother he inherited her share in the suit property. He has stated that in addition to above his mother also inherited share in the suit property from her mother Gurbachan Kaur who had inherited share of her son Balbir Singh. He has stated that plaintiffs are not in possession of any portion of suit property. He has stated that suit property comprised of Kothi, Kitchen cottage and servant quarters, lawns, tennis court and remaining land is forest land. He has stated that there are about 600 trees over suit property of different species such as Oak, Cedar etc. He has stated that there is common path in the suit property. He has stated that

in addition to suit property parties have joint property at village Basiala in District Hoshiarpur Punjab and in village Binjon in District Hoshiarpur Punjab. He has stated that partition proceedings with respect to property situated at Punjab are also pending. He has stated that one set is situated in ground floor and same is in occupation of Satrajbir Singh Parmar and he is also residing in one set since his birth. He has stated that one set is in occupation of Smt. Inderjeet and her children in upper floor of the main building. He has stated that entire suit property was maintained earlier by his mother and after her death he is maintaining suit property and he and his deceased mother Chander Kanta d/o Sh. Avtar Singh have already spent Rs.30 lacs for maintenance of suit property. He has stated that none of other co-sharers have contributed towards maintenance of structure over suit property. He has stated that total market value of the suit property is more than Rs.40 crores. He has stated that plaintiffs have not correctly shown the shares of co-owners in the plaint. He has stated that he was born on 27.04.1968. He has stated that suit property was purchased in the year 1956. He has stated that he has seen sale deed with respect to suit property. He has stated that name of his mother Smt. Chander Kanta does not reflect in sale deed. He has stated that his maternal grand father late Sh. Avtar Singh was Govt. employee. He has denied suggestion that sons of late Sh. Avtar Singh have 1/5th share each in the property known as Monastery. He has admitted that sale deed qua suit property was executed in favour of five sons of late Avtar Singh. He has admitted that Sh. Balbir Singh died in the year 1982. He has denied suggestion that at the time of death of Sh. Balbir Singh he was in occupation of two rooms in Monastery. He has denied suggestion that said rooms were later occupied by Smt. Gurbachan Kaur. He has denied suggestion that suit property is property of five brothers only. He has admitted that in the revenue record suit property is recorded in the ownership of five brothers. Self stated the property was purchased from funds of Hindu undivided family. He has stated that Hindu undivided family comprised of five sons of Dr. Avtar Singh and his daughter Smt. Chander Kanta and Dr. Rajbeer Singh. He has stated that he could not produce any document showing that there was Hindu undivided family consisting of aforesaid persons. He has stated that he did not file any document relating to Hindu undivided family in his written statement. He has stated that Dr. Rajbeer Singh went to England somewhere in the year 1954. He has stated that Dr. Rajbeer Singh has independent residence. He has denied suggestion that his mother was residing separately from his maternal grand father. He has denied suggestion that all the brothers are having separate residence and separate mess. Self stated that before 2005 they were residing jointly. He has admitted that his mother was divorced in the year 1970. He has admitted that his mother was teacher. He has stated that he could not produce any document in order to prove that suit property was purchased with the help of ancestral funds. He has denied suggestion that his mother Smt. Chander Kanta had no share in the property till death of Smt. Gurbachan Kaur. He has denied suggestion that his mother Smt. Chander Kanta acquired share in the property after the death of Balbir Singh. Self stated that she acquired additional share in addition to her earlier share i.e. 1/6th. He has stated that forest is not recorded in revenue record. Self stated that revenue record is not prepared correctly. He has stated that he did not apply for correction of revenue record regarding suit property. He has admitted that in revenue record suit property is recorded in the ownership of five brothers. He has admitted that after the death of Balbir Singh his 1/5th share is recorded in revenue record in favour of plaintiffs and late Smt. Gurbachan Kaur. He has admitted that after execution of sale deed suit property was recorded in equal shares between five brothers. He has stated that his mother did not challenge the revenue entries relating to ownership shares of parties in revenue record during her life time relating to suit property. He has admitted that partition proceedings relating to agricultural land and constructed property situated in two villages Basiala and Binjon are under progress at Punjab. Self stated that partition proceedings at Punjab filed after filing of present suit. He has stated that legal heirs of late Dr. Ranbeer Singh Parmar are disqualified legal heirs. He has stated that SLP in this regard is pending before Hon'ble Supreme Court of India. He has stated that he is an Advocate by profession. He has stated that he is an income tax assessee. He has denied suggestion that his mother and he did not maintain Monastary property. He has denied suggestion that suit property was not purchased from joint Hindu family funds. He

has also denied suggestion that joint Hindu family of late Dr. Avtar Singh did not exist at any point of time.

7. Following documentaries evidence filed by parties. (1) Ext.PW1/A is copy of sajra kisatbar qua suit property. (2) Ext.PW1/A-1 is copy of jamabandi for the year 2005-2006 qua suit property. (3) Ext.DW1/A is application for partition filed before A.C. 1st Grade Garhshankar by Smt. Davinder Parmar and Jasbeera LRs of deceased Balbir Singh. (4) Ext.DW2/A is copy of suit for declaration filed by Sh. Ranjodh Singh in the Court of Civil Judge (Sr. Dvn.) Garhshankar Distt. Hoshiarpur (Punjab) title Ranjodh Singh Vs. Davinder Parmar and others relating to property situated at village Basiala Tehsil Garhshankar Distt. Hoshiarpur (Punjab). (5) Ext.DW2/B is copy of written statement filed in civil suit title Ranjodh Singh vs. Davinder Parmar. (6) Ext.DW2/C is affidavit filed by Ranjodh Singh in civil suit title Ranjodh Singh vs. Davinder Parmar. (7) Ext.DW2/D is counter claim filed in C.S. 35/2013 pending before Civil Judge (Sr. Dvn.) Garhshankar Distt. Hoshiarpur (Punjab). (8) Ext.DW2/E is order dated 11.11.2013 passed in civil suit title Ranjodh Singh vs. Davinder Parmar etc. (9) Ext.DW3/A and Ext.DW3/B are copies of suit for partition in C.S. No.614/2013 filed by Smt. Davinder Parmar and others pending before Civil Judge (Sr. Dvn.) Garhshankar Distt. Hoshiarpur (Punjab) relating to property situated at village Binjon Tehsil Garhshankar Distt. Hoshiarpur (Punjab). (10) Ext.DW6/A is certificate given by Sub Registrar Shimla H.P. to the effect that record pertaining to date 29.9.1956 has been destroyed in fire occurred in D.C. office complex during year December 1972. (11) Ext.DW4/A is copy of missal hakiyat settlement for the year 1989-1991 qua suit property. (12) Ext.DW4/B is copy of jamabandi for the year 2000-2001 qua suit property. (13) Ext.DW4/C is copy of jamabandi for the year 2005-2006 qua suit property. (14) Ext.DW4/D is copy of jamabandi for the year 2010-2011 qua suit property.

8. Submission of learned Advocate appearing on behalf of plaintiffs that plaintiffs are legally entitled for preliminary decree of partition qua shares of parties in accordance with law is accepted for reasons hereinafter mentioned. Court has perused the copy of jamabandi for the year 2010-2011 Ext.DW4/D placed on record qua suit property prepared by public official in discharge of official duty. Court has also perused copy of missal hakiyat for the year 1989-1991 Ext.DW4/A placed on record qua suit property. In ownership column of jamabandi Ext.DW4/D placed on record it is recorded that (1) Balbir Singh (2) Gurdeep Singh (3) Kulbir Singh (4) Sukhbir Singh (5) Satrajbir Singh s/o Sh. Avtar Singh s/o Raj Singh are owners of suit property in equal shares. In remarks column it is recorded that co-owner Balbir Singh died and his 1/5th share devolved upon Jasveera d/o deceased Balbir Singh and devolved upon Smt. Davinder Parmar widow of deceased Balbir Singh and devolved upon Smt. Gurbachan Kaur mother of deceased Balbir Singh in equal shares vide mutation No.86 attested on dated 5.5.2000. In the present case Jasveera and Davinder Parmar plaintiffs inherited share of deceased Balbir Singh as per Hindu Succession Act 1956. Deceased Balbir Singh died intestate and there is no evidence on record that deceased Balbir Singh has executed any testamentary document during his life time. Smt. Davinder Parmar and Smt. Jasveera inherited share of deceased Balbir Singh and became co-owners of suit property. It is well settled law that co-owner can file partition suit at any point of time. In view of the fact that in the record of right prepared under H.P. Land Revenue Act 1954 Ext.DW4/A names of Smt. Davinder Parmar and Smt. Jasveera are recorded as co-owners of suit property it is held that plaintiffs are legally entitled for relief of preliminary decree of partition qua their shares in accordance with law for maximum use of suit property and in order to avoid multiplicity of judicial proceedings inter se parties qua suit property. Hence it is held that plaintiffs are legally entitled for relief of preliminary decree of partition qua their shares in accordance with law. Issue No.1 is accordingly decided in favour of plaintiffs.

Findings upon issue No.2 with reasons:

9. Submission of learned Advocates appearing on behalf of defendants that present civil suit is filed for partial partition and same is not maintainable is rejected being devoid of any force for reasons hereinafter mentioned. It is well settled law that immovable property is always partitioned khatawise in accordance with law. Latest jamabandi of suit land for the year 2010-2011 is Ext.DW4/D placed on record. As per jamabandi for the year 2010-2011 khata number

of suit land is 129 and khatoni number of suit land is 138 and khasra numbers of suit land are 1439, 1440, 1441, 1442, 1443, 1444, 1445, 1446, 1447, 1448, 1449, 1450, 1451, 1452, 1458 & 1460 kita 16 measuring 11902.41. It is well settled law that immovable property situated at villages Basiala and Binjon Tehsil Garhshankar Distt. Hoshiarpur (Punjab) cannot be partitioned alongwith present civil suit because immovable property situated at villages Basiala and Binjon is beyond territorial jurisdiction of High Court. It is well settled law that High Court cannot pass any order qua immovable property situated at Punjab. Jurisdiction of H.P. High Court is only confined relating to territorial jurisdiction of Himachal Pradesh only. In view of the fact that partition suit filed for separation of khata No.129 it is held that present partition proceedings relating to khata No.129 and relating to immovable suit property in Himachal Pradesh is maintainable. It is proved on record that separate partition proceedings are pending in Punjab relating to property situated at villages Basiala and Binjon Tehsil Garhshankar Distt. Hoshiarpur (Punjab) in accordance with law. As per section 123 and Chapter IX of H.P. Land Revenue Act 1954 persons whose shares are recorded in last record of rights can file partition proceedings. Names of plaintiffs recorded in ownership column of jamabandi for the year 2010-2011 Ext.DW4/D placed on record. Hence it is held that plaintiffs are legally entitled for partition of suit land. Entries of jamabandi for the year 2010-2011 qua suit land Ext.DW4/D remained unrebutted on record. Defendants did not examine any revenue official in order to rebut entries recorded in zamabandi Ext.DW4/D. Zamabandi Ext.DW4/D is prepared by public official in discharge of official duty and is relevant fact under section 35 of Indian Evidence Act 1872. It is well settled law that entries recorded by public official in public record in discharge of official duty can be rebutted only by way of examination of public official in Court in accordance with law.

10. Submission of learned Advocates appearing on behalf of defendants that suit for partition is not maintainable because most of the area is covered under forest and on this ground suit filed by plaintiffs be dismissed is rejected being devoid of any force for reasons hereinafter mentioned. Court has carefully perused the entries of jamabandi for the year 2010-2011 Ext.DW4/D prepared by revenue official in discharge of his official duty. Forest is not recorded over suit land in jamabandi for the year 2010-2011. Jamabandi Ext.DW4/D has been prepared by public official in discharge of his official duty under H.P. Land Revenue Act and is relevant fact under section 35 of Indian Evidence Act 1872. Defendants did not adduce any positive cogent and reliable evidence on record to rebut jamabandi for the year 2010-2011 Ext.DW4/D placed on record. Even defendants did not examine any revenue official in order to rebut the entry of revenue record prepared under H.P. Land Revenue Act 1954. Jamabandi for the year 2010-2011 Ext.DW4/D placed on record remain unrebutted.

11. Submission of learned Advocate appearing on behalf of co-defendant 7 that in fact suit property was purchased by Sh. Avtar Singh from joint family funds and daughter of Sh. Avtar Singh namely Chander Kanta is also legally entitled to inherit suit property alongwith her brother in equal shares in addition to share inherited by her from Smt. Gurbachan Kaur is also rejected being devoid of any force for reasons hereinafter mentioned. Suit property was purchased in the name of five persons by way of registered sale deed dated 26.9.1956 in consideration amount of Rs.20,000/- (Twenty thousand) (1) Sh. Balbir Singh s/o Sh. Avtar Singh (2) Sh. Gurdeep Singh s/o Sh. Avtar Singh (3) Sh. Kulbir Singh s/o Sh. Avtar Singh (4) Sh. Sukhbir Singh s/o Sh. Avtar Singh (5) Sh. Satrajbir Singh s/o Sh. Avtar Singh. It is well settled law that title in immovable property is passed after registration of sale deed. See AIR 1961 Apex Court 1747 title **Ram Saran Lall and others Vs. Mst. Domini Kuer and others**. There is no positive cogent and reliable evidence on record in order to prove that suit property was purchased from joint funds.

12. Submission of learned Advocate appearing on behalf of co-defendant 7 that Rs.30 lac spent by Smt. Chander Kanta d/o Sh. Avtar Singh and Sh. Randeep Singh legal heir of Smt. Chander Kanta and co-defendant 7 is entitled for compensation is decided accordingly. Whether Sh. Randeep Singh is entitled for compensation to the tune of Rs.30 lac relating to maintenance and repair of structure will be decided at the time of final partition in accordance with law. It is well settled law that at the time of passing of preliminary decree of partition only shares of parties

are defined by way of preliminary decree of partition and matter of compensation is always decided in final decree of partition.

13. Submission of learned Advocate appearing on behalf of co-defendant 7 that deceased Chander Kanta became co-owner of suit property in the capacity of coparcener is also rejected being devoid of any force for reasons hereinafter mentioned. It is well settled law that coparcenery property is always inherited from three generations. In the present case there is no evidence on record in order to prove that suit property came from three generations. On the contrary it is proved on record that suit property is self acquired property of (1) Balbir Singh (2) Gurdeep Singh (3) Kulbir Singh (4) Sukhbir Singh (5) Satrajbir Singh by way of registered sale deed dated 26.9.1956 in consideration amount of Rs.20,000/- (Twenty thousand).

14. Submission of learned Advocates appearing on behalf of defendants that at the time of sale deed dated 26.9.1956 vendee namely Balbir Singh was major and was student and other vendees were minors and on this ground partition suit be dismissed is also rejected being devoid of any force for reasons hereinafter mentioned. It is proved on record that at the time of execution of sale deed dated 26.9.1956 father of vendees was government employee. It is well settled law that sale deed can be executed in favour of minors by father of minors. Sale deed in favour of minors is valid sale deed in accordance with law.

15. Submission of learned Advocates appearing on behalf of defendants that khasra No. 1452 is path and same be kept as joint in final partition proceedings is accepted for reasons hereinafter mentioned. In jamabandi for the year 2010-2011 Ext.DW-4/D khasra No. 1452 has been shown as gair mumkin path. It is well settled law that path shown in record of rights should be kept joint in final partition proceedings for benefits of all co-owners. Order accordingly. Issue No.2 is decided accordingly.

Findings upon issue No.3 with reasons:

16. Submission of learned Advocates appearing on behalf of defendants that suit is bad for non-joinder of necessary parties is rejected being devoid of any force for reasons hereinafter mentioned. It is well settled law that in suit of partition all the co-owners are necessary parties. Plaintiffs have impleaded all the co-owners as co-party in the present suit. Defendants did not adduce any positive cogent and reliable evidence on record in order to prove issue No.3. Hence it is held that present suit is not bad for non-joinder of necessary parties. Issue No.3 is decided against defendants on the concept of *ipse dixit.* (An assertion made without proof).

Findings upon issue No.4 with reasons:

17. Submission of learned Advocates appearing on behalf of defendants that that suit has not been properly valued for purposes of Court fee and jurisdiction is decided accordingly. As per jamabandi Ext.DW4/D it has been specifically mentioned that revenue of suit land is swai. Word 'swai' means local rate and surcharge. Actual local rate and surcharge not mentioned in latest jamabandi for the year 2010-2011 Ext.DW4/D placed on record. It is well settled law that when partition of some structure is sought then Court fee should be affixed as per market value of structure involved in partition proceedings. Defendants did not file any valuation report on record of structure involved in partition case. It is held that at the time of final partition proceedings Local Commissioner will be appointed and Local Commissioner will assess the market value of structure in accordance with law and thereafter directions will be issued to plaintiffs to file requisite Court fee in accordance with law relating to partition of structure and land situated over suit property. It is well settled law that Court can demand the Court fee in accordance with law at any stage of the case. Issue No.4 is decided accordingly.

Findings upon issue No.5 with reasons:

18. Submission of learned Advocates appearing on behalf of defendants that plaintiffs are estopped by their acts, deeds, conduct and acquiescences to file and maintain the present suit is rejected being devoid of any force for reasons hereinafter mentioned. Onus to prove issue No.5 is upon defendants No.1, 2 & 4 to 7. Defendants No.1, 2 & 4 to 7 did not adduce any positive cogent and reliable evidence on record in order to prove issue No.5. Hence issue No.5 is

decided against defendants No.1, 2 & 4 to 7 on the concept of *ipse dixit.* (An assertion made without proof).

Findings upon issue No.6 with reasons:

19. Submission of learned Advocates appearing on behalf of defendants that plaintiffs have not come to Court with clean hands and suppressed material facts from the Court is also rejected being devoid of any force for reasons hereinafter mentioned. Onus to prove issue No.6 is upon defendants. Defendants did not adduce any positive cogent and reliable evidence on record in order to prove issue No.6. Hence issue No.6 is decided against defendants on the concept of *ipse dixit.* (An assertion made without proof).

Findings upon issue No.7 with reasons:

20. Submission of learned Advocates appearing on behalf of defendants that plaintiffs are out of possession and plaintiffs are not legally entitled for relief of partition qua their shares is also rejected being devoid of any force for reasons hereinafter mentioned. It is well settled law that possession of one co-sharer is possession of all co-sharers as per law. It was held in case reported in AIR 1961 Punjab 528 title **Sant Ram Nagina Ram Vs. Daya Ram Nagina Ram and others** wherein rights and liabilities of co-owner defined as follows: (1) A co-owner has an interest in the whole property and also in every parcel of it. (2) Possession of the joint property by one co-owner is in the eye of law possession of all. (3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all. (4) The above rule admits of an exception when there is ouster of co-owner by another. But in order to negative the presumption of joint possession on behalf of all on the ground of ouster the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other as when co-owner openly asserts his own title and denies that of the other. (5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment. (6) Every co-owner has a right to use the joint property in husband like manner. Defendants did not plead right of adverse possession against plaintiffs in pleadings qua suit property. In view of ruling cited supra it is held that plaintiffs are legally entitled for partition of their shares in joint suit property in accordance with law.

21. **Share of parties will be as follows for preparation of preliminary decree of partition of suit land**:

(A) It is held that after registration of sale deed before Sub Registrar Shimla (H.P.) qua suit property dated 24.9.1956 title of suit property devolved as follows: (1) Sh. Balbir Singh acquired ownership title to the extent of 1/5th share in suit property. (2) Sh. Gurdeep Singh acquired ownership title to the extent of 1/5th share in suit property. (3) Sh. Kulbir Singh acquired ownership title to the extent of 1/5th share in suit property. (4) Sh. Sukhbir Singh acquired ownership title to the extent of 1/5th share in suit property. (5) Sh. Satrajbir Singh acquired ownership title to the extent of 1/5th share in suit property.

(B) It is proved on record that Sh. Balbir Singh died intestate in the year 1983. There is nothing on record in order to prove that deceased Balbir Singh has executed any testamentary document during his life time qua his share relating to suit property. It is held that 1/5th share of deceased Balbir Singh devolved as per section 8 of Hindu Succession Act 1956 as specified in clause 1 of the schedule upon Smt. Davinder Parmar widow of deceased Balbir Singh and upon Jasveera d/o deceased Balbir Singh and Smt. Gurbachan Kaur mother of deceased Balbir Singh in equal shares in suit property.

(C) It is proved on record that Sh. Gurdeep Singh also died intestate. There is nothing on record in order to prove that deceased Gurdeep Singh has executed any testamentary document during his life time qua his share relating to suit property. After the death of deceased Gurdeep Singh his 1/5th share devolved as per section 8 of Hindu Succession Act 1956 upon his LRs as follows Smt. Inderjit Parmar widow of deceased Gurdeep Singh, Harminder Singh s/o deceased Gurdeep Singh and Jasveera d/o deceased Gurdeep Singh as specified in clause 1 of the schedule

in equal shares in suit property. It is clarified that if at the time of death of Sh. Gurdeep Singh his mother Smt. Gurbachan Kaur was also alive then she had also inherited her share as per section 8 of Hindu Succession Act 1956.

(D) It is also proved on record that Smt. Gurbachan Kaur also died intestate in the year 2005. There is nothing on record in order to prove that Smt. Gurbachan Kaur has executed any testamentary document during her life time qua her share relating to suit property. It is held that share of Smt. Gurbachan Kaur inherited by her devolved as per section 15 of Hindu Succession Act 1956 upon her sons and daughters (including children of any predeceased son or daughter) in equal shares relating to suit property.

Relief:

22. In view of findings upon issues No.1 to 7 preliminary decree of partition is passed. Share of parties in the suit land will be as mentioned in para 21 (A), (B), (C) and (D). It is held that final partition cannot be conveniently made without further inquiry. It is further held that final partition of suit land relating to vacant land as mentioned in record of right i.e. Ext.DW4/D Jamabandi for the year 2010-2011 will be conducted by District Collector or any gazetted officer subordinate to the Collector deputed by him in this behalf as per section 54 of Code of Civil Procedure 1908. It is further held that in final partition proceedings expert Local Commissioner will be appointed by Court for partition of structure over suit land in accordance with law. It is further held that Local Commissioner will also be appointed in final partition for assessment of valuation of superstructure and land and thereafter plaintiffs will file Court fee in accordance with law in final partition proceedings. It is further held that path mentioned in khasra No.1452 will be kept joint inter se parties in final partition proceedings. Rights of tenants in structure situated over suit land will be governed by law of partition inter se co-owners in accordance with law. Parties are left to bear their own costs. Preliminary decree of partition of suit property is passed accordingly. Learned Registrar (Judicial) will prepare preliminary decree of partition in accordance with law forthwith. C.S. No.96/2009 relating to preliminary decree of partition 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 SANDEEP SHARMA, J.

Daya Ram ....Petitioner

Versus

The State of Himachal Pradesh & others ....Respondents

CWP No. 2612 of 2016
Date of decision: 06.10.2016

Constitution of India, 1950- Article 226- Petitioner filed a public interest litigation regarding the service matter- held, that public interest litigation in service matter is not maintainable- petition dismissed. (Para-2 to 5)

Cases referred:

Girjesh Shrivastava & Ors. versus State of M.P. & Ors., 2010 AIR SCW 7001

Dr. J.S. Chauhan versus State of Himachal Pradesh and others, ILR 2016 (III) HP 376 D.B.

For the petitioner : Mr. V.D. Khidtta, Advocate.

For the respondents: Mr. Anup Rattan and Mr. Varun Chandel, Additional Advocate Generals with Mr. Kush Sharma, Deputy Advocate General.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The petitioner has invoked the jurisdiction of this Court by the medium of this writ petition as Public Interest Litigation.

2. The subject matter of the petition is the service matter. The question is –whether the writ will lie?

3. The public interest litigation in service matter is not maintainable, as held by the Apex Court in case titled as **Girjesh Shrivastava & Ors. versus State of M.P. & Ors.,** reported in **2010 AIR SCW 7001** and by this Court in **CWP No. 3131 of 2014, titled as Dr. J.S. Chauhan versus State of Himachal Pradesh and others,** decided on 6th May, 2016.

4. It is apt to reproduce paras 14 and 16 of the judgment in **Girjesh Shrivastava's case (supra)** herein:

> *"14. However, the main argument by the appellants against entertaining WP (C) 1520/2001 and WP (C) 63/2002 is on the ground that a PIL in a service matter is not maintainable. This Court is of the opinion that there is considerable merit in that contention.*
>
> *15. .....*
>
> *16. In the case of Dr. Duryodhan Sahu and others v. Jitendra Kumar Mishra and others (1998) 78 SCC 273 : (AIR 1999 SC 114 : 1998 AIR SCW 3467), a three Judge Bench of this Court held a PIL is not maintainable in service matters. This Court, speaking through Srinivasan, J. explained the purpose of administrative tribunals created under Article 323-A in the backdrop of extraordinary jurisdiction of the High Courts under Articles 226 and 227. This Court held "if public interest litigations at the instance or strangers are allowed to be entertained by the (Administrative) Tribunal, the very object of speedy disposal of service matters would get defeated" (para 18). Same reasoning applies here as a Public Interest Litigation has been filed when the entire dispute relates to selection and appointment."*

5. Accordingly, the writ petition is dismissed as not maintainable. However, the petitioner is at liberty to seek appropriate remedy.

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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 Dev Bhumi Industries .....Petitioner.

Versus

The Commissioner of Income Tax and others ..... Respondents.

CWP No.5584 of 2012.
Judgment reserved on: 27.09.2016.
Date of decision: October 6, 2016.

Income Tax Act, 1961- Section 127(1) and 127(4)- Petitioner contended that its case was transferred from I.T.O., Parwanoo to I.T.O., Una and ex-parte assessment order was illegally passed – respondents stated that show cause notice was issued but no reply was filed – held, that petitioner had already filed a statutory appeal against the order of assessment – a writ petition cannot be filed when alternative remedy is available – if a party has two remedies and it chooses one of them, it cannot avail the other one – writ petition cannot be filed, when alternative remedy is available – petition dismissed. (Para- 5 to 17)

Cases referred:

K.S.Rashid and Sons versus Income-tax Investigation Commission and Ors., AIR 1954 SC 207
Nagubai Ammal and others versus B. Shama Rao and others, AIR 1956 SC 593
Scrutton, in Verschures Creameries Ltd. v. Hull and Netherland Streamship Company Limited (1921) 2 K.B. 608 (D)
A.V. Venkateswaran, Collector of Customs, Bombay versus Ramchand Sobhraj Wadhwani and Anr., AIR 1961 SC 1506
M/s Trilokchand Motichand and others versus H.B. Munshi, AIR 1970 SC 898
Jai Singh versus Union of India and others, (1977) 1 SCC 1
Bombay Metropolitan Region Development Authority, Bombay versus Gokak Patel Volkart Ltd. and Ors., 1995 1 SCC 642
S.J.S.Business Enterprises(P) Ltd. versus State of Bihar and Ors., 2004 Supp 2 JT 601
State of Punjab and others versus Punjab Fibres Ltd. and others, (2005) 1 SCC 604
Awadh Bihari Yadav and others versus State of Bihar and others, (1995) 6 SCC 31)

For the Petitioner	Mr.Pankaj Kumar Singh, Mr.Neeraj Gupta and Ms.Poonam Gehlot, Advocates.
For the Respondents:	Mr.Vinay Kuthiala, Senior Advocate with Ms.Vandana Kuthiala, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

By medium of this writ petition, the following reliefs have been prayed for:-

"(a) For a writ of certiorari or any other applicable writ or order or direction quashing the assessment order dated 26.12.2006 passed by the respondent No.2 w.r.t. the Petitioner Firm for the Assessment Year 2001-2002;

(b) For a writ of certiorari or any other applicable writ or order or direction quashing the transfer order dated 18/19.01.2006 passed by the Respondent No.1 w.r.t. the Petitioner Firm for the Assessment Year 2001-2002."

2. The pleaded case of the petitioner firm is that despite it having been closed down its business with effect from 30.11.2001, the respondent No.1 without following the procedure laid down under Section 127(1) & 4 of the Income Tax Act, 1961, (for short 'Act') has illegally vide order dated 18/19.01.2006 transferred the case of the petitioner firm from ITO, Parwanoo to ITO, Una and thereafter respondent No.2 has illegally passed the assessment order dated 26.12.2006 making an ex parte assessment of Rs.4,82,565/-.

3. The respondents have filed their reply wherein they have raised the preliminary objection regarding the very maintainability of the petition on the ground that the petitioner firm has already questioned the impugned order of assessment by filing an appeal and, therefore, cannot be permitted to choose two forums in respect of the same subject matter for the same relief by filing the instant petition. It is not disputed that the notice under Section 148 of the Act was received back on 01.07.2005 with the remark "*addressee left the place hence returned*". However, it is claimed that the notice under Section 148 of the Act dated 22.06.2005 was infact received by Smt. Renu Aggarwal and Smt. Beena Mittal, partners of the petitioner firm, on 05.07.2005 and the photocopy of the registered A.D. has been annexed as Annexure R-2. Lastly, it is claimed that notices were infact issued to the petitioner firm calling upon it as to why the case be not transferred to ITO, Una, but the petitioner firm did not choose to file its reply and consequently the case was transferred and decided by the ITO, Una.

4. The petitioner firm has filed rejoinder wherein it has been specifically denied that the notice dated 22.06.2005 was ever received by any of the partners. It is further averred that purported notices were served at the address of the factory site which had been closed long back and secondly one Anita in the notice was never a partner in the petitioner firm. It is also averred that the address Bitana Road was never submitted in the office of the respondents and these notices infact appeared to have been sent continuously at wrong address, though the respondents were having the addresses of the partners as contained in partnership deed dated 01.04.2000. It is lastly averred that all the notices sent subsequently under Sections 142/143 of the Act were duly received by the partners of the petitioner firm as the same were sent at the addresses as given in the partnership deed dated 01.40.2000.

We have heard the learned counsel for the parties and gone through the material placed on record.

5. At the outset, it may be observed that there is no dispute that the petitioner firm prior to filing of the instant petition has already assailed the assessment order dated 26.12.2006 by filing statutory appeal under Section 246A (1) (b) of the Act before the appellate authority. Therefore, the moot question is whether the petitioner firm can maintain a petition under Article 226 of the Constitution of India for the reliefs for which it has already availed the alternate remedy by filing the appeal, as the merits of the case can only be gone into by this Court after it holds the petition to be legally maintainable.

6. Ordinarily, where the parties have more than one remedy available, they have to elect or select one of the remedies. In case, if the party is allowed to select multiple remedies in multiple Forums and Courts, there will obviously be multiplicity of litigation and there is every chance and likelihood that the judgments and/or orders may also be conflicting with each other.

7. In ***K.S.Rashid and Sons*** *versus* ***Income-tax Investigation Commission and Ors.***, ***AIR 1954 SC 207***, a Hon'ble Constitution Bench of the Hon'ble Supreme Court was considering an issue that when the remedy under Section 8(5) of the Taxation of Income (Investigation Commission) Act, 1947, had been pending, whether the High Court could entertain the writ petition. The Hon'ble Supreme Court held that a person may choose/effect whether it will proceed with the alternate remedy or with the writ petition, but both cannot be pursued simultaneously.

8. It is more than settled that when more than one remedy is available to a party in respect of the same grievance, it is open for that party to elect or to choose his remedy. But, once he chooses his remedy, all incidents attached to that remedy must follow. Reference may be made to ***Nagubai Ammal and others*** *versus* ***B. Shama Rao and others, AIR 1956 SC 593*** wherein relying on the observations of Lord Justice Scrutton, in Verschures Creameries Ltd. v. Hull and Netherland Streamship Company Limited (1921) 2 K.B. 608 (D), it was observed:-

> *"The ground of the decision is that when on the same facts, a person has the right to claim one of two reliefs and with full knowledge he elects to claim one and obtains it, it is not open to him thereafter to go back on his election and claim the alternative relief."*

9. In ***A.V. Venkateswaran, Collector of Customs, Bombay*** *versus* ***Ramchand Sobhraj Wadhwani and Anr., AIR 1961 SC 1506***, another Constitution Bench of the Hon'ble Supreme Court held that even where a party has approached the alternative Forum, the Court should entertain the writ petition or not, cannot be formulated in a straightjacket formula. The Court may examine the facts and circumstances of the case and decide as to whether it should entertain the petition or not. However, where the petitioner has already approached the alternative Forum for appropriate relief, it is not appropriate that the writ petition should be entertained. The rule is based on public policy and motivating factor is that of existing of parallel jurisdiction of another Court.

10. Similar view was reiterated by another Constitution Bench in ***M/s Trilokchand Motichand and others*** *versus* ***H.B. Munshi, AIR 1970 SC 898*** and the Hon'ble Supreme Court cautioned that a writ Court should not entertain the writ petition and it is only in rare cases where the ordinary process of law appears inefficacious that the writ Court may interfere even when other remedies are available.

11. In ***Jai Singh*** *versus* ***Union of India and others, (1977) 1 SCC 1***, the Hon'ble Supreme Court held that the appellant therein having filed a suit in which the same question as the subject matter in the writ petition was agitated could not be permitted to pursue to parallel remedies in respect of the same matter at the same time.

12. In ***Bombay Metropolitan Region Development Authority, Bombay*** *versus* ***Gokak Patel Volkart Ltd. and Ors., 1995 1 SCC 642***, the petitioner therein had filed a writ petition during the pendency of the appeal before the Statutory Authority. The Hon'ble Apex Court held that such a writ was not maintainable.

13. In ***S.J.S.Business Enterprises(P) Ltd.*** *versus* ***State of Bihar and Ors., 2004 Supp 2 JT 601,*** the Court held that mere availability of alternative forum for appropriate relief does not impinge upon the jurisdiction of the High Court to deal with the matter. Even if it is not a position to do so on the basis of the affidavits filed, however, if a party has already availed the alternative remedy while invoking the jurisdiction under Article 226 of the Constitution it will not be appropriate to the Court to entertain the writ petition.

14. In ***State of Punjab and others*** *versus* ***Punjab Fibres Ltd. and others, (2005) 1 SCC 604***, a Bench of Hon'ble three Judges' held that where the assessee challenges order of the Sales Tax Tribunal in an appeal as well as in writ petition simultaneously, in such circumstances, the writ petition would not be maintainable.

15. It is clear from the aforesaid exposition of law that public policy demands that a person has right to choose the forum for redressal of his grievance, but he cannot be permitted to choose two forums in respect of the same subject matter for the same relief.

16. It yet needs to be clarified that the writ Court may exercise its discretionary jurisdiction even if the parties approached other forum. There must be extraordinary situation or circumstance, which may warrant different approach, particularly, where the orders passed by the Court are sought to be violated or thwarted with impunity. The Court cannot be a silent spectator in such extraordinary situation. (Ref: ***Awadh Bihari Yadav and others*** *versus* ***State of Bihar and others, (1995) 6 SCC 31).*** However, this is not the fact situation obtaining in the instant case. What to talk of an extraordinary situation or circumstance, the petitioner firm has not even disclosed about the pendency of the appeal in its writ petition and the same only finds mention in the list of dates appended therewith. There being no extraordinary situation or circumstance warranting this Court to step-in to interfere, we are clearly of the view that the instant writ petition is not maintainable.

17. The petitioner firm having chosen to avail of the remedy, as provided in the statute that too earlier to the filing of the instant petition, cannot maintain this petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

18. However, before parting, it may be necessary to observe that anything stated in the judgment shall not be construed to be an expression of opinion on the merits of the case and the appellate authority shall proceed to decide the appeal uninfluenced by any observations that may be contained hereinabove.

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

Solan District Truck Operators Transport Cooperative Society Ltd. ..Appellant

Versus

Sh. Harjinder Singh and others ...Respondents

LPA No. 21/2016
Reserved on: September 28, 2016
Decided on: 6th October, 2016

H.P. Co-operative Societies Act, 1968- Section 72- Respondent No. 1 filed a reference petition pleading that he is founder- member of the society- he had sold his truck with prior intimation and understanding that on the purchase of a new truck, he would be given a new token number- however, the number was not given to him, although it was given to similarly situated persons – a reply was filed by the society that the respondent No.1 lost the membership with the sale of truck and token could not be granted – reference was allowed and direction was issued to allot new token to the respondent No. 1- appeal and revision were filed, which were dismissed- a writ petition was filed, which was allowed and the authority was directed to decide the case on merit – a fresh order dismissing the revision was filed- a writ petition was filed against the order, which was also dismissed- held, in appeal that as per bye- laws, a person remains a member till he remains the owner of the truck – however, bye-laws do not provide that sale of truck would amount to expulsion – no person can be expelled without complying with the bye laws- resolution could not have been passed in violation of the bye laws – the resolution was also not approved by the Registrar Co-operative Societies – the question of fact cannot be decided in exercise of the writ jurisdiction - the writ Court had passed the order on the basis of the material on record – appeal dismissed. (Para- 10 to 24)

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

For the appellant Mr. Sunil Mohan Goel, Advocate

For the respondents: Mr. Neeraj Gupta, Advocate for respondent No.1

Mr. Romesh Verma and Mr. Varun Chandel, Additional Advocate Generals and Mr. J.K. Verma and Mr. Kush Sharma, Deputy Advocate Generals, for respondents No.2 to 5.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge:

This Letters Patent Appeal is directed against judgment and order dated 2.12.2015 passed by the learned Single Judge in CWP No. 1841/2015, whereby petition preferred by the appellant-Society (herein after referred to as 'Society'), came to be dismissed (for short, 'impugned judgment'). From the perusal of the facts, it appears that respondent No.1 namely Harjinder Singh, who is a member of the society, filed a reference petition under Section 72 of the HP Cooperative Societies Act, 1968 (herein after referred to as 'Act'), before the Assistant Registrar Cooperative Societies, Solan, averring therein that he is the founder member of the society, sold his truck with prior intimation and understanding with the Society that on purchase of a new truck, he would be given a new token number, purchased the same in the year 2005, was not allotted token number. Though similarly situated persons who were admittedly junior members, were allotted token numbers.

2. Society by way of reply, refuted the claim put forth on behalf of respondent No.1 by stating that no intimation whatsoever was given by respondent No.1 to the Society with regard to sale of truck bearing registration No. HP-13-274 alongwith token, thus lost his membership because he sold his truck which was a pre-condition to become member of the Society. Apart from above, Society also claimed before the Assistant Registrar Cooperative Societies that the respondent No. 1 sold his truck in the year 2004 i.e. before allotment of work to the Society vide order dated 15.2.2005 by the Deputy Commissioner, Solan and as such the token as claimed by the respondent No.1 can not be granted to him at this stage. Society also raised objections that the reference was time barred as the same was filed after five years and as such same deserved to be dismissed on the ground of delay only.

3. Assistant Registrar Cooperative Societies allowed the said reference vide order dated 22.7.2011, wherein he passed following directions:

> "Keeping in view the facts and circumstances narrated herein above and after going through the record adduced before me, I am convinced that Sh. Harjinder Singh is a registered member of the Respondent Society and he plied his vehicle through the society till May, 2005 after which he sold his vehicle with token. However, he purchased new vehicle but the society did not allot new token to him. But his membership has not been cancelled by the respondent society till date and he has casted his vote in the election of the society held on 05.04.2011 being member of the society. The counsel for the respondent failed to prove that the petitioner has been expelled from the membership of the society as the respondent society has not adopted the proper procedure for expulsion of his membership. Further, the respondent has adopted 'Pick and Choose' method by allotting new token to some members who had also sold their vehicles with token. Therefore, ex-parte decision is announced against the respondent and the Respondent Society is directed to allot new token to the petitioner and provide work to his Vehicle on priority basis. The present petition is disposed of in terms of the foregoing submissions."

4. Society being aggrieved and dissatisfied with order passed by Assistant Registrar Cooperative Societies filed an appeal under Section 93 of the Act which came to be registered as Appeal No. 13/2011, was dismissed by the appellate authority vide order dated 2.4.2012 and Society being further aggrieved with aforesaid rejection of the appeal preferred a revision under Section 94 of the Act, which was transferred to the Deputy Registrar (Consumer) Cooperative Societies, who vide order dated 6.10.2012 rejected the revision and upheld the order passed by the appellate authority with the direction to the Society to allot new token number to respondent No.1 and provide work to his truck within 15 days from the receipt of the order. It also emerged from the record that the Society being not satisfied by the aforesaid order passed by Deputy Registrar (Consumer) Cooperative Societies, preferred a revision/review petition under Section 94 of the Act before the Special Secretary (Cooperation), who rejected the same on the ground of maintainability. Special Secretary (Cooperation) to the Government of Himachal Pradesh concluded that the orders assailed before him were passed in revision by the Additional Registrar (Administration) Cooperative Societies under Section 94(1) and (2) of the Act and as such there was no provision of second revision/appeal, accordingly, he dismissed the revision petition vide order dated 14.2.2013.

5. It further emerges from the record that subsequent to the dismissal of the revision petition by the Special Secretary (Cooperation), Society filed a writ petition bearing CWP No. 4294/2013 before this Court. A Coordinate Bench of this Court vide judgment dated 21.11.2014 while setting aside order dated 14.2.2013 passed by Special Secretary (Cooperation), directed the said authority to decide the case on merits on or before 31.12.2014. Subsequent to the aforesaid judgment passed by this Court, Special Secretary (Cooperation) passed fresh order dated 31.12.2014 in revision/review petition filed under Section 94 of the Act whereby revision petition was dismissed on merits.

6. Mr. Sunil Mohan Goel, Counsel representing the Society forcibly argued that the impugned judgment passed by the learned Single Judge is not sustainable in the eye of law as the same is not based upon the correct appreciation of the facts as well as law available on record as such the same deserves to be set aside. Mr. Goel further contended that the learned Single Judge has fallen in grave error while coming to the conclusion that respondent No.1 was member of the Society for all intents and purposes, which finding is contrary to the record, respondent No.1 had lost his membership immediately after sale of his truck by him and no token, if any, could be allotted to him. Mr. Goel further contended that respondent No.1 sold his truck alongwith token number allotted to him for consideration to other person, as a result of which, the purchaser became member of the Society in place of respondent No.1 hence the finding of the learned Single Judge that the respondent No.1 is member of the Society being contrary to law and record deserves to be set aside. Mr. Goel further submitted that the learned Single Judge as well as the authorities below miserably failed to take note of the fact that the reference petition under Section 72 of the Act was filed by respondent No.1 after a delay of more than five years that too without there being any cogent explanation on record which itself suggests that he was not aggrieved by any act of the Society from 2005 till filing of the petition i.e. 2011. Mr. Goel further contended that the learned Single Judge as well as the authorities below failed to appreciate the resolution dated 5.12.2008 passed by the General House of the Society, whereby it was resolved that new token numbers would be allotted to those persons who were already having one truck in operation with the Society.

7. While referring to resolution dated 5.12.2008, Mr. Goel forcefully contended that a bare perusal of resolution referred to herein above, clearly suggests that any member who sells his vehicle and violates bye-law 5(iii), his membership would be cancelled. While concluding his arguments, Mr. Goel stated that since respondent sold his truck alongwith token number to some other person, his membership was cancelled in terms of the resolution dated 5.12.2008 and as such impugned judgment passed by learned Single Judge whereby he upheld the orders passed by the authorities below deserves to be set aside.

8. Mr. Neeraj Gupta, Advocate duly assisted by Mr. Ajeet Jaswal, Advocate supported the judgment passed by the learned Single Judge. Mr. Gupta while referring to the judgment of the learned Single Judge vehemently argued that the same is based on correct appreciation of documents as well as law made available on the record by the respective parties. While inviting attention of this Court to the judgment, Mr. Gupta forcefully contended that each and every aspect of the matter has been dealt with meticulously by the learned Single Judge while deciding the writ petition as preferred by the Society and as such present appeal deserves to be dismissed. Mr. Gupta while refuting the contentions put forth on behalf of the Society that the Courts below failed to take note of the resolution dated 5.12.2008, strenuously argued that the authorities below as envisaged under the Act, while adjudicating the controversy at hand, specifically dealt with aforesaid resolution. Mr. Gupta further contended that once it stands proved on record that resolution dated 5.12.2008 was not passed in conformity with the bye-laws, authorities below as well as learned Single Judge of this Court rightly came to the conclusion that the Society had no authority to deny registration and allotment of token, if any, in favour of respondent No.1 and as such there is no illegality or infirmity in the judgment passed by the learned Single Judge. While concluding his arguments, Mr. Gupta forcefully contended that the resolution dated 5.12.2008 was rightly not considered by the authorities below since the same was not passed in accordance with the provisions as contained in the bye-laws of the Society as well as Act. In the aforesaid background, Mr. Gupta prayed for dismissal of the present appeal by upholding the judgment passed by the learned Single Judge.

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

10. From the pleadings and contentions having been made on behalf of the respective parties, it becomes clear that respondent No.1, who was a member of the Society, sold his truck with token number to some other person, and accordingly, his membership was cancelled in

terms of resolution dated 5.12.2008 (annexure P-10), wherein it was resolved that any member, who sells his vehicle and violates bye-law 5(iii), his membership would be cancelled. Now, the question which remains to be decided by this Court is whether membership, if any, of the respondent No.1 could be cancelled by the Society in terms of Resolution dated 5.12.2008 or not. It is undisputed before us that respondent No.1 herein was a member of the Society for all intents and purposes prior to cancellation of membership. Society framed bye-laws (annexure P-2). Bye-law 5 provides as under:

> "5. Subject to the provisions of Bye-laws any individual shall be admission as a member of the society if he is.
>
> (i) over 18 Years in age and of sound mind.
>
> (ii) of good characters.
>
> (iii) subject to the provisions of Act and Rules and Bye-Laws, any individual should be owner of truck carrier and who is hereditary resident of area of operations, having ancestral land and also duly recommended by the truck operators union in the area of the society shall be eligible for admission as a member of the Society.
>
> (iv) The numbers of the trucks per member should be at most of three trucks per member."

11. Similarly, Bye-law 6 provides for the categories of persons who are not eligible for admission as member of the Society. Bye-law 6 provides as under:

> "6. No individual shall be eligible for admission as a member of the Society if:-
>
> (v) He has applies for bankruptcy, or
>
> (vi) He has been declared as a insolvent, or
>
> (vii) He has sentenced for any offence involving dishonesty or moral turpitute 5 years preceeding the date of his admission as member."

12. Bye-law 13 provides for the expulsion of a member from the society. Bye-law 13 reads as under:

> "13. (a) A member may be expelled for one or more of the following reasons: -
>
> (viii) Ceasing to reside in the area of operation of the society.
>
> (ix) Failure to pay the share money or operation of the society.
>
> (x) Conviction of criminal offence involving dishonesty or moral turpitude.
>
> (xi) An application for bankruptcy.
>
> (xii) An action which may be held by the general body on account of dishonesty or contrary to the interest, reputation and stand objects of the society.
>
> (b) A person shall cease to be member of the society in one or more of the circumstances: -
>
> (i) Death
>
> (ii) Ceasing to hold at least one share.
>
> (iii) Withdrawal after six months notice to the Secretary of the Society provided the share/ shares held by the member are disposed of it accordance with by law 11 & 12.
>
> (iv) Permanent insanity
>
> (v) Declaration of bankruptcy."

13. A close scrutiny of the facts as have been discussed in detail, clearly indicates that respondent No. 1 was a member of the Society in terms of bye-law 5 till the time, he was

owner of the truck, which he allegedly sold to some other person alongwith token in the year 2004. But if clause 6 of the Bye-laws is read in its entirety, wherein conditions/circumstances have been detailed in which one can not be admitted as a member of society, admittedly, respondent No. 1 does not fall in any of the categories as mentioned in this clause. Similarly, perusal of Bye-law 13 (a) and (b) nowhere suggests that a member who sells his truck can be expelled. Since in the present case, the specific stand of the Society is that the respondent No.1 ceased to be a member of the Society as he had sold his truck to another person alongwith token, but the bye-laws nowhere provides that person who sells his truck to any person would invite expulsion.

14. In the present case, society vide resolution dated 5.12.2008, resolved that the person who becomes vehicle-less after selling his truck to somebody else, or violates the conditions of bye-law 5(iii), would be expelled and his membership would be cancelled. This Court, while examining aforesaid decision taken in resolution dated 5.12.2008 was unable to find any condition in the bye-laws of the Society which provides for cancellation of the membership on account of selling of truck by its member. As such, this court really finds it difficult to accept the contention put forth on behalf of the Society that since respondent No.1 sold his truck, his membership was rightly cancelled in terms of resolution dated 5.12.2008. It is well settled that bye-laws are always framed by a society providing therein complete mechanism to run the affairs of the society smoothly. Once, under the bye-laws, specific conditions have been incorporated for membership as well as expulsion, no member can be expelled on the strength of resolution that too without carrying out any effective amendment in the bye-laws. It is undisputed that before passing resolution dated 5.12.2008, Society had never carried out any amendment to bye-laws by adding/providing therein the condition for expelling the members on account of selling of vehicles, if any. Though, this Court after perusing the bye-laws which have been annexed alongwith the writ petition, is fully convinced that the membership of respondent No.1 could not be cancelled on the strength of resolution dated 5.12.2008, as same does not appear to be passed in accordance with the bye-laws as well as the Act and Rules. It emerges from the orders passed by the authorities below and the judgment passed by the learned Single Judge that resolution dated 5.12.2008 was passed by the Society in the meeting of its General House wherein 482 members were present out of 1135 members, meaning thereby that necessary quorum was not complete to take any decision, especially decision with regard to expulsion of members of the Society. A careful perusal of order passed by the Assistant Registrar Cooperative Societies Solan in reference petition under Section 72 of the HP Cooperative Societies Act, 1968 clearly suggests that the Society resolved to expel its 113 members including the respondent No.1 from membership vide resolution No. 9 dated 5.12.2009 whereas, as per Rule 23 of the HP Cooperative Societies Rules, 1971, when a committee of the cooperative society decides to bring resolution for expulsion of any member, consideration of such resolutions shall be included in the agenda for the next general meeting and notice thereof shall be given to the member against whom such resolution is proposed to be brought calling upon him to represent in the general meeting to be held not earlier than a period of one month, from the date of such notice and to show cause against expulsion to the general body of the members. Rule 23 of the HP Cooperative Societies Rules, 1971 reads as under:

> 23. Procedure of expulsion of members.—(1) Where any member of a society proposes to bring a resolution for the expulsion of any other member, he shall give a written notice, thereof, to the Chairman of the society. On receipt of such a notice, or when the committee itself decides to bring in such resolution, the consideration of such resolution shall be included in the agenda for the next general meeting and a notice thereof shall be given to the member against whom such a resolution is proposed to be brought, calling upon him to represent at the general meeting to be held not earlier than a period of one month from the date of such notice, and to show cause against expulsion to the general body of members.

(2) After hearing the member, if he is present, or after taking into consideration any written representation which he might have made, the general body of members shall proceed to consider the resolution.

(3) When a resolution passed in accordance with sub-rule(1) is sent to the Registrar, or otherwise brought to his notice, the Registrar may consider the resolution, and after making such enquiries as he may deem fit, give his approval and communicate the same to the society and the member concerned. The resolution shall be effective from the date of such approval by the Registrar.

15. But, in the present case, it clearly emerges from the record that the Society while passing aforesaid resolution wherein decision with regard to cancellation of the membership of respondent No.1 alongwith other 113 members was taken, miserably failed to comply with Rule 23 of the Rules, 1971 because at no point of time, intimation, if any, with regard to aforesaid discussion in the meeting was sent to respondent No.1. Apart form the above, this Court was unable to find on record any document, placed by the society to suggest that it had issued any show cause notice, if any, to respondent No.1 before canceling his membership in terms of the resolution dated 5.12.2008 and as such this court sees no illegality or infirmity in the judgment passed by learned Single Judge as well as the orders passed by the authorities below.

16. At the cost of repetition, it may be mentioned again that this Court carefully perused clauses 13(a) and (b) of the bye-laws of the Society relating to termination of the members from the society and found that there is no provision in the aforesaid bye-law of the Society which provides that a member would be deemed to be expelled automatically after selling his vehicle. Though the Society by way of placing resolution dated 5.12.2008 made an attempt to demonstrate that the aforesaid bye-law No. 13 (a) and (b) was amended vide resolution dated 5.12.2008, wherein condition was incorporated that a member would be expelled automatically if he sells his vehicle and becomes vehicle-less. At this stage, it may be observed that no resolution providing therein a condition for expulsion/cancellation of the membership can be passed by a Society without carrying out amendment in the bye-laws, wherein admittedly it has been not provided that member would be expelled automatically, if he sells his vehicle and becomes vehicle-less. Apart from the above, this court perused bye-law 46 of the Society which reads as under:

"46. No amendment to these by-laws shall be carried out save in accordance with the resolution passed at a general meeting of which due notice of the intention to discuss the amendment has been given provided that no such resolution shall be valid unless it is passed by majority of the members present at the general meeting at which not less then two-third of the members for the time being of the society are present.

Provided further that modle by-laws or amendments previously approved by the Registrar may be adopted by a majority at a general meeting with an ordinary quorum."

17. Aforesaid bye-law clearly provides that amendment, if any, in bye-laws of the Society can be effected only in the general house meeting. In the present case, as emerges from the records, only 482 members of the society were present out of 1135 members when this resolution No. 8 dated 5.12.2008 was allegedly approved by the Society. This Court after careful perusal of the aforesaid bye-law 46, is fully convinced that the resolution No. 8 dated 5.12.2008 was not approved by 2/3rd members of the Society as provided in bye-law 46 of the Society and as such same was rightly declared *void ab initio* as per mandatory provisions of bye-law 46 of the Society by learned Single Judge while dismissing the petition preferred by the Society.

18. Society has placed no document on record to demonstrate that resolution dated 5.12.2008 was approved by the Registrar Cooperative Societies in terms of Section 11 of the Act.

19. Apart from above, this Court viewed the matter from another angle also. In the present case, it is undisputed that the truck was sold by respondent No.1 in 2004 to some other person alongwith token and thereafter he kept on participating in the meetings of the Society, rather he voted in the election of the Society. It is not understood how decision, if any, taken vide

resolution dated 5.12.2008 could be made applicable by the Society on a member who had sold his truck in 2004. Perusal of resolution dated 5.12.2008 nowhere suggests that the same was to be made applicable retrospectively and as such membership of respondent No.1, who sold his truck in 2004 can not be cancelled/ expelled in terms of resolution dated 5.12.2008. Hence, this court has no hesitation to conclude that there is no illegality or infirmity in the findings returned by the learned Single Judge that it stands proved on record that till date respondent No. 1 is a member of the Society and he is legally entitled to all the privileges enjoyed by other members of the Society in terms of bye-laws framed by the society on its registration.

20. From the discussion made herein above, we have no hesitation to conclude that the Society had no authority to cancel the membership of respondent No.1 in terms of resolution dated 5.12.2008, which was admittedly not passed in accordance with bye-laws of the Society as well as provisions contained in the Act and Rules as discussed in detail herein above. Apart from above, it is settled principle of law that the questions of facts can not be gone into in writ proceedings.

21. 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"

22. 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 (deceased) 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.

23. 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.

24. This Court 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 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."

25. Having said so, there is no merit in the appeal filed by the Society and same is dismissed, alongwith pending applications, if any. Judgment passed by the learned Single Judge is upheld.

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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
Bhupinder Kumar & anr. .....Respondents.

Cr. Appeal No. 172 of 2012
Date of decision: October 06, 2016.

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased was married to accused No. 1- accused No. 2 was her mother-in-law- the accused started harassing the deceased on the pretext that defective articles were given in dowry – she disclosed the incidents to her parents – she consumed poison subsequently-the accused were tried and acquitted by the trial Court- held in appeal that harassment of the woman should be to coerce her to meet unlawful demand of dowry- solitary instance of harassment is not sufficient and there should be series of circumstances- the deceased had consumed poison within 7 years of marriage – mother, sister and aunt of the deceased admitted that no demand of dowry was made at the time of marriage – no complaint was made regarding the harassment of the deceased – father of the deceased admitted that no money was paid to the deceased by him – it was not shown as to what defect was pointed by the accused in the articles supplied in dowry – the reason for suicide was not established by the prosecution and the accused were rightly acquitted by the trial Court- appeal dismissed. (Para-11 to 25)

Cases referred:
Kishangiri Mangalgiri Goswami vs. State of Gujarat, reported in 2009(4) SCC 52
Amalendu Pal @ Jhantu vs. State of West Bengal, reported in 2010(1) SCC 707
State of H.P. vs. Pardeep Singh and another, reported in Latest HLJ 2013 (HP) 1431
Manju Ram Kalita vs. State of Assam, reported in (2009) 13 SCC 330
Girdhar Shankar Tawade vs. State of Maharashtra, reported in 2002(5) SCC 177

For the appellant :Mr. D.S. Nainta and Mr. Virender Verma, Addl. AGs.
For the respondent :Mr. Anoop Chitkara, Advocate.

The following judgment of the Court was delivered:

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

State of Himachal Pradesh is in appeal before this Court against the judgment dated 29.10.2011 passed by learned Addl. Sessions Judge, Fast Track Court, Kangra at Dharamshala in Sessions Case No. 14-K-VII/11, Sessions Trial No. 22/2011, whereby the

respondents-accused (hereinafter referred to as accused) have been acquitted of the charge under Sections 498-A, 306 read with Section 34 IPC.

2. The complaint is that learned Trial Court has failed to appreciate the evidence available on record in its right perspective and to the contrary based findings on hypothesis, conjectures and surmises. The reasoning, the trial Court has recorded while acquitting the accused, is manifestly unreasonable and untenable. The testimonies of the prosecution witnesses have erroneously been discarded for untenable reasons only on account of they being in near relations of the deceased without there being any proof of enmity of the witnesses with the accused. Cogent and reliable evidence suggesting that immediately before her death, the deceased visited her parental house on 22.3.2011 and apprised her parents about her harassment and torture in the matrimonial home show that she was tortured and harassed immediately before the commission of suicide by her. An abrasion on outer aspect lumber region in left side establishes that the deceased was administered beatings before her death as the accused allegedly failed to explain the said injury. Since the deceased committed suicide within 7 years of her marriage with accused Bhupinder Kumar and the prosecution has produced satisfactory evidence to establish that she was being tortured and harassed in the matrimonial home, the presumption against them to have abetted the commission of suicide by the deceased should have been drawn. The claim of the respondent-State is, therefore, that despite of the prosecution having proved its case beyond all reasonable doubt, the accused have been erroneously acquitted of the charge.

3. In order to decide the fate of the present appeal, it is desirable to take note of the facts of this case in a nut shell. The case under Section 498-A/306 IPC read with Section 34 IPC was registered in Police Station Kangra against both the accused at the instance of PW-1 Onkar Chand, the father of deceased Naina. Naina was married in April, 2008 to accused No. 1 Bhupinder Kumar. Accused No. 2 Smt. Samangla Devi was her mother-in-law. As per the prosecution story, the deceased was treated nicely for some time by the accused persons in the matrimonial home. They started treating her with cruelty at the pretext that sufficient dowry was not given to her by her parents and that the articles given in dowry were defective after 2-3 months of her marriage. The deceased as and when used to come to her parental house had been disclosing her miseries and harassment at the hands of the accused at the pretext of demand for dowry to her parents. Her parents had been pacifying her that they will take up the matter with the accused and ensure that she was not tortured by them any further. On 22.3.2011 also, when she visited her parental house to attend “chawarkha”, she told her parents that she was being tortured by the accused. Her parents, however, sent her back to the matrimonial home on the assurance that the matter will be taken up with her husband and mother-in-law, the accused persons. She, therefore, returned to matrimonial home. However, on the next date i.e. 23.3.2011, she consumed poison and her father PW-1 Onkar Chand was informed at 1:00 PM over his cell phone in this regard. Her parents accompanied by other villagers and relatives though reached at the place of accused persons where they came to know that she had been shifted to the hospital at Tanda. However, when they reached in the hospital, they found Naina having already expired.

4. The statement of PW-1 Onkar Chand Ext. PW-1/A under Section 154 Cr.P.C. was recorded in the hospital by the police. On the basis of Ext. PW-1/A, FIR Ext. PW-11/A was registered in Police Station, Kangra. The investigation was partly conducted by PW-12 HHC Mahinder Singh and partly by PW-14 ASI Santosh Raj. The witnesses, PW-1 Onkar Chand, father of the deceased, her mother Smt. Sudarshana Devi (PW-2), sister Neelma Devi (PW-3) and aunt Soma Devi (PW-4) were associated during the investigation of the case.

5. PW-5 Megh Nath was examined to prove that PW-1 Onkar Chand came to the house of accused in his presence and discussed the matter qua harassment of his daughter in their house with them. He, however, has not supported the prosecution case in this regard. The remaining witnesses are mostly police officials who remained associated during the course of investigation of the case in one way or the other. PW-8 Kaptan Singh is also formal because he

has photographed the dead body whereas PW-13 Dr. Susheel Sharma has conducted autopsy on the dead body of the deceased.

6. On the other hand, both the accused were also examined under Section 313 Cr.P.C. They both have admitted that the deceased was married to accused No. 1 in April, 2008. However, the remaining incriminating circumstances put to them during their examination under Section 313 Cr.P.C. have been denied being wrong for want of knowledge. In their defence, it was pleaded that they are innocent and were implicated falsely in this case. Accused No. 1 has further stated that he started depositing Rs. 100/- per month in the name of his wife, deceased Naina, in the Post Office right from 20.4.2009 and continued to deposit the same till March, 2011 i.e. during her life time.

7. Accused have also examined Anjali Sharma (DW-1), Post Office (Recurring Deposit) Agent, who has supported the plea raised by the accused persons qua deposit of Rs. 100/- per month in the account of the deceased which was opened by her husband accused No. 1 Bhupinder Kumar.

8. Learned trial Judge, after holding full trial has concluded that the prosecution has failed to prove its case against the accused beyond all reasonable doubt. They both have therefore been acquitted of the charge framed against each of them.

9. Sh. D.S.Nainta, learned Addl. Advocate General, has argued with all vehemence that the evidence as has come on record by way of testimonies of PWs 1 to 4 amply demonstrate that the deceased has committed suicide within 7 years of her marriage with accused Bhupinder Kumar and that it is accused persons alone who have abetted the commission of suicide by the deceased. According to Mr. Nainta, therefore, it is a case where presumption under Section 113-A of the Indian Evidence Act, should have been drawn against both the accused as they failed to explain that if cruelty and harassment of the deceased at their hand was not the cause of commission of suicide by her, what prompted her to take such a drastic step.

10. Sh. Anoop Chitkara, Advocate, while repelling the arguments addressed on behalf of the State has very ably argued that mere allegations of harassment and cruel treatment meted out by the accused persons to the deceased is not sufficient to attribute guilt to them. According to Mr. Chitkara, in order to make out a case against the accused persons, the prosecution was required to plead and prove instances of cruelty, its nature and the steps taken by her parents on coming to know about the so called harassment of their daughter at the hands of the accused. Mr. Chitkara has also pointed out various contradictions in the prosecution evidence and the improvements made by the witnesses while appearing in the witness box. Therefore, while supporting the impugned judgment, Mr. Chitkara has sought the dismissal of the present appeal, being devoid of merits.

11. We shall first deal with the plea relating to applicability of Section 306 of the IPC in the case in hand. Section 306 IPC deals with abetment of suicide. The Apex Court in ***Kishangiri Mangalgiri Goswami vs. State of Gujarat,*** reported in ***2009(4) SCC 52,*** while discussing the scope of Section 306 of the Code, in the context of abetment of suicide, has observed as under:

> "8. Section 306 IPC deals with abetment of suicide. The said provision reads as follows:
>
> "306 ABETMENT OF SUICIDE.
>
> If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."
>
> 9. Abetment involves a mental process of instigating a person or intentionally aiding that person in doing of a thing. In cases of conspiracy also it would involve that mental process of entering into conspiracy for the doing of that thing. More active role which can be described as instigating or aiding the doing of a thing it

required before a person can be said to be abetting the commission of offence under Section 306 of IPC."

12. The abetment of a thing has been defined under Section 107 of the Code. The circumstances under which abetment of suicide by a person on being instigated by another person can be inferred have been discussed again by the Apex Court in ***Amalendu Pal @ Jhantu vs. State of West Bengal,*** reported in ***2010(1) SCC 707.*** The relevant text of this judgment reads as follows:

"12.At the outset, we intend to address the issue regarding the applicability of Section 306 IPC in the facts of the present case. Section 306 deals with abetment of suicide and Section 107 deals with abetment of a thing. They read as follows:

"306. Abetment of suicide.--If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

* * *

107. Abetment of a thing.--A person abets the doing of a thing, who--

First.--Instigates any person to do that thing; or Secondly.--Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or Thirdly.--Intentionally aids, by any act or illegal omission, the doing of that thing. Explanation 1.--A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

* * * Explanation 2.--Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act."

13. The legal position as regards Sections 306 IPC which is long settled was recently reiterated by this Court in the case of Randhir Singh v. State of Punjab (2004) 13 SCC 129 as follows in paras 12 and 13:

"12. Abetment involves a mental process of instigating a person or intentionally aiding that person in doing of a thing. In cases of conspiracy also it would involve that mental process of entering into conspiracy for the doing of that thing. More active role which can be described as instigating or aiding the doing of a thing is required before a person can be said to be abetting the commission of offence under Section 306 IPC.

13. In State of W.B. v. Orilal Jaiswal this Court has observed that the courts should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty."

14. Further in the case of Kishori Lal v. State of M.P. (2007) 10 SCC 797, this Court gave a clear exposition of Section 107 IPC when it observed as follows in para 6:

"6. Section 107 IPC defines abetment of a thing. The offence of abetment is a separate and distinct offence provided in IPC. A person, abets the doing of a thing when (1) he instigates any person to do that thing; or (2) engages with one or more other persons in any conspiracy for the doing of that thing; or (3) intentionally aids, by act or illegal omission, the doing of that thing. These things are essential to complete abetment as a crime. The word "instigate" literally means to provoke, incite, urge on or bring about by persuasion to do any thing. The abetment may be by instigation, conspiracy or intentional aid, as provided in the three clauses of Section 107. Section 109 provides that if the act abetted is committed in consequence of abetment and there is no provision for the punishment of such abetment, then the offender is to be punished with the punishment provided for the original offence. "Abetted" in Section 109 means the specific offence abetted. Therefore, the offence for the abetment of which a person is charged with the abetment is normally linked with the proved offence."

[See also Kishangiri Mangalgiri Swami v. State of Gujarat (2009) 4 SCC 52]

15. Thus, this Court has consistently taken the view that before holding an accused guilty of an offence under Section 306 IPC, the Court must scrupulously examine the facts and circumstances of the case and also assess the evidence adduced before it in order to find out whether the cruelty and harassment meted out to the victim had left the victim with no other alternative but to put an end to her life. It is also to be borne in mind that in cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. Merely on the allegation of harassment without their being any positive action proximate to the time of occurrence on the part of the accused which led or compelled the person to commit suicide, conviction in terms of Section 306 IPC is not sustainable.

16. In order to bring a case within the purview of Section 306 of IPC there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. Therefore, the act of abetment by the person charged with the said offence must be proved and established by the prosecution before he could be convicted under Section 306 IPC.

17. The expression `abetment' has been defined under Section 107 IPC which we have already extracted above. A person is said to abet the commission of suicide when a person instigates any person to do that thing as stated in clause firstly or to do anything as stated in clauses secondly or thirdly of Section 107 IPC. Section 109 IPC provides that if the act abetted is committed pursuant to and in consequence of abetment then the offender is to be punished with the punishment provided for the original offence.

18. Learned counsel for the respondent-State, however, clearly stated before us that it would be a case where clause `thirdly' of Section 107 IPC only would be attracted. According to him, a case of abetment of suicide is made out as provided for under Section 107 IPC."

13. What constitutes an offence punishable under Section 498-A and 306 of the Indian Penal Code has also been discussed by this Court in ***State of H.P. vs. Pardeep Singh and another***, reported in ***Latest HLJ 2013 (HP) 1431.*** The relevant text of this judgment is also reproduced as under:

> ***"10.*** *At the outset it is desirable to discuss as to what constitutes the commission of an offence punishable under Sections 498-A and 306 of the Indian Penal Code. A bare reading of Section 498-A reveals that* ***sine qua non*** *to establish the said offence is subjecting to cruelty the wife by her husband or relative with a view to*

coerce her or any person related to her to meet any unlawful demand for any property or valuable security or willful conduct of the husband of such woman or a relative, of such a nature as is likely to drive her to commit suicide or to cause grave injury or danger to life, limb or health."

14. We may also make reference to the judgment of the Apex Court in ***Manju Ram Kalita vs. State of Assam,*** reported in ***(2009) 13 SCC 330,*** wherein it has been held as under:

> ***"11.*** *"Cruelty" for the purpose of Section 498-A IPC is to be established in the context of Section 498-A IPC as it may be different from other statutory provisions. It is to be determined/ inferred by considering the conduct of the man, weighing the gravity or seriousness of his acts and to find out as to whether it is likely to drive the woman to commit suicide, etc. It is to be established that the woman has been subjected to cruelty continuously/persistently or at least in close proximity of time of lodging the complaint. Petty quarrels cannot be termed as "cruelty" to attract the provisions of Section 498-A IPC. Causing mental torture to the extent that it becomes unbearable may be termed as cruelty."*
>
> ***12.*** *So far as the commission of offence punishable under Section 306 of the Indian Penal Code is concerned, the prosecution is required to prove beyond all reasonable doubt that some person has committed suicide as a result of abetment by the accused."*

15. It is now to be seen in the light of the principles settled in the judgments (supra) that the accused have abetted the commission of suicide by the deceased by administering beatings to her and also treating her with cruelty at the pretext of demand for dowry.

16. In order to infer the commission of offence punishable under Section 498-A of the I.P.C, the harassment of woman should not be mere harassment and rather harassment to coerce her to meet unlawful demand of dowry. In order to constitute cruelty, a solitary instance of harassment is not sufficient but there should be series of acts of harassment of the woman by her husband and his relatives. In this regard, we are drawing support from the judgment of the Hon'ble Apex Court in ***Girdhar Shankar Tawade vs. State of Maharashtra,*** reported in ***2002(5) SCC 177.*** The relevant text reads as follows:

> "18. A faint attempt has been made during the course of submissions that explanation (a) to the Section stands attracted and as such no fault can be attributed to the judgment. This, in our view, is a wholly fallacious approach to the matter by reason of the specific finding of the trial Court and the High Court concurred therewith that the death unfortunately was an accidental death and not suicide. If suicide is left out, then in that event question of applicability of explanation (a) would not arise - neither the second limb to cause injury and danger to life or limb or health would be attracted. In any event the willful act or conduct ought to be the proximate cause in order to bring home the charge under Section 498- A and not de-hors the same. To have an event sometime back cannot be termed to be a factum taken note of in the matter of a charge under Section 498-A. The legislative intent is clear enough to indicate in particular reference to explanation (b) that there shall have to be a series of acts in order to be a harassment within the meaning of explanation (b). The letters by itself though may depict a reprehensible conduct, would not, however, bring home the charge of Section 498-A against the accused. Acquittal of a charge under Section 306, as noticed hereinbefore, though not by itself a ground for acquittal under Section 498-A, but some cogent evidence is required to bring home the charge of Section 498-A as well, without which the charge cannot be said to be maintained. Presently, we have no such evidence available on record."

17. Now coming to the case in hand, admittedly, the deceased was married to accused Bhupinder Kumar in April, 2008. There is again no quarrel that she took poison on

23.3.2011 in the matrimonial home and died in Dr. R.P.G.M.C., Tanda, District Kangra. She has committed suicide within 7 years of her marriage in the matrimonial home. As per the medical evidence, she died in an unnatural death i.e. by consuming phosphine gas poisoning. The question which needs adjudication, however, is that it is on account of her harassment and torturing, she had taken such a drastic step to put an end of her life. The answer to this poser in all fairness and in the ends of justice would be in negative because the evidence produced by the prosecution even if taken as it is does not disclose any specific instance of harassment and cruelty and such allegations against the accused are rather general in nature. Her father, PW-1 Onkar Chand, while in the witness box tells us that at the time of marriage of deceased with accused No. 1, neither any list of dowry was given by the accused persons nor did they demand dowry articles from them. PW-2 Sudarshana Devi, the mother of the deceased, has admitted in her cross-examination that at the time of marriage, the accused had never made any demand for dowry. Similar is the version of PW-3 Neelma Devi, the sister of deceased as she has also admitted that at the time of marriage neither accused demanded dowry nor any list of dowry articles was given. Interestingly enough, the aunt of deceased, PW-4 Soma Devi has also made the similar statement while in the witness box as according to her, right from her marriage till her death no article in dowry was given to the deceased by her parents. Not only this, PW-1 Onkar Chand has also admitted that right from the date of marriage of deceased with accused No. 1, he has never given any money to her. Such evidence as has come on record by way of the testimony of prosecution witnesses itself makes it crystal clear that the prosecution case qua the accused had been torturing the deceased with cruelty at the pretext of demand for dowry is false. The story to this effect seems to be engineered and fabricated just to implicate the accused in a false case.

18. Interestingly enough, the complainant party never made any complaint against the accused to respectables in the area or the authorities concerned, such as local Panchayat and police etc. We may make reference here to the testimony of the complainant PW-1, who has admitted that he never lodged any report against the accused persons with any authority, including Gram Panchayat. Similar is the version of PW-2 Smt. Sudarshana Devi, as according to her, they never lodged any complaint against the accused persons anywhere. The prosecution case that the deceased was being tortured and harassed even on account of articles given to her in dowry were defective is also not proved beyond all reasonable doubt because PW-1 Onkar Chand has admitted in his cross-examination that he never disclosed in his statement as to what defects the accused had been pointing out in the articles given to the deceased in dowry. PW-2 Sudarshana Devi also tells us that even to her also the deceased had not disclosed as to what defects in the articles of dowry were being pointed out by the accused. The testimonies of prosecution witnesses that the accused had demanded refrigerator and T.V. in dowry is an improvement because nothing to this effect has come in the statement Ext. PW-1/A recoded under Section 154 Cr.P.C. However, if the evidence as has come on record by way of testimony of the prosecution witnesses qua this aspect is seen, PWs 1 to 4 while in the witness box have stated that they never disclosed the names of articles, the accused used to demand from the deceased in dowry. PW-4 Soma Devi has further stated that the deceased never disclosed that what articles were being demanded from her by the accused in dowry and as to what articles were deficient.

19. Whether the deceased visited her parental house on 22.3.2011 or on 23.3.2011 is also not proved beyond all reasonable doubt for the reasons that PW-1 Onkar Chand while in the witness box has stated that the deceased had come to his house on 'Chawarkha' on 22.3.2011 and apprised him about her harassment by the accused. According to him, he pacified his daughter by saying that he will speak to her husband and mother-in-law and she was sent back to matrimonial home. However, PW-2 Sudarshana Devi, mother of the deceased while corroborating the statement of her husband PW-1 Onkar Chand deposed that the deceased told them about her harassment at the pretext of demand for dowry. She was sent by them to matrimonial home on the next date i.e. 23.3.2011. If coming to the testimony of Neelama Devi (PW-3), on 23.3.2011, the deceased met her at 12:00 noon and told that the accused used to

harass and torture her at the pretext of demand for dowry. As per this witness also, they made the deceased to go back to the matrimonial home. Such evidence available on record is not suggestive of that the deceased was made to go back to her house by the witnesses on the same day i.e. 22.3.2011 or the next day i.e. 23.3.2011. Nothing has come on record as to whose 'chawarkha' was being performed on 22.3.2011. Above all, as per the version of PW-3 Neelama, it took about two hours to reach in the matrimonial home of Naina on foot from her house. When this witness and deceased met in the house of former at 12:00 noon on that day, the deceased could have reached in the matrimonial home around 2:00 PM on that day. Had it been so, how the intimation qua the deceased having consumed poison could have been given to her father PW-1 Onkar Chand at 1:00 PM. Therefore, the prosecution story that the deceased had visited the house of her parents, a day prior to commission of suicide, seems to be engineered and fabricated just to show that immediately before the deceased consumed poison she was tortured and harassed by the accused. The prosecution has, however, miserably failed to prove so for the reason that even if it is believed that the deceased visited her parental house on 22.3.2011 and disclosed that the accused used to harass her at the pretext of demand for dowry for want of date, time and specific instance of such harassment, it cannot be believed by any stretch of imagination that the deceased was beaten up and harassed mentally as well as physically immediately before she came to the house of her parents.

20. Interestingly enough, the parents and near relations of the deceased never lodged any report against the accused persons qua alleged demand of dowry from them by the deceased and that her harassment for and in connection with demand for dowry continued till her death. The non-reporting of the matter to any authority is an improbable human conduct because normally when a daughter would tell her miserable plight in the matrimonial home in connection with demand of dowry, the parents or other family members cannot be expected to be a mute spectators and rather deal with the husband or the erring relatives of the husband sternly in accordance with law. PW-1 Onkar Chand, though tells us that when he went to the place of the accused to settle the matter with them, they quarreled with him also, however, PW-5 Megh Raj associated by the police to substantiate this aspect of the matter has turned hostile and not supported the prosecution case in this regard.

21. The reappraisal of the evidence in the manner as aforesaid leads to the only conclusion that deceased though has committed suicide, however, not on account of being tortured and harassed by the accused persons. No doubt, nothing has come on record that if the commission of suicide by the deceased has not been abetted by the accused persons, what prompted her to put an end of her life, however, on this score also, no criminal liability can be fastened upon the accused.

22. It is not always necessary that suicide is committed by a married woman only on account of the fact that she was being subjected to cruelty by her husband or relatives of her husband. Sometimes, it is the temperament and approach of a person to various issues coming across in his/her life also to persuade such person to take such a drastic step.

23. True it is that this incident has taken away the life of a young woman, that too, within four years of her marriage with accused No. 1 in the matrimonial home. The presumption under Section 113-A of the Indian Evidence Act, however, cannot be drawn in this case because the prosecution has miserably failed to discharge the initial onus upon it that deceased has committed suicide only on account of her harassment by the accused. The presumption under Section 113-B of the Evidence Act cannot also be drawn in this case because it is not proved that the accused used to demand dowry from her and used to torture her mentally as well as physically on this score.

24. As a matter of fact, the present is a case where nothing suggesting that the deceased was being tortured or harassed by the accused persons in relation to their demand of dowry or otherwise and the degree of cruelty was so high that she was not able to understand comparison between life and death and in such a state of mind, chosen the pangs of death, has come on record. True it is that in normal circumstances, no person is expected to take such a

drastic step to do away with his/her life that too without there being any cause, however, present is not a case where it can be said that the deceased has committed suicide owing to cruel treatment meted out to her by the accused persons.

25. In view of what has been said hereinabove, this appeal fails and the same is accordingly dismissed. The personal bonds furnished by all the accused persons shall stand cancelled and the sureties discharged.

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

Criminal Appeal No. 24 of 2015 alongwith
Criminal Appeal No. 65 of 2015, Criminal Appeal No. 66 of 2015,
Criminal Appeal No.67 of 2015 & Criminal Appeal No.68 of 2015.
Judgment reserved on : 27.9.2016
Date of Decision : October 6, 2016

1. Cr. Appeal No. 24 of 2015
Wakar Chaudhary ...Appellant
Versus
State of Himachal Pradesh ...Respondent
2. Cr. Appeal No. 65 of 2015
Dalip ...Appellant
Versus
State of Himachal Pradesh ...Respondent
3. Cr. Appeal No. 66 of 2015
Bablu ...Appellant
Versus
State of Himachal Pradesh ...Respondent
4. Cr. Appeal No. 67 of 2015
Iqbal Khan ...Appellant
Versus
State of Himachal Pradesh ...Respondent
5. Cr. Appeal No. 68 of 2015
Asha @ Sarfutti ...Appellant
Versus
State of Himachal Pradesh ...Respondent

Indian Penal Code, 1860- Section 302 and 396 read with Section 120B- **Indian Arms Act, 1959**- Section 25- Dead body of deceased R and D were found – their hands and mouths were tied and their throats were slit with a knife lying at the spot – the accused were arrested and they confessed to the commission of crime – disclosure statements were made – it was found on investigation that all the accused travelled in a taxi from Delhi to Solan, where they spent a night in a hotel – they committed the murder of the deceased, committed dacoity and sold the gold ornaments – the ornaments were sold at Delhi- the accused were tried and convicted by the Trial Court- held in appeal that testimonies of prosecution witnesses are contradicting each other on material points, which make their testimonies doubtful – the case is based on circumstantial evidence and the circumstances should lead unerringly to the guilt of the accused- material witnesses were not examined – accused were not known to each other – the possibility of the innocence of the accused cannot be ruled out- finger prints of the accused did not match the finger prints lifted by the police from the scene of the crime – the call record of the mobile of the deceased R was not placed on record- independent witnesses to the recovery were not examined – the manager of the hotel admitted that he could not identify the guests staying in the hotel – the

genesis of the prosecution story regarding theft of ornaments from the body of the deceased R is extremely doubtful – no doors were opened – disclosure statement does not inspire confidence- PW-10 resiled from his earlier statement recorded by Magistrate - sufficient time was not given by Magistrate to the witness- circumstances do not establish the guilt of the accused conclusively- appeal allowed and accused acquitted. (Para-10 to 78)

Cases referred:

Shivaji Sahabrao Bobade and another Versus State of Maharashtra, (1973) 2 SCC 793
Aher Raja Khima Versus State of Surashtra, AIR 1956 SC 217
Lal Mandi v. State of W.B., (1995) 3 SCC 603
Pudhu Raja and another Versus State Represented by Inspector of Police, (2012) 11 SCC 196
Madhu Versus State of Kerala, (2012) 2 SCC 399
Dilip Singh Moti Singh versus State of Gujarat, (2010) 15 SCC 622
Mulakh Raj and others Versus Satish Kumar and others, (1992) 3 SCC 43; and Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116
Padala Veera Reddy v. State of Andhra Pradesh and others, 1989 Supp (2) SCC 706,
State of U.P. v. Ashok Kumar Srivastava, (1992) 2 SCC 286
Mukhtiar Singh and another v. State of Punjab, AIR 1995 SC 686
Yogendra Morarji vs. State of Gujarat, (1980) 2 SCC 218
Murarilal vs. State of M.P., AIR 1980 SC 531
Gopal Krishnaji Ketkar vs. Mohamed Haji Latif & others, AIR 1968 SC 1413
Mussauddin Ahmed vs. State of Assam, (2009) 14 SCC 541
Pulukuri Kottaya and others v. Emperor, AIR (34) 1947 Privy Council 67
State of Bombay Vs. Kathi Kalu Oghad, (11 Judges Bench), 1961 (2) Cri.L.J. 856
Bodhraj alias Bodha & others vs. State of Jammu and Kashmir, (2002) 8 SCC 45
Harivadan Babubhai Patel vs. State of Gujarat, (2013) 7 SCC 45
Mahabir Mandal & others vs. State of Bihar, (1972) 1 SCC 748
Kishore Chand vs. State of Himachal Pradesh, (1991) 1 SCC 286
Harnath Singh v. The State of Madhya Pradesh, AIR 1970 SC 1619
Ram Kishan Singh v. Harmit Kaur and another, AIR 1972 SC 468
Ram Lakhan Sheo Charan and others v. State of UP, 1991 Cr.L.J 2790
Prem Kaur v. State of Punjab and others, (2013) 14 SCC 653

For the appellant : Mr. Anoop Chitkara, Advocate, for the appellant in Cr. A. No. 67 of 2015.
Mr. Vinay Thakur, Advocate, as Legal Aid Counsel for the appellant in Cr. A. No. 66 of 2015.
Mr. Vir Bahadur Verma, Advocate as Legal Aid Counsel for the appellant in Cr. A. No. 65 of 2015.
Ms. Archana Dutt, Advocate, as Legal Aid Counsel for the appellant in Cr. A. No. 68 of 2015.
Mr. O. P. Chauhan & Ms. Shikha Chauhan, Advocates, for the appellant in Cr. A. No. 24 of 2015.

For the respondent : Mr. Vikram Thakur and Mr. Puneet Rajta, Deputy Advocate Generals for the respondent/State in all the appeals.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Appellants-convicts Wakar Chaudhary, Dalip, Bablu, Iqbal Khan and Asha @ Sarfutti (hereinafter referred to as the accused), have filed the instant Criminal Appeals, assailing

the judgment dated 20.11.2014/26.11.2014, passed by the learned Addl. Sessions Judge-I, Solan, Distt. Solan, H.P., in Sessions Trial No. 24-S/7 of 2012, titled as *State of Himachal Pradesh vs. Wakar Chaudhary & others*, whereby they all stand convicted for having committed offences punishable under the provisions of Sections 302 and 396, both read with Section 120B of the Indian Penal Code. In addition, accused Wakar Chaudhary also stands convicted for having committed an offence punishable under the provisions of Section 25-54-59 of the Arms Act, 1959. They all stand sentenced as under:

Name of accused	Sections	Sentence
Wakar Chaudhary	302/120B IPC	Rigorous Imprisonment for life and to pay a fine of Rs.5000/-, and in default of payment thereof to further undergo simple imprisonment for a period of three months.
	396/120B IPC	Rigorous imprisonment for 10 years and pay fine of Rs.3000/- and in default of payment thereof to further undergo simple imprisonment for a period of two months.
	25-54-59 Arms Act	Rigorous imprisonment for 3 years and pay fine of Rs.3000/- and in default of payment thereof to further undergo simple imprisonment for a period of two months.
Dalip, Bablu, Iqbal Khan and Asha @ Sarfutti.	302/120B IPC	Rigorous Imprisonment for life and to pay a fine of Rs.5000/- each and in default of payment thereof to further undergo simple imprisonment for a period of three months each.
	396/120B IPC	Rigorous imprisonment for 10 years each and pay fine of Rs.3000/- each and in default of payment thereof to further undergo simple imprisonment for a period of two months each.

2. In short, it is the case of prosecution that Priya Mahant (PW-4) and Rajesh (PW-5) noticed bodies of deceased Rattni @ Nani and Desh Raj lying inside the Kinner House, situate at Rajgarh Road, Solan, H.P. Such fact was immediately brought to the notice of the police at Police Station Sadar, Solan. Police Official Inspt. Raj Kumar (PW-26) visited the spot and inspected the room where the bodies were lying. Hands and mouth of both the deceased were tied and their throats slit with a knife lying on the spot. Inquest reports (Ext.PW-26/B to Ext. PW-26/E) came to be prepared and dead bodies sent for post mortem, so conducted by Dr. Anuj Kumar Gupta (PW-23) and reports (Ext.PW-23/C & Ext. PW-23/D) taken on record. After conducting preliminary investigation, the premises were sealed by the police. Police took into possession various incriminating articles from the spot and sent them for analysis to the Forensic Science Laboratory for opinion of experts. During the course of investigation, police interrogated several persons, including Priya Mahant (PW-4) and Manish (not examined), who were associated with the affairs and activities of the Kinner Centre run and managed by deceased Rattni. Initially police suspected hand of these persons and also took them into custody. However, since they were released on bail and no substantive evidence qua their involvement came to light and investigation did not lead to any further clue, eventually untraced report came to be filed on 27.7.2011, in connection with F.I.R. No. 267/2009, dated 29.10.2009 (Ext. PW-17/A) registered at Police Station Solan Sadar, Distt. Solan, H.P.

3. After a period of approximately two years, on 1.12.2011, SI-Ved Parkash (not examined) deputed at Anti Auto Theft Staff North West District, Delhi received a secret information that one lady alongwith four – five persons was seeking opinion from a lawyer at the

Court Complex, Rohini, in connection with an offence/murder which took place at Solan. With the receipt of such information, immediately a police party came to be constituted and same day, accused were nabbed. During interrogation, they confessed to have committed murder of deceased Rattni and Desh Raj. Such information came to be passed on to the police officials of Police Station Solan and on receipt thereof, Inspt. Chaman Lal (PW-27) after reaching Delhi took custody of the accused and by obtaining transit remand, brought them to Solan, where, in custody, they made confessional/disclosure statements in the presence of independent witnesses. Also pursuant thereto, accused led the police identifying various places of crime.

4. During the course of such investigation, police discovered that on 28th October, 2009, in pursuance of a criminal conspiracy, all the accused travelled in a taxi from Delhi to Solan where they spent the night in a hotel and in the morning of 29th October, 2009, at about 11.00 – 11.30 a.m., visited the Kinner Centre and after murdering the deceased, committed dacoity by stealing their gold ornaments. Thereafter in a huff, all of them left the spot only to return to Delhi, where accused Wakar Chaudhary sold the gold ornaments to a jeweler. Also while committing the crime, accused Wakar Chaudhary unauthorizedly used a licenced revolver owned by him. With the completion of investigation, which prima facie, revealed complicity of the accused in the alleged crime, challan came to be presented against them in the Court for trial.

5. Accused were charged for having committed offences punishable under the provisions of Sections 302 and 396, both read with Section 120-B of the Indian Penal Code. Additionally accused Wakar Chaudhary was charged for having committed an offence punishable under the provisions of Section 25-54-59 of the Arms Act. All the accused pleaded not guilty and claimed trial.

6. In order to establish the aforesaid charges, prosecution examined as many as 29 witnesses and statements of the accused under Section 313 of the Code of Criminal Procedure were recorded, in which they took plea of innocence and false implication. No evidence in defence came to be led by them.

7. Appreciating the material placed on record by the prosecution, trial Court, as observed earlier, convicted all the accused in relation to all the charged offences and sentenced them as aforesaid. Hence the present appeals.

8. In convicting the accused what primarily weighed with the trial Court was: (i) Confessional statements made by the accused before the police officials, admitting their guilt of having murdered the deceased; (ii) Their disclosure statements which, (a) led to the identification of the spot of crime; (b) the hotel where they spent the night intervening 28th/29th October, 2009; (c) Place and the person to whom, after committing dacoity, gold ornaments of the deceased came to be sold; (iii) The version of Nizam (PW-10), driver of the taxi, in which, the accused travelled from Delhi to Solan and back; (iv) Acquaintanceship between accused Asha and deceased Rattni.

9. We have heard learned counsel for the parties and also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that the reasoning adopted by the trial Court is perverse and 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 material placed on record, causing serious prejudice to the accused, resulting into miscarriage of justice.

10. Contradictions in the testimony of the witnesses to our mind, are major, grave and material, rendering their version to be absolutely uninspiring in confidence, impeaching their credibility and reliability.

11. 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)

[See: *Aher Raja Khima Versus State of Surashtra*, AIR 1956 SC 217].

12. 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.

13. 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.

14. Undisputedly it is not a case of direct evidence, but that of circumstantial evidence. We shall first deal with the law on the point.

15. Law with regard to circumstantial evidence is now well settled. It is a settled proposition of law that when there is no direct evidence of crime, the guilt of the accused can be proved by circumstantial evidence, but then the circumstances from which the conclusion of guilt is to be drawn, should be fully proved and such circumstances must be conclusive in nature, to fully connect the accused with the crime. All the links in the chain of circumstances must be established beyond reasonable doubt, and the proved circumstances should be consistent, only with the hypothesis of guilt of the accused, being totally inconsistent with his innocence. While appreciating the circumstantial evidence, the Court must adopt a very cautious approach and great caution must be taken to evaluate the circumstantial evidence. [*Pudhu Raja and another Versus State Represented by Inspector of Police*, (2012) 11 SCC 196; *Madhu Versus State of Kerala*, (2012) 2 SCC 399; *Dilip Singh Moti Singh versus State of Gujarat*, (2010) 15 SCC 622, *Mulakh Raj and others Versus Satish Kumar and others*, (1992) 3 SCC 43; and *Sharad Birdhichand Sarda Versus State of Maharashtra*, (1984) 4 SCC 116.].

16. Also, apex Court in *Padala Veera Reddy v. State of Andhra Pradesh and others,* 1989 Supp (2) SCC 706, held that when a case rests upon circumstantial evidence, following tests must be satisfied:

> "(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
>
> (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."
>
> (Also see: *Ramreddy Rajesh Khanna Reddy v. State of A.P.,* (2006) 10 SCC 172; *Balwinder Singh v. State of Punjab,* 1995 Supp (4) SCC 259; and *Harishchandra Ladaku Thange v. State of Maharashtra,* (2007) 11 SCC 436).

17. Each case has to be considered on its own merit. Court cannot presume suspicion to be a legal proof. In the absence of an important link in the chain, or the chain of circumstances getting snapped, guilt of the accused cannot be assumed, based on mere conjectures.

18. The apex Court in *State of U.P. v. Ashok Kumar Srivastava*, (1992) 2 SCC 286, while cautioning the Courts in evaluating circumstantial evidence, held that if the evidence adduced by the prosecution is reasonable, capable of two inferences, the one in favour of the accused must be accepted. This of course must precede the factum of prosecution having proved its case, leading to the guilt of the accused.

19. In the instant case, perusal of the impugned judgment reveals that trial Court, as is so required under law (*Mukhtiar Singh and another v. State of Punjab,* AIR 1995 SC 686), has specifically not culled out the circumstances or framed the points for consideration against the accused. Before this Court, prosecution has pressed the following circumstances emerging from record:-

(1). Recovery of dead body of Rattni and Desh Raj;

(2) Registration of F.I.R. No. 267 of 2009 (Ext. PW-17/A), dated 29.10.2009 at Police Station Sadar Solan, in connection with the crime;

(3) Non involvement of Priya Mahant (PW-4) or Manish in the crime;

(4) Receipt of secret information and arrest of the accused at Delhi where they made confessional statements;

(5) Custody of the accused having been handed over to police officials of Police Station Solan;

(6) Disclosure statements made by the accused at Solan;

(7) Identification of various spots of crime by accused Iqbal, Dalip and Wakar Chaudhary;

(8) Acquaintanceship of deceased with accused Asha;

(9) Accused having travelled from Delhi to Solan and spent the night in a hotel and the following morning, after committing the crime, returned to Delhi. Their presence having been noticed on the spot by an independent person i.e. Prerna;

(10) Recovery of weapon of offence i.e. knife (Ext.P-3); and

(11) Recovery of pistol from the custody of accused Wakar Chaudhary.

20. For establishing the same we were minutely taken through the testimonies of all the witnesses and other evidence on record.

21. But before we deal with the testimonies of the prosecution witnesses, it would be worthwhile to discuss certain undisputed facts – yes undisputed – which have emerged on record through their testimonies:

(i) Information of death of the deceased came to be furnished to the police by Priya Mahant (PW-4), Shilpa, Manish and Rajesh (PW-5);

(ii) Significantly neither Shilpa nor Manish (himself a suspect) stand examined in Court;

(iii) Inspt. Raj Kumar (PW-26) who initially investigated the case did not rule out the possibility of involvement of these persons in the crime. After all, both of them had left the house together, in the company of Priya Mahant and Rajesh;

(iv) Priya Mahant and Manish were themselves suspects and were arrested and confined to judicial custody for 54 days;

(v) Eventually untraced report dated 29.7.2011 came to be filed by the police in the Court;

(vi) Asha was known to deceased Rattni from before, which information came to be furnished by Rajesh (PW-5) to the police in the year 2009. Police did not suspect her role in the crime. Nor did anyone point out any finger of suspicion against her;

(vii) None of the other accused had any association with the deceased or their activities;

(viii) Accused were not known to each other from before. They were neither friends, acquaintances or business partners;

(ix) Admission of some of the prosecution witnesses about the ailing condition and ill health of deceased Rattni, who more or less, was confined to the four walls of her residence (Kinner Centre);

(x) Police handed over key of the room of deceased Rattni to Sweety, ordinarily a resident of Kalka (Haryana), who had rivalry with the deceased over the area of operation. Why it was so done, remains unexplained on record. Her involvement in the crime has not been ruled out;

(xi) Existence of a dispute with regard to succession amongst between Priya Mahant, Asha @ Sarfutti and Sweety;

(xii) Neither did police associate nor did prosecution examine any independent witnesses of repute in Court. They only associated Shami Kaushal (PW-25) who himself was a convict in relation to an NDPS crime;

(xiii) Records so taken on record by Inspt. Raj Kumar (PW-26), of telephonic conversation *inter se* Priya, Sweety and deceased Rattni are missing from the record;

(xiv) Also Prerna, an independent person who allegedly last saw the accused near the place of occurrence of crime, remains unexamined in Court;

(xv) Rough sketch prepared by Inspt. Raj Kumar (PW-26) for identification of the accused through Prerna is also missing from the record;

(xvi) Proceedings of test identification parade so got conducted from Prerna, for identifying accused Asha is not on record;

(xvii) Finger prints of the accused taken by Inspt. Raj Kumar (PW-26) are not part of the record;

(xviii) Police Official SI-Ved Parkash who received the secret information from an "informer" (not examined) of the accused seeking legal opinion at the Courts Complex, Rohini (Delhi) was also not examined in court;

(xix) Though allegedly arms weapon i.e. revolver was recovered from Wakar Chaudhary at Delhi, but however conviction is that of an unlicensed pistol; and

(xx) What prompted the accused to seek legal opinion at Delhi after a gap of two years, in the teeth of investigation having closed and untraced report filed in the Court remains unestablished on record.

22. We have highlighted these points only to demonstrate the missing links in the chain of events, rendering the prosecution case of involvement of only the accused and none else in the crime to be doubtful.

23. Repetitive that we may sound but we are constrained to observe that Prerna was the most material witness in the instant case. She was the sole eye witness. After all, police officials want us to believe that she had seen the movement of the accused at the spot of crime. And this was at the time of commission of crime. No reason is forthcoming for her non examination in Court. Inspt. Raj Kumar (PW-26) records her presence and admits of having shown rough sketch of the alleged culprits (undisclosed) to her, which also never came to be placed on record. In paragraph- 48 of the judgment, trial Court erred in observing that non-identification of the accused by Prerna would not render the prosecution case to be fatal. Identification of the accused through her was absolutely necessary, more so in the absence of proof of any conspiracy, having been established on record.

24. Neither the lawyer from whom accused sought legal opinion, nor SI Ved Prakash, AATS Delhi, stands examined in Court. Save and except the statement of taxi driver Nizam (PW-10) and Manager of the hotel Ashok Kumar (PW-6), prosecution has failed to establish as to how and in what manner the accused were otherwise known to each other and with what motive they hatched a conspiracy of murdering the deceased or together committing an act of dacoity.

25. Prosecution has not been able to establish the charge of conspiracy in any manner. In similar circumstances the apex Court in *Yogendra Morarji vs. State of Gujarat,* (1980) 2 SCC 218 observed that "it was as much the duty of the Court as of the parties to bring on the record all material evidence necessary to reach at the truth. In the circumstances, the failure of the accused to examine these persons as his witnesses, therefore, did not *ipso facto* give rise to the inference that the defence story was absolutely false".

26. It has come on record that finger prints of the accused were taken by the police. They also did not match with the finger prints lifted by the police from the scene of crime, as is so admitted by Inspt. Chaman Lal (PW-27). Now the report of the Finger Prints Bureau is not on record. Why it was concealed remains a mystery. Adverse presumption can be drawn under the provisions of Section 114 (g) of the Indian Evidence Act, 1872. In paragraph – 48 of the judgment, trial Court does take notice of such fact, but then, records no findings thereto. In a case of circumstantial evidence it was an important link in the chain.

27. The apex Court in *Murarilal vs. State of M.P.,* AIR 1980 SC 531 has observed that "the more developed and the more perfect a science, the less the chance of an incorrect opinion and the converse if the science is less developed and imperfect. The science of identification of finger-prints has attained near perfection and the risk of an incorrect opinion is practically non-existent".

28. During investigation, as is so admitted by Inspt. Raj Kumar, call record of the mobile used by deceased was obtained, but however, it never came to be placed on record by the prosecution. Trial Court has not considered this aspect of the matter. It was absolutely necessary, for it would have highlighted involvement of Priya Mahant and Manish, who themselves were suspects, in the backdrop of admission made by Inspt. Raj Kumar that he had been informed by Sweety that prior to the occurrence of the crime, Priya Mahant had sold about 15 to 20 tolas of gold belonging to deceased Nani (Rattni).

29. In *Gopal Krishnaji Ketkar vs. Mohamed Haji Latif & others,* AIR 1968 SC 1413, has observed that "even if the burden of proof does not lie on a party, the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof".

30. The apex Court in *Mussauddin Ahmed vs. State of Assam,* (2009) 14 SCC 541, has held that:

> "11. It is the duty of the party to lead the best evidence in its possession which could throw light on the issue in controversy and in case such material evidence is withheld, the court may draw adverse inference under Section 114 Illustration (g) of the Evidence Act, 1872 notwithstanding that the onus of proof did not lie on such party and it was not called upon to produce the said evidence [vide *Gopal Krishnaji Ketkar vs. Mohamed Haji Latif & others,* AIR 1968 SC 1413].

31. Under these circumstances and most certainly adverse inference can be drawn against the State.

Circumstances No. (1) and (2):

32. Recovery of dead body of Rattni and Desh Raj vide memos (Ext. PW-26/B & Ext. PW-26/D) dated 29.10.2009, which fact came to be proved by Priya Mahant (PW-4), Rajesh (PW-

5) and Inspt. Raj Kumar (PW-26) and that F.I.R. No. 267/2009, dated 29.10.2009 (Ext. PW-17/A) Police Station Solan Sadar, Distt. Solan, H.P. came to be registered is not in dispute.

Circumstance No. (3):

33. Despite arrest of witness Priya Mahant (PW-4) and her acquaintance Manish (not examined) on 1.11.2009 who remained in judicial custody till 24.12.2009 (54 days), police found no evidence against these persons which led to the filing of untraced report by the police on 27.7.2011. No doubt it was for the Investigating Officer to have formed his opinion with regard to any incriminating circumstance against these persons but in the given facts and circumstances, we are of the considered view that concealment of relevant material, as discussed earlier, has created doubt about such fact. Principles laid down in *Sharad Birdhichand Sarda* (supra) require exclusion of involvement of none else other than the accused in the crime about which in the factual backdrop there is significant and material breach.

Circumstances No. (4):

34. Prosecution wants the court to believe that on receipt of secret information by the police party headed by SI Ved Prakash, AATS Delhi, to the effect that the accused were seeking legal opinion in connection with the crime in question, so proved by SI Ramesh Kumar (PW-2), accused were detained at Court Complex Rohini, Delhi on 1.12.2011 when they made confessional statements (Ext. PW-2/D1 to Ext. PW-2/D5), dated 1.12.2011 of having committed the murder, in the presence of SI Ramesh Kumar (PW-2).

35. There is no explanation on record as to why SI Ved Prakash, AATS Delhi, was not examined in Court. If the description of the informer was to be kept secret, at least the Lawyer from whom the accused were allegedly seeking opinion could have been examined in Court. It is difficult to believe that in a place like Delhi and that too within the court complex, which is busy, no independent witness could easily be made available and associated at the time the accused were detained and made confessional statements. Also who is this Lawyer, as stated by SI Ramesh Kumar (PW-2) is a mystery. According to this witness, woman Constable Neelam was also associated when accused were nabbed on 1.12.2011. Even she remains unexamined in Court. It was necessary to lend credence to the otherwise shaky version of the witness.

36. Further Ramesh Kumar wants the Court to believe that accused confessed of having committed murder, information whereof, came to be passed on to Police Station Sadar, Solan on telephone. As per sequence of events so narrated by this witness, thereafter accused were arrested under Section 41 (1A) Cr.P.C. and personal belongings, including a revolver were recovered from them. Also during interrogation, accused made confessional statements (Ext. PW-2/D-I to Ext. PW-2/D-V), admitting having murdered the deceased. The witness is categorical that such statements came to be made when the accused were interrogated separately. Now why is it that when first time the accused made disclosure statements it was immediately not reduced into writing.

37. 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.**"**

38. 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)

39. In *State of Bombay Vs. Kathi Kalu Oghad, (11 Judges Bench)*, 1961 (2) Cri.L.J. 856, the apex Court held that:

"11. … … … "To be a witness" means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. A person is said 'to be a witness' to a certain state of facts which has to be determined by a court or authority authorised to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay, or giving his opinion, as an expert, in respect of matters in controversy. Evidence has been classified by text writers into three categories, namely, (1) oral testimony; (2) evidence furnished by documents; and (3) material evidence. We have already indicated that we are in agreement with the Full Court decision is Sharma's case, 1954 SCR 1077: (AIR 1954 SC 300) that the prohibition in clause (3) of Article 20 covers not only oral testimony given by a person accused of an offence but also his written statements which may have a bearing on the controversy with reference to the charge against him. … … … … … …

… It is well established that clause (3) of Article 20 is directed against self- incrimination by an accused person. Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge. For example, the accused person may be in possession of a document which is in his writing or which contains his signature or his thumb impression. … …

12. In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so.

In other words, it should be a statement which makes the case against the accused person at least probable, considered by itself." ... ...

[Emphasis supplied]

40. In *Bodhraj alias Bodha & others vs. State of Jammu and Kashmir,* (2002) 8 SCC 45, Hon'ble Supreme Court of India, held that:-

"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)

41. 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]."

42. The apex Court in *Mahabir Mandal & others vs. State of Bihar,* (1972) 1 SCC 748 has held that:

"47. Reference may also be made to Section 26 of the Indian Evidence Act, according to which 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 against such person. There is nothing in the present case to show that the statements which were made by Kasim and Mahadeo accused on September 18, 1963, at the police station in the presence of Baijnath resulted in the discovery of any incriminating material as may make them admissible under Section 27 of the Indian Evidence Act. As such, the aforesaid statements must be excluded from consideration."

43. Also the apex Court in *Kishore Chand vs. State of Himachal Pradesh,* (1991) 1 SCC 286 has observed that:

> "8. … … Section 25 of the Evidence Act provides that no confession made to a police officer shall be proved as against a person accused of any offence. Section 26 provides that no confession made by any person while he is under custody of the police officer, unless it be made in the immediate presence of a magistrate, shall be proved as against such person. Therefore, the confession made by an accused person to a police officer is irrelevant by operation of Section 25 and it shall (*sic* not) be proved against the appellant."…

44. In the aforesaid backdrop, findings returned by the trial Court making the confessional statements to be admissible, as observed in paragraphs 51 to 53 of the impugned judgment, are legally unsustainable. Such statements are hit by the constitutional provisions and Section 25 of the Evidence Act and as such could not have been relied upon for establishing the fact in issue.

Circumstance No. (5):

45. This circumstance though stands proved on record through the testimonies of SI Ramesh Kumar (PW-2) and Inspt. Chaman Lal (PW-27), but of no consequence as we find the link in the chain to have been snapped at the first instance itself.

Circumstance No. (6):

46. Prosecution wants the Court to believe that at Solan, accused Iqbal Khan having made disclosure statement (Ext.PW-25/A), dated 5.12.2011 in the presence of Shami Kaushal (PW-25) and Kailash Thakur (not examined); accused Dalip having made disclosure statement (Ext. PW-20/A), dated 6.12.2011 in the presence of HC Om Parkash (PW-20) and HC Sohan Lal (not examined); and accused Wakar Chaudhary having made disclosure statement (Ext. PW-20/B), dated 8.12.2011 also in the presence of HC Om Parkash (PW-20) and HC Sohan Lal (not examined).

47. We express our doubt with regard to the voluntary nature of such disclosure statements. In Court, prosecution has not examined witness Kailash Thakur and the credibility of another witness Shami Kaushal (PW-25) is suspect. In fact, he is a convict and in touch with the police. One cannot forget the fact that such statement came to be recorded five days after the arrests, making the delay significant and unexplainable, more so in view of the fact that police did not suspect involvement of accused Asha in the crime.

Circumstance No. (7):

48. Prosecution wants the court to believe that pursuant to the disclosure statement (Ext. PW-6/B), accused Iqbal got identified the hotel where they had spent the night prior to the commission of the crime which led the police to recover the record of the hotel, so taken into possession vide memo (Ext.PW-6/C) dated 5.12.2011, proved by Ashok Kumar (PW-6), Shami Kaushal (PW-25) and Inspt. Chaman Lal (PW-27).

49. Identification of the spot of crime by accused Dalip vide memo (Ext. PW-7/A) dated 6.12.2011, proved by Neha (PW-7) and Sunita (not examined).

50. Identification of the Jeweler at Delhi vide memo (Ext. PW-21/A) dated 9.12.2011 in the presence of Mukesh Kumar (not examined), ASI Rakesh Guleria (PW-21) and Inspt. Chaman Lal (PW-27); and recovery of receipt of gold ornaments sold by accused Wakar

Chaudhary to Vijay Verma (PW-8) vide memos (Ext. PW-8/A and Ext. PW-8/B) dated 9.12.2011 as also statement of complainant (Ext. PW-4/A) proved by these persons as also Inspt. Raj Kumar (PW-26).

51. Pursuant to the disclosure statement (Ext. PW-25/A), Shami Kaushal (PW-25) and Inspt. Chaman Lal (PW-27) went to the hotel as shown to them by accused Iqbal. As such the hotel was got identified. But the fact of the matter is that police took all the accused persons to the hotel. Why so? remains unexplained. Perhaps they wanted them to be identified from the establishment. However on this count, we may only observe that even Ashok Kumar, Manager of the hotel (PW-6), the only witness examined in the Court admits that he could not identify each and every customer who had stayed in his hotel consisting of fifteen rooms. Significantly it is not the case of this witness that he knew the accused from before. In Court, he does state that even though police had brought all the accused, he could only identify accused Wakar Chaudhary, who allegedly filled up the register. He admits that no other accused signed any of the documents of the hotel. His version of having identified Wakar Chaudhary to be the person who signed the register cannot be said to be inspiring in confidence, considering the time gap of more than two years and his admission of not being in a position of identifying other customers having stayed in his hotel. It is not the case of this witness that accused Wakar Chaudhary was otherwise his frequent/regular customer. Significantly police did not get the accused identified from this witness, by conducting the test identification parade. Also this witness was aware of the fact that the deceased had died. He did not inform the police of the accused having stayed in his ho tel, the night prior to the incident.

52.Also authenticity of register (Ext.P-7) itself is in doubt, for the first entry recorded therein is of 20.8.2009 and is also not signed by any government official, who otherwise comes for inspection of the hotel in relation to the assessment of luxury tax.

53. Neha (PW-7) was associated by the police for identification of the spot of crime by accused Dalip. But then we do not find her testimony to be inspiring in confidence. Definitely she is not an independent person, for the police handed over the keys of the residence of deceased Rattni to her *Guru* i.e. Sweety. Also this person is resident of Kalka (Haryana) and ordinarily not residing within the state of Himachal Pradesh. Now why would police associate a person from outside the State as a witness is a mystery. In any case, identification of the spot cannot be said to be discovery of fact, for the police was already aware of the same.

54. At this juncture we may deal with the opinion (Ext. PW-29/A) of expert Dr. Jagjit Singh (PW-29) proving the exemplar handwriting of accused Wakar Chaudhary to have matched with the handwriting on register (Ext. P-7). This is only corroborative piece of evidence, which in the given facts and circumstances cannot be considered to be substantive in nature. One cannot forget the time gap between the date of entry in the register and the alleged identification of the said accused by witness Ashok Kumar. Assuming hypothetically this accused had actually stayed in the hotel, then save and except the ocular version of Nizam (PW-10), whom we otherwise do not find to be stating the truth, as we shall discuss herein later, there is nothing on record to establish that the remaining accused also stayed in the hotel.

55. Prosecution wants the Court to believe that after robbing the deceased of their gold ornaments, accused Wakar Chaudhary sold them to a Jeweler by the name of Vijay Verma (PW-8) at Delhi. Disclosure statement (Ex.PW-20/B) and identification of the place of the jeweler (Ex.PW-21/A), recovery of the estimate bill book (Ex.P-8) and receipt (Ex.PW-8/B) are pressed by the prosecution.

56. We may only observe that the genesis of prosecution story of theft of ornaments and other valuables from the body of deceased or from their house is extremely doubtful bordering falsehood.

57. In her statement (Ex. PW-4/A), Priya Mahant (PW-4) got recorded that ornaments worn by the deceased on their necks and hands, as also currency were stolen. Significantly, there is no allegation of breaking open of almirah or locker. But Inspt. Raj Kumar (PW-26), in the

inquest reports, did not record such fact. But while appearing in Court, Priya Mahant improved her version by stating that almirah placed inside the room was opened and locker thereof broken. Also some articles were found to have been taken out of the bed box kept inside the room. She is categorical that jewellery, i.e. rings, gold chain, bracelet, tops, bangles, all of gold, worn by both the deceased, were found missing. The version is absolutely uninspiring in confidence, for (a) it is an improvement, (b) not corroborated by Inspt. Raj Kumar (PW-26), and most importantly (c) it stands belied by Dr. Anuj Kumar Gupta (PW-23), who issued the postmortem reports (Ext.PW-23/C & Ext. PW-23/D) recording that both deceased Rattni and Desh Raj were having gold ornaments on their fingers, wrists and ears.

58. As such, prosecution case of motive stands totally demolished, rendering the genesis of prosecution story to be unbelievable and untrue, if not false.

59. That apart, disclosure statement (Ex.PW-20/B) made by accused Wakar Chaudhary is uninspiring in confidence. No independent witness was associated by the police. Further, it is not the case of prosecution that accused was known to jeweller Vijay Verma (PW-8). He was not having regular business dealings with the said accused, who otherwise, on the asking of the police, had identified the accused during the Test Identification Parade which in the instant case, was absolutely necessary. The Apex Court in *Harnath Singh v. The State of Madhya Pradesh,* AIR 1970 SC 1619, has observed that:-

> "9. ... . During the investigation of a crime the Police has to hold identification parades for the purpose of enabling witnesses to identify the properties which are the subject matter of the offence or to identify the persons who are concerned therein. They have thus a twofold object: first, to satisfy the investigating authorities that a certain person not previously known to the witnesses was involved in the commission of the crime or a particular property was the subject of the crime. It is also designed to furnish evidence to corroborate the testimony which the witness concerned tenders before the Court."

60. Further Vijay Verma wants the Court to believe that sometime in the year 2009, accused came to him and got prepared estimate of gold jewellery of approximately 82.4 grams. Estimate thereof (Ex.P-8) was prepared and eventually gold was sold to him for a sum of Rs.1,20,000/-, for which receipt (Ex.PW-8/B) came to be issued to accused Wakar Chaudhary.

61. We are pained to observe that the trial Court, in Paragraphs 44-47 of the impugned judgment, failed to fully appreciate such version, which we do not find to be inspiring in confidence. As already observed, he was not known to accused Wakar Chaudhary from before. He admits that he could not recognize his customers, who had purchased or sold gold in the year 2009. Now why would a jeweller issue an estimate and keep record thereof, remains unexplained. It is not the usual practice adopted by him or the requirement of law. Crucially, payment was made not by cheque, but in cash. Why would a person make payment of Rs.1,20,000/- in cash, in violation of law, remains unexplained. Also, what happened to the said jewellery remains unexplained. Gold ornaments have not been recovered. Description of gold gewellery on Ex.PW-8/B does not tally with the statement (Ex.PW-4/A) or postmortem reports (Ext.PW-23/C & Ext. PW-23/D). In fact there is absolute vagueness about the number or description of the articles stolen by the accused. It is also not the case of this witness or that of the prosecution that the ornaments were got melted. There is also no recovery of cash. Also none came forward to depose that it was distributed amongst the accused. We otherwise express doubt with regard to the genuineness or authenticity of the receipt (Ex. PW-8/B), for as is so admitted by the witness, save and except, on the documents recovered by police, there are no signatures of any other customer on any one of the records/books maintained by him. Also as to whether, purchase of gold was accounted for in the books of accounts or not; or whether any tax return with respect thereto, came to be filed or not remains unproven on record. But what totally knocks down the prosecution case is his admission that even he did not ask for identity of accused Wakar Chaudhary at the time of purchase of jewellery. Hence this circumstance cannot be said to have been proven on record.

Circumstance No.8

62. Prosecution wants the court to believe the accused Asha knew deceased Rattni from before, which fact is evident from album (Ext. P-9) so recovered by the police vide memo (Ext. PW-9/A), dated 9.12.2011 in the presence of Umesh Chauhan (PW-9) and Mukesh Kumar (not examined) as also Inspt. Chaman Lal (PW-27).

63. This circumstance is not incriminating in any manner. Asha was known to the deceased was a fact, which was already made known to the police, way back in the year 2009, as is so admitted by Inspt. Raj Kumar.

Circumstances No. 9

64. Prosecution case is of the accused having travelled all the way from Delhi to Solan in a taxi owned by Nizam (PW-10), so proven by this witness in terms of his statement (Ext. PW-22/B), recorded by JMIC Vikrant Kaundal (PW-22) under the provisions of Section 164 Cr.P.C.; recovery of tax receipt (Ext.PW-11/A) dated 28.10.2009, maintained at the tax barrier Parwanoo vide memo (Ext.PW-11/B) dated 19.12.2011, proved on record by Sachinder Chaudhary (PW-11) and Inspt. Chaman Lal (PW-27); recovery of register of hotel (Ext.P-7) singed by accused Wakar Chaudhary which fact stands proven on record by Dr. Jagjit Singh (PW-29), who opined the specimen handwriting of Wakar Chaudhary taken in the presence of JMIC Vikrant Kaundal (PW-22) vide memo (Ext. PW-22/E) dated 14.12.2011 to have matched with the entries in the register recovered vide memo (Ext. PW6/C) dated 5.12.2011.

65. Most crucial circumstance, pressed by the prosecution, purportedly has emerged through the testimony of Nizam (PW-10). It is a matter of record that statement of this witness, under the provisions of Section 164 of the Code of Criminal Procedure (Ex.PW-22/B), was recorded by Shri Vikrant Kaundal (PW-22), a Magistrate, in terms whereof, he deposed that at Delhi accused Dalip hired his taxi, in which all the accused travelled up to Solan and together spent the night in a hotel. For a short duration, even he slept with them. Following day, on their way to Delhi, accused got stopped the vehicle at a particular place and left together. Accused Bablu returned after five minutes whereas remaining accused returned after about half an hour. At that time, accused Iqbal was carrying a black coloured bag in his hand. Thereafter, under instructions from accused Dalip, he straightway drove to Delhi, where accused Iqbal, Bablu and Asha got down at Khajuri red light and accused Wakar Chaudhary and Dalip got dropped at their respective residences.

66. Even though we find the Magistrate to have proven on record statement (Ex.PW-22/B), but then in Court this witness (PW-10) has resiled from the same. He (PW-10) has explained that only under threats extended by the police, he made such statement in Court. He is categorical that police had also inquired about the whereabouts of his driver and also threatened to put him behind bars. In his unrebutted testimony, he has stated that for two days, on the asking of police, he kept on rehearsing the said statement (Ex.PW-22/B), so made before the Magistrate.

67. Also what one cannot ignore is admission made by Vikrant Kaundal that he had not afforded sufficient time to the witness for pondering over the matter and that he had not questioned about his educational qualifications. Significantly Nizam himself had not made any separate application, conveying his willingness to make such a statement.

68. The apex Court in *Ram Kishan Singh v. Harmit Kaur and another*, AIR 1972 SC 468 has observed that "a statement under section 164 of the Code of Criminal Procedure is not substantive evidence. It can be used to corroborate the statement of a witness. It can be used to contradict a witness".

69. In *Ram Lakhan Sheo Charan and others v. State of UP*, 1991 Cr.L.J 2790, the Court observed as under:

> "12. The trial was held when the new Code of Criminal Procedure had come into force. The wordings of S. 164 in the new and old Code of Criminal Procedure

> with little changes are the same. As early as in Manik Gazi v. Emperor, AIR 1942 Cal 36: (1942) 43 Cri L.J. 277 a Division Bench of the Calcutta High Court had held that the statements u/s. 164 of the Code can be used only to corroborate or contradict the statements made u/ss. 145 and 157 of the Indian Evidence Act. In Brij Bhushan Singh v. Emperor, AIR 1946 PC 38 and in Mamand v. Emperor, AIR 1946 PC 45 the Privy Council had observed that the statement u/s. 164 of the Code cannot be used as a substantive evidence and which can only be used to contradict and corroborate the statement of a witness given in the Court. Similar observations, as made in the two cases below, were made by the Privy Council, in Bhuboni Sahu v. King, AIR 1949 PC 257: (1949) 50 Cri L.J. 872 and in Bhagi v. Crown, (AIR (37) 1950 HP 35). It was also held by a single Bench of the Himachal Pradesh Judicial Commissioners court that statement u/s. 164 of Code cannot be used as a substantive piece of evidence. In State v. Hotey Khan, 1960 ALJ 642. A division Bench of this Court had also observed that statements u/s. 164 of the Code cannot be used as a substantive evidence.
>
> (13) The above catena of cases go to show that where the witnesses do not support the prosecution story in the Court, then their statements u/s. 164 of the Code cannot be used as substantive piece of evidence."…

70. Crucially there is a missing link, leading to the recording of statement (Ex.PW-22/B). No independent witness has made reference of the vehicle or the accused having travelled in the same from Delhi to Solan.

71. Prosecution wants the Court to believe that while entering Himachal Pradesh, at the Barrier at Parwanoo, toll tax was paid by the driver, which entry was made and receipt issued. But then, how would such fact link the accused to the crime. Entry at the barrier does not record the name of the persons travelling in the vehicle or for that matter driver of the vehicle.

72. Significantly, vehicle of Nizam was allegedly hired by accused Dalip who had no past acquaintance or business relationship. It is not the prosecution case that accused Dalip was known to Nizam from before. Nizam is an owner of taxi. That'a about all. Without identification, how is it that this witness was able to identify the accused in Court and that too after a gap of two years. Significantly, he does not disclose the place of residence of accused Dalip or Wakar Chaudhary and most crucially, about which there is no iota of evidence, how is it that police party i.e. Inspt. Raj Kumar or Inspector Chaman Lal actually reach up to him, for in the confessional statements (Ex.PW-2/D-I to 2/D-V), what came to be disclosed was not the type or number of the vehicle and the name/identity of the driver/owner, but the fact that accused had travelled in a "private car", which unrebuttedly is not Tata Sumo, a vehicle registered as a taxi. Also, no log book of the vehicle stands proven on record.

73. Police was already aware of the spot of crime or the place where the accused had spent the night. As such, Memo (Ex. PW-10/D), more so, in the absence of examination of independent witnesses is of no significance. As such even such circumstance cannot be said to have been proven on record.

Circumstance No.10

74. Weapon of offence, i.e. knife (Ex.P-3) was recovered by the police from the spot. But well there is nothing on record to link the accused to the same.

Circumstance No.11

75. SI Ramesh Kumar (PW-2) states that in Delhi, when the accused were arrested, licenced revolver came to be recovered from the possession of accused Wakar Chaudhary. Trial Court, in Para-53 of the impugned judgment has held the same to have been used by Wakar Chaudhary for threatening the deceased at the time of committing decoity. Now significantly, in view of admission made by SI Ramesh Kumar, accused was also carrying licence to possess and carry this firearm. For establishing the fact that the firearm came to be carried beyond the territorial limits, i.e. within the State of Himachal Pradesh, again prosecution seeks reliance upon

the testimony of Nizam, who simply states that he had seen a pistol hung with the belt by accused Wakar Chaudhary. Now, this witness categorically does not identify the weapon of offence to be the one which he had seen. Also, there is no whisper that such firearm ever came to be used in the commission of crime.

76. Hence, from the material placed on record, prosecution has failed to establish that the accused are guilty of having committed the offence(s) they stand 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. The chain of events do not stand conclusively established, leading only to one conclusion, i.e. guilt of the accused. Circumstances when cumulatively considered do not fully establish completion of chain of events, indicating to the guilt of the accused and to no other hypothesis, other than the same.

77. 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. Also perversity as discussed by Hon'ble the Apex Court in *Prem Kaur v. State of Punjab and others,* (2013) 14 SCC 653, is writ large.

78. Hence, for all the aforesaid reasons, appeals are allowed and the judgment of conviction and sentence dated 20.11.2014/26.11.2014, passed by the learned Addl. Sessions Judge-I, Solan, Distt. Solan, H.P., in Sessions Trial No. 24-S/7 of 2012, titled as *State of Himachal Pradesh vs. Wakar Chaudhary & others*, is set aside and the accused are acquitted of the charged offences. They be released from jail, if not required in any other case. Amount of fine, if deposited by the accused, be refunded to them. Release warrants be prepared accordingly. Registrar (Judicial) to ensure prompt compliance.

79. This Court places on record, with appreciation, the efforts put in by M/s. Anoop Chitkara, O.P. Chauhan and Shikha Chauhan learned counsel as also M/s Vinay Thakur, Vir Bahadur Verma and Archana Dutt, learned legal aid counsel, in assisting the Court.

Appeals stand disposed of, so also pending application(s), if any.

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

Bajaj Alianz General Insurance Company Limited. .....Petitioner.

Versus

Anuradha Sood & others. .....Respondents.

CMPMO No. 258 of 2016
Reserved on: 06.10.2016
Decided on: 07.10.2016

Code of Civil Procedure, 1908- Order 1 Rule 10, Order 8 Rule 9 and Section 151- A petition seeking compensation was filed- it was found that vehicle was insured with the ICICI, Lombard General Insurance Company – the applicant filed applications to file additional reply and to implead ICICI, Lombard General Insurance Company- applications were dismissed by MACT- held, that even if the owner had insured the vehicle with two insurance companies, it is not permissible to say that it was not insured by either – the plea of fraud was not established – the Court had rightly dismissed the application- petition dismissed. (Para-5 to 9)

Case referred:

United India Insurance Company Limited vs. Rajendra Singh and others, (2000) 3 SCC 581

For the petitioners: Mr. Aman Sood, Advocate.
For the respondents: Nemo for respondents No. 1 to 3.
Mr. Manohar Lal Sharma, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioner, who is respondent No. 3 before the learned Court below (hereinafter referred to as *'the petitioner'*), against the order of learned Motor Accident Claims Tribunal (1), Kangra at Dharamshala, H.P., passed in MACP No. 40G/II/08, dated 12.05.2016, whereby the learned Court dismissed the applications of the petitioner herein filed under Order 1, Rule 10 CPC and under Order 8, Rule 9 CPC read with Section 151 CPC, seeking impleadment of ICIC Lombard Geneal Insurance Company Limited and also seeking permission to file additional reply to the petition filed by the respondents herein under Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the Act").

2. Briefly stating the facts giving rise to the present petition are that respondents No. 1 to 3 herein have maintained a petition under Section 166 of the Act seeking compensation in lieu of death of Dr. Naveen Sood (husband of respondent No. 1 and father of respondents No. 2 and 3 herein), who died on 28.08.2007 in an accident, in which vehicle (Truck) bearing registration No. HP-63-4515 was involved. As per the petitioner, during the pendency of the petition under Section 166 of the Act, it was unearthed that vehicle in question was already insured with ICICI Lombard General Insurance Company. Therefore, the petitioner herein, being an insurance company, moved an application under Order 8, Rule 9 CPC read with Section 151 CPC seeking permission to file additional reply to the petition and it is alleged that respondent No. 4 herein (owner of the vehicle), by playing fraud upon the petitioner, got another insurance policy issued from the petitioner. Subsequently, the petitioner moved another application under Order 1, Rule 10 CPC for impleading M/s ICICI Lombard General Insurance Company Limited as party in the claim petition. The learned Motor Accident Claims Tribunal below decided both these applications with a consolidated order dated 12.05.2016, whereby both these applications were dismissed, hence the present petition.

3. Learned counsel for the petitioner/Bajaj Insurance Company has argued that ICICI Lombard Insurance Company is a necessary party, as the said Insurance Company has already insured the vehicle of respondent No. 4 (owner of the vehicle) and the learned Court below has fallen in error in dismissing both the applications by ignoring the fact that when it came to the notice of the petitioner that the vehicle was insured earlier also. Further argued that the learned Court below should have allowed both the applications. On the other hand, the learned counsel for respondent No. 4 has argued that ICICI Lombard Insurance Company did not insure the vehicle of respondent No. 4 as the insurance policy was cancelled after giving due notice to respondent No. 4, as the cheque presented for premium of the policy was dishonoured and only thereafter the vehicle was insured with the present petitioner. In rebuttal, learned counsel for the petitioner has argued that these facts will be decided only if the applications of the petitioner are allowed and the new facts come on record after impleading the ICICI Lombard Insurance Company as party-respondent.

4. To appreciate the arguments of the parties, I have gone through the record in detail.

5. Firstly, it is clear that it is for the petitioner to choose as to against whom he wants to lay his claim. If fraud has been played on the petitioner, as alleged by the petitioner, the said fact would be required to be considered and adjudicated upon in the claim petition. Whether the petitioner has insured the vehicle on its own or the insurance policy was obtained by fraud played by respondent No. 4, is a matter which is under adjudication before the Court below, as the present petitioner is contesting the petition from the very beginning. In reply to the

applications, respondent No. 4-owner has taken a plea that the vehicle could not be plied earlier due to the domestic problem and when it was plied by engaging a new driver, it was again insured with respondent No. 4, being a new vehicle. Even if the owner has insured the vehicle with two insurance companies, either of the insurance company cannot say that it has not insured the vehicle. When the vehicle was insured, it was insured completely by the insurance company knowing fully well the value of the vehicle. There is no condition pointed out by the learned counsel for the petitioner that the contract of insurance demonstrates that the vehicle cannot be insured, if it is already insured with another company. Further it is for the claimants to choose as to against whom they wanted to pursue the petition. Therefore, I find no infirmity with the order passed by the learned Court below.

6. The learned counsel for the petitioner has relied upon the judgment of Hon'ble Supreme Court, titled as ***United India Insurance Company Limited vs. Rajendra Singh and others, (2000) 3 Supreme Court Cases 581,*** wherein it has been held as under:

> *"11. Thus the Tribunal refused to open the door to the appellant Company as the High Court declined to exercise its writ jurisdiction which is almost plenary for which no statutory constrictions could possibly be imposed. If a party complaining of fraud having been practiced on him as well as on the court by another party resulting in a decree, cannot avail himself of the remedy of review or even the writ jurisdiction of the High Court, what else is the alternative remedy for him? Is he to surrender to the product of the fraud and thereby became a conduit to enrich the impostor unjustly? Learned Single Judge who indicated some other alternative remedy did not unfortunately spell out what is the other remedy which the appellant Insurance Company could pursue."*

7. The judgment, as cited by the learned counsel for the petitioner, is not applicable to the facts of the present case, as the petitioner has failed to show how fraud has been committed upon it. The petitioner has issued the insurance policy to respondent No. 4-owner knowing fully well that the truck is in existence and has insured the same as per the insurance contract.

8. In these circumstances, this Court did not find that the petitioner has been able to show that the fraud has been committed. In view of the above, the judgment, as cited by the learned counsel for the petitioner, is not applicable to the facts of the present case.

9. As has been held hereinabove, there is no merit in this petition and the order of the learned Court below is just, reasoned and after appreciating the facts which have come on record to their true perspective. The present petition, being devoid of merits, deserves dismissal and is accordingly dismissed, as also pending application(s), if any.

10. The observations made hereinabove will have no bearing on the merits of the main claim petition.

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

Smt. Hema Devi & others ....Appellants

Versus

Sh. Lajji Ram Thakur & another .....Respondents

FAO No. 35 of 2012
Decided on : 07.10.2016.

Motor Vehicles Act, 1988- Section 166- Deceased was earning Rs. 5,000/- per month and was getting Rs. 100 per day as daily allowance - it can be safely held by guess work that the monthly income of the deceased could not be less than Rs. 4,000/- per month- deceased was 23 years old

at the time of accident- he was bachelor and 50% of the amount is to be deducted towards personal expenses- thus, claimants have lost Rs.2,000/- per month as 'loss of dependency' – considering the age of the deceased, multiplier of 15 is applicable - thus, claimants are entitled to Rs. 2,000 x 12 x 15= Rs. 3,60,000/- under the head 'loss of dependency' – claimants have spent Rs. 15,800/- on travelling and thus are entitled to Rs. 15,800/- under the head 'travelling expenses'- rate of interest was awarded @8% per annum, which is excessive and is reduced to 7.5% per annum- total compensation of Rs.3,60,000 +15,800= Rs.3,75,800/- awarded along with interest @ 7.5% per annum. (Para-11 to 20)

Cases referred:

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

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

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 Supreme Court Cases 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 Supreme Court Cases 738

Savita versus Binder Singh & others, 2014 AIR SCW 2053

Kalpanaraj & Ors. 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. Jagan Nath, Advocate.
For the Respondents: Nemo.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

In terms of note of the Registry, the respondents stand duly served. But there is no representation on their behalf. Hence, they are set ex-parte.

2. Subject matter of this appeal is the award, dated 18th October, 2011, made by the Motor Accident Claims Tribunal, Shimla, Himachal Pradesh (for short "the Tribunal") in M.A.C. Petition No. 9-S/2 of 2008, titled as Smt. Hema Devi & others versus Sh. Lajji Ram Thakur and another, whereby compensation to the tune of Rs. 3.00 lacs with interest @ 8% per annum from the date of filing of the claim petition till its realization with costs assessed at Rs. 5,000/- was awarded in favour of the claimants and against the respondents (for short "the impugned award").

3. 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.

4. The claimants have questioned the impugned award on the ground of adequacy of compensation.

5. The only dispute in this appeal is -whether the amount awarded is inadequate. The answer is in the affirmative for the following reasons.

6. The claimants had invoked the jurisdiction of the Tribunal for grant of compensation to the tune of Rs. 10,65,000/- as per the break-ups given in the claim petition.

7. The respondents resisted and contested the claim petition by filing replies.

8. Following issues came to be framed by the Tribunal:

"1. Whether Sunil Kumar died due to rash and negligent driving of Van No. HP-03-3299 by respondent No. 2? ....OPP

2. Whether the petition is not maintainable? ...OPR

3. Whether the petitioners have no cause of action to file the petition?...OPR

4. If issue No. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled to and from who

5. Relief."

Issue No. 1.

9. The parties have led evidence. The Tribunal after scanning the evidence, oral as well as documentary, held that the claimants have proved that driver, namely, Sanjay Kumar, has driven the offending vehicle, i.e. van bearing No. HP-03-3299, rashly and negligently, and caused the accident, in which Sunil Kumar sustained injuries, was taken to IGMC, Shimla and thereafter was referred to PGI Chandigarh, wherein he succumbed to his injuries. There is no rebuttal to the said evidence. Accordingly, the findings returned by the Tribunal on Issue No. 1 are upheld.

Issues No. 2 & 3.

10. It was also for the respondents to plead and prove that the claim petition was not maintainable and the claimants had no cause of action to file the claim petition, has failed to do so. Accordingly, the findings returned by the Tribunal on Issues No. 2 & 3 are upheld.

Issue No. 4.

11. It is averred in the claim petition that the deceased was earning Rs. 5,000/- per month and was getting Rs. 100/- per day as daily allowance as driver. By guess work, it can be safely held that the monthly income of the deceased would not have been less than Rs. 4,000/- per month.

12. It is averred in the claim petition that the deceased was 23 years old at the time of accident, which fact stands proved in terms of Matriculation Certificate (Ext. PW-2/B).

13. The deceased was a bachelor and 50% is to be deducted towards his personal expenses while keeping in view 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.** Accordingly, it is held that the claimants have lost source of dependency to the tune of Rs. 2,000/- per month.

14. The multiplier of '15' is applicable in this case, as per the 2nd Schedule appended to the Motor Vehicles Act read with the ratio laid down by the Apex Court in ***Sarla Verma's, Reshma Kumari's and Munna Lal Jain's,*** cases, *supra* 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.**

15. Viewed thus, the claimants are held entitled to the amount of Rs. 2,000/- x 12 x 15 = Rs. 3,60,000/-, under the head 'loss of dependency'.

16. The claimants have placed on record receipts relating to the expenses incurred by them on travelling, amounting to the tune of Rs. 15,800/-, are held entitled to compensation to the tune Rs. 15,800/- under the head 'travelling expenses'.

17. The Tribunal has fallen in an error in awarding interest @ 8% per annum, which was to be awarded as per the prevailing rates, i.e. 7.5% per annum.

18. 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.

19. 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.

20. Accordingly, the claimants are held entitled to total compensation to the tune of Rs.3,60,000/- + Rs.15,800/- = Rs.3,75,800/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization.

21. The amount of compensation is enhanced and the impugned award is modified, as indicated above. The appeal is accordingly disposed of.

22. The respondents are directed to deposit the enhanced amount alongwith interest, within a period of eight weeks from today before the Registry. On deposit, the Registry is directed to release the entire amount in favour of the claimants, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing the same in their accounts.

23. Send down the records after placing a copy of the judgment on the Tribunal's file.

****

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

Jyoti Thakur .....Petitioner.

Versus

Indian Oil Corporation Ltd & Ors. .....Respondents

CWP No. 9773 of 2011
Reserved on : 20.09.2016
Date of Decision: 7th October, 2016

Constitution of India, 1950- Article 226- Petitioner applied for the award of Rajiv Gandhi Gramin L.P.G. Vitrak (R.G.G.L.V)- petitioner was informed that she had qualified for draw- she was informed subsequently that her candidature was rejected – she filed a representation, which was also rejected- held, in the writ petition that the aim of the scheme was to set up small size L.P.G. Distribution Agency to increase penetration and to cover remote and low potential areas - the report of the Commissioner shows that there is fair weather road to the land offered by the petitioner on which HRTC bus plies – this shows that the rejection of the land on the ground of lack of approach was not correct - the respondent was supposed to act fairly without any prejudice or mala fides – writ petition allowed and the order passed by respondent set aside- respondent directed to consider the case of the petitioner. (Para-12 to 24)

Cases referred:

City Industrial Development Corporation through its Managing Director vs. Platinum Entertainment and Others, (2015)1 SCC 558

B.A. Linga Reddy and Others vs. Karnataka State Transport Authority and Others, (2015)4 SCC 515

For the petitioner: Mr. Sanjeev Bhushan, Senior Advocate, with Ms. Abhilasha Kaundal, Advocate.

For the respondents: Mr. K.D.Sood, Senior Advocate, with Mr. Sanjeev Sood, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

By way of instant writ petition filed under Articles 226/227 of the Constitution of India, the petitioner has prayed for following reliefs:-

> "(i) That a writ in the nature of certiorari may be issued and the order dated 28.10.2011 Annexure P-5 may kindly be quashed and set-aside.
>
> (ii) That a writ in the nature of mandamus may be issued directing the respondents to issue award letter in favour of the petitioner for Rajiv Gandhi Gramin LPG Vitrak at Parwara, District Mandi, H.P.

2. Briefly stated facts, as emerged from the record are that pursuant to the advertisement, issued by the respondents (hereinafter referred to as the 'Corporation'), present petitioner applied on prescribed format (Annexure P-1) for the award of Rajiv Gandhi Gramin LPG Vitrak (hereinafter referred to as 'RGGLV') at Parwara, District Mandi, H.P. It further emerged from the record that the application of the petitioner alongwith similarly situated persons was scrutinized by the Corporation and after scrutiny petitioner was found eligible for further process, since, she had procured minimum qualifying marks i.e. 80. Thereafter, vide communication (Annexure P-3), dated 6.6.2011, Area Manager, Indian Oil Corporation Limited, Shimla intimated the present petitioner that pursuant to her application for award of 'RGGLV' at Parwara, District Mandi, H.P., under open category, she has qualified for draw for selection of 'RGGLV' and as such, she was requested to be present alongwith photo identity card issued by any Government department for the draw at 10:00 AM on 01.07.2011 at the address given in the letter(Annexure P-3).

3. It also appears from the record that after issuance of aforesaid letter dated 6.6.2011, Field Officer of the corporation, visited the plot offered by the petitioner as well as other similarly situated persons to ascertain the genuineness and correctness of the information furnished on the prescribed format by the petitioner and other applicants in terms of the advertisement issued by the corporation. Finally, vide communication dated 28.10.2011 (Annexure P-5), General Manager(LPG)PSO, Chandigarh, intimated the present petitioner that her candidature for 'RGGLV' at Parwara, District Mandi, H.P. stands rejected for following reasons:-

> "(i) The plots offered by you(khasra No.1005) was not found suitable for the construction of godown as the same is less than the minimum required dimensions of 20 meter x24 meter as mentioned in the above said advertisement.
>
> (ii) Another plot offered in the application at khasra No.994 was not found suitable for the construction of godown as the same is not approachable because it is covered on all sides by the land owned by others.
>
> (iii) Land offered at Khasra No.1003 to the FVC committee, is not found owned by the applicant or by any member of the 'family unit' as given in multi distributorship norms."

4. Petitioner being aggrieved and dissatisfied with the aforesaid letter (Annexure P-5), filed an representation (Annexure P-6), dated 4.11.2011 stating therein that plot bearing khasra No.994 is not covered by anybody else and it is very crystal clear in the revenue paper.

Secondly, petitioner stated that though width of khasra No.1005 is less than 20 metres and the length is about 40 metres, but owner of adjacent khara No.1003 has agreed to exchange the land and in this regard, he also filed affidavit where he has consented to exchange the land for the construction of godown. In nutshell, the petitioner stated that she and her family members has preferred khasra No.1005 with the help of khasra No.1003 and so did the verification team but if the plot is not suitable, she is ready to construct the godown on khasra No.994. But it appears that aforesaid representation filed by the present petitioner was also rejected and as such, she was compelled to file instant Civil Writ Petition seeking reliefs as have been reproduced hereinabove.

5. Respondents by way of detailed reply, refuted all the contentions contained in the writ petition and stated that petitioner has failed to establish any breach of statutory duty and obligation towards them, no prejudice, whatsoever, has been caused to her and as such, present petition deserve to be dismissed.

6. Mr. Sanjeev Bhushan, learned Senior Advocate, duly assisted by Ms. Abhilasha Kaundal, Advocate, for the petitioner, vehemently argued that impugned order dated 28.10.2011 (Annexure P-5) is not based upon the factual position existing on the spot, which was duly verified by the Field Officer, deputed by the corporation to inspect the plots offered by the petitioner pursuant to the advertisement. Mr. Bhushan, further argued that pursuant to her application, she was found eligible to be considered for allotment of 'RGGLV' and accordingly vide communication dated 6.6.2011(Annexure P-3), she was declared qualified for draw of selection of 'RGGLV' scheduled to be held on 1.7.2011. As per Mr. Bhushan, vide application (Annexure P-1), petitioner had offered two plots i.e. khasra No.994 and khasra No.1005, which was 20 meters in width and 40 meters **i**n length and both the plots were in conformity to the dimensions provided under the advertisement and as such, there was no occasion, whatsoever, for the corporation to reject the candidature of the petitioner for allotment of 'RGGLV'. As per Mr. Bhushan, that once vide communication dated 6.6.2011, petitioner was declared eligible to be considered for allotment of 'RGGLV', there was no occasion, for the corporation to declare her unfit vide communicated dated 28.10.2011. Mr. Bhushan, while inviting attention of this Court to Annexure P-5 i.e. communication dated 28.10.2011, forcibly contended that reasons assigned by the corporation while rejecting the candidature of the present petitioner, are contrary to factual position existing at the spot. He contended that at first instance, khasra No.994 was offered by the present petitioner for construction of godown and dimensions of this plot was strictly in terms of standards provided in the advertisement as well as brochure(Annexure P-2), but corporation solely with a view to oust the present petitioner, came up with the plea that khasra No.994 is not suitable for the construction of godown as the same is not approachable because it is covered on all sides by the land owned by the others. In this regard, Mr. Bhushan, invited the attention of this Court to the report furnished by the Local Commissioner appointed by this Court, wherein Local Commissioner in his report has submitted as under:-

REPORT ON POINTS No. 1 to 4

The Hon'ble High Court has constituted the Commission vide its order dated 04.01.2013 in CWP No.9773/2011, comprising of Sub-Divisional Magistrate Gohar, Executive Engineer, HPPWD Division Gohar. The Commission visited the site on dated 02.03.2013 and report is as under:-

1. There exist a PWD main road MDR Kandha Pandoh road from which Km.6/200 there is a link road namely Kelodhar Parwara having length 7/ 265 upto Majhol village.
2. This road is fair weather motorable road and HRTC bus regularly plying on this road.
3. The link road is all weather road.
4. From the PWD link road Majhol at Km 7/265 there is a link road constructed by the Block department having length 230 meter up to Primary School Majhol

and 50 meter up to khasra No.994 Muhal Parwara. Only light Transport Vehicle can ply up to the petitioner plot comprised in khasra No.994 situated in muhal Parwara."

7. Mr. Bhushan, learned counsel forcibly contended that aforesaid report submitted by the petitioner itself, falsify the stand taken by the corporation that khasra No.994 is not approachable and same is covered on all sides by the land owned by the others. Similarly, Mr. Bhushan, stated that another plot bearing khasra No.1005 was also suitable for the construction of godown, but corporation rejected the same on very flimsy grounds. Mr. Bhushan, invited the attention of the Court to Annexure P-4 i.e. affidavit tendered by one Sh.Jalam Singh, who categorically stated that he is ready and willing to exchange khasra No.1005 with khasra No.1003 and he has no objection, in case godown of 'RGGLV' is constructed on khasra No.1003. While concluding his arguments, Mr. Bhushan, strenuously argued that careful perusal of Local Commissioner report, as have been reproduced hereinabove, clearly belies the stand taken by the corporation in letter dated 28.10.2011, wherein it has been categorically concluded by the Local Commissioner that PWD link road Majhol at Km 7/265 is a link road constructed by the Block department having length 230 meter up to primary School Majhol and 50 meters up to khasra No.994 muhal Parwara. In the aforesaid background, Mr. Bhushan, prayed that the present petition deserve to be allowed with the direction to the respondent-corporation to make allotment of this 'RGGLV' in favour of the petitioner being most eligible candidate.

8. Mr. K.D.Sood, Senior Advocate duly assisted by Mr. Sanjeev Sood, Advocate, representing the respondent-corporation, refuted the claim put forth on behalf of the petitioner by stating that no injustice, whatsoever, has been caused to the petitioner by any action of the corporation, rather corporation has acted strictly in conformity with the rules and regulations as prescribed under the brochure containing condition for selection of 'RGGLV'. Mr. Sood, contended that pursuant to application (Annexure P-1), filed by the petitioner, her case was duly considered by field verifying agency of the corporation, who found both the plots offered by the petitioner not suitable for construction of godown and as such, present petition deserve to be dismissed being devoid of any merits.

9. As per Mr. Sood, vide communication dated 6.6.2011(Annexure P-3), petitioner was only declared qualified for draw for selection of 'RGGLV' and on the basis of the same, she cannot claim that she was selected for 'RGGLV' in terms of advertisement (Annexure P-1). Mr. Sood, while inviting attention of this Court to communication dated 6.6.2011 (Annexure P-3), contended that it clearly suggests that same was issued in terms of clause-12 of Brochure, wherein complete procedure has been laid down to deal with the application received by the corporation, pursuant to advertisement Annexure P-1. Mr. Sood, also invited the attention of this Court to various conditions contained in the Brochure for selection of 'RGGLV' to demonstrate that application of the petitioner was dealt with in accordance with the provisions contained in the brochure and at no point of time, corporation made any departure from the same. While referring to clause 12.2 of the brochure, Mr. Sood, stated that selection, if any, at preliminary stage, was to be done by draw of lots out of all eligible applicants securing minimum qualifying marks i.e. 80%. Since, petitioner had secured minimum 80% marks on the basis of information furnished in the application, she was informed vide communication dated 6.6.2011 that draw of lots would be made on 1.7.2011. But, as per clause 12.9, field verification was to be carried out by Field Verifying Staff qua the land offered by the selected candidate and if the information given in the application is/was not found to be correct, no letter of intent could be issued. As per Mr. Sood, in terms of clause 12.9, spot inspection in case of present petitioner was conducted by field verifying agency, who informed that plot bearing khasra No.994 is not suitable for construction of godown since the same is not approachable because it was covered on all sides by the land owned by others. The filed verifying committee also reported that khasra No.1005 is also not suitable for construction of godown since area is less than the minimum required dimensions of 20 x 24 meters, as mentioned in the advertisement as well as brochure (Annexure P-2). Another proposal put forth on behalf of the present petitioner i.e. khasra No.1003 was also not found suitable by the committee since same was not owned by the petitioner or any member of

the 'family unit' as given in multiple dealership/distributorship norm provided under the brochure, as referred hereinabove. Mr. Sood, vehemently argued that in view of the aforesaid specific report rendered by field verifying agency, case of the petitioner could not be considered at all for allotment of 'RGGLV' at Parwara, District Mandi, HP and as such, there is no illegality and infirmity in the order dated 28.10.2011, whereby candidature of the petitioner was rejected specifically detailing therein the reasons for not considering the case of the petitioner. While referring to the contention put forth on behalf of the petitioner that the Local Commissioner, specifically reported that khasra No.994 is abutted to the road, Mr. Sood, stated that inspection was carried out on 2.3.2013 and Commissioner submitted the report before the Hon, ble Court on 17th March April, 2013, to which corporation filed objection on 22nd April, 2013. Mr. Sood , forcibly contended that link road does not satisfy the requirement of the corporation as per its policy and as such, the plot offered by the petitioner is not suitable and the case of the petitioner cannot be considered for LPG distributorship.

10. As per Mr. Sood, even for the sake of arguments, if it is presumed that link road connects with khasra No.994, same may not satisfy the conditions as contained under the brochure, wherein it has been specifically mentioned that for the construction of godown, land should be minimum dimensions 20 x24 meters and it should be freely accessible through all weather motorable approach road. As per Mr. Sood, report of Local Commissioner itself reflects that no straight road goes to khara No.994, rather from PWD link road Majhol, there is a link road constructed by the Block Department having length 230 meter up to primary School, Majhol and 50 meter upto khasra No.994 muhal Parwara, which means there is no sufficient road, on which truck carrying LPG cylinder can ply. Mr. Sood, while concluding his arguments, forcibly contended that petitioner has no right, whatsoever, to claim distributorship, if any, in terms of the advertisement issued by the corporation, rather corporation is well within its right to adjudge the suitability of plot offered by the petitioner as well as other applicants. Moreover, selection, if any, can be made only in terms of policy/guidelines i.e. brochure.

11. I have heard learned counsel for the parties as well carefully gone through the record.

12. Before adverting to the merits of the case, it would be profitable to reproduce relevant provisions contained in the brochure for selection of 'RGGLV'as under:-

> 1. **Rajiv Gandhi Gramin LPG Vitrak(RGGLV) Yognya**
>
> Locations for setting up of Rajiv Gandhi Gramin LPG Vitrak(RGGLV) are identified broadly based on potential of average monthly sale of 600 LPG Cylinders of 14.2 Kg and 1800 customers with monthly per capita consumption of about 5 Kg. The assessment of refill sale potential is based on several factors including population, population growth rate, economic prosperity of the location and the distance from the existing nearest distributor.
>
> Setting up of RGGLV at the identified location is a business proposition and has normal business risks and does not guarantee any assured returns or profits or any quantum of refill sale. It is extremely important to note that proprietor of RGGLV himself operates it and if need be he may employee one person for assistance.
>
> **4. Common Eligibility criteria for all categories:-**
>
> (e)..... ' 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).

(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 norms. 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.

7. Basic Facilities Required for Operation of RGGLV

RGGLV would require a storage Godown approved and licensed by Chief Controller of Explosives of Petroleum and Explosive Safety Organization (PESO) for storage of LPG in cylinders. A showroom of the dimensions 2.6mx3 m can be constructed near the Godown or in an existing nearby shop.

For construction of Godown, land should be Minimum Dimensions 20 meter x24 meter. It would be freely accessible through all weather motorable approach road(public road of 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.

RGGLV will not be required to deliver LPG cylinders at the residence of the customers. LPG cylinders will be given to the customers from the authorized licensed LPG Godown at the Retail Selling Price(RSP).

12. SELECTION PROCESS

12.1 A Committee consisting of two Officers of the concerned Oil Company will do scrutiny of the application and award marks to the applicants based on the information given in the application.

12.2. Selection will be done by draw of lot out of all eligible applicants securing minimum qualifying marks. Minimum qualifying marks is 60% for locations reserved under SC/ST Category and minimum 80% marks for all other category locations.

12.3 The list of ineligible applicants, eligible but not qualified applicants and qualified applicants for draw of lot will be made available on the notice board of the concerned office of the Oil Company as well as on the website of the concerned Oil Company.

12.4 All the applicants will be individually informed about the status of their application. Ineligible and eligible but not qualified applicants can representations within 15 days from the date of the letter.

12.5 Efforts would be made by Oil Company to ensure that all the representation/complaints are disposed off within three months.

12.6 After disposed of representations/complaints, if any, all the eligible candidates who have qualified will be asked to report at a specified place on specified date and time for draw of lot. The same will be notified in the local newspapers. Each qualified candidates will be issued a token number and this token number will be recorded on his/her application.

12.7 All token numbers will be put in an empty box in the presence of the candidates, the officials of the Company and the invited guest from

amongst the local MP, MLA, Zila Parishad, Panchayat Samiti Chairman, Sarpanch, Revenue Officials etc. However, a quorum comprising of at least 50% of the candidate (whose names are there in the draw) and the concerned company officials could be sufficient to proceed with the draw of lots. The proceeding of the draw will be Video graphed.

12.8 One token number will be drawn out and the candidate to whom the token number was allotted will be declared as selected candidate.

12.9 Field verification will be carried out for the selected candidate and if the information given in the application by the applicant is found to be correct, Letter of Intent will be issued to the selected candidate.

12.10 In case of rejection of selected candidate due to findings in the Field Investigation or if selected candidate is unable to develop facilities for Rajiv Gandhi LPG Vitrak within the specified time, then his candidature will be cancelled and draw will be held again from the remaining qualified eligible candidates to select the next candidate following the procedure as mentioned above in para 12.3 to 12.6."

13. Aforesaid conditions contained in the brochure, clearly suggests that 'RGGLV Yogna' launched on 16th October, 2009, which aims at setting up small size LPG distribution Agencies in order to increase rural penetration and to cover remote as well as low potential areas. In the present case, petitioner vide Annexure P-1, applied for 'RGGLV' offering therein two plots bearing khasra No.994 and 1005. As per clause-3 of the brochure, reproduced hereinabove, selection, if any, was to be made vide draw of lots out of all eligible candidates securing qualifying marks, wherein minimum qualifying marks is 60% for location reserved SC/ST category and minimum 80% marks for all other category locations. It appears that since petitioner, who had applied in general category had procured 80% marks, was invited for draw of lot vide communicated dated 6.6.2011. This Court after perusing the aforesaid provisions of clause-3 of the brochure, is unable to accept the contention put forth on behalf of the petitioner that she should selected vide communication dated 6.6.2011, whereby she was declared qualified for draw for selection of 'RGGLV'. Clause-3 of the brochure, clearly provides that selection would only done by draw of lots out of all eligible applicants securing minimum qualifying marks, meaning thereby, by aforesaid process, corporation had only to do screening of all the applicants, who had applied pursuant to the advertisement issued by the corporation for 'RGGLV'. In the instant case, since petitioner had secured minimum 80% marks, she was declared qualified for draw of selection.

14. In the instant case, petitioner offered two plots, as have been referred hereinabove, this Court after perusing the material available on record is fully convinced and satisfied that the corporation has rightly not considered the case of the present petitioner for construction of godown on khasra No.1005 and thereafter an alternate site offered by the petitioner by furnishing an affidavit of one Sh. Jalam Singh, wherein he agreed to give land of khasra No.1003 to the petitioner in exchange of khasra No.1005 because bare perusal of the document available on record suggest that khasra No.1005 was not suitable for construction of godown since the same was less than dimension 20x24 meters as prescribed under brochure. Though, petitioner by furnishing affidavit on record made by Jalam Singh prayed that her request for construction of godown may be considered qua the plot bearing khasra No. 1003 but same was rejected by Field Verification Committee, solely for the reasons that khasra No.1003 is not owned by the petitioner or any family members of the 'family unit' as provided in the multiple dealership/distributorship norm.

15. Clause 4(g) of the brochure, as has been reproduced hereinabove, clearly provides that applicant should own a suitable plot of minimum 20x24 in dimension for construction of LPG Cylinder storage/ godown. It further provides that own means having clear ownership title of the property in the name of the applicant/ family member of the 'Family Unit' as defined in multiple dealership/distributorship norm. It further provides that in case

ownership/ co-ownership by the family member, consent letter from the family member would be required. Similarly, in clause-4, multiple dealership/distributorship and family unit have been defined, wherein it has been provided that multiple dealership norms means that the applicant or other family of the 'family unit'.

16. Since, it is an admitted case of the petitioner herself that Sh. Jalam Singh, in no manner, was related to her, this Court sees no illegality in the order passed by the Corporation, wherein offer given by the petitioner to construct the godown on khasra No.1003, was rejected on the ground that the same was not found owned by the applicant or by any member of 'Family Unit' as given multiple dealership/distributorship norm. As far as, khasra No.994, which was offered by the present petitioner as a first choice in her application (Annexure P-1), is concerned, corporation vide communication dated 28.10.2011 stated that khasra No.994 was not found suitable for the construction of godown since the same is not approachable and it is covered on all sides by the land owned by others.

17. Since, vide order dated 4.1.2013, this Court had specifically asked the Commission to submit its report "whether any link road exist to the plot of the petitioner bearing khasra No.994 situated in Mohal Parwara, Tehsil Chachiot, District Mandi, H.P" and the Commission, after visiting the spot specifically reported that there exit PWD main road MDR Kandha Pandoh road from which Km. 6/200 there is link road namely Kelodhar Parwara having length 7/265 upto Majhol village. Similarly, Commission while answering question No.2 formulated by this Court in its order dated 4.1.2013, reported that road is fair weather motorable road and HRTC bus is regularly plying on this road. The Commission further while answering questions No.3 and 4 framed by the Court in its order dated 4.1.2012 has categorically reported that from the PWD link road Majhol at Km 7/265 there is a link road constructed by the Block Department having length 230 meter upto Primary School Majhol and 50 meter upto khasra No.994 Muhal Parwara. The Commissioner further reported that link road is fair weather motorable road and only light transport vehicle can ply up to the petitioner plot comprised in khasra No.994 situated in muhal Parwara.

18. But, careful perusal of the aforesaid report, clearly suggests that from PWD link road there is link road constructed by the Block department having length 230 meter upto primary School Majhol and 50 meter upto khara No.994 muhal Parwara, which clearly suggests that khasra No.994 is abutted to the road and L.T.V. plies on the road. The Commissioner while stating that road is fair weather motorable road has specifically stated that HRTC bus regularly plies on this road. Though, Commission has stated that only Light Motor Vehicle can ply upto petitioner plot comprising khasra No.994 situated in muhal Parwara, but it clearly emerge from the report that till Primary School, Majhol, which is 50 meter away from khara No.994 of muhal Parwara, there is a link road constructed by Block department having length 230 meter, on which HRTC bus regularly plies.

19. This Court, after perusing the report submitted by the Commission appointed by this Court has all reasons to agree with the contention put forth on behalf of the petitioner's counsel that the impugned order dated 28.10.2011 is contrary to the factual position which exists on the spot. Since the commission has categorically stated that road leads upto khasra No.994 i.e. plot owned by the present petitioner and there is all fair weather motorable road, this Court sees no force in the contention put forth on behalf of the learned counsel representing the respondent-corporation that the plot of land i.e. khasra No.994 is not suitable and cannot be considered for LPG distributorship, rather this Court, after perusing the report submitted by the Commission, is of the view that land/plot bearing khasra No.994, as offered by the petitioner is suitable for construction of godown for LPG distributorship in terms of the condition contained in brochure Annexure P-2. It is undisputed that plot of khasra No.994 is of minimum 20x24 meter in dimension. Similarly, after perusing the record, this Court is fully satisfied that the same is abutted to the road, which is freely accessible through all weather motorable approach road. The Commission has categorically reported that on the road, HRTC bus plies till Primary School from where petitioner plot is hardly a distance of 50 meters to which also road has been constructed.

As per the commission report, Light Motor Vehicle can go up to the plot of the petitioner bearing khasra No.994. Since, only condition contained in the brochure is that road should be freely accessible through all weather motorable approach road, application furnished by the petitioner Jayoti Thakur could not be rejected by respondent-corporation on the ground that khasra No.994 is not suitable for construction of godown. Accordingly, this Court after perusing the report submitted by the Commission pursuant to the directions passed by this Court on 4.1.2013 is fully satisfied that khasra No.994 is suitable for construction of godown and same is all weather motorable approachable road as required under brochure.

20. In the present case, respondent being instrumentalities of the State was expected to act fairly without there being any bias and mala-fide, especially when it deals with public establishments or issuance of any grant of licence etc. In this regard the Hon'ble Apex Court **in City Industrial Development Corporation through its Managing Director vs. Platinum Entertainment and Others, (2015)1 SCC 558**, held:-

> "37. It is well settled that whenever the Government dealt with the public establishment in entering into a contract or issuance of licence, the Government could not act arbitrarily on its sweet will but must act in accordance with law and the action of the Government should not give the smack of arbitrariness. In the case of Ramana Dayaram Shetty vs. International Airport Authority of India & Ors., (1979) 3 SCC 489, this Court observed as under: (SCC pp.504 & 506 paras 11 &12)-
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> "11. Today the Government in a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits, including jobs, contracts, licences, quotas, mineral rights, etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Governments and local authorities. Licences are required before one can engage in many kinds of businesses or work. The power of giving licences means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people. Many individuals and many more businesses enjoy largesse in the form of Government contracts. These contracts often resemble subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with Government. Government owns and controls hundreds of acres of public land valuable for mining and other purposes. These resources are available for utilization by private corporations and individuals by way of lease or licence. All these mean growth in the Government largesse and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, can it be said that they do not enjoy any legal protection? Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure?"
>
> "12. .....It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must

be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and nondiscriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

39. In **Kasturi Lal Lakshmi Reddy & Ors. vs. State of Jammu and Kashmir & Anr**., (1980) 4 SCC 1, this Court observed as under:(SCC pp.13-14, paras 14-15).

"14. Where any governmental action fails to satisfy the test of reasonableness and public interest discussed above and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid. It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot, for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so. Such considerations may be that some directive principle is sought to be advanced or implemented or that the contract or the property is given not with a view to earning revenue but for the purpose of carrying out a welfare scheme for the benefit of a particular group or section of people deserving it or that the person who has offered a higher consideration is not otherwise fit to be given the contract or the property. We have referred to these considerations only illustratively, for there may be an infinite variety of considerations which may have to be taken into account by the Government in formulating its policies and it is on a total evaluation of various considerations which have weighed with the Government in taking a particular action, that the court would have to decide whether the action of the Government is reasonable and in public interest. But one basic principle which must guide the court in arriving at its determination on this question is that there is always a presumption that the governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the court by proper and adequate material. The court cannot lightly assume that the action taken by the Government is unreasonable or without public interest because, as we said above, there are a large number of policy considerations which must necessarily weigh with the Government in taking action and therefore the court would not strike down governmental action as invalid on this ground, unless it is clearly satisfied that the action is unreasonable or not in public interest. But where it is so satisfied, it would be the plainest duty of the court under the Constitution to invalidate the governmental action. This is one of the most important functions of the court and also one of the most essential for preservation of the rule of law. It is imperative in a democracy governed by the rule of law that governmental action must be kept within the limits of the law and if there is any transgression, the court

must be ready to condemn it. It is a matter of historical experience that there is a tendency in every Government to assume more and more powers and since it is not an uncommon phenomenon in some countries that the legislative check is getting diluted, it is left to the court as the only other reviewing authority under the Constitution to be increasingly vigilant to ensure observance with the rule of law and in this task, the court must not flinch or falter. It may be pointed out that this ground of invalidity, namely, that the governmental action is unreasonable or [pic]lacking in the quality of public interest, is different from that of mala fides though it may, in a given case, furnish evidence of mala fides.

15. The second limitation on the discretion of the Government in grant of largess is in regard to the persons to whom such largess may be granted. It is now well settled as a result of the decision of this Court in Ramana D. Shetty v. International Airport Authority of India that the Government is not free, like an ordinary individual, in selecting the recipients for its largess and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion. The law is now well-established that the Government need not deal with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure. Where the Government is dealing with the public whether by way of giving jobs or entering into contracts or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with some standard or norm which is not arbitrary, irrational or irrelevant. The governmental action must not be arbitrary or capricious, but must be based on some principle which meets the test of reason and relevance. This rule was enunciated by the court as a rule of administrative law and it was also validated by the court as an emanation flowing directly from the doctrine of equality embodied in Article 14. The court referred to the activist magnitude of Article 14 as evolved in E.P. Royappa v. State of Tamil Nadu and Maneka Gandhi case, (1978) 1 SCC 248 and observed that it must follow as a necessary corollary from the principle of equality enshrined in Article 14 that though the State is entitled to refuse to enter into relationship with anyone, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets that test of reasonableness and non- discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and nondiscriminatory ground'. (Ramana Dayaram Shetty case, SCC p.512.para 21)

This decision has reaffirmed the principle of reasonableness and non arbitrariness in governmental action which lies at the core of our entire constitutional scheme and structure." (pp.576-580)

21. In **B.A. Linga Reddy and Others vs. Karnataka State Transport Authority and Others,** (2015)4 SCC 515, the Court held:

"16. The pari materia provisions contained in sections 99 and 102 of the Act of 1988 are reproduced hereunder:

"99. Preparation and publication of proposal regarding road transport service of a State transport undertaking.-[(1)] Where any State Government is of opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport

service, it is necessary in the public interest that road transport services in general or any particular class of such service in relation to any area or route or portion thereof should be run and operated by the State transport undertaking, whether to the exclusion, complete or partial, of other persons or otherwise, the State Government may formulate a proposal regarding a scheme giving particulars of the nature of the services proposed to be rendered, the area or route proposed to be covered and other relevant particulars respecting thereto and shall publish such proposal in the Official Gazette of the State formulating such proposal and in not less than one newspaper in the regional language circulating in the area or route proposed to be covered by such scheme and also in such other manner as the State Government formulating such proposal deem fit.

(2) Notwithstanding anything contained in sub-section (1), when a proposal is published under that subsection, then from the date of publication of such proposal, no permit shall be granted to any person, except a temporary permit during the pendency of the proposal and such temporary permit shall be valid only for a period of one year from the date of its issue or till the date of final publication of the scheme under section 100, whichever is earlier.

102. Cancellation or modification of scheme.-

(1) The State Government may, at any time, if it considers necessary, in the public interest so to do, modify any approved scheme after giving-

(i) the State transport undertaking; and (ii) any other person who, in the opinion of the State Government, is likely to be affected by the proposed modification, an opportunity of being heard in respect of the proposed modification.

(ii) The State Government shall publish any modification proposed under subsection (1) in the Official Gazette and in one of the newspapers in the regional languages circulating in the area in which it is proposed to be covered by such modification, together with the date, not being less than thirty days from such publication in the Official Gazette, and the time and place at which any representation received in this behalf will be heard by the State Government."

17. It is apparent from the provisions that the scheme is framed for providing efficient, adequate, economical and properly coordinated road transport service in public interest. Section 102 of the Act of 1988 does not lay down the requirement of recording any express finding on any particular aspect; whereas the duty is to hear and consider the objections. It requires the State Government to act in public interest to cancel or modify a scheme after giving the State transport Undertaking or any other affected person by the proposed modification an opportunity of hearing. The State is supposed to be acting in public interest while exercising the power under the provision. However, that does not dispense with the requirement to record reasons while dealing with objections. Modification of the scheme is a quasi-judicial function while modifying or cancelling a scheme. The State Government is duty-bound to consider the objections and to give reasons either to accept or reject them. The rule of reason is

anti-thesis to arbitrariness in action and is a necessary concomitant of the principles of natural justice.

18. In **Siemens Engineering & Manufacturing Co. of India Ltd. v. Union of India**,[1976 (2) SCC 981, it was held : (SCC pp. 986-87, para 6)

> "6. .....It is now settled law that where an authority makes an order in exercise of a quasi-judicial function, it must record its reasons in support of the order it makes. Every quasi-judicial order must be supported by reasons. That has been laid down by a long line of decisions of this Court ending with N.M. Desai v. Testeels Ltd.. But, unfortunately, the Assistant Collector did not choose to give any reasons in support of the order made by him confirming the demand for differential duty. This was in plain disregard of the requirement of law. The Collector in revision did give some sort of reason but it was hardly satisfactory. He did not deal in his order with the arguments advanced by the appellants in their representation dated December 8, 1961 which were repeated in the subsequent representation dated June 4, 1965. It is not suggested that the Collector should have made an elaborate order discussing the arguments of the appellants in the manner of a Court of law. But the order of the Collector could have been a little more explicit and articulate so as to lend assurance that the case of the appellants had been properly considered by him. If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, [pic]with the proliferation of Administrative Law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi- judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law."

19. This Court in **Rani Lakshmi Bai Kshetriya Gramin Bank's case while relying upon S.N. Mukherjee v. Union of India**,1990 (4) SCC 594 case, SCCp.243, para 8):

> "8. The purpose of disclosure of reasons, as held by a Constitution Bench of this Court in S.N. Mukherjee v. Union of India (1990 (4) SCC 594), is that people must have confidence in the judicial or quasi-judicial authorities. Unless reasons are disclosed, how can a person know whether the authority has applied its mind or not? Also, giving of reasons minimises the chances of arbitrariness. Hence, it is an essential requirement of the rule of law that some reasons, at least in brief, must be disclosed in a judicial or quasi-judicial order, even if it is an order of affirmation."

20. A Constitution Bench of this Court has laid down in Krishna Swami v. Union of India & Ors. [1992 (4) SCC 605] that if a statutory or public authority/ functionary does not record the reasons, its decision would be

rendered arbitrary, unfair, unjust and violating Articles 14 and 21 of the Constitution. This Court has laid down: (SCC p.637, para 47)

> "47 .....Undoubtedly, in a parliamentary democracy governed by rule of law, any action, decision or order of any statutory/public authority/functionary must be founded upon reasons stated in the order or staring from the record. Reasons are the links between the material, the foundation for their erection and the actual conclusions. They would also demonstrate how the mind of the maker was activated and actuated and their rational nexus and synthesis with the facts considered and the conclusions reached. Lest it would be arbitrary, unfair and unjust, violating Article 14 or unfair procedure offending Article 21. But exceptions are envisaged keeping institutional pragmatism into play, conscious as we are of each other's limitations.

21. In Workmen of Meenakshi Mills Ltd. & Ors. v. Meenakshi Mills Ltd. & Anr. [1992 (3) SCC 336] while considering the principles of natural justice, it has been observed that it is the duty to give reasons and to pass a speaking order; that excludes arbitrariness in action as the same is necessary to exclude arbitrariness. This Court has observed thus : (SCC pp.374 & 378, paras 42 & 49)

> "42. We have already dealt with the nature of the power that is exercised by the appropriate Government or the authority while refusing or granting permission under sub-section (2) and have found that the said power is not purely administrative in character but partakes of exercise of a function which is judicial in nature. The exercise of the said power envisages passing of a peaking order on an objective consideration of relevant facts after affording an opportunity to the concerned parties. Principles or guidelines are insisted on with a view to control the exercise of discretion conferred by the statute. There is need for such principles or guidelines when the discretionary power is purely administrative in character to be exercised on the subjective opinion of the authority. The same is, however, not true when the power is required to be exercised on objective considerations by a speaking order after affording the parties an opportunity to put forward their respective points of view.
>
> 49. We are also unable to agree with the submission that the requirement of passing a speaking order containing reasons as laid down in sub-section (2) of Section 25-N does not provide sufficient safeguard against arbitrary action. In S.N. Mukherjee v. Union of India, 1990 (4) SCC 594, it has been held that irrespective of the fact whether the decision is subject to appeal, revision or judicial review, the recording of reasons by an administrative authority by itself serves a salutary purpose, viz., "it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision making."(SCC p.612, para 36)" (pp.528-530)

22. Consequently, in view of the aforesaid discussion as well as law referred hereinabove, this Court has no hesitation to conclude that the action of the respondent-corporation in not allotting 'RGGLV' in favour of the petitioner is unjust, discriminatory and in complete violation of principle of natural justice and as such, same deserves to be quashed and set aside.

23. Admittedly, in the present case petitioner had applied for 'RGGLV' pursuant to the advertisement issued by the respondent-corporation and he was selected for draw of lots since she had acquired minimum marks. Perusal of the report of Commission, as has been discussed in detailed hereinabove, clearly suggests that land/plot offered by the petitioner is suitable for construction of godown.

24. Hence, the present petition is allowed and order dated 28.10.2011 (Annexure P-5) is quashed and set-aside. The respondent-Corporation is directed to consider the case of the petitioner for allotment of 'RGGLV' at Parwara, District Mandi, HP on khasra No.994, as mentioned in the application filed by her pursuant to advertisement (Annexure P-1) within a period of four weeks from the date of this judgment.

Accordingly, the present petition is disposed of alongwith pending application(s), if any.

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

FAO No.314 of 2011 with FAO No.7 of 2013.
Reserved on : 30.09.2016.
Pronounced on : 7.10..2016

1. FAO No.314 of 2011

Lakhwinder Singh ..... Appellant
Versus
Seema Devi and others ..... Respondents

2. FAO No.7 of 2013

Sewa Singh and Another ..... Appellants
Versus
Lakhwinder Singh and others ..... Respondents

Motor Vehicles Act, 1988- Section 166- Claimants pleaded in the claim petition that L was driving the tractor at the time of the accident- L and his father pleaded that deceased was driving the tractor at the time of accident- it was mentioned in the FIR that L was driving the vehicle – the contents of the FIR are to be accepted as correct as it was lodged soon after the accident – the owners pleaded that they had sold the vehicle to father of L, which is corroborated by oral evidence, application for release and hire purchase agreement- the person who is in actual possession and the control of the vehicle has to satisfy the liability- Tribunal had wrongly saddled the registered owner with liability- award modified. (Para-14 to 28)

Cases referred:

Rakesh Kumar & Etc. vs. United India Insurance Company Ltd. & Ors. Etc. Etc., JT 2016 (6) SC 504

HDFC Bank Ltd. vs. Kumari Reshma and Ors, 2014 AIR SCW 6673

FAO No.314 of 2011:

For the appellants: Mr.Jagdish Thakur, Advocate, for appellant No.1.
Appellant No.2 deleted.

For the respondents: Mr.Karan Singh Kanwar, Advocate, for respondents No.1 to 7.
Mr.B.C. Negi, Senior Advocate, with Mr.Narender Singh Thakur, Advocate, for respondents No.8 and 9.

FAO No.7 of 2013:

For the appellants: Mr.B.C. Negi, Senior Advocate, with Mr.Narender Singh Thakur, Advocate, for the appellants.

For the respondents: Mr.Jagdish Thakur, Advocate, for respondent No.1.
Mr.Karan Singh Kanwar, Advocate, for respondents No.3 to 9.
Respondent No.2 deleted.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Both these appeals are directed against a common award, dated 7th June, 2011, passed by the Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P., (for short, the Tribunal), whereby compensation to the tune of Rs.3,94,000/, alongwith interest at the rate of 7.5% per annum from the date of filing of the claim petition till realization, came to be granted in favour of the claimants. The driver, the owner under sale agreement Gurdeep Singh and the registered owners i.e. Sewa Singh & Ranbir Singh were saddled with the liability, (for short, the impugned award).

2. Feeling aggrieved, the driver and the owner have challenged the impugned award by the medium of FAO No.314 of 2011, while the registered owners filed FAO No.7 of 2013 questioning the impugned award, on the grounds taken in the memos of appeals.

Facts:

3. Claimants, being widow, parents, sons and daughters of deceased Nar Singh, invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, 1988, (for short, the Act), for grant of compensation to the tune of Rs.20.00 lacs, as per the break-ups given in the claim petition. It was averred that on 29th April, 2007, at about 8.30 a.m., the deceased, namely, Nar Singh, aged about 32 years, alongwith Gurmeet Singh, was traveling on tractor bearing No.HR-11-5553 to village Jangla Bhood to sell wheat straw. It was further averred that at the relevant time, the tractor was being driven by its driver, namely, Lakhwinder Singh, and when the said tractor reached at Jangla Bhood, due to the rash and negligent driving of the driver of the offending tractor, it met with an accident, resulting into the death of Nar Singh. In regard to the accident, FIR No.86/07 was registered at Police Station, Nahan. It was also averred that the deceased was an agriculturist and was earning Rs.15,000/- per month from that vocation. Hence the claim petition.

4. Respondent No.1 i.e. Lakhwinder Singh (driver) and respondent No.2-C Gurdeep Singh resisted the claim petition by filing replies. Respondent No.2-A Sewa Singh and respondent No.2-B Ranvir Singh did not appear before the Tribunal and were proceeded against ex parte.

5. On the pleadings of the parties, the Tribunal framed the following issues:

"1. Whether Nar Singh died on account of rash and negligent driving of the Tractor by respondent No.1 Lakhwinder Singh, 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 bad for misjoinder of the respondents? OPR-1 & 2C.

4. Whether the petition is not maintainable in the present form? OPR-1 & 2C

5. Relief."

6. Parties have led evidence. In order to prove their case, claimants examined PW-2 Sajad Ali, PW-3 Sukhpal Singh, PW-4 Umeed Singh, PW-5 Shakil Ahmed Sheikh and one of the claimants i.e. Seema Devi appeared as PW-1. On the other hand, respondent No.1 Lakhwinder Singh and respondent No.2-C Gurdeep Singh appeared in the witness box as RW-1 and RW-4, respectively. Respondents also examined Sheetal Kumar as RW-2 and ASI Om Kishan as RW-3.

7. The Tribunal after scanning the pleadings as well as the entire evidence allowed the claim petition and saddled respondents No.1 & 2-C (jointly and severally), and respondents No.2-A and 2-B (jointly and severally), with the liability in the ratio of 50 : 50.

8. Feeling aggrieved, original respondents No.1 and 2-C (Lakhwinder Singh and Gurdeep Singh) filed FAO No.314 of 2011 and original respondents No.2-A and 2-B (registered owners) challenged the impugned award by way of FAO No.7 of 2013.

9. During the pendency of the appeals, Gurdeep Singh (respondent No.2 in FAO No.7 of 2013 and appellant No.2 in FAO No.314 of 2011) expired, constraining the appellants to move an application, being CMP No.7132 of 2015 in FAO No.7 of 2013, for deletion of name of said Gurdeep Singh, since the sole legal representative of Gurdeep Singh, namely, Lakhwinder Singh was already on record. Accordingly, the said application was allowed vide order dated 15th July, 2015 and the name of Gurdeep Singh was ordered to be deleted from the array of respondents. Thereafter, in FAO No.314 of 2011 also, the name of said Gurdeep Singh, being appellant No.2, was deleted on the request of the learned counsel for the appellant.

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

11. Learned counsel for the appellant in FAO No.314 of 2011 argued that the Tribunal has fallen into an error in saddling Lakhwinder Singh and Gurdeep Singh with the liability to the extent of 50% for the reason that the appellant Lakhwinder Singh was not driving the offending tractor at the time of accident, but it was the deceased who was driving the said tractor and the deceased himself was responsible for the accident. Further argued that the registered owners have to satisfy the award.

12. The learned counsel for the appellants in FAO No.7 of 2013 argued that the appellants Sewa Singh and Ranvir Singh had already sold the vehicle in favour of Gurdeep Singh. Therefore, it was submitted that the Tribunal has wrongly fastened the liability on them to the extent of 50%.

13. After hearing the learned counsel for the parties, the following questions emerge for determination in these appeals:

(i) Who was driving the offending vehicle rashly and negligently at the time of accident?

(ii) Whether the Tribunal has rightly saddled Lakhwinder Singh & Gurdeep Singh with the liability to the extent of 50%, and Sewa Singh & Ranvir Singh to the extent of 50%?

(iii) Who is to be saddled with the liability?

14. The claimants have pleaded in the claim petition that Lakhwinder Singh was driving the offending tractor at the relevant point of time. In order to prove the said factum, the claimants examined PW-2 Sajad Ali, who has specifically deposed that at the time of accident, Lakhwinder Singh was driving the offending tractor.

15. On the other hand, the said Lakhwinder Singh and Gurdeep Singh (father of Lakhwinder Singh) have averred in their replies that the deceased was himself driving the offending tractor at the time of accident, have examined one Sheetal Kumar as RW-2 who stated that the offending tractor was being driven rashly and negligently by the deceased himself at the time of accident.

16. FIR No.86/07 (Ext.PW-1/B) was registered by Gurmeet Singh in Police Station Nahan, was one of the occupants in the offending tractor at the time of accident. In the FIR, it was reported that Lakhwinder Singh was driving the offending tractor at the time of accident. However, afterwards, the informant Gurmeet Singh resiled from the said statement during investigation and stated that the FIR was recorded under compulsion. But, the said Gurmeet Singh has not been examined as witness before the Tribunal, thus adverse inference has to be drawn.

17. The contents of the first information report recorded with promptitude has to be given credence. In the instant case, the FIR was registered immediately after the accident and the first version, the informant Gurmeet Singh has given, was that at the time of accident, Lakhwinder Singh was driving the offending tractor. The Tribunal has rightly scanned the evidence and has not relied upon the statement of RW-2 Sheetal Kumar. The contents of the FIR and the statement of PW-2 Sajad Ali do, prima facie, establish that Lakhwinder Singh was driving the offending tractor at the time of accident in which deceased Nar Singh lost his life.

18. The Tribunal while coming to the conclusion that Lakhwinder Singh was driving the offending tractor at the time of accident, has rightly made detailed discussion in paragraph 13 of the impugned award. The said findings are borne out from the records and are accordingly upheld. Question No.(i) is answered accordingly.

19. Appellants, namely, Sewa Singh and Ranvir Singh, registered owners, have specifically pleaded in the appeal that though they were the registered owners of the offending vehicle, but, much prior to the accident, they had sold it to Gurdeep Singh, (father of Lakhwinder Singh) and said Gurdeep Singh was in possession of the offending tractor at the relevant time and the vehicle was under his control. The stand of the registered owners is fortified by the plea taken by Lakhwinder Singh and Gurdeep Singh, who have pleaded in the replies filed by them to the claim petition, that Lakhwinder Singh was not driving the offending vehicle, but deceased Nar Singh was driving the same. In case the vehicle was not in the possession of Gurdeep Singh, he would not have taken such a stand while defending the claim petition.

20. Apart from it, there is ample documentary evidence available on the record to show that the registered owners had already sold the offending vehicle to Gurdeep Singh. During investigation, the offending vehicle was seized off by the police, Gurdeep Singh filed an application (Ext.PA) before the Chief Judicial Magistrate concerned for the release of the same, being the owner of the said vehicle. Alongwith the said application, he also annexed hire purchase agreement Ext.PD, which shows that the said agreement was entered into between the registered owners (Sewa Singh and Ranvir Singh) and Gurdeep Singh on 23rd March, 2006 and was duly attested by Notary Public. The said agreement does disclose that the registered owners received full and final payment of the offending vehicle, had no objection if the vehicle was transferred in the name of Gurdeep Singh and would not be responsible for taxes, challans, accident etc. etc. after the date of execution of the said agreement i.e. 23rd March, 2006.

21. Perhaps, when the earlier application was not granted, Gurdeep Singh filed another application, dated 16th May, 2007, before the Chief Judicial Magistrate concerned (Ext.PF) for the release of the offending vehicle, alongwith the Special Power of Attorney (Ext.PG) of the registered owners and the Chief Judicial Magistrate released the vehicle in favour of Gurdeep Singh vide order dated 16th May, 2007. Spurdari bond Ext.PJ was executed by Gurdeep Singh. It is also not the case of Gurdeep Singh that, on release, he had not taken the offending vehicle on Spurdari.

22. The hire purchase agreement was exhibited before the Tribunal as Ext.PD, Lakhwinder Singh and Gurdeep Singh have not objected to the same, though registered owners were set ex parte, are precluded from raising any objection about the admissibility of the same at a later stage.

23. The Apex Court in case titled as **Rakesh Kumar & Etc. vs. United India Insurance Company Ltd. & Ors. Etc. Etc., JT 2016 (6) SC 504,** has held that once the licence was proved and marked in evidence without any objection by the insurance company, it had no right to raise any objection about its admissibility at a later stage. It is apt to reproduce paragraph 20 of the said decision hereunder:

> *"20. First, the driver of the offending vehicle (N.A.-2) proved his driving license (Exhibit-R1) in his evidence. Second, when the license was proved, the Insurance Company did not raise any objection about its admissibility or manner of proving. Third, even if any objection had been raised, it would have had no merit because it has come on record that the original*

driving license was filed by the driver in the Court of Judicial Magistrate First class, Naraingarh in a criminal case arising out of the same accident. Fourth, in any event, once the license was proved by the driver and marked in evidence and without there being any objection by the Insurance Company, the Insurance Company had no right to raise any objection about the admissibility and manner of proving of the license at a later stage (See Oriental Insurance Company Ltd. Vs. Premlata Shukla & Ors., 2007 13 SCC 476 and lastly, the Insurance Company failed to adduce any evidence to prove that the driving license (Ex.R1) was either fake or invalid for some reason."

24. Thus, from the perusal of the hire purchase agreement, coupled with the discussion made herein above, it becomes crystal clear that the offending vehicle was in the possession of Gurdeep Singh at the time of accident.

25. The Apex Court in case titled as **HDFC Bank Ltd. vs. Kumari Reshma and Ors, 2014 AIR SCW 6673** held that a person who is in possession of the vehicle in terms of a hire purchase agreement or agreement of lease or agreement of hypothecation is the owner of the said vehicle. It is apt to reproduce paragraphs 10 and 24 of the said judgment hereunder:

"10. On a plain reading of the aforesaid definition, it is demonstrable that a person in whose name a motor vehicle stands registered is the owner of the vehicle and, where motor vehicle is the subject of hire-purchase agreement or an agreement of hypothecation, the person in possession of the vehicle under that agreement is the owner. It also stipulates that in case of a minor, the guardian of such a minor shall be treated as the owner. Thus, the intention of the legislature in case of a minor is mandated to treat the guardian of such a minor as the 'owner'. This is the first exception to the definition of the term 'owner'. The second exception that has been carved out is that in relation to a motor vehicle, which is the subject of hire-purchase agreement or an agreement of lease or an agreement of hypothecation, the person in possession of vehicle under that agreement is the owner. Be it noted, the legislature has deliberately carved out these exceptions from registered owners thereby making the guardian of a minor liable, and the person in possession of the vehicle under the agreements mentioned in the dictionary clause to be the owners for the purposes of this Act.

24. On a careful analysis of the principles stated in the foregoing cases, it is found that there is a common thread that the person in possession of the vehicle under the hypothecation agreement has been treated as the owner. Needless to emphasise, if the vehicle is insured, the insurer is bound to indemnify unless there is violation of the terms of the policy under which the insurer can seek exoneration."

26. The Apex Court further held that the person who is in actual possession of the vehicle and is under control of the same at the time of accident has to satisfy the liability. It is apt to reproduce paragraphs 13, 15, 16 and 25 hereunder:

"13. In this context, we may refer to a two-Judge Bench decision in Rajasthan State Road Transport Corporation V. Kailash Nath Kothari & Others, 1997 7 SCC 481. In the said case, plea was taken by the Rajasthan State Road Transport Corporation (RSRTC) before the High Court that as it was only a hirer and not the owner of the bus, it could not be fastened with any liability for payment of compensation but the said stand was not accepted. It was contended before this Court that the Corporation not being the owner of the bus was not liable to pay any compensation arising out of the accident because driver who was driving the bus at the relevant time, was not in the employment of the owner of the bus and not of the Corporation and hence, it could not be held vicariously liable for the rash and negligent act of the driver. The Court referred to the definition in Section 2(3), which defines "contract carriage", Section 2(19), which defines the "owner", Section 2(29), which defines "stage carriage" and Section 42 that dealt with "necessity of permits". Be it stated, these provisions reproduced by the Court pertained to Motor Vehicles Act, 1939 (for short, 'the 1939 Act'). The owner under the 1939 Act was defined as follows:

> "2. (19) 'owner' means, where the person in possession of a motor vehicle is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hirepurchase agreement, the person in possession of the vehicle under that agreement;"
>
> The Court referred to the conditions 4 to 7 and 15 of the agreement and in that context held thus:
>
> "The admitted facts unmistakably show that the vehicle in question was in possession and under the actual control of RSRTC for the purpose of running on the specified route and was being used for carrying, on hire, passengers by the RSRTC. The driver was to carry out instructions, orders and directions of the conductor and other officers of the RSRTC for operation of the bus on the route specified by the RSRTC".

While dealing with the definition of the owner under the 1939 Act, the Court ruled that the definition of owner under Section 2(19) of the Act is not exhaustive. It has, therefore to be construed, in a wider sense, in the facts and circumstances of a given case. The expression owner must include, in a given case, the person who has the actual possession and control of the vehicle and under whose directions and commands the driver is obliged to operate the bus. To confine the meaning of "owner" to the registered owner only would in a case where the vehicle is in the actual possession and control of the hirer would not be proper for the purpose of fastening of liability in case of an accident. The liability of the "owner" is vicarious for the tort committed by its employee during the course of his employment and it would be a question of fact in each case as to on whom can vicarious liability be fastened in the case of an accident.

15. In this context, it is profitable to refer to a two-Judge Bench decision in National Insurance Co. Ltd. V. Deepa Devi & Ors., 2008 1 SCC 414. In the said case the question arose whether in the event a car is requisitioned for the purpose of deploying the same in the election duty, who would be liable for payment of compensation to the victim of the accident in terms of the provisions of 1988 Act. The Court referred to the definition of 'owner' in the 1939 Act and the definition of 'owner' under Section 2(30) of the 1988 Act. In that context, the Court observed that the legislature either under the 1939 Act or under the 1988 Act had visualized a situation of this nature. The Court took note of the fact that the respondent no. 3 and 4 continued to be the registered owners of the vehicle despite the fact that the same was requisitioned by the District Collector in exercise of the power conferred upon him under the Representation of People Act, 1951 and the owner of the vehicle cannot refuse to abide by the order of requisition of the vehicle by the District Collector. Proceeding further, the Court ruled thus:

> "..... While the vehicle remains under requisition, the owner does not exercise any control thereover. The driver may still be the employee of the owner of the vehicle but he has to drive it as per the direction of the officer of the State, who is put in charge thereof. Save and except for legal ownership, for all intent and purport, the registered owner of the vehicle loses entire control thereover. He has no say as to whether the vehicle should be driven at a given point of time or not. He cannot ask the driver not to drive a vehicle on a bad road. He or the driver could not possibly say that the vehicle would not be driven in the night. The purpose of requisition is to use the vehicle. For the period the vehicle remains under the control of the State and/or its officers, the owner is only entitled to payment of compensation therefor in terms of the Act but he cannot not exercise any control thereupon. In a situation of this nature, this Court must proceed on the presumption that Parliament while enacting the 1988 Act did not envisage such a situation. If in a given situation, the statutory definitions contained in the 1988 Act cannot be given effect to in letter and spirit, the same should be understood from the common sense point of view.

16. Elaborating the concept, the Court referred to Mukesh K. Tripathi V. Senior Divisional Manager LIC, 2004 8 SCC 387, Ramesh Mehta V. Sanwal Chand Singhvi, 2004 5 SCC 409, State of Maharashtra V. Indian Medical Assn., 2002 1 SCC 589, Pandey & Co. Builders (P) Ltd., V. State of Bihar, 2007 1 SCC 467 and placed reliance on Kailash Nath Kothari , National Insurance Co. Ltd. V. Durdadahya Kumar Samal, 1988 2 TAC 25 and Chief Officer, Bhavnagar Municipality V. Bachubhai Arjanbhai, 1996 AIR(Guj) 51 and eventually opined the State shall be liable to pay the amount of compensation to the claimant and not the registered owner of the vehicle and consequently the appellant therein, the insurance company.

25. In Purnya Kala Devi , a three-Judge Bench has categorically held that the person in control and possession of the vehicle under an agreement of hypothecation should be construed as the owner and not alone the registered owner and thereafter the Court has adverted to the legislative intention, and ruled that the registered owner of the vehicle should not be held liable if the vehicle is not in his possession and control. There is reference to Section 146 of the Act that no person shall use or cause or allow any other person to use a motor vehicle in a public place without insurance as that is the mandatory statutory requirement under the 1988 Act. In the instant case, the predecessor-ininterest of the appellant, Centurion Bank, was the registered owner along with respondent no.2. The respondent no. 2 was in control and possession of the vehicle. He had taken the vehicle from the dealer without paying the full premium to the insurance company and thereby getting the vehicle insured. The High Court has erroneously opined that the financier had the responsibility to get the vehicle insured, if the borrower failed to insure it. The said term in the hypothecation agreement does not convey that the appellant financier had become the owner and was in control and possession of the vehicle. It was the absolute fault of the respondent no.2 to take the vehicle from the dealer without full payment of the insurance. Nothing has been brought on record that this fact was known to the appellant financier or it was done in collusion with the financier. When the intention of the legislature is quite clear to the effect, a registered owner of the vehicle should not be held liable if the vehicle is not in his possession and control and there is evidence on record that the respondent no.2, without the insurance plied the vehicle in violation of the statutory provision contained in Section 146 of the 1988 Act, the High Court could not have mulcted the liability on the financier. The appreciation by the learned Single Judge in appeal, both in fact and law, is wholly unsustainable."

27. In view of the above discussion, it is held that Gurdeep Singh, who was in actual possession of the offending vehicle, had the control of the offending vehicle, and thus, has to satisfy the entire liability. The Tribunal has fallen into an error in saddling the registered owners with the liability. Since the driver of the offending vehicle, namely, Lakhwinder Singh is the sole representative of Gurdeep Singh, who has expired during the pendency of the appeals, therefore, said Lakhwinder Singh has to satisfy the award. Questions No.(ii) and (iii) are answered accordingly.

28. Having said so, the appeal filed by the registered owners, being FAO No.7 of 2013, is allowed and the appeal filed by Lakhwinder Singh i.e. FAO No.413 of 2011 is dismissed. The impugned award is modified, as indicated above. Lakhwinder Singh son of deceased Gurdeep Singh is directed to deposit the entire award amount, alongwith interest as awarded by the Tribunal, within a period of six weeks from today, in the Registry of this Court and on deposit, the Registry is directed to release the entire amount in favour of the claimants strictly in terms of the impugned award.

29. Both the appeals are disposed of accordingly.

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

Mansho Devi ...Appellant.
Versus
Smt. Meera Devi and others ...Respondents.

FAO No. 50 of 2011
Decided on: 07.10.2016

Motor Vehicles Act, 1988- Section 166- Deceased was 65 years of age at the time of accident- his wife has been deprived of her source of income as well as matrimonial home- the deceased was shopkeeper and agriculturist – his income cannot be less than Rs. 6,000/- per month- 1/3rd has to be deducted towards personal expenses and the loss of the dependency is Rs. 4,000/- per month – multiplier of 5 is just and the claimant is entitled to compensation of Rs. 4,000 x 12 x 5= Rs. 2,40,000/- under the head ' Loss of income' – claimant is also entitled to Rs. 10,000/- each under the head 'loss of consortium', 'loss of love and affection', 'loss of estate' and 'funeral expenses'- thus, the claimant is entitled to Rs. 2,80,000/- with interest @ 7.5% per annum from the date of claim petition till realization- the vehicle was insured and therefore, insurer is liable to indemnify the owner. (Para- 20 to 28)

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

For the appellant: Mr. Mohit Thakur, Advocate.
For the respondents: Mr. Nitin Thakur, 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)*

Mr. Nitin Thakur, Advocate, put in appearance on behalf of respondents No. 1 and 2 and prayed that the ex-parte proceedings drawn against respondents No. 1 and 2 in terms of order, dated 12th August, 2016, be set-aside. His statement is taken on record. Ordered accordingly.

2. Subject matter of this appeal is award, dated 31st May, 2010, made by the Motor Accident Claims Tribunal, Ghumarwin, District Bilaspur, Himachal Pradesh (Camp at Bilaspur) (for short "the Tribunal") in M.A.C. No. 51 of 2005, titled as Mansho Devi versus Smt. Meera Devi and others, whereby the claim petition filed by the appellant-claimant 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-appellant has failed to prove that the offending vehicle was being driven by its driver, i.e. respondent No. 2, rashly and negligently at the time of the accident.

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 appellant-claimant invoked the jurisdiction of the Tribunal for grant of compensation to the tune of ₹ 15 lacs, as per the break-ups given in the claim petition, on the ground that she has lost her husband in a vehicular accident, which was caused by the driver, namely Shri Desh Raj, while driving Mohindra Max Pick Up Number applied for, rashly and

negligently on 26th September, 2004, at about 8.30 A.M. at Village Bharoli Lag, District Bilaspur, H.P., in which deceased-Sukh Ram sustained injuries and succumbed to the said injuries.

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 20th November, 2008:

> *"1. Whether the deceased Sukh Ram was crushed by Trala No. applied for being driven by respondent No. 2 negligently on 26.9.2004 at 8.30 p.m. at Bharoli Lag at Distt. Bilaspur as alleged? OPP*
>
> *2. If issue No. 1 is proved in affirmative to what amount and from whom the petitioner is entitled for compensation? OPP*
>
> *3. Whether the claim petition is not maintainable as alleged? OPR-1 to 3*
>
> *4. Whether the petitioner has no cause of action to file the petition as claimed? OPR-1*
>
> *5. Whether no accident had taken place on 26.7.2004 at 8.30 p.m. near Bharoli Lag and Sukh Ram had not died in such an accident as alleged? OPR-3*
>
> *6. Whether the alleged accident dated 26.9.2004 had taken place solely due to negligence of driver of the alleged Tralla and deceased had been crushed thereby as alleged? OPR-3*
>
> *7. Whether the vehicle in question was being driven by an unauthorised person having no valid and effective driving licence to drive such class of vehicle and was also being plied in violation of insurance policy if any, as alleged? OPR-3*
>
> *8. Relief."*

7. The appellant-claimant has examined three witnesses and herself stepped into the witness box in support of her claim. The insurer has examined Shri Mohinder Singh as RW-1. The owner-insured and the driver of the offending vehicle themselves stepped into the witness box as RW-2 and RW-3, respectively.

8. The Tribunal after scanning the evidence, oral as well as documentary, dismissed the claim petition in terms of the impugned award.

Issue No. 1:

9. The Tribunal has held that the appellant-claimant has miserably failed to prove that the offending vehicle was owned by respondent No. 1 and at the time of the accident, was being driven by respondent No. 2 and decided the said issue against the appellant-claimant.

10. Admittedly, FIR No. 138 of 2004, dated 26th September, 2004 (Ext. PW-3/A) was registered at Police Station Talai, District Bilaspur. The Tribunal has fallen in an error in holding that the driver of the offending vehicle, i.e. respondent No. 2, namely Shri Desh Raj, has not been prosecuted for causing this accident in the criminal case instituted on the basis of FIR No. 138 of 2004. The said finding is factually and legally incorrect for the following reasons:

11. It is apt to record herein that the appellant-claimant has moved CMP No. 70 of 2011 in terms of the mandate of Order 41 Rule 27 of the Code of Civil Procedure for placing on record the additional document, i.e. copy of the final report-challan presented in case FIR No. 138 of 2004 in terms of Section 173 of the Code of Criminal Procedure before the Court of competent jurisdiction, i.e. Judicial Magistrate 1st Class, Court No. 1, Ghumarwin, District Bilaspur. The application is granted and copy of the final report-challan is taken on record. CMP No. 70 of 2011 is disposed of accordingly.

12. Perusal of the said final report-challan does disclose that the final report-challan in FIR No. 138 of 2004 has been presented against Shri Desh Raj, i.e. respondent No. 2, who was driving the offending vehicle at the time of the accident.

13. Thus, it has, *prima facie,* been proved that the driver, namely Shri Desh Raj, had driven the offending vehicle rashly and negligently at the relevant point of time.

14. Moreover, respondent No. 3, i.e. the insurer, while filing reply before the Tribunal, has admitted that the accident was outcome of negligent driving of the offending vehicle by its driver. It is apt to reproduce the relevant portion of para 3 of the preliminary submissions of the reply filed on behalf of insurer-respondent No. 3 hereinbelow:

> *"3. ..... It is submitted that the alleged accident on 26.9.04 also took place solely due to the negligence of th driver of the alleged "Tralla" as he kept it start and he, himself, got down from it where the road was narrow and sloppy and suddenly the said "Tralla" came back itself and crushed the deceased. ....."*

15. Viewed thus, it is held that the Tribunal has fallen in an error in determining issue No. 1. The findings returned by the Tribunal on this issue are set aside and it is held that the driver of the offending vehicle had driven the offending vehicle rashly and negligently at the relevant point of time and caused the accident, in which deceased-Sukh Ram sustained injuries and succumbed to the said injuries. Accordingly, issue No. 1 is decided in favour of the appellant-claimant.

16. Before dealing with issue No. 2, I deem it proper to determine issues No. 3 to 7.

Issue No. 3 and 4:

17. It was for the respondents to plead and prove that the claim petition was not maintainable and the appellant-claimant has no cause of action to file the claim petition. As discussed hereinabove, the appellant-claimant became the victim of the vehicular accident, thus, was well within her rights to maintain the claim petition. The Tribunal, without making any discussion, decided both these issues in favour of the respondents. The findings recorded by the Tribunal on both issues No. 3 and 4 are set aside and the said issues are decided in favour of the appellant-claimant and against the respondents.

Issues No. 5 and 6:

18. Learned counsel for the insurer-respondent No. 3 had not pressed both these issues before the Tribunal and the same came to be decided against it, has not questioned the said findings. Accordingly, the findings returned by the Tribunal on issues No. 5 and 6 are upheld.

Issue No. 7:

19. The driving licence of the driver of the offending vehicle is on the record as Mark R-2, 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. There is no proof on the file to show that the offending vehicle was being driven in violation of the insurance policy. Accordingly, the findings returned by the Tribunal on issue No. 7 are set aside and the said issue is decided against respondent No. 3-insurer.

Issue No. 2:

20. Admittedly, the deceased was 65 years of age at the time of the accident, left behind his wife, i.e. the appellant-claimant, who was 55 years of age at the time of filing of the claim petition. She is the sufferer and only she knows what difficulties she has faced right from the date of the accident till today. She is not only deprived of her source of income, but is also deprived of her matrimonial home and matrimonial life in her old age because of the accident due to which she had to part away with her counterpart.

21. It has been averred that the deceased was earning ₹ 10,000/- per month as shopkeeper and agriculturist. Roughly, it can safely be held that he was earning not less than ₹ 6,000/- per month from all sources. One-third has to be deducted towards his personal expenses. Thus, it is held that the appellant-claimant has lost source of income/dependency to the tune of ₹ 4,000/- per month.

22. 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"), multiplier of '5' is just and appropriate.

23. Accordingly, it is held that the appellant-claimant is entitled to compensation to the tune of ₹ 4,000/- x 12 x 5 = ₹ 2,40,000/- under the head 'loss of income'.

24. The appellant-claimant is also held entitled to compensation to the tune of ₹ 10,000/- each under the heads 'loss of consortium', 'loss of love and affection' 'loss of estate' and 'funeral expenses'.

25. Viewed thus, the appellant-claimant is held entitled to compensation to the tune of ₹ 2,40,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- = ₹ 2,80,000/- with interest @ 7.5% per annum from the date of the claim petition till its realization.

26. The question is – who is to be saddled with liability? There is no dispute viz-a-viz the factum of insurance. Accordingly, respondent No. 3-insurer is saddled with liability.

27. Having glance of the above discussions, the impugned award is set aside, appeal is allowed, compensation is awarded and claim petition is granted, as indicated hereinabove.

28. 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 appellant-claimant through payee's account cheque or by depositing the same in her bank account.

29. 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.

Mohan Singh .....Appellant
Versus
Sukhwinder Kumar and others .....Respondents

FAO No.453 of 2011
Decided on :07.10.2016

Motor Vehicles Act, 1988- Section 166- Tribunal held that rashness and the negligence of the driver was not proved – held, that the judgment in the criminal Court cannot be relied upon to determine the rashness and the negligence- the Tribunal had considered the evidence and had rightly held that rashness and negligence was not proved- appeal dismissed. (Para- 7 to 11)

For the appellant: Mr.Pawan Gautam, Advocate.
For the respondents: Mr.Tara Singh Chauhan, Advocate, for respondents No.1 and 2.
Mr.B.M. Chauhan, 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 August, 2011, passed by Motor Accident Claims Tribunal-II, Una, H.P., (for short, the Tribunal), whereby the claim petition filed by the claimant was dismissed, (for short, the impugned award).

2. Claimant had invoked the jurisdiction of the Tribunal by filing claim petition under Section 166 of the Motor Vehicles Act, 1988, (for shot, the Act), seeking compensation to the tune of Rs.15.00 lacs, on the grounds taken in the memo of claim petition.

3. The claim petition was resisted by the respondents by filing replies.

4. On the pleadings of the parties, the following issues were framed by the Tribunal:

"1. Whether the petitioner suffered the injuries due to the rash and negligent driving of Pick Up Van 207 bearing registration No.PB-08AN-7851 by the driver/respondent Shri Sukhwinder Kumar as alleged? OPP

2. If issue No.1 is proved in affirmative, whether the petitioner is entitled to compensation as claimed. If so, its quantum and from whom? OP Parties

3. Whether the respondent No.1 was not holding and possessing a valid license to drive the vehicle. If so, its effect? OPR-3

4. Whether the Pick Up Van was being driven in violation of the terms and conditions of the insurance policy as alleged, if so, its effect? OPR-3

5. Whether the petition is bad for non-joinder of the necessary parties as alleged. If so, its effect? OPR-3

6. Whether the petition is collusive as alleged? OPR-3

7. Relief."

5. The claimant, in order to prove his case, has examined PW-1 Anil Kumar and PW-3 Dr.Savinder Kumar Hans, while the claimant himself stepped into the witness box as PW-2. On the other hand, the driver of the offending vehicle appeared before the Tribunal as RW-1.

6. The Tribunal after examining the pleadings of the parties and the evidence has come to the conclusion that the accident had not taken place due to rash and negligent driving of the driver of the Van i.e. respondent No.1, but the claimant himself was rash and negligent and had caused the accident.

7. At this stage, the learned counsel for the appellant stated that though, in regard to the accident, FIR was registered against the claimant and challan was presented before the court of Judicial Magistrate under Sections 279 and 337 Indian Penal Code, however, after trial, the claimant has been acquitted. Thus, on the strength of this judgment, the learned counsel for the appellant submitted that the claimant has already been acquitted by the court of competent jurisdiction and such acquittal is conclusive proof that the claimant himself had not driven the offending vehicle rashly and negligently at the relevant point of time. The learned counsel for the appellant filed across the board a photocopy of the judgment passed by the Judicial Magistrate Ist Class, Court No.III, Una, H.P., dated 8th July, 2013, made part of the file.

8. A perusal of the judgment passed by the Judicial Magistrate shows that the claimant has been acquitted of the offence as the prosecution could not prove the case beyond reasonable doubt. It is apt to reproduce paragraph 31 of the said judgment hereunder:

"31. After going through the entire facts and circumstances of the case, in the light of evidence on record and arguments of Ld. Counsel for the parties, I have come to the conclusion that prosecution remained unable to prove the guilt of the accused beyond all reasonable shadow of doubt. In the light of such, benefit of doubt is extended the accused and hence, these points are decided against the prosecution and in favour of the accused."

9. The Judicial Magistrate has acquitted the claimant of the offences by extending benefit of doubt. Thus, no benefit can be derived by the claimant by relying upon the said judgment.

10. The Tribunal has discussed all the facts and rightly came to the conclusion that the deceased himself had driven the vehicle rashly and negligently and had caused the accident. It is apt to reproduce paragraph 14 of the impugned award hereunder:

> *"14. There is no denial of the fact that the petitioner is a local man, whereas, the respondents No.1 & 2 hail from the adjoining State of Punjab. Therefore, the possibility of the police registering a false F.I.R. against the petitioner after joining hands with his opponents is very remote. It appears to me that the petitioner is telling nothing except a bundle of lies to grab the compensation money despite the fact that he himself is/was a wrong doer."*

11. Having said so, it is held that the impugned award is well reasoned, needs no interference. The appeal is dismissed accordingly.

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

FAos No. 33, 34 & 39 of 2012
Decided on : 07.10.2016.

FAO No. 33 of 2012

National Insurance Company Limited ....Appellant
Versus
Smt. Reena Devi & others .....Respondents

FAO No. 34 of 2012

National Insurance Company Limited .....Appellant
Versus
Smt. Gita Devi & others .....Respondents

FAO No. 39 of 2012

National Insurance Company Limited .....Appellant
Versus
Smt. Reena Devi & others .....Respondents

Motor Vehicles Act, 1988- Section 149- It was specifically pleaded in the claim petition that deceased were travelling in the vehicle as owners of goods- this plea was upheld by the Tribunal- insurer had not led any evidence to rebut this fact- the insurer was rightly held liable to pay the compensation. (Para-5 and 7)

Motor Vehicles Act, 1988- Section 163-A and 167- It was pleaded in the claim petition that deceased was driver of the vehicle- his income was Rs. 3,300/- per month and falls within the income slab of Rs. 40,000/- per annum – the claim petition was maintainable – the legal representatives have an option to file the claim petition before the Tribunal or before Employees Compensation Commissioner- the amount awarded by the Tribunal is not excessive but falls within the parameters of Motor Vehicles Act- appeal dismissed. (Para-6 and 8 to 18)

FAO No. 33 of 2012

For the Appellant : Mr. Lalit K. Sharma, Advocate.
For the Respondents: Mr. Vinod Thakur, Advocate, for respondents No. 1 to 4.
Mr. Rajesh Kumar, Advocate, for respondents No. 5 & 6.

FAOs No. 34 & 39 of 2012

For the Appellant : Mr. Lalit Kumar Sharma, Advocate.
For the Respondents: Mr. Vinod Thakur, Advocate, for respondents No. 1 to 4.
Mr. Rajesh Kumar, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

All these appeals are outcome of a motor vehicular accident, thus I deem it proper to club and determine all these appeals by this common judgment.

Brief Facts.

2. It is averred in the claim petitions that on 31.1.2010, at about 7.30 p.m., driver, namely, Baldev Ram, was driving vehicle i.e. Tata Tipper bearing registration No. HP 57-3297, rashly and negligently, at Choori Bridge, Tehsil and District Chamba, in which Inder Ram, Naresh Kumar and driver Baldev Ram sustained injuries and succumbed to the same.

3. In all the appeals, the insurer-National Insurance Company Limited has questioned the awards passed by the Motor Accident Claims Tribunal, Chamba Division, Chamba, H.P., for short 'the Tribunal' in **MAC Petition No. 20 of 2010**, titled **Smt. Reena Devi & others versus Smt. Bhuwan & others**, **MAC Petition No. 23 of 2010**, titled as **Smt. Geeta Devi & others versus Smt. Bhuwan & another** and **MAC Petition No. 21 of 2010**, titled **Smt. Reena Devi & others versus Smt. Bhuwan & another**, whereby compensation was granted to the claimants, as per the details given in the respective awards, hereinafter referred to as 'the impugned awards', on grounds taken in the memo of appeals.

4. The claimants and owner of the offending vehicle have not questioned the impugned awards, on any count. Thus, the same have attained finality, so far these relate to them.

5. It is specifically pleaded in Claim Petitions No. 21 & 23 of 2010, subject matters of FAOs No. 34 & 39 of 2012, that the deceased were travelling in the offending vehicle, i.e. Tata Tipper bearing registration No. HP-57-3297, as owners of the goods.

6. In Claim Petition No. 20 of 2010, subject matter of FAO No. 33 of 2012, it is pleaded that the deceased was driver of the offending vehicle.

7. While going through Claim Petitions No. 21 & 23 of 2010, subject matters of FAOs No. 34 & 39 of 2012, the fact that the deceased were travelling in offending vehicle as owner of the goods stands upheld by the Tribunal, after scanning the oral as well as documentary evidence. The insurer has not led any evidence to rebut the said factum, thus the evidence led by the claimants has remained unrebutted. Learned Counsel for the insurer has not contested the impugned awards made in Claim Petitions No. 21 & 23 of 2010, subject matters of FAOs No. 34 & 39 of 2012, on any other ground.

8. In Claim Petition No. 20 of 2010, (FAO No. 33 of 2012), the deceased was the driver of the offending vehicle and his legal representatives-claimants had invoked the jurisdiction of the Tribunal in terms of Section 163-A of the Motor Vehicles, Act, 1988, for short 'the MV Act', for grant of compensation.

9. Learned counsel for the appellant argued that claim petition No. 20/2010 was not maintainable. The argument is not tenable for the following reasons.

10. The aim and object of the MV Act is to grant compensation to the claimants as early as possible without succumbing to the technicalities.

11. The claimants have averred in the claim petition that the income of the deceased was Rs. 3300/- per month, thus falls within the income slab of Rs. 40,000/- per annum.

12. The Division Bench of this Court has discussed all aspects of law in **FAO No. 474 of 2010**, titled as **Oriental Insurance Company Limited versus Sh. Sihnu Ram & others**, decided on 28.09.2016. Applying test, the petition was maintainable.

13. Learned Counsel for the appellant-insurer further argued that the legal representatives of the deceased could have filed the petition in terms of the Workmen's Compensation Act, for short 'the WC Act'.

14. The argument, though attractive, is devoid of any force for the following reasons.

15. In terms of Section 167 of MV Act, the legal representatives have option to file petition either under MV Act or under WC Act. It is apt to reproduce Section 167 of the Act herein.

> ***"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."*

16. The claimants had two remedies available with them; one to file claim petition before the Tribunal and other to file petition under the WC Act. They have chosen to knock the door of the Tribunal under the MV Act.

17. This Court in ***FAO No. 363 of 2006*** titled ***Smt. Rajo Devi versus Sh. Madan Lal Sharma and others*** decided on 2.5.2014, ***FAO No. 530 of 2009*** titled ***Oriental Insurance Co. Ltd. versus Smt. Kamlo and others*** decided on 25.7.2014 and ***FAO No. 227 of 20***06 titled ***National Insurance Co. Ltd. versus Nishan Surya and anothe***r decided on 3.1.2014 has laid down the similar principles of law.

18. The amount awarded by the Tribunal in the said claim petition is not excessive, rather falls within the parameters of the MV Act.

19. Having said so, the impugned awards are upheld and all the appeals are dismissed.

20. 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.

21. 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.

National Insurance Company Ltd. .....Appellant

Versus

Smt. Gayatri & others .....Respondents

FAO No. 43 of 2012
Decided on : 07.10.2016.

Motor Vehicles Act, 1988- Section 149- MACT held that insurer was liable to pay the compensation – High Court had already held in FAO No.187 of 2009 titled National Insurance Company Ltd. Versus Sunita Devi decided on 17.4.2012 that insurer is liable to pay the compensation – in view of this judgment, appeal is dismissed. (Para-2 to 4)

For the Appellant : Mr. Ramakant Sharma, Senior Advocate with Ms. Soma Thakur, Advocate.
For the Respondents: Mr. H.S. Rangra, Advocate, for respondent No. 1.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 5th November, 2011, passed by the Motor Accident Claims Tribunal (II), Mandi, H.P. (for short, "the Tribunal") in Claim Petition No. 24 of 2007, titled as Gayatri & others versus Goverdhan Singh & another, whereby compensation to the tune of Rs.4,79,000/- with interest @ 10% per annum from the date of the award till its realization came to be awarded in favour of the claimants and the insurer came to be saddled with liability (for short "the impugned award").

2. The claimants and the owner-insured of the offending vehicle have not questioned the impugned award, thus, has attained finality so far it relates to them.

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

4. This Court in a batch of FAOs, FAO No.187 of 2009, titled as National Insurance Company Limited versus Smt. Sunita Devi & others, decided on 17.04.2012, being the lead case, which were outcome of the same accident, has already determined the said issue, whereby and where under the insurer came to be saddled with liability. The Judgment, *supra,* is made part of the file.

5. In view of the above, the impugned award is upheld and the appeal is dismissed.

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.

Oriental Insurance Co. Ltd. .....Appellant

Versus

Pushpa Devi and others .....Respondents

FAO No.485 of 2011
Decided on : 07.10.2016

Motor Vehicles Act, 1988- Section 166- Tribunal held that S was driving the vehicle in a rash and negligent manner, which had caused the accident- driver did not question the said findings – held, that insurer cannot question this finding without seeking permission under Section 170 of M.V. Act – the driving licence was proved on record and no breach of terms and conditions was established- insurer cannot question the adequacy of compensation- however, the compensation was on lower side – appeal dismissed. (Para-9 to 29)

Cases referred:

Rakesh Kumar & Etc. vs. United India Insurance Company Ltd. & Ors. Etc. Etc., JT 2016 (6) SC 504

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

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.Lalit K. Sharma, Advocate,.

For the respondents: Mr.G.R. Palsara, Advocate, for respondents No.1 to 4.
Mr.Mukesh Thakur, Advocate, for respondents No.5 and 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This appeal is directed against the award, dated 26th September, 2011, passed by Motor Accident Claims Tribunal, Mandi, District Mandi, H.P., (for short, the Tribunal), whereby compensation to the tune of Rs.18,60,000/-, with interest at the rate of 7% per annum from the date of filing of the petition till realization, came to be awarded in favour of the claimants, and the insurer was saddled with the liability, (for short, the impugned award).

2. Facts of the case, in brief, are that on 3rd August, 2007, deceased Sanjeev Kumar, was going from Sundernagar to Mandi in his own car bearing registration No.HP-32-0294, when he reached near Valley View Hotel, truck bearing No.HP-34B-1351, being driven by respondent No.2 Subhash Chand rashly and negligently, hit the car, as a result of which Sanjeev Kumar sustained injuries and died on the spot. Hence, the claim petition for compensation to the tune of Rs.20.00 lacs.

3. Respondents resisted the claim petition by filing replies.

4. Following issues came to be framed by the Tribunal:

"1. Whether respondent No.2 was driving the truck HP-34B-1351 on 3.8.2007 at 10.30 a.m. at Chakkar, in rash and negligent manner, resulting in the death of Sanjeev Kumar, as alleged? OPP

2. If issue No.1 is proved, to what amount and from whom the petitioners are entitled? OPP

3. Whether respondent No.2 was not having a valid and effective driving licence and was driving the vehicle in violation of the terms and conditions of the insurance policy? OPR-3

4. Whether the petition is not maintainable, as alleged? OPR 1 & 2

5. Whether the accident has occurred due to the rash and negligent driving of the deceased himself as alleged? OPR 1 & 2.

6. Relief."

5. Claimants have examined three witnesses, namely, PW-1 Pushpa Devi (one of the claimants), PW-2 Partap Singh and PW-3 Rakesh Kumar. On the other hand, the owner and the driver stepped into the witness box as RW-1 and RW-2, respectively, and also examined ASI Suresh Kumar as RW-3. The insurer has not led any evidence.

6. The Tribunal after examining the pleadings and the evidence allowed the claim petition and saddled the insurer with the liability.

7. The claimants, the owner and the driver have not challenged the impugned award on any count, thus, the same has attained finality so far as it relates to them.

8. Feeling aggrieved, the insurer has challenged the impugned award by way of instant appeal, on the grounds taken in the memo of appeal.

9. During the course of hearing the learned counsel for the appellant/insurer submitted that the Tribunal has wrongly come to the conclusion that Subhash Chand had driven the offending vehicle rashly and negligently and had caused the accident. In the absence of any appeal having been filed by the driver of the offending vehicle, can insurer urge that the accident was not the outcome of rash and negligent driving of the driver?. The answer is in the negative for the following reasons.

10. The Tribunal, after scanning the pleadings and the evidence, held that Subhash Chand (original respondent No.2) had driven the offending vehicle rashly and negligently at the relevant point of time and had caused the accident. Driver Subhash Chand and the insured had not questioned the said findings recorded by the Tribunal by filing appeal.

11. The insurer has not led any evidence in rebuttal and in support of the assertions made in the reply filed to the claim petition. The insurer has also not sought permission under Section 170 of the Motor Vehicles Act, 1988, (for short, the Act).

12. It being so, the Tribunal has rightly made discussion that the driver of the offending vehicle, namely, Subhash Chand had driven the offending vehicle rashly and negligently and had caused the accident. Accordingly, the findings recorded by the Tribunal on issue No.1 are upheld.

13. Onus to prove issue No.3 was on the insurer, has not led any evidence to discharge the same. On the contrary, it is seen from the records that the driving licence of the driver has been proved on record and stands exhibited as Ext.PW-1/D in the presence of the learned counsel for the parties. At the time of exhibiting the said document, no objection was raised by the insurer, therefore, it is precluded from raising any objection about the admissibility of the same at a later stage.

14. The Apex Court in case titled as **Rakesh Kumar & Etc. vs. United India Insurance Company Ltd. & Ors. Etc. Etc., JT 2016 (6) SC 504,** has held that once the licence was proved and marked in evidence without any objection by the insurance company, it had no right to raise any objection about its admissibility at a later stage. It is apt to reproduce paragraph 20 of the said decision hereunder:

> *"20. First, the driver of the offending vehicle (N.A.-2) proved his driving license (Exhibit-R1) in his evidence. Second, when the license was proved, the Insurance Company did not raise any objection about its admissibility or manner of proving. Third, even if any objection had been raised, it would have had no merit because it has come on record that the original driving license was filed by the driver in the Court of Judicial Magistrate First class, Naraingarh in a criminal case arising out of the same accident. Fourth, in any event, once the license was proved by the driver and marked in evidence and without there being any objection by the Insurance Company, the Insurance Company had no right to raise any objection about the admissibility and manner of proving of the license at a later stage (See Oriental Insurance Company Ltd. Vs. Premlata Shukla & Ors., 2007 13 SCC 476 and lastly, the Insurance Company failed to adduce any evidence to prove that the driving license (Ex.R1) was either fake or invalid for some reason."*

15. Having said so, the findings recorded by the Tribunal on issue No.3 are upheld.

16. Onus to prove issues No.4 and 5 was on the owner and the driver, have not led any evidence to prove the said issues. The Tribunal, after scanning the evidence, has rightly come to the conclusion that the owner and the driver have failed to discharge the onus cast on them and prove these issues. The owner and the driver have not challenged the said findings. Accordingly, the same are upheld as having attained finality.

Issue No.2

17. Keeping in view the discussion made hereinbelow, the insurer cannot question the adequacy of compensation.

18. In terms of the mandate of Sections 147 and 149 of the 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 Act has been obtained.

19. It is apt to reproduce Section 170 of the 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."

20. 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.

21. 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.

22. 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."

23. Thus, the insurer can question the adequacy of compensation only if it has sought permission under Section 170 of the Act. In the present case, it has to be seen whether the insurer has sought any such permission?

24. During the course of hearing, the learned counsel for the insurer frankly conceded that no permission was granted under Section 170 of the Act.

25. Having said so, it is held that the insurer cannot challenge the impugned award on the ground of adequacy of compensation.

26. Factum of insurance is admitted. Thus, the insurer has been rightly saddled with the liability.

27. Notwithstanding above, I have gone through the impugned award and the record. The deceased, at the time of accident, was 37 years of age, was a government employee and was drawing salary to the tune of Rs.14,094/- per month as per salary certificate Ext.PW-3/A. The Tribunal after making deduction, has rightly concluded that the deceased was earning Rs.1,24,000/- per annum. Keeping in view the age of the deceased, the Tribunal has rightly applied multiplier of 15, as has been held by 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.

28. In addition, the Tribunal has awarded Rs.5,000/- each under the heads 'loss of estate' and 'funeral charges'; and Rs.10,000/- under the head 'consortium'. The amount awarded under the former two heads appears to be on the lower side, however, since the claimants have not questioned the impugned award, therefore, the same is reluctantly upheld.

29. Having regard to the above discussion, the impugned award is upheld and the appeal is dismissed. The Registry is directed to release the awarded amount forthwith 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.

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

Rafia Ram ...Appellant.

Versus

Smt. Rakhi and others ...Respondents.

FAO No. 123 of 2012
Decided on: 07.10.2016

Motor Vehicles Act, 1988- Section 166- MACT awarded the compensation and saddled the insured, owner of the van, with liability- it was contended that in another claim petition the accident was held to be the result of rash and negligent driving of the bus – appeal was preferred and the award was upheld- held, that in view of the decision in the other claim petition, the order of the Tribunal modified and claimants are held entitled to the claim amount from the insurer of the bus – the Tribunal had wrongly awarded the interest @ 6% per annum , which is modified to 7.5% per annum. (Para- 3 to 13)

Cases referred:

United India Insurance Co. Ltd. Versus K.M. Poonam and others, 2011 ACJ 917

Manager, National Insurance Co. Ltd. versus Saju P. Paul and another, 2013 ACJ 554

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 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 Supreme Court Cases 738

Savita versus Binder Singh & others, 2014 AIR SCW 2053

Kalpanaraj & Ors. 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 Supreme Court Cases 434

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

For the appellant:	Mr. Raghunandan Chaudhary, Advocate.
For the respondents:	Mr. H.S. Rangra, Advocate, for respondents No. 1 to 3. Mr. S.K. Acharya, Advocate, for respondents No. 4 and 5. Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Ishan Thakur, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Challenge in this appeal is to award, dated 16th September, 2011, made by the Motor Accident Claims Tribunal-II, Mandi, District Mandi, H.P., (for short "the Tribunal") in MACT No. 75 of 2003, titled as Smt. Rakhi and others versus Sh. Arun Kumar and others, whereby compensation to the tune of ₹ 12,89,288/- with interest @ 6% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimants and the owner-insured of Maruti Van came to be saddled with liability (for short "the impugned award").

2. The appellant-owner-insured of Maruti Van has questioned the impugned award on the grounds taken in the memo of the appeal.

3. Learned counsel appearing on behalf of the appellant-owner-insured of the Maruti Van argued that another claim petition, being Claim Petition No. 12 of 2008, titled as Smt. Ranjeeta & others versus Arun Kumar & others, arising out of the same accident came to be determined by Motor Accident Claim Tribunal (I), Mandi (for short "MACT-I") in terms of award, dated 12th January, 2010, wherein it was held that the accident was outcome of rash and negligent driving of bus, bearing registration No. HP-31-6555, by its driver and the insurer of the bus came to be saddled with liability. Further argued that the said award was questioned by the insurer of the bus before this Court by the medium of FAO No. 222 of 2010, titled as National Insurance Company Ltd. versus Smt. Ranjeeta & others, and the award made by MACT-I was upheld by this Court vide judgment, dated 10th April, 2015. It has been prayed that in view of the abovesaid position, the impugned award be set aside and the insurer of the bus be saddled with

liability and the appellant-owner-insured of the Maruti Van be exonerated. He has also made available copy of the judgment in FAO No. 222 of 2010, across the Board, made part of the file.

4. On the last date of hearing, Mr. Ashwani K. Sharma, learned Senior Counsel, was asked to examine the judgment in FAO No. 222 of 2010 (supra) and seek instructions. In sequel thereto, Mr. Sharma frankly conceded that it is a fact that the claim petition, subject matter of FAO No. 222 of 2010, was outcome of the same accident and the insurer of the bus was saddled with the liability by MACT-I, which was upheld by this Court vide judgment (supra) and the said judgment has attained finality.

5. The following issues were framed by the Tribunal in the claim petition in hand on 2nd December, 2006:

> *"1. Whether deceased Joginder Kumar died due to the rash and negligent driving of drivers of bus No. HP-31-6555 and maruti van No. HP-01-0517 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 Raj Kumar, driver of bus No. HP-31-6555 was not having valid and effective driving license at the time of accident? OPR-3*
>
> *4. Whether the accident had taken place due to rash and negligent driving of Sanjay Kumar, driver of Maruti Van No. HP-01-0517 as alleged, if so, to what effect? OPR-3*
>
> *5. Whether the bus No. HP-31-6555 was being driven in contravention of terms and conditions of the insurance policy? OPR-3*
>
> *6. Relief."*

6. The Tribunal, after scanning the evidence, oral as well as documentary, held that the accident had taken place due to the negligence of driver of the Maruti Van, which is factually and legally incorrect as per the record and also against the decision/award made by MACT-I, which has been upheld by this Court and has attained finality. The parties are caught by the doctrine of *res judicata.*

7. Having said so, the Tribunal has fallen in an error in determining issues No. 1 & 4 and it is held that the driver of the bus, bearing registration No. HP-31-6555, had driven the same rashly and negligently at the relevant point of time and caused the accident, in which two persons including deceased-Joginder Kumar sustained injuries and succumbed to the said injuries. Issues No. 1 and 4 are decided accordingly.

8. There is no dispute viz-a-viz quantum of compensation, driving licence of the driver of the bus and the terms and conditions contained in the insurance policy. The findings returned by the Tribunal qua these issues have attained finality.

9. The Tribunal has also fallen in an error in awarding interest @ 6% per annum, which was to be awarded as per the prevailing rates.

10. 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.

11. Having said so, I deem it proper to enhance the rate of interest from 6% per annum to 7.5% per annum from the date of filing of the claim petition till its realization.

12. Learned counsel for the insurer of the bus submitted that the impugned award so far it relates to awarding interest @ 12% per annum be set aside.

13. Keeping in view all the facts read with the judgment made by this Court in FAO No. 222 of 2010 (supra), I deem it proper to modify the impugned award by providing that the insurer of the bus has to satisfy the impugned award. 14. Viewed thus, it is held that the claimants are entitled to compensation to the tune of ₹ 12,89,288/- with interest @ 7.5% per annum from the date of the claim petition till its realization and the insurer of the bus is saddled with liability.

15. The awarded amount be deposited 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 respective bank accounts.

16. The statutory amount deposited by the appellant-owner-insured of the Maruti Van is awarded as costs in favour of the claimants. The said amount be also released in favour of the claimants.

17. The appeal is allowed and the impugned award is modified, as indicated hereinabove.

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

****

BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Sahi Ram Arya and another ...Petitioners.

Versus

Sushil Bansal ...Respondent.

Civil Revision No.92 of 2016
Date of Decision : October 7, 2016

Limitation Act, 1963- Section 5- An application for condonation of delay of 80 days was filed, which was dismissed – held, that the applicant had met with an accident after the pronouncement of the judgment – mere absence of medical certificate should not have led to the dismissal of the application – the delay cannot be used to defeat the claim of a person undergoing hardship - accident can happen with any person – petition allowed. (Para- 7 to 15)

For the Petitioners : Mr. Ashok Sood, Advocate.
For the Respondent : Mr. Bimal Gupta, Senior Advocate, with Mr. Vineet Vashista, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

When the matter came up for hearing on 29.9.2016, the following order was passed:

"Power of attorney is stated to have been filed in the Registry. To enable learned counsel or the respondent to complete her instructions, matter is adjourned.

List on 7.10.2016."

2. Plaintiff-respondent Sushil Bansal, hereinafter referred to as the plaintiff, filed a suit for permanent prohibitory injunction against defendants-petitioners Sahi Ram Arya and Smt. Surto Devi, hereinafter referred to as the defendants.

3. The dispute essentially pertains to the boundary of the premises owned by the parties to the lis.

4. Vide judgment and decree dated 5.12.2013, passed by Civil Judge (Junior Division), Solan, Himachal Pradesh, in Civil Suit No.490/1 of 2004/2000, titled as *Sushil Bansal v. Sahi Ram Arya and another,* plaintiff's suit came to be decreed in the affirmative. Defendants assailed the same, by filing an appeal. However, since there was delay of 80 days, an application under Section 5 of the Limitation Act, seeking condonation of delay came to be filed, which stands dismissed vide impugned order dated 26.2.2016, passed by the learned District Judge, Solan, District Solan, Himachal Pradesh, in Case No.101-S/6 of 2014, titled as *Sahi Ram Arya and another v. Sushil Bansal.*

5. In the present petition, so filed under the provisions of Section 115 of the Code of Civil Procedure, the defendants have laid challenge to the said order.

6. Having heard learned counsel for the parties as also perused the record, so made available, Court is of the considered view that the present petition needs to be allowed.

7. The Court below had the jurisdiction to condone the delay. So, it is not a case of lack of jurisdiction, but if such jurisdiction is not exercised, in accordance with law, then obviously this Court would intervene to set the record right, more so when the order, lacking sensitivity, is found to be perverse.

8. It is a matter of record that the judgment and decree came to be passed on 5.12.2013 and the counsel applied for the certified copy on 7.12.2013, which was received on 28.1.2014.

9. It cannot be disputed, more particularly, in view of the ocular and documentary evidence, which has come on record, that Sahi Ram Arya met with an accident and remained admitted in the hospital. His wife was attending to him. This was during the period intervening the date of pronouncement and filing of the appeal.

10. Court below found the medical certificate not to have been proven on record. But then, it should not have adopted such a hyper-technical approach, more so, in the case of neighbours, who have to live, perhaps for generations, together and under all circumstances, have to maintain peace and harmony, which in fact is the ultimate goal sought to be achieved through the mechanism provided for dispensation of administration of justice.

11. One cannot forget that the parties, who are ordinarily residing in Solan, are not familiar with the procedures.

12. In fact, plaintiff ought to have shown grace in not contesting the application, on account of delay and perhaps assisted the Court, on the merits of the appeal, which unfortunately was also found to be lacking before this Court.

13. Yes, delay confers a right upon a party, but then Court cannot adopt such a pedantic approach, more so in the case of a litigant, who is undergoing hardship and suffering well beyond its control. The only mistake of the defendants was that they could not prove the medical certificate in accordance with law. But then it is not that they did not heed to the advice of their counsel. It is not the case of the plaintiff, that the defendants are chronic litigants. Also they do not belong to a family of lawyers or have lawyers as friends.

14 In the instant case, mistake, if any, in not proving the document cannot be attributed to the party. Even otherwise statement of the party was sufficient enough to have condoned the delay, which in any event is neither inordinate nor can be said to be deliberate.

Accident(s) can happen to anyone. This alone prevented the defendants from tiling the appeal within the prescribed period of limitation.

15. Hence, the present petition is allowed and the impugned order dated 26.2.2016, passed by the learned District Judge, Solan, District Solan, Himachal Pradesh, in Case No.101-S/6 of 2014, titled as *Sahi Ram Arya and another v. Sushil Bansal* is set aside. Delay in filing the appeal is condoned. Appeal be heard on merits.

16. 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 15.11.2016.

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

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

SRI RAM FOOD INDUSTRIES .....Petitioner.

Versus

STATE OF HIMACHAL PRADESH AND ANOTHER .....Respondents.

CWP No.2428 of 2016.
Judgment reserved on :06.10.2016.
Date of decision: October, 7th, 2016.

Constitution of India, 1950- Article 226- Respondent No. 2 invited global e-tenders for procurement of various pulses – the petitioner submitted 16 bids and was declared L-1 in 10 bids – however, the tender was cancelled without assigning any reason- fresh bids were invited and the petitioner was again declared L-1 in second group –however, the tender was again cancelled – respondent replied that the tender was cancelled on the basis of downward trend in the prices – there was only one bidder for group 2 – hence, re-tendering was ordered by State Level Purchase Committee- held, that officials of the respondent were not impleaded by name nor any personal allegation was made against them- malafides have to be established on the basis of cogent evidence and not on the basis of vague and unsupported material – the petitioner had not questioned the order of cancellation of earlier tenders – the rates were lower in the second tender – the State Level Committee had rightly concluded that group 2 be re-tendered – the Court will intervene in contractual matters only if no responsible authority could have reached at a decision – it was specifically provided that tender will be rejected in case the bids were less than three – the decision to cancel the tender was bonafide- petition dismissed. (Para- 8 to 28)

Cases referred:

E.P. Royappa Vs. State of Tamil Nadu (1974) 4 SCC 3
Gulam Mustafa Vs. State of Maharashtra (1976) 1 SCC 800
Union of India and others Vs. Ashok Kumar and others, (2005) 8 SCC 760
Tata Cellular versus Union of India (1994) 6 SCC 651
Michigan Rubber (India) Ltd. vs. State of Karnataka and Ors. (2012) 8 SCC 216
Jagdish Mandal versus State of Orissa and others (2007) 14 SCC 517

For the Petitioner : Ms.Shilpa Sood, Advocate.

For the Respondents: Mr.Kush Sharma, Deputy Advocate General with Mr.J.S.Guleria, Assistant Advocate General, for respondent No.1
Mr.Arvind Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The petitioner firm is aggrieved by the non-awarding of tender despite it being the lowest tenderer and has filed this petition with the following prayers:-

> *"a) Issue an appropriate writ, order or direction quashing the act of the respondent thereby cancelling the tender dated 29.08.2016, wherein the petitioner has been declared as L1 as well as short-term E-tender notice calling for tenders to be opened on 26.09.2016.*
>
> *b) Direct the Respondent No.2 to issue supply order to the petitioner in respect of Urd and Black Masar pulses in group 2, where the petitioner has been declared as L1 by the respondent."*

2. It is averred that H.P. State Civil Supplies Corporation Limited (respondent No.2) had initially invited global E-tenders for procurement of various pulses and the last date for submission of online tenders alongwith samples was 25.07.2016. The petitioner firm being eligible applied for and submitted 16 out of 18 bids and even deposited the earnest money of Rs.75 lacs. Out of these 16 bids so submitted by the petitioner firm, it was declared L-1 in 10 bids. But inspite of this, respondent No.2 malafidely and with an ulterior motive and with the sole purpose of ousting the petitioner firm unilaterally and without assigning any reason cancelled the tender.

3. The respondent-Corporation thereafter invited fresh bids for the same items and the petitioner firm again participated and was successfully declared as L-1 in the second group inasmuch as the petitioner firm was declared L-1 for 'Urd Sabut' for three months as well as for six months supply and the petitioner firm was declared as L-1 for 'Black Masar' for six months supply.

4. It is thereafter averred that the respondent-Corporation once again in order to oust the petitioner firm from the tender process malafidely and with an ulterior motive cancelled the bids for the second group and again called fresh tenders for the entire group in which the petitioner firm was declared as L-1. The petitioner firm has assailed the action of the respondents on the grounds of discrimination, malafides and abuse of power.

5. At this stage, we may observe that though initially respondent No.1 had filed its reply, however, on the request made, the reply was ordered to be withdrawn, as would be evident from the order dated 28.09.2016 and it is thereafter that respondent No.1 has filed fresh reply. It has been averred therein that it was the State Level Purchase Committee constituted by the State Government under the Chairmanship of the Managing Director of respondent No.2 that the decision to cancel the earlier tender dated 25.07.2016 had been taken as per the procedure in view of the downward trend in the prices of pulses and good monsoon reported in media which recommendations were accepted by the State Government. In all, tenders for 9 pulses were to be invited which were divided into 3 groups and lowest rated 'Dal' in each group was to be selected for distribution under the Public Distribution System (PDS). The classification of the selected pulses was to be done on the basis of the ascending order of prices to eliminate post tender discretion and also to ensure that one 'Dal' from each group is procured in a transparent manner and the grouping of the pulses is as under:-

1st Group = (1) Rajmah (2)Rongi (3) White Chana - Coarse Dals

2nd Group = (1)Moong (2) Urd (3) Black Masar - Sabut Dals

3rd Group = (1)Dal Chana (2) Malka (3) Masri - Dal Bina Chilka

6. In the tender subsequently floated which is the subject-matter of the instant lis, the quoted rates for all 'Dals' were found to be far lesser than the one which was quoted in the earlier tender of Rs.195 to 2091 per quintal. The financial bid for 'Moong Sabut' in Group-2 had not been opened as there was only one bidder firm namely 'M/s Sanna Enterprises' which was

also not found technically qualified which meant that L-1 rate of the group had only been received for two pulses. Therefore, the Committee was of the opinion that the Government may select L-1 'Dal' i.e. 'Balck Masar' for six months or consider re-tendering for all the pulses of Group-2. It is further averred that the market rates for 'Moong Sabut' indicated in the recommendations reflected that it was lower than that of the other 'Dals' in this group. The recommendations of the State Level Purchase Committee were considered at the Government level and it was decided that the lowest rated pulses from 1st and 3rd group be considered for procurement and re-tender for group-2 be done immediately.

7. In its separate reply filed by respondent No.2, it has completely washed its hands from the dispute by contending that it is only the procurement agency for respondent No.1 and acts as per its dictates.

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

8. It is vehemently argued by Ms.Shilpa Sood, learned counsel for the petitioner firm that the entire action of the respondents is tainted with malafides as they are bent upon to ensure that the petitioner firm is not awarded the tender despite its offer being the lowest (L-1).

9. At this stage, we may note that the officials of the respondents have not been impleaded as parties by name nor are there any personal allegations against them.

10. Mala fides according to Black's Law Dictionary 10th Edition means "*with bad faith".* Malafide is said to be an intentional doing of a wrong act without just cause or excuse, it is done with an intention to inflict an injury or under such circumstances that the law will imply an evil motive to the act.

11. It is more than settled that mala fides have to be established on the basis of cogent evidence and material as may be available on record and merely on the basis of some vague and unsupported material, writ Court cannot draw an inference, much less, a conclusion about the existence of mala fides. When the allegations of mala fides are made and when the prayer is to interfere with a particular action of the State Government or its functionaries on the ground of mala fides, the allegations of mala fides have to be established and proved to such an extent that the Court can record a positive finding to the effect that mala fides as pleaded are established in the given set of circumstances.

12. Indisputably, it is always open for the Court to go into the question of mala fides raised by a litigant, but in order to succeed, much more than a mere allegation is required. Bald and unfounded allegations of mala fides are not sustainable and that mala fides must be specifically pleaded and proved. It is equally settled that when such allegations of mala fides are made, they should be made with all sense of responsibility, otherwise, the maker of such allegations should be ready to face consequences.

13. It is equally well settled that the burden of proving mala fides is on the person making the allegations and the burden is 'very heavy." (***E.P. Royappa Vs. State of Tamil Nadu (1974) 4 SCC 3***).

14. There is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of mala fides are often more easily made than made out and the very seriousness of such allegations demands proof of a high degree of credibility. As observed by the Hon'ble Supreme Court in ***Gulam Mustafa Vs. State of Maharashtra (1976) 1 SCC 800*** *"It (mala fides) is the last refuge of a losing litigant."*

15. In ***Union of India and others Vs. Ashok Kumar and others, (2005) 8 SCC 760***, it is held by the Hon'ble Supreme Court that seriousness of allegations of mala fides demands proof of high order of credibility and the Courts should be slow to draw dubious inferences from incomplete facts placed before them by a party, particularly when the

imputations are grave and they are made against the holder of an office having high responsibility. It was held:

> *"21. Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. While the indirect motive or purpose, or bad faith or personal ill- will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting on the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. It is not the law that mala fide in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts. (S. Pratap Singh v. State of Punjab AIR1964 SC 72). It cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility. As noted by this Court in E. P. Royappa v. State of Tamil Nadu and Another (AIR 1974 SC 555), Courts would be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. (See Indian Railway Construction Co. Ltd. v. Ajay Kumar (2003) 4 SCC 579)."*

16. There can be two ways by which a case of mala fides can be made out. Firstly, that the action which is impugned has been taken with the specific object of damaging interests of aggrieved party and secondly such action is aimed at helping another party which results in damage to the party alleging mala fides.

17. Adverting to the facts, it would be seen that the case of the petitioner firm does not fall in either of the categories above as the inference of malafides has been sought to be drawn on the basis of vague and unsubstantiated pleadings.

18. As per the admitted case of the petitioner firm, it did not choose to question the order of cancellation of the earlier tenders, which as observed earlier, were cancelled in view of the downward trend in the prices of pulses and good monsoon reported in the media. It is also not disputed that in the subsequent tenders floated by the respondents rates of pulses as compared to the earlier tenders were lowest by Rs.195 to 2091 per quintal.

19. Now adverting to the decision regarding cancellation of the tender in which the petitioner firm was a participant, the State Level Purchase Committee constituted by the State Government vide notification dated 09.05.2007 concluded that the L-1 rates had been received only for two pulses and, therefore, it was of the opinion that the Government may select one 'Dal' i.e. 'Black Masar' or consider re-tendering for all the pulses of group-2 in view of the provisions contained in Clause 19(b) (4) of the Notification dated 24.10.2013 which reads thus:-

> *"(4) The number of firms/bids received in the advertised tender system shall not be less than three. If the number of firms/bid receives is less than three, then normally such tender may be rejected and process of re-tendering may be initiated. However, if the demand happens to be very urgent, the authority next above the indenting officer, may be consulted before rejection, and if that authority recommends that the purchase be effected on the basis of the number of tenders received and certifies that the rates in tender, proposed to be accepted, are reasonable, suitable action shall be taken in the Stores Department after referring*

the matter to the authority next above that ordinarily competent to sanction purchase."

20. It is more than settled that this Court would interfere in tender or contractual matters in exercise of power of judicial review only in case the process adopted or decision made by the authority is malafide or intended to favour someone or the process adopted or decision made is so arbitrary and irrational that no responsible authority acting reasonably and in accordance with relevant law could have reached and lastly in case the public interest is affected. If the answers to these questions are in the negative, then there should be no interference by this Court in exercise of its powers under Article 226 of the Constitution of India.

21. By now it is equally settled that principles of judicial review under Article 226 of the Constitution of India would apply to the exercise of contractual powers by the Government only in case the process adopted or decision making process of the authorities is wrong and illegal and in order to prevent arbitrariness or favoritism. The Government is the guardian of the finances of the State and is, therefore, expected to protect the financial interests of the State.

22. In ***Tata Cellular*** versus ***Union of India (1994) 6 SCC 651***, the Hon'ble Supreme Court has laid down the following limitations in relation to the scope of judicial review of administrative decisions in exercise of powers awarding contracts:(SCC pp 687-88, para 94)

"(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle (1948) 1 KB 223: (1947) 2 All PR 680 (CA) of reasonableness (including its other facets pointed out above) but must be free from arbitrariness, not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

23. In ***Michigan Rubber (India) Ltd.*** vs. ***State of Karnataka and Ors. (2012) 8 SCC 216***, the legal position on the subject was summed up after a comprehensive review and principles of law applicable to the process for judicial review identified in the following words: (SCC p.229, paras 23 - 24)

"23. From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

24. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached'? and

(ii) Whether the public interest is affected.

If the answers to the above questions are in negative, then there should be no interference under Article 226." (emphasis supplied)

24. Similar reiteration is found in a number of judgments of the Hon'ble Supreme Court as also the judgments rendered by this Court in CWP No.765/2014, titled as Namit Gupta versus State of Himachal Pradesh and others, decided on 27.03.2014, CWP No.9337/2013, titled as Ashok Thakur versus State of Himachal Pradesh and others, decided on 06.05.2014, CWP No. 4112/2014 titled as Minil Laboratories Pvt. Ltd versus State of Himachal Pradesh and another, decided on 15.07.2014, CWP No. 4897/2014 titled as Mahalaxmi Oxyplants Pvt. Ltd. versus State of Himachal Pradesh and another, decided on 10.09.2014, CWP No.6953/2014 titled as M/s Kausal Air Products versus State of Himachal Pradesh and others, decided on 05.11.2014, CWP No.1007/2015 titled as Sandeep Bhardwaj versus State of Himachal Pradesh and others, decided on 01.09.2015 and CWP No.2929 of 2015 titled ELICO Ltd. vs. State of Himachal Pradesh and others, decided on 31.12.2015.

25. Adverting to the facts, the learned counsel for the petitioner firm would vehemently argue that while inviting the tender, it was never the condition that the bids will be considered only if atleast there should be three bids for each 'Dal' in each group and, therefore, on this ground alone bid of the petitioner firm cannot be cancelled.

26. We do not find any force in such contentions for the simple reason or else the same would amount to misreading of provisions contained in 19 (b) (4) of the Notification (supra) wherein it is clearly provided that the number of firms/bids received shall not be less than three and if the number of firms/bids received is less than three, then normally such tender may be rejected and the process of re-tendering may be initiated. Importantly, the vires of these provisions have not even been assailed by the petitioner firm.

27. Having failed in such submission, the learned counsel for the petitioner firm would then argue that in case the respondents wanted only lowest rates, irrespective of the category of 'Dal', then there was no necessity of having advertised three 'Dals'. Though, we may find such submission to be attractive, but we cannot be unmindful of the fact that it is not the domain of the Court to embark upon uncharted ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy can be evolved. Such exercise must be left to the discretion of the Department. The Court can only interfere if the policy is absolutely capricious or totally arbitrary and unfounded *ipse dixit* offending the basic requirement of Article 14 of the Constitution of India. It is more than settled that in economic and policy matters, the scope of judicial review is extremely limited.

28. Apart from above, we have no hesitation to conclude that the decision regarding cancellation of the tender is a bonafide one and is otherwise in the larger public interest because by not accepting the tender of the petitioner firm, the State Government is saving approximately a sum of Rs.12 crores. It is not a fit case to exercise powers of judicial review as there is no violation of the provisions of law and further there is no procedural aberration or error in assessment. It is more than settled that power of judicial review will not be permitted to invoke to protect private interest at the cost of public interest and reference in this regard can conveniently be made to the judgment rendered by the Hon'ble Supreme Court in ***Jagdish Mandal*** *versus* ***State of Orissa and others (2007) 14 SCC 517*** wherein the Hon'ble Supreme Court observed as under:

> "*22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :*
>
> > *i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.*
> >
> > *OR*
> >
> > *Whether the process adopted or decision made is so arbitrary and irrational that the court can say : 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";'*
> >
> > *ii) Whether public interest is affected.*
>
> *If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant*

of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

29. In view of the aforesaid discussion, we find no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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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
Dharamveer @ Kaku ... Respondent

Cr. Appeal No. 334 of 2010
Reserved on: 27.09.2016
Date of decision: 07.10.2016

Indian Penal Code, 1860- Section 306- Deceased committed suicide by consuming poison - she left a suicide note implicating the accused- accused was tried and acquitted by the trial Court- held, that the suicide note mentioned that accused used to harass her and block her way - the deceased used to come to meet the deceased during the night time – the deceased walked into the police station and disclosed that she had consumed poison – she had not disclosed in the police station that she was harassed by the accused due to which she had consumed poison, rather she had disclosed that she was upset because of family problems – the handwriting expert was not examined and it could not be inferred that the note was written by the deceased- it was not established that accused used to ask the deceased to commit suicide – the trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-6 to 28)

Cases referred:
Puran Chand Vs. State of Haryana (2010) 6 Supreme Court Cases 566
Sangara Bonia Sreen Vs. State of Andhra Pradesh, 1997 (5) Supreme Court Cases, 348
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

For the appellant: Mr. Vikram Thakur and Mr. Puneet Rajta, Deputy Advocate Generals.
For the respondent: M. N.K. Thakur, Senior Advocate with Ms. Jamuna Kumari, 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 Additional Sessions Judge, Una, in Sessions Case No. 13 of 2009 dated 19.12.2009, vide which, learned trial Court acquitted the accused for commission of offence punishable under Section 306 of Indian Penal Code.

2. The case of the prosecution in brief was that deceased Rekha Rani, who was resident of village Pandoga reached Police Post, Pandoga, on 26.06.2008 at 1.00 P.M. after having consumed some poisonous substance and one constable and PW-11 Bhupinder Dogra rushed her to PHC Bhadsali. Keeping in view her precarious condition, she was immediately referred to Regional Hospital at Una, where she was examined by PW-14 Dr. Vipan Chander

Sharma, however, she unfortunately died on the same day. Her uncle PW-15 Dharam Singh who was the only person available at home came to know from a police constable that one girl who was taking name of his brother Gurmeet Singh had consumed some poison and was at Police Post Pandoga. Further as per prosecution, by the time PW-15 Dharam Singh reached the Police Post, Rekha Rani had been shifted to PHC Bhatsali, from where she had been further sifted to Regional Hospital, Una and he accompanied the deceased. This fact was conveyed to her father by PW-15. He also asked father of the deceased not to come to the hospital. Further as per prosecution, when PW-15 reached home, father of deceased PW-1 Gurmeet Singh showed him a letter which was found lying in the backside of his house. This letter Ext. PW1/A was stated to have been scribed by the deceased. Statement of PW-1 was recorded under Section 154 Cr.P.C. on the basis of which First Information Report Ext. PW15/A was registered at Police Station Haroli. Accused was arrested on the same date. Letter Ext. PW1/A was seized vide seizure memo Ext. PW1/C. Autopsy report of the deceased was collected by Investigating Officer and during the course of investigation, PW-20 HC Ravinder Singh collected the admitted handwriting of the deceased and the extract of register maintained in the Co-operative Society, Pandoga, which bore the signatures of the deceased vide Ext. PW1/F. As per postmortem report Ext. PW13/C, deceased had died due to Phosphide Gas poisoning. Report of Assistant Director, FSL, Junga, stated that the signatures and the admitted handwriting of the deceased and the letter Ext. PW1/A was written by one and the same person.

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 306 of Indian Penal Code, 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 in the absence of proof of the ingredients of Section 306 I.P.C., it could not be concluded with certainty and beyond reasonable doubt that the accused had abetted the commission of suicide by the deceased. Learned trial Court further held that necessary nexus between the acts attributed to the accused and the commission of the offence were lacking. On these grounds, learned trial Court acquitted the accused.

5. We have heard learned counsel for the parties and have also gone through the records of the case as well as judgment passed by learned trial Court.

6. In the present case, Ext.PW1/A is the alleged suicide note which as per prosecution was written by the deceased. A perusal of the said suicide note which as per prosecution is also the dying declaration of the deceased is to the effect that the accused was for sometime harassing her and often the accused used to block her way. It was further mentioned in the said suicide note that the accused used to harass the deceased by saying that the deceased had said yes to him and she used to come to meet the accused during night time. It was further mentioned in the suicide note that when her uncle came to know about this he called in the morning. It was further mentioned in the suicide note that the accused had threatened the deceased in the morning that this time no one can save her and if she wants then she can either run away or can die by consuming something. It was further mentioned in the suicide note that the uncle of the deceased was not at fault as he was humiliated because of her. It was further mentioned in the suicide note by the deceased that she went to the house of the accused and informed his mother and thereafter also accused threatened her. It was further contained in the said suicide note that in these circumstances the deceased did not want to live and she was committing suicide and that accused would be responsible for her death because her life was spoiled by him.

7. Before we deal with the suicide note of the deceased, there are few other relevant factors which need to be referred at this stage.

8. Constable Rajesh Kumar entered the witness box as PW-5 and he stated that in the year 2008 he was posted at Police Post Pandoga as MC and deceased had come to Police Station at 11.00-12.00 A.M. on 26.06.2008 and she remained in Police Station for 10-15 minutes. Thereafter, she was taken to the hospital. He admitted it to be correct that while she was present in Police Post she was talking.

9. Constable Sanjeev Kumar who entered the witness box as PW-7, deposed that the deceased had come to the Police Post at 1.00 P.M. and had only disclosed the name of her father as Gurmeet Singh. She was taken to the hospital by one constable and one flour mill owner namely Bhupinder Dogra. In his cross-examination, he stated that it took about ten minutes for him to record DDR No. and he admitted it to be correct that the girl had been sent to hospital after recording the DDR. This witness further stated that the constable who had taken the deceased to the PHC i.e. Constable Rajesh Kumar had returned back by 1.30 P.M. This witness further stated that the deceased had been taken to PHC on scooter which was driven by Constable Rajesh and all three had gone on the scooter. He denied the suggestion that the deceased had come to the Police Station at 11.00 A.M. and she was not talking at that time.

10. Bhupinder Dogra entered the witness box as PW-11 and he deposed that he runs a flour mill at Pandoga which was just opposite the Police Post and on 26.06.2008 one girl had come to Police Post Pandoga and police had called him to the Police Post. He further deposed that the girl was proclaiming that she had consumed poison and she further disclosed that she was upset because of her family problem. This witness was declared as hostile witness and he was examined by learned Public Prosecutor. In his cross-examination by learned Public Prosecutor, he admitted it to be correct that he had taken the girl to PHC Bhadsali alongwith the police on a motorcycle. He further stated that after having admitted her there, her Chacha and Chachi came and he accordingly left the place. In his cross-examination by the defence, this witness admitted it to be correct that the girl was talking and she had walked till the motorcycle and she had disclosed in his presence that her family and relatives had been harassing her and, therefore, she had consumed poison.

11. One thing which is apparent from the perusal of the testimony of the above prosecution witnesses is that after consuming poison it was the deceased who herself came to the Police Post and disclosed her having consumed poison to the police. It is further evident from the testimony of the above witnesses that a DDR was entered which took about 10-15 minutes time and thereafter, the deceased was sent to PHC Bhadsali on motorcycle. It has also come on record that while she had come to the Police Station she was talking and she had herself walked upto the motorcycle to be taken to PHC Bhadsali.

12. The prosecution has not been able to demonstrate that during this entire period that is from the moment the deceased came to the Police Post and disclosed the factum of her having consumed poison till her condition deteriorated and she died, she had at any point taken the name of accused and disclosed before the police that she had either consumed poison because of harassment meted out to her by the accused or by his acts the accused had abetted the deceased to take such a harsh step. On the contrary, it has come in the testimony of PW-11 that Bhupinder Dogra that the deceased was upset because of her family problem.

13. In this background, now we will refer to the suicide note allegedly written by the deceased. It is not the case of the prosecution that when the deceased came to the Police Post and disclosed the factum of her having consuming poison she herself handed over the said suicide note to the police. As per prosecution, suicide note was handed over by her father who found the same at the backside of his house.

14. Report of Assistant Director, Document & Photo Division, State Forensic Science Laboratory, Junga, Shimla, is on record as Ext. PZ. As per this report, questioned documents were Q-1 to Q-6, admitted documents were A-1 to A-10 and conclusion mentioned therein was that the blue enclosed signatures and writings stamped and marked as A-4 to A-10 and red

enclosed signatures and writings similarly stamped and marked as Q-1 to Q-6, all were written by one and the same person. Incidentally, the author of this document Ext. PZ Dr. Meenakshi Mahajan was not examined by the prosecution.

15. The Apex Court has held in **Puran Chand Vs. State of Haryana** (2010) 6 Supreme Court Cases 566, that the Courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. It has been further held that a mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The courts must bear in mind that each criminal trial is an individual aspect. It may differ from the other trials in some or the other respect and, therefore, a mechanical approach to the law of dying declaration has to be shunned.

16. Coming to the suicide note of the deceased, the handwriting expert who prepared Ext. PZ has not been examined by the prosecution. No plausible justification has been given by the prosecution for not examining the expert. It is apparent from the material produced on record by the prosecution that though the deceased was in her senses and was also talking when she came to the Police Post and thereafter also however during this entire time while she was in her senses she did not name the accused as the person who had abetted her to commit suicide.

17. From the above circumstances, it cannot be said beyond reasonable doubt that the accused had actually abetted the commission of suicide by the deceased or that the suicide note was in fact written by the deceased.

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 our considered view, 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.

19. It is a unique legal phenomenon in the Indian Penal Code that the only act, the attempt of which alone will become an offence, is suicide. The person who attempts to commit suicide is guilty of the offence under Section 309 IPC, whereas the person who committed suicide cannot be reached at all. Section 306 renders the person who abets the commission of suicide punishable for which the condition precedent is that, suicide should necessarily have been committed. Thus, the crux of the offence under Section 306 itself is abetment. In other words, if there is no abetment there is no question, the offence under Section 306 comes into play.

20. Hereinafter, we will apply these principles to the facts of the present case. A close scrutiny of the statements of the prosecution witnesses will demonstrate that none of them have mentioned any explicit act on the part of the accused which can be termed to be an act of abetment on their behalf which led deceased Rekha Rani to commit suicide. On the basis of the statements of the prosecution witnesses who were also interested witnesses, it cannot be said that the prosecution was successful in demonstrating and proving that the accused had committed any act which could be termed to be an act of abetment towards the commission of suicide by deceased Rekha Rani.

21. 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, we are afraid that 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 he had instigated the deceased to commit suicide.

22. 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 the learned Trial Court whereby the accused has been acquitted is either perverse or the acquittal of the accused by the learned Trial Court has amounted to travesty of justice.

23. It is settled law that 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.

24. 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.

25. 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.*

26. 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.

27. 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.

28. Accordingly, in view of the discussion held above, we do not find any perversity in the findings recorded by learned trial Court and therefore, while upholding the judgment of acquittal passed by learned trial Court, the present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged.

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

Kishor Chand (deceased) through his LRs Sanjeev Verma & others ....Petitioners.

Versus

Ashwani Kumar and anr. ...Respondents.

CMPMO No.145 of 2016.
Reserved on : 03.10.2016.
Decided on: 17th October,2016.

Code of Civil Procedure, 1908- Order 17 Rule 1- The suit of the plaintiffs was listed for evidence- an application for adjournment was filed, which was dismissed and the suit was also dismissed for want of evidence- held, that many opportunities were granted to the plaintiffs for producing the evidence but the evidence was not produced- the Court cannot wait indefinitely for the production of the evidence and the evidence was rightly closed- petition dismissed.

(Para-7 to 9)

Cases referred:

Ram Gobinda Dawan and others vs. Smt. Bhaktabala and Ram Gobinda Dawan and others vs. Sunil Kumar Roy and another, 1971 (1) Supreme Court Cases, 387

State of Uttar Pradesh and another vs. Jagdish Sharan Agrawal and others, 2009 (1) Supreme Court Cases, 689

For the petitioners : Mr. Ashwani Sharma, Advocate.
For the respondents : Mr. Anil Jaswal, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioners under Article 227 of the Constitution of India, for quashing and setting the impugned order dated 08.06.2015, passed by learned Civil Judge (Junior Division), Court No.II, Hamirpur, District Hamirpur, H.P, in Civil Suit No.34 of 2011.

2. Brief facts giving rise to the present petition are that the petitioners/plaintiffs (hereinafter referred to as 'plaintiffs') filed a suit for declaration against the respondents/defendants (hereinafter referred to as 'defendants') to the effect that plaintiffs are in possession as tenants situated over the land bearing Khata No.196 min, Khatauni No.342 min, Khasra No.1026, measuring area 42/84 sq. meters, in Mohal Gandhi Nagar, Mauza Bazuri Tehsil and District Hamirpur, H.P and the entry shown in the column of possession is wrong, illegal and contrary to the factual position existing on the spot alongwith the suit for permanent prohibitory injunction restraining the defendants from interfering in the peaceful possession of the plaintiff over the shop and also not to dispossess the plaintiff forcibly by demolition of the same. In alternative, suit for mandatory injunction directing the defendants to restore the possession of the plaintiff in the said shop in case, they succeed in forcibly dispossessing the plaintiffs from the said shop during the pendency of suit. It is averred that the defendants have failed to file written statement within the statutory period of ninety days from the date of receiving the notice, therefore, they had filed an application under Section 148 CPC, for extension of time and ultimately the defendants had filed written statement alongwith counter claim on 6.9.2011. Thereafter, both the parties have filed replication to the written statement in the suit and counter claim, wherein it has been alleged that the suit was instituted by predecessor-in-interest of the petitioners, namely, Kishore Chand Verma and he had obtained all the relevant record qua the dispute from the concerned authorities and had kept the same in his custody during his lifetime. During the pendency of suit, Kishore Chand Verma (plaintiff) died on 18.12.2012 and consequent

thereto the plaintiffs have suffered irreparable loss and hardships, as they have to start the whole case afresh by collecting the relevant record maintained by the deceased as well as from the relevant agencies. After the demise of Kishore Chand Verma, predecessor-in-interest of the plaintiff, application under Order 23 Rule 3 CPC, for placing on record the legal heirs of the deceased was moved by the plaintiffs for impleading the present plaintiffs as legal heirs of deceased Kishore Chand Verma, the same was allowed by the learned Court below. It is further averred that on the basis of plaint, written statement alongwith counter claim, replications of the respective parties, issues were famed and the case was fixed for plaintiffs evidence. It is further averred that after the sudden demise of the father of the plaintiffs, they went under depression and even one of the plaintiffs got himself treated at Regional Hospital, Hamirpur, as well IGMC Hospital, Shimla. After the death of predecessor-in-interest of the plaintiffs the present plaintiff, namely, Bhuvnesh being a responsible and elder male member in the family was bestowed to shoulder with family responsibilities and responsibilities of dealing with multiplicity and litigation pending before the learned Courts at Hamirpur. Though admittedly earlier all the litigations were being managed by the deceased Kishore Chand Verma and after his death the same was fallen as havoc on the entire family and consequent thereto the plaintiff, namely, Bhuvnesh had suffered with intense depression for years all together and undergone treatment initially at Regional Hospital, Hamirpur and subsequently at IGMC, Shimla. When the matter was taken up on 8.6.2015 before the learned Court below, learned counsel for the plaintiffs has moved an application for seeking one more adjournment for producing the plaintiffs witnesses for the reason that the plaintiff is suffering from fever, but the same was rejected for the reason that the same is not annexed with any prescription or medical slip and moreover the plaintiffs have already been granted sufficient opportunities to lead their evidence. It is further averred that the plaintiffs have not examined even a single witness and as such plaintiffs have failed to prove their contention qua injunction. Accordingly, suit is dismissed for want of evidence as well as want of prosecution.

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

4. Learned counsel appearing on behalf of the plaintiffs has argued that the learned Court below has failed to appreciate the fact that the plaintiff was precluded from leading evidence for the sufficient reason and the learned Court below should have granted more opportunity to the plaintiffs to lead their evidence.

5. On the other hand, learned counsel appearing on behalf of the defendants has argued that there is no ground to grant another opportunity to the plaintiffs to lead evidence despite given many opportunities and after giving last opportunity on two adjournments costs and then additional cost was imposed, but the plaintiffs have failed to produce the witnesses, when the suit was dismissed the only remedy available to the plaintiffs to file an appeal against the dismissal of the suit.

6. In rebuttal, learned counsel appearing on behalf of the plaintiffs has argued that the only remedy available by way of filing petition under Article 227 of the Constitution of India, as the impugned order passed by the learned Court below is perversed.

7. After going through the entire record of this case, this Court finds that the suit is pending adjudication in the learned Court below from the year 2011, the plaintiff was given many opportunities to produce plaintiff witnesses, but despite giving many opportunities the plaintiffs witnesses were not present. At this moment, suit of the plaintiff was dismissed for want of evidence i.e. for want of prosecution. I have gone through the law as cited by learned counsel appearing on behalf of the plaintiffs in ***Ram Gobinda Dawan and others*** *vs.* ***Smt. Bhaktabala and Ram Gobinda Dawan and others*** *vs.* ***Sunil Kumar Roy and another, 1971 (1) Supreme Court Cases, 387,*** wherein it has been held as under :

> *"To conclude Ex.7, in our opinion, does not operate as res judicata even against the claim of Subasini Dasi and her sons inasmuch as the matter was not*

heard and finally decided on merits after contest by the Land Acquisition Court. We have already pointed out that if the plea of res judicata is not accepted the decision of the two courts regarding Subasini Dasi's having in Plot No.9202 half share will have also to be sustained."

8. The question involved in the present case is not with regard to the subsequent suit or whether the suit is barred by res judicata. The suit is barred by res judicata will arise only in that case and not in the present proceedings. So, the aforesaid judgment is not applicable in the present case. In ***State of Uttar Pradesh and another*** *vs.* ***Jagdish Sharan Agrawal and others, 2009 (1) Supreme Court Cases, 689,*** wherein it has been held as under :

"In the present case, the suit filed by Nagar Palika was dismissed on technical ground and in any case the State was not a party. So far the suit where the state was a party and amendments were made, the same was dismissed for non- prosecution. But the same was not dismissed under Order 9 Rule 8. Order 9 Rule 8 and Order 9 Rule 9 of CPC read as follows:

"8. Procedure where defendant only appears-Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

9. Decree against plaintiff by default bars fresh suit-1 Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party."

Therefore Order 9 Rule 9 cannot be said to be applicable. The dismissal of the suit for non-prosecution was not a decision on merit. Consequently, the said order cannot operate as res judicata.

Above being the position the High Court's order is clearly unsustainable and is set aside. The matter is remitted to the District Judge, Lalitpur to decide the proceeding on merit. Appeals are allowed but without any order as to costs."

9. As has been held in the case law (supra), if the suit is dismissed under Order 9 Rule 8 CPC, it is not a decision on merits afresh, suit is not barred, but this is not the issue involved in the present revision petition and so it is not required to be discussed at this stage. The only issue involved in this case is that whether the impugned order passed by the learned Court below by not allowing another opportunity to lead evidence, requires interference under Article 227 of the Constitution of India or not. This Court finds that the learned Court below has granted many opportunities to the plaintiffs to lead their evidence and thereafter two opportunities, one after another, was granted on cost and also an additional cost. The Court cannot keep of watching the plaintiffs to lead their evidence by years together. The suit is pending from the year 2011. In these circumstances, this Court finds that this is not a fit case where the interference of this Court requires under Article 227 of the Constitution of India.

10. Accordingly, the petition is devoid of any merit and deserves dismissal, hence the same is dismissed. However, the parties are left to bear their own costs. Pending applications, if any, shall also stands disposed of.

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

Naresh Kumar and others. ...Appellants.

Versus

Chuni Lal ...Respondent.

RSA No.189 of 2006.
Reserved on : 28.9.2016.
Decided on: 17.10.2016.

Specific Relief Act, 1963- Section 5- Plaintiff filed a civil suit for possession pleading that defendant No. 1 had forcibly raised construction over the land owned by plaintiff - defendants No. 2 and 3 had put the shuttering material on the part of the suit land- the suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that defendants had taken the plea of adverse possession but this plea was not established- mere possession how so ever long is not equal to the adverse possession- earlier suit for injunction was filed and cause of action in the two suits is not identical – appeal dismissed. (Para-10 to 16)

Cases referred:

Inacio Martins (deceased) through LRs vs. Narayan Hari Naik and others, 1993 (2) S.L.J. 2219

Deva Ram and another vs. Ishwar Chand and another, 1996 (1) S.L.J 711

Narain Dass and others vs. Smt. Vidya Devi through her LRs and others, Latest HLJ 2014 (HP) 876

For the appellants: Mr. Adarsh Sharma, Advocate.
For the respondent : Mr. H.C. Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present Regular Second Appeal under Section 100 of the Code of Civil Procedure is maintained by the appellants against the judgment and decree dated 9.12.2005, passed by the learned Additional District Judge, Mandi, in Civil Appeal No.71 of 2003, whereby the learned Appellate Court has affirmed the judgment and decree passed by learned Civil Judge (Junior Division), Karsog, District Mandi, in Civil Suit No.123 of 2001, dated 5.3.2003.

2. Briefly stating facts giving rise to the present appeal are that respondent/plaintiff (hereinafter referred to as 'the plaintiff') filed a suit for possession against the appellants/defendants (hereinafter referred to as 'the defendant') on the allegations that he is owner-in-possession of land comprised in Khata/Khatauni No.118/172, Khasra No.420 and 421 measuring 0-2-4 bighas situated in Mauja Karsog, District Mandi, H.P. Earlier, he had filed a suit for permanent prohibitory and mandatory injunction, in the year 1996 and the same was decided on 22.12.1999, as per which, the same was partly decreed for permanent prohibitory injunction, but relief of mandatory injunction was denied to him. As per the plaintiff, he is permanent resident of Pangna, which is about 30 KM from Tehsil Head Quarter, Karsog. Defendant No.1 taking advantage of his absence raised construction in the form of latrine over Khasra No.421 measuring 0-0-10 bighas, which act on his part was highly illegal and wrongful. Khasra No.420/1 measuring 0-0-8 bighas, defendants No.2 & 3 had kept wooden shuttering after the decision of earlier suit. Although, he had requested the defendants to remove the shuttering from Khasra No.420/1, but they started making lame excuses. Since, he is rightful owner of the suit land, he is legally entitled to recover it possession from the defendant. The cause of action accrued on 22.12.1999, when his earlier suit, was partly decreed and on 28.1.2001, when defendants No.2 & 3 kept wooden shuttering over part of the suit land i.e. Khasra No.420/1 and

on 22.8.2001, when the defendants finally refused to deliver the possession of the suit land to him.

3. The suit was resisted and contested by raising preliminary objections qua limitation, estoppel, locus standi, valuation and barred under Order 2 Rule CPC. It is contended that previously Mohan, Kanshi Ram and Amar Nath were owners of the suit land, which was already in possession of their (defendant's) father and this fact was well within the knowledge of the plaintiff, when he had purchased the land comprising in Khasra Nos.421 and 420 from the previous owner. It was further contended that when the plaintiff had filed a previous suit, at that time, they had already constructed latrine over Khasra No.421 and had been using land bearing Khasra No.420/1, for stacking of wood material etc. The latrine was constructed in the year 1984 and at that time neither previous owner nor the plaintiff had raised any objection. Their possession over the suit land remained quite open, peaceful, continuous, uninterrupted, hostile and notorious to the knowledge of the plaintiff and previous owners since July, 1984 and they did not take any steps to get back the same. In these circumstances, their possession had ripened into absolute title in the month of July, 1996 by virtue of adverse possession. Thus, all right, title and interest of the plaintiff over the suit land stood lost and extinguished in their favour. Since at the time of filing of previous suit, the plaintiff was aware about their possession over the suit land and no relief for possession was claimed. By filing replication, the plaintiff has reasserted and reaffirmed his own allegations by denying those of defendants. It was specifically averred that latrine over Khasra No.421 was constructed by the defendants during the pendency of earlier suit i.e. after 3.3.1997, when they took forcible possession of the same. As far as Khasra No.420/1 is concerned, they kept shuttering over it on 22.12.1999.

4. The learned trial Court framed following issues on 22.4.2002 :

"1. Whether the plaintiff is owner-in-possession of land comprised in Khata Khatauni No.118/172 Khasra Nos.420, 421 measuring 0-2-4 bighas situated at Mauja Karsog ? OPP

9. Whether defendant No.1 has raised construction in the form of latrine over Khasra No.421 measuring 0-0-10 bighas, if so whether plaintiff is entitled to the possession as prayed ? OPP.

10. Whether the defendant Nos.2 & 3 have kept wooden shuttering over Khasra No.420/1 measuring 0-0-8 bighas after decision of the suit bearing No.59 of 1996 decided on 22.12.1999 if so whether plaintiff is entitled for possession thereupon ? OPP.

11. Whether the defendants have raised construction during the pendency of the suit bearing No.59 of 1996 decided on 22.12.1999, if so its effect ? OPP.

12. Whether the suit is properly valued for the purpose of court fee and jurisdiction ? OPP.

13. Whether the suit is barred under Order 2 Rule 2 CPC ? OPD.

14. Whether the suit is within limitation ? OPP.

15. Whether the plaintiff is estopped to file the present suit by his own act, conduct and deeds ? OPD.

16. Whether the plaintiff has no locus standi to file the present suit ? OPD.

17. Whether the defendants had already constructed their latrine over Khasra No.421 and they have been using the land in Khasra No.420/1 measuring 0-0-8 bighas for stacking of wooden material etc. since July 1984 and the previous owner as well as plaintiff did not object so ? OPD.

18. Whether the possession of defendants over the suit land since July 1984 has become adverse to the plaintiff ? OPD.

19. Relief. "

5. The learned trial Court has decided Issue Nos.1 to 5 and 7 in affirmative, Issue Nos.6, 8 to 11 against the defendant and decreed the suit. Thereafter, the appeal was maintained before learned Addl. District Judge, Mandi and the same was dismissed. Hence, the present regular second appeal, which was admitted on the following substantial question of law:

> "What is the effect of the deposition of plaintiff Chuni Lal made by him as PW-1 that the encroachment was made in the year 1997 (when the earlier suit was pending), when the same is contrary to the pleaded version that the encroachment was made after the decision of the earlier suit (the earlier suit was decided in the year 1999)?"

6. Learned counsel appearing on behalf of the plaintiff has argued that the learned Court below has not appreciated the statements of PW-6, DW-1 and DW-2 correctly. He has further argued that the suit was barred under Order 2 Rule 2 CPC, as in the earlier suit permission of the Court was not taken to institute the suit for mandatory injunction afterwards at the time, the earlier suit was maintained before the learned Court below.

7. On the other hand, learned counsel appearing on behalf of the defendant has argued that when the earlier suit was instituted, there was no structure over the suit land and when the structure was raised the present suit was instituted. He has referred case law in **Inacio Martins (deceased) through LRs** vs**. Narayan Hari Naik and others, 1993 (2) S.L.J. 2219, Deva Ram and another** vs**. Ishwar Chand and another, 1996 (1) S.L.J 711** and **Sh. Narain Dass and others** vs. **Smt. Vidya Devi through her LRs and others, Latest HLJ 2014 (HP) 876.**

8. In rebuttal, learned counsel appearing on behalf of the plaintiff has argued that the learned Court below has not taken into consideration the fact that there was no encroachment proved on record, so the appeal is required to be allowed.

9. To appreciate the arguments of learned counsel for the parties, I have gone through the record in detail.

10. As per the plaintiff, the defendants have taken into consideration the advantage of adverse possession. The jamabandi Ex.P-1 for the year 1999-2000 shows that the plaintiff is owner-in-possession of the suit land comprised in Khasra No.420 and 421, measuring 0-2-4 bighas. The defendants have taken the plea of adverse possession in the written statement qua Khasra No.421, measuring 0-0-10 bighas and Khasra No.420/1 measuring 0-0-8 bighas. It is also admittedly pleaded by the defendants that they have constructed latrine over Khasra No.421 in the year 1984 and this fact was well in the knowledge of plaintiff as well as previous owner. Similarly, they have pleaded that Khasra No.420/1 measuring 0-0-8 bighas land is used for stacking of wooden materials. Further, they have pleaded that neither the previous owners nor the plaintiff has taken any steps in taking back the possession and thereby raising a plea of adverse possession. Now, it is relevant to determine whether defendants have perfected their possession into title by virtue of adverse possession over Khasra No.421 and 420/1. There is no dispute that earlier suit was filed by the plaintiff against the defendants and the same was partly decreed for permanent prohibitory injunction and relief of mandatory injunction was denied. The defendants are asserting their possession over Khasra No.420/1 and 421, since the year 1984. In reply to the suggestion of PW-1, he has stated that Khasra No.421, measuring 0-0-10 bighas, there is a latrine and over Khasra No.420/1 measuring 0-0-8 bighas, there is 'Dhara' (Wooden Khoka). The stand of the defendant is that they are coming in possession of Khasra No.420/1 and 421, since the year 1984 and this fact was well in the knowledge of previous owner as well as the plaintiff. DW-1 Jai Gopal, defendant has given version that Mohan Lal, Kanshi Ram and Amar Nath were owners of Khasra No.420/1 and 421 and he is asserting the possession over these Khasra numbers since July, 1984. As per his version, nobody has interfered in their possession since 1984 and now in the year 1996 possession matured into ownership. The necessary ingredients of adverse possession i.e. 'possession to the knowledge of owner' is not categorically stated by this witness. His version also goes to show that he does not know whether

the plaintiff is in knowledge of their khasra numbers as stated by him in Khasra No.420/1 and 421. Hence, necessary ingredients of adverse possession is not proved from the statement of defendant. Defendant in his examination-in-chief has also not categorically stated qua the ownership of plaintiff over Khasra No.420/1 and 421 and also not stating what is starting point of adverse possession against the plaintiff. He is only making reference to previous owners, namely, Mohan Lal, Kanshi Ram and Amar Nath. It is true that the conditions for claiming adverse possession is admitted ownership of others. It is also equally true that mere long possession, however of any length of time, is not enough to prove adverse possession. The defendants in the previous suit have not taken a specific plea of adverse possession qua the suit land as revealed from their written statement Ex.PW4/B. This fact is also breaking the plea of adverse possession raised by the defendants.

11. The defendants have failed to prove the adverse possession while appearing as DW-1 in the witness box. He has stated that he is not aware whether the possession of the defendant is in the knowledge of the plaintiff. DW-2 has simply stated that he was employed by defendants as 'Mason' while raising construction of latrine in the year 1984. DW-3 no doubt tries to say that the possession of the defendants is over disputed land since 1985, but mere possession, however so long, is not enough to prove the adverse possession. Plaintiff is coming on the basis of title for the relief of possession qua the suit land. Moreover, it has admittedly come in the statement of DW-1 that in the year 1996, there was some interim orders obtained by the plaintiff against them. Admittedly, as per Ex.P-2, defendants were restrained not to interfere in the suit land. From these facts, it can safely be concluded that the plaintiff filed earlier suit against the defendants only when there was some cause of action against the defendants in which he succeeded getting the relief. The case of the plaintiff is also that the defendants started raising construction during the pendency of previous suit in the year 1997. This fact is also stated by PW-1 and PW-3. PW-3 knows both the parties and he has house adjoining to the suit land and also stating that the defendants have raised latrine and 'Dhara' in the year 1997. The evidence led by the plaintiff is inspiring confidence in comparison to the evidence led by the defendants and his witnesses. The version given by DW-2 in comparison to the version given by PW-3 is inspiring less confidence, whereas PW-3 is testifying a fact by stating that the construction raised by the defendants in the year 1997. Therefore, it can be safely concluded that the defendants have raised construction over Khasra No.421 and 420/1 in the year 1997 during the pendency of suit bearing No.59 of 1996. The defendants have failed to prove that the construction was raised in the year 1984 and that was in the knowledge of plaintiff. The defendants have failed to prove adverse possession, as claimed by them qua Khasra No.420 and 421 and plaintiff is coming on the basis of title for claiming possession of suit land for which he has also placed on record jamabandi Ex.P-1. Tatima Ex.PW6/A, has also proved on record. It is also clear that defendant No.1 has raised construction in the form of latrine over Khasra No.421 measuring 0-0-10 bighas and this fact is also admittedly pleaded by the defendant, but taking a plea of adverse possession, which plea is not found sustainable. Similarly, it is also admitted that the defendants are using Khasra No.420/1 measuring 0-0-8 bighas for stacking wooden material. The plea of adverse possession has also not proved by the defendants. Therefore, it can be safely concluded that the plaintiff is owner of land comprised in khasra No.420 and 421 measuring 0-2-4 bighas and he is entitled for the possession of suit land comprised in Khasra No.420 measuring 0-0-10 bighas and comprised in Khasra No.420/1 measuring 0-0-8 bighas, which is also shown in tatima Ex.PW6/A. Defendants have taken a plea that the present suit is barred under provisions of Order 2 Rule 2 C.P.C. It is contended that the plaintiff has not taken a plea of possession in the earlier suit, but this plea taken by the defendants is not sustainable. It is for this reason that the plaintiff has proved a distinct and separate cause of action in the present case. It has been proved on record that the defendants have raised construction in the year 1997 and, therefore, suit of the plaintiff for possession cannot be barred under Order 2 Rule 2 C.P.C.

12. Hon'ble Apex Court in **Inacio Martins (deceased) through L.Rs. vs. Narayan Hari Naik and others, 1993 (2) S.L.J. 2219,** wherein it has been held as under :

"The next contention which found favour with the High Court was based on the language of Order 2 Rule 2 (3) of the Code of Civil Procedure. The submission regarding constructive res judicata was also based on this very provision. Now Order 2 concerns the framing of a suit. Rule 2 thereof requires that the plaintiff shall include the whole of his claim in the framing of the suit. Sub-rule (1) of Rule 2, inter alia, provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. If he relinquishes any claim to bring the suit within the jurisdiction of any court he will not be entitled to claim that relief in any subsequent suit. However, sub-rule (3) of Rule 2 provides that a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs he shall not afterwards sue for any relief so omitted. It is well known that Order 2 Rule 2 CPC is based on the salutary principle that a defendant or defendants should not be twice vexed for the same cause by splitting the claim and the reliefs. To preclude the plaintiff from so doing it is provided that if he omits any part of the claim or fails to claim a remedy available to him in respect of that cause of action he will thereafter be precluded from so doing in any subsequent litigation that he may commence if he has not obtained the prior permission of the court. But the Rule does not preclude a second suit based on a distinct cause of action. It may not be out of place to clarify that the doctrine of res judicata differs from the rule embodied in Order 2 Rule 2, in that, the former places emphasis on the plaintiff's duty to exhaust all available grounds in support of his claim while the latter requires the plaintiff to claim all reliefs emanating from the same cause of action. The High Court is, therefore, clearly wrong in its view that the relief claimed is neither relevant nor material. Now, in the fact-situation of the present case, as we have pointed out earlier, the first suit was for an injunction and not for possession of the demised property. The first suit was dismissed on the technical ground that since the plaintiff was not in de facto possession no injunction could be granted and a suit for a mere declaration of status without seeking the consequential relief for possession could not lie. Once it was found that the plaintiff was not in actual physical possession of the demised property, the suit had become infructuous. The cause of action for the former suit was not based on the allegation that the possession of the plaintiff was forcibly taken sometime in the second week of June, 1968. The allegation in the former suit was that the plaintiff was a lessee and his possession was threatened and, therefore, he sought the court's assistance to protect his possession by a prohibitory injunction. When in the course of that suit it was found that the plaintiff had in fact been dispossessed, there was no question of granting an injunction and the only relief which the court could have granted was in regard to the declaration sought which the court held could not be granted in view of the provisions of Specific Relief Act. Therefore, the cause of action for the former suit was based on an apprehension that the defendants were likely to forcibly dispossess the plaintiff. The cause of action for that suit was not on the premises that he had in fact been illegally and forcibly dispossessed and needed the court's assistance to be restored to possession. Therefore, the subsequent suit was based on a distinct cause of action not found in the former suit and hence we do not think that the High Court was right in concluding that the suit was barred by Order 2 Rule 2(3) of the Code of Civil Procedure. It may be that the subject matter of the suit was the very same property but the cause of action was distinct and so also the relief claimed in the subsequent suit was not identical to the relief claimed in the previous suit. The High Court was, therefore, wrong in thinking that the difference in the reliefs claimed in the two suits was immaterial and irrelevant. In the previous suit the relief for possession was not claimed whereas in the second

suit the relief was for restoration of possession. That makes all the difference. We are, therefore, of the opinion that the High Court was completely wrong in the view that it took based on the language of Order 2 Rule 2 (3) of the Civil Procedure Code."

In **Deva Ram and another vs. Ishwar Chand and another, 1996 (1) S.L.J 711,** wherein it has been held as under :

> "The subsequent suit was brought by the respondents for recovery of possession on the ground that they were the owners of the land in suit and were consequently entitled to recover its possession. The cause of action in the subsequent suit was, therefore, entirely different. Since the previous suit was for recovery of sale price, the respondents could not possibly have claimed the relief of possession on the basis of title as title in that suit had been pleaded by them to have been transferred to the defendants [appellants]. The essential requirement for the applicability of Order 2 Rule 2, namely, the identity of causes of action in the previous suit and the subsequent suit was not established. Consequently, the District Judge as also the High Court were correct in rejecting the plea raised by the appellants with regard to Order 2 Rule 2 of the Civil Procedure Code."

13. Learned counsel appearing on behalf of the defendant has also relied upon a decision of Hon'ble High Court of Himachal Pradesh rendered in a case titled **Sh. Narain Dass and others** vs. **Smt. Vidya Devi through her L.Rs. and others, Latest HLJ 2014 (HP) 876,** wherein it has been held as under :

> "Submission of learned Advocate appearing on behalf of the appellants that forefather of appellants was in possession of the suit land since 1965 and long possession ripened into right of adverse possession over suit land and on this ground appeal be accepted is rejected being devoid of any force for reasons hereinafter mentioned. It is well settled law that prolonged possession by itself does not prove the factum of ownership by adverse possession. See: 1992 (2) Sim.L.C 248 titled Devi Chand Vs. Raj Dulari. It is well settled law that a person claiming adverse possession over immovable property should prove that possession was peaceful, open continuous and hostile to the knowledge of the true owner. See: AIR 1999 Delhi 281 titled Smt.Rama Kanta Jain Vs. M.S. Jain and other. Also See: 1996 (2) Civil Court Cases 118 HP titled Jangbahadru Vs. Smt Juthi Devi and others. It is well settled law that adverse possession is based upon unlawful possession which has become lawful with the passage of time subject to certain conditions. Hence it is held that appellants did not prove all ingredients of adverse possession over the suit property in accordance with law. Even as per jamabandi entries Ext.P-1 placed on record for the year 1993-94 in the ownership column and in possession column of suit land names of appellants did not figure. It is well settled law when there is conflict between oral evidence and documentary evidence then documentary evidence always prevails unless documentary evidence is not rebutted by examination of public official who prepared public document in discharge of official duty. It was held in case reported in 1999(1) SLJ page 16 titled Ram Krishan vs. Geeta Devi and others that oral evidence is not sufficient to rebut the entries incorporated in revenue record in discharge of official duty unless the revenue official who had incorporated the entries in public record is not examined in Court. None of the witness examined by appellants have stated in their testimony that possession of appellants became hostile to the legal rights of deceased plaintiff or her L.Rs. Hence it is held that ingredients of hostile possession not proved on record by way of oral testimony of witness examined by appellants."

14. From the above, it is clear that even if the encroachment was made in the year 1993, it makes no effect as the defendants have failed to prove the encroachment to the knowledge of the plaintiff, as the defendant witnesses itself stated that the defendant has no knowledge whether the plaintiff was having any knowledge with regard to the encroachment, as has been held earlier. The suit was filed for the relief of permanent prohibitory injunction, as the structure in the form of latrine and 'Dhara' was raised, the suit for mandatory injunction was maintained. The cause of action was not identical, so the suit is not barred under Order 2 Rule 2 CPC, holding that the suit is barred under Order 2 Rule 2 CPC, the cause of action should be identical which is not proved by the defendants in the instant case. So, the findings recorded by the learned Courts below are as per law, needs no interference. As far as the encroachment is concerned, the defendants have failed to prove that it was in the knowledge of the plaintiff.

15. In view of the above, substantial question of law as framed on 26.6.2006, is answered accordingly holding that the subsequent suit for mandatory injunction for the structures raised much after the earlier suit and so the subsequent suit is maintainable for mandatory injunction, as has already been decided by Hon'ble Apex Court.

16. In view of the above discussion, there is no illegality and infirmity in the judgment and decree passed by the learned Appellate Court, so there is no need for interference. In these circumstances, the appeal of the appellant is without merit and deserves dismissal, hence the same is dismissed. However, in the peculiar facts and circumstances of this case, parties are left to bear their own cost (s). Pending application (s), if any shall also stands disposed of.

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

Paras Ram & others. .....Petitioners.

Versus

State of H.P. & others. .....Respondents.

CMPMO No. 104 of 2016
Reserved on: 03.10.2016
Decided on: 17.10.2016

Code of Civil Procedure, 1908- Section 151- A civil suit was filed for seeking an injunction – an application for impleading the applicants as defendants was filed at the stage of argument- application was allowed subject to the payment of cost of Rs. 10,800/- - the cost was not deposited and it was stated that only some of the defendants wanted to contest and they be allowed to deposit part of the cost - an application for striking of the defence was filed, which was dismissed- held, that there was no mention of the individual cost - it was not permissible to modify the order subsequently – revision accepted and direction issued to deposit whole of the cost. (Para-5 to 9)

Cases referred:

Anand Parkash vs. Bharat Bhushan Rai and another, AIR 1981 Punjab and Haryana 269 (Full Bench).

For the petitioners: Mr. I.D. Bali, Sr. Advocate, with Mr. Virender Bali, Advocate.

For the respondents: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG, for the respondent/State.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioners/plaintiffs (hereinafter referred to as *'the petitioners'*) against the order of learned Civil Judge (Sr. Division) Court No. 1, Mandi, H.P., passed in CMA No. 164-VI/15 in Civil Suit No. 10933/2013(60-I/12), dated

19.12.2015, whereby the learned Court dismissed the application of the petitioners under Section 151 CPC for striking off the defence of newly added defendants No. 3, 4, 5, 6 and 7 for non-payment of costs vide order dated 09.10.2014, whereunder the application under Order 1, Rule 10(2) CPC was allowed subject to payment of costs of Rs.10,800/- (rupees ten thousand eight hundred).

2. Briefly stating the facts giving rise to the present petition are that the petitioner instituted a suit against the respondents/defendants (hereinafter referred to as 'the respondents') seeking permanent prohibitory and mandatory injunction under Sections 38 and 39 of the Specific Relief Act, wherein it was averred that defendants may be restrained permanently from raising construction of water tank nearby/over the source of water canal ('kuhul') on the land comprised in Khasra No. 528, situated in Mohal Sajha/522, Sub Tehsil Aut, District Mandi, H.P. Subsequently, on 14.08.2012, the learned Court in the above mentioned suit directed the parties to maintain status quo qua nature and construction of water channel on the water source. As per the petitioner, when the case was at the stage of arguments, an application under Order 1, Rule 10(2) CPC read with Section 151 CPC, for impleading the applicants therein as defendants, was filed. The same was opposed, however, the learned Court below allowed the application subject to payment of costs of Rs.10,800/-. The costs was not deposited and on 12.01.2015, the counsel for the newly added defendants stated in the Court that only applicants/defendants 5,12,32,38 and 46 want to contest the case and only these defendants be allowed to deposit costs of Rs.1000/- @ Rs.200/- each. The plea was accepted by the learned Court below and applicants/defendants No. 5,12,32,38 and 46 were added as defendants and they were also allowed to deposit costs @ Rs.200/- each. Consequently, the petitioner, by way of an application under Section 151 CPC, prayed for striking off the defense of newly added defendants succinctly on the ground that the order dated 09.10.2014, passed in CMA No. 145/14, was a conditional order and the non-fulfilment thereof has rendered the order inoperative. However, the learned Court below did not accept the application and dismissed the same. Resultantly, defendants No. 5, 12, 32, 38 and 46 were allowed to defend the case after depositing costs of Rs.200/- each. Hence the present petition.

3. The learned counsel for the petitioner has argued that the order passed by the learned Court below is required to be interfered with, as imposition of costs was a condition precedent for further proceedings of the case and as the defendants have not deposited the imposed costs, that is, Rs.10,800/- , the defence of the defendants was required to be closed. Conversely, the learned counsel for the respondents has argued that the contesting defendants have deposited the costs of their share and, therefore, there is no illegality in dismissing the application of the present petitioners. In rebuttal, the learned counsel for the petitioner has relied upon a decision in ***Anand Parkash vs. Bharat Bhushan Rai and another, AIR 1981 Punjab and Haryana 269 (Full Bench).***

4. Heard. To appreciate the rival contentions of the parties, I have gone through the record in detail.

5. Order dated 09.10.2014, passed by the learned Court below, is extracted in *extenso* as under:

> *"This order shall dispose off an application under order 1Rule 10 of the Code pf Civil Procedure having been moved by the 54 applicants for adding them as defendants in the present suit. It is averred by the applicants that the plaintiffs have filed the suit for permanent prohibitory injunction against State of H.P. with the allegations that they have been allegedly irrigating their land through the "Kuhal Khai Ka Nalla". The source has been claimed by them to be in Khasra No. 528 which is existing nearby the "Nalla" comprised in Khasra No. 527. the defendants in the main suit have been sought to be restrained from causing any interference in construction of water tank so as to divert the water to the tank. The state on the other hand has pleaded that the Irrigation and Public Health Department has constructed a water supply scheme "Sojha-jeori-Kigas" from its*

spring source in the year 1978-79 which is situated over the Government Land on the bank of "Khahi Nalla" to provide drinking water to the inhabitants of the village Sojha and jeori. The scheme has been functioning since the year 1978-79. However, during the Monsoon season the water changed its course from one side of the boulders to other and the chamber has also been destroyed. The employees of the Irrigation and Public Health Department have prepared a new small chamber 2x2 feet at the new source so as to start it. No Kuhal has been in existence on the spot where as the entire water is being used for drinking requirement of the inhabitants of the two villagers. The result of the case would effect all the residents of the village Sojha and jeohri and as such they want to be impleaded as defendants.

On filing of this application a reply has been preferred by the plaintiffs by stating that the proposed applicants are not the necessary or proper parties to be impleaded in the present suit and that they are 54 applicants in the application but the power of attorney of only 41 persons has been filed. Two of the applicants have already appeared in the witness box as witnesses and the application has been filed due to enmity qua which FIR No. 60 dated 15-06-2012 has also been instituted. The file has already been listed for arguments at which state this application has been moved just to delay the matter. No reply to the application has been preferred by the defendants.

Learned counsel for the applicants has argued that they are required to be impleaded as defendants as the fate of the case shall determine their rights and that they want to be heard. Power of attorney of all the applicants is on record. As against this the learned counsel for the plaintiff has argued that the application has been moved just to delay the proceedings and that it be dismissed.

Thus after hearing the learned counsel for the parties and going through the respective pleadings it is discernible that the plaintiffs have sought injunction against the defendants i.e. State of H.P. and Executive Engineer, Irrigation and Public Health Division Mandi, restraining them from constructing the water tank near by or over the source of water channel on Khasra No. 528. A prayer of Mandatory injunction requiring the restoration of "Khai Nalla Ki Kuhal" to its original position has also been made. The applicants have been stating that they would be affected by the adjudication in the matter, as such they are required to be impleaded as defendants as their water scheme is involved in the instant case being undertaken by the State of H.P. and the Irrigation and Public Health Department. Accordingly, keeping this assertion in view, it is appropriate that the applicants be arrayed as defendants in the suit and there is substance in the assertion of the applicant. However as this application has been moved at the fag end of the proceedings and some of the applicants have also appeared as witnesses is the case as such the application is allowed subject to cost of Rs. 10,800/-. Let the file be put up for filing of the amended memo of the parties as well as for written statement for 20.1.2014."

6. From the above order it is clear that costs of Rs.10,800/- was imposed upon the defendants therein and the application was allowed. There is no mention of costs of Rs.200/- each, as has been held by the learned Court in the subsequent order dated 19.12.2015, passed in the application of the present petitioner (plaintiff). Whether the Court can proceed further after part payment of costs, as has been done in this case, I would like to refer to Section 35(B) of the Code of Civil Procedure, 1908, which reads as under:

"35B. Costs for causing delay.—(1) If, on any date fixed for the hearing of a suit or for taking any step therein, a party to the suit—

(a) fails to take the step which he was required by or under this Code to take on that date, or

(b) obtains an adjournment for taking such step or for producing evidence or on any other ground, the Court may, for reasons to be recorded, make an order requiring such party to pay to the other party such costs as would, in the opinion of the Court, be reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending the Court on that date, and payment of such costs, on the date next following the date of such order, shall be a condition precedent to the further prosecution of—

(a) the suit by the plaintiff, where the plaintiff was ordered to pay such costs,

(b) the defence by the defendant, where the defendant was ordered to pay such costs.

Explanation.—Where separate defences have been raised by the defendants or groups of defendants, payment of such costs shall be a condition precedent to the further prosecution of the defence by such defendants or groups of defendants as have been ordered by the Court to pay such costs.

(2) The costs, ordered to be paid under sub-section (1) shall not, if paid, be included in the costs awarded in the decree passed in the suit; but, if such costs are not paid, a separate order shall be drawn up indicating the amount of such costs and the names and addresses of the persons by whom such costs are payable and the order so drawn up shall be executable against such persons."

7. Further the Hon'ble High Court of Punjab and Haryana in case titled as ***Anand Parkash vs. Bharat Bhushan Rai and another, AIR 1981 Punjab and Haryana 269 (Full Bench),*** has held as under:

"22. … … … … … …

When the provisions of Section 35B are analysed we find that the Legislature was not satisfied by using the word 'shall' only and this word shall' in the Section is qualified by the words 'condition precedent'. Where a statute declares that doing of a particular thing shall be a condition precedent, then obviously the intention is to make it a peremptory mandate. A condition precedent is a condition which must be performed. If the Legislature had not intended to make the provisions of the Section mandatory, then it was not at all necessary for the Legislature to have qualified the word 'shall' by using words 'condition precedent'. The Legislature has made its intention absolutely clear by using the words 'shall be a condition precedent' that the provisions of this section are mandatory in nature and that any non-compliance of these provision would be fatal. To me, the words 'condition precedent' qualifying the word ' shall' appear to be the clincher for interpreting the provisions of Section 35B are mandatory. As has been observed earlier the costs are ordered to be paid to compensate the other party who for no fault of his has to undergo inconvenience and incur expenses. If an adjournment is sought and the same is granted on payment of costs, then on the next date of hearing the party who sought adjournment is bound to pay the costs. In my view, on he plain language of the section the Court is only required to see whether the costs have been paid or not and if a party does not pay the costs, then the only course open to the Court is to disallow the prosecution of the suit or the defence any further. The Court would not go into the question whether the party who sought adjournment has or has not been guilty of delaying he suit or that it was not useful for the party to lead evidence or that the adjournment sought was unnecessary. When a party seeks adjournment, he pays the costs for his own folly or mistake which results into inconvenience and unnecessary harassment to the other side. He does not do so as an act of benevolence. Moreover, a litigant is excepted to show full respect to the words of the Court. He cannot be permitted to ignore them or flout them with impunity. In case he opts to disregard the orders of the court and fails to pay the costs, then he must suffer penal consequences. The duty of paying costs is on the

party who has been ordered to pay the costs. The Court or the party who has to receive costs, is not obliged to remind this delinquent party to perform its duty. The whole purpose of enacting this provision would be frustrated if the same is held to be directory. It may again be emphasised that the Courts are not required to find out as to what was the intention of the party in obtaining adjournment as the moment an adjournment is obtained on the date on which a suit is fixed for hearing or for taking any step therein, then the same results in the delay of the decision of the suit. One of the essential requirements for attracting the applicability of this provision is that the date has to be when a suit is fixed for hearing or for taking any step therein. If the date is only for depositing of process fee or for doing some such act; then it cannot be said that the suit was fixed for hearing or for taking any step therein. When once the ingredients of the Section are proved, then no other extraneous consideration would be taken into account by the Courts."

8. In view of what has been discussed hereinabove, this Court finds that the learned Court below allowed the application filed by the applicants/defendants under Order 1, Rule 10(2) CPC read with Section 151 CPC, vide its order dated 09.10.2014, subject to deposit of costs of Rs.10,800/-, so the imposition of costs was a condition precedent. As held above, there was nothing like newly added defendants can deposit costs of Rs.200/- each. Therefore, the newly added defendants are required to deposit the entire amount of costs.

9. Accordingly, the present revision petition is allowed and it is ordered that the newly added defendants will deposit the entire amount of costs, that is, Rs.10,800/- within four weeks from today and only then the Court will allow them to joint the proceedings as per law.

10. In view of the above, the petition stands disposed of, as also pending application(s), if any. No costs.

11. The parties are directed to appear before the learned Trial Court on ***15.11.2016.*** Records, if any, be also sent forthwith.

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

Yogesh Sharma ...Appellant.

Versus

Jyoti and others ...Respondents.

FAO No.486 of 2011.
Reserved on : 5.10.2016
Decided on:17th October, 2016

Motor Vehicles Act, 1988- Section 166- Claimant had suffered 10% permanent disability and had suffered loss of income- he is a tailor and income of Rs. 3,000/- per month cannot be said to be excessive- age of the claimant is between 23 to 26 years and multiplier of '18' is reasonable- medical expenses of Rs. 25,000/- are just and reasonable – no amount was paid towards future loss of amentias and Rs. 25,000/- awarded under this head – total compensation of Rs. 1,14,800/- + 25,000/- awarded along with interest @ 7.5% per annum. (Para-10 and 11)

For the appellant: Mr. J.L. Bhardwaj, Advocate.

For the respondents : Mr. O.P. Negi, Advocate, for respondent No.1.
Nemo for respondent No.2.
Mr. Ashwani Sharma, Sr. Advocate with Mr. Ishan Thakur, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal under Section 173 of the Motor Vehicles Act, 1988, is maintained by the appellant/petitioner (hereinafter referred to as the 'petitioner') for enhancement of the amount of compensation awarded by learned Motor Accidents Claims Tribunal-I, Solan, dated 30.8.2011 in Claim Petition No.67-S/2 of 2009.

2. Brief facts giving rise to the present appeal are that on 7.3.2009 at place Piplughat Tehsil Arki, District Solan, the petitioner met with an accident and suffered injuries in the car bearing No. HP-11-3555, being driven by respondent No.2 and owned by respondent No.1 and insured by respondent No.3. As per the petitioner, he was travelling in the said car, which was being driven by respondent No.2, in a rash and negligent manner. Thereafter, he suffered injuries and was taken to Arki hospital from where he was referred to IGMC, Shimla, for treatment. The petitioner suffered multiple injuries and remained admitted in the hospital and thereafter got treatment after discharge from hospital. As per the petitioner, he was 23 years of age and working as a tailor, at the time of accident and suffered permanent disability in the accident.

3. As far as the accident is concerned, the same is admitted by respondents No.1 and 2 in their reply. Rest of the averments regarding rash and negligent driving were denied. As per respondents No.1 and 2, the accident has taken place, as a result of rash and negligent driving of unknown truck. FIR has been registered in Police Station, Arki, District Solan, H.P.

4. The learned Tribunal below framed the following issues on 30.10.2011 :

> "1. Whether the petitioner received injuries in an accident caused on account of rash and negligent driving of the respondent No.2 while driving the vehicle owned by respondent No.1 ? OPP.
>
> 2. If Issue No.1 is proved in affirmative to what amount of compensation the petitioners are entitled and from whom ? OPP.
>
> 3. Whether the vehicle was being driven in violation of the terms and conditions of the insurance policy and the respondent No.3 is not liable to pay the compensation? OPR-3.
>
> 4. Relief."

5. After deciding Issue No.1 in favour of the petitioner and Issues No.2 and 3 against the respondents, the learned Tribunal below awarded compensation of Rs. 1,14,800/- to the petitioner.

6. Learned counsel appearing on behalf of the petitioner has argued that the compensation awarded by the learned Tribunal below is in on very lower side. On the other hand, learned counsel appearing on behalf of respondent No.1 has argued that the vehicle was insured and there is no liability of respondent No.1.

7. Learned Senior Counsel appearing on behalf of respondent No.3 has argued that the amount of compensation is just and reasoned, therefore, the appeal deserves dismissal. He has further argued that the award of compensation has been given on each and every point.

8. In rebuttal, learned counsel appearing on behalf of the petitioner has argued that the petitioner was working as a tailor at the relevant time and suffered 10 % permanent disability, so the income of the tailor is required to be taken much more than Rs. 3,000/- which has been wrongly taken by the learned Tribunal below.

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

10. As far as permanent disability is concerned, PW-1 Dr. Ashish Sharma, from Orthopedic medicines was examined to prove it. As per him, the petitioner has suffered 10% permanent disability. PW-3 Umesh Kumar has deposed that the petitioner has suffered injuries in an accident with the offending vehicle, as the offending vehicle had rolled down from the road at a time driver of the offending vehicle failed to give pass to the truck coming from the opposite direction. The petitioner suffered 10% permanent disability getting treatment as indoor or outdoor patient in IGMC, Shimla and has also suffered loss of income. PW-4 Hari Dass, deposed that the petitioner suffered injuries in an accident with the offending vehicle. PW-5 Sapna deposed that her husband suffered injuries in an accident with the offending vehicle and thereby remained under treatment as indoor as well as outdoor patient and confined to bed and suffered 10% permanent disability. She has further deposed that the petitioner remained dependent upon her and thereby suffered loss of income in addition to the costs of treatment. It has not come on record that the petitioner was working as a tailor. No evidence has been led by the petitioner to prove the fact that he was working as a tailor at the relevant time or that he is a tailor by profession and so, this Court finds no illegality in the assessment of income of the petitioner, which is taken as Rs. 3,000/-, for the purpose of calculating disability. The multiplier is also applied correctly i.e. 18, after taking into consideration the age of petitioner in between 23 to 26 years. At the same point of time, the medical expenses awarded Rs. 25,000/-, as cost of treatment is also just and reasoned, but after going through the record, this Court finds that no compensation has been awarded to the petitioner for the loss of future amenities due to permanent disability the petitioner has suffered. So, this Court finds that the petitioner is held entitled to Rs. 25,000/- for the loss of future amenities. The compensation award passed by the learned Tribunal below is required to be enhanced by Rs. 25,000/-, on account of the loss of future amenities. No other points argued so, needs no consideration.

11. The net result of the above discussion is that the compensation awarded by learned Tribunal below is enhanced by Rs. 25,000/-. Accordingly, the petitioner is held entitled Rs. 1,14,800/- plus Rs. 25,000/- alongwith interest at the rate of 7.5 % per annum from the date of petition, till the date of realization. The appeal is accordingly disposed of. In the peculiar facts and circumstances of the case, parties are left to bear their own costs. Pending application (s), if any, shall also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Ex. Petty Officer No.114294-K Hari Pal Singh ...Appellant.

Versus

State of HP & others ...Respondents

LPA No.338 of 2012.
Reserved on: 26.09.2016.
Date of decision: 18.10.2016.

Constitution of India, 1950- Article 226- Appellant is an ex-serviceman who got himself enrolled with the Sub Regional Employment Officer Ex-servicemen Employment Cell for the post of x-ray technician/Radiographer – seven persons were selected – appellant filed a writ petition, which was dismissed- he again filed a writ petition, which was dismissed –held, that appellant had not questioned the selection of private respondents and had not taken steps to get the writ petition restored- he is precluded from questioning the appointment in view of bar contained in Order 2 Rule 2 of C.P.C. –the petitioner was selected subsequently– he joined duties and thereafter resigned - his conduct is not above board – appeal dismissed. (Para-3 to 7)

For the Appellant: Mr.R.L.Chaudhary, Advocate.

For the Respondents: Mr.Romesh Verma, Mr.Varun Chandel, Addl. A.G.s and Mr. J.K.Verma and Mr. Kush Sharma, Deputy A.G.s., for respondents No.1 to 3.
Nemo for respondent No.4.
Respondents No.5, 6 and 9 stand deleted.
Respondents No.7, 8 and 10 are ex parte.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This Letters Patent Appeal is directed against the judgment dated 07.07.2011 passed by the learned single Judge in CWP (T) No.3052/2009, whereby the claim of the petitioner (appellant herein) for appointment to the post of Radiographer on regular basis with effect 28.09.2000 was ordered to be dismissed.

2. Certain undisputed facts may be noticed. The appellant is an Ex-serviceman, who prior to his retirement, got himself enrolled with the Sub Regional Employment Officer, Ex-servicemen Employment Cell, HP at Hamirpur for the post of X-Rays Technician/Radiographer. The official respondents conducted a selection in September, 1999 and appointed seven Ex-servicemen as Radiographers, who were given appointment vide order dated 28.09.2000.

3. It appears that in the year 2005 the appellant did approach the learned H.P. Administrative Tribunal by filing O.A.(M) No.143/2005, however, he did not question the appointments of the private respondents herein and only claimed the following reliefs:-

> *"(i) The respondents be directed to notify the vacancies for the post of Radiographers in the State and thereby give an appointment to the applicant being a qualified and trained person;*
>
> *(ii) The orders dated 29.3.2005 and 19.7.2005 at Annexures 'PB' and 'PD' be quashed and set aside or a supernumerary post or a regular post of Radiographer be created and the applicant be appointed against the said post from the date persons as indicated in the impugned order dated 29.3.2005 at Annexure 'PB' have been appointed as Radiographers;*
>
> *(iii) The seniority of the applicant be kept intact for all intents and purposes along with 6 appointed persons as stipulated in Annexure 'PB' dated 29th March, 2005'.*
>
> *(iv) To grant to the applicant such other consequential reliefs which the Hon'ble Tribunal may deem fit, just and proper in facts and circumstances of the matter."*

4. It is not in dispute that upon closure of the learned Tribunal, the case was transferred to this Court and registered as CWP (T) No.12606/2008 and was ultimately dismissed in default vide order dated 28.12.2012.

5. However, before the dismissal of this petition, the appellant again approached this Court by filing CWP (T) No.3052 of 2009 (out of which the instant appeal has arisen) claiming therein the following reliefs:-

> *"i) That the respondents may kindly be directed to give appointment to the petitioner against the post of Radiographer on regular basis from the date i.e. 28.9.2000 when the Junior Ex-servicemen (Respondents No.5 to 10) were given appointment vide Annexure P-13 against the post of Radiographer without any requisite qualification and the petitioner was deprived from the appointment although, the petitioner was possessing requisite qualification of Radiographer and experience thereof.*

ii) That the respondents may kindly be directed to give appointment to the petitioner against the post of Radiographer on regular basis as per the interview held by the respondent No.3 on 2.8.2007 as per Annexure P-21 since 6 junior Ex-servicemen have already been given appointment on regular basis as Radiographer by the Respondent-State."

6. Evidently, the appellant while filing OA (M) No.143/2005 (CWP (T) No.12606/2008) had not questioned the selection of the private respondents and admittedly the appellant has taken no steps to get restored the aforesaid writ petition and is, therefore, clearly precluded from questioning their appointments in view of the principles contained in Order 2 Rule 2 CPC.

7. As regards the subsequent selection, the interest of appellant has been adequately safeguarded, whereby he has been directed to be nominated and thereafter considered for appointment as per law, as is evident from the judgment passed by the learned writ Court, relevant portion whereof is extracted below:-

"3. With regard to prayer (ii), respondents have admitted the fact that pursuant to interview letter dated 17.7.2007(Annexure P-21), petitioner was selected and his name is placed at Sr.No.3 of the panel. However, since no posts for general category candidates were available, appointment letter could not be issued to him. Confusion arose for the reason that posts were in fact required to be filled up by reserved category candidates. Nonetheless it is the respondent's categorical stand, as is evident from affidavit dated 16.12.2009 filed by the Sub Regional Employment Officer, HP Ex-Servicemen Employment Cell, Hamirpur that as and when posts of Radiographer shall be notified by respondent No.2, petitioner's name shall be nominated against the same on its turn."

8. Having observed so, though we find no merit in this appeal, however, it would be relevant to note that when the case was taken up for hearing on 26.09.2016, learned Deputy Advocate General made available to us a communication dated 26.09.2016 which indicates that the appellant was not only given appointment, but even joined as Radiographer at PHC, Churru on 29.09.2012. However, he thereafter submitted three months' resignation notice on 29.04.2013 and resigned from service with effect from 01.06.2013. In such circumstances, we have no hesitation to conclude that conduct of the appellant, to say the least, is not above board and in case he was not really interested in job, he ought not to have wasted the precious time of the Court.

9. In view of the above discussion, we find no merit in this appeal and the same is accordingly dismissed, leaving the parties to bear their costs. Pending application, if any, also stands disposed of.

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

RSA Nos.196 and 198 of 2004.
Date of decision: 18.10.2016

1. <u>RSA No.196 of 2004</u>

Jai Krishan ....Appellant-Plaintiff
Versus
Bhagwan Chand & Ors. ....Respondents-Defendants

2. <u>RSA No.198 of 2004</u>

Jai Krishan ....Appellant-Defendant
Versus
Bhagwan Chand & Ors. ....Respondents- Plaintiffs

Specific Relief Act, 1963- Section 34- Separate suits seeking declaration and injunction were filed by the parties claiming ownership/possession over the suit land –the trial Court held that suit land was in exclusive possession of B at the time of filing of the suit – the plea of J that he is in possession and mortgage was never redeemed was negated- separate appeals were preferred, which were dismissed- held, in second appeal that the Courts had not taken into consideration the documents Ex.P7 and P10 on the ground that these were prepared on the basis of settlement, which was set aside by the Hon'ble High Court - however, the judgment of Hon'ble High Court was set aside by Hon'ble Supreme Court and the settlement operation was upheld- hence, the case remanded to the trial Court for fresh adjudication after taking into consideration Ex.P7 and P10. (Para-22 to 37)

Cases referred:
Gian Singh and Others vs. The State of H.P. and Others, 1994(2) Sim.L.C. 104
Dharmi vs. Jania and Others, Latest HLJ 2011 (HP) 3
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264

For the Appellant: Mr.Ajay Kumar, Senior Advocate with Mr.Dheeraj Vashishat, Advocate.
For Respondent No.1: Mr.V.D. Khidta, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

Both these appeals have been filed by appellant Jai Krishan against the common judgment and decree dated 20.3.2004 passed by learned District Judge, Shimla, Camp at Rohru in Civil Appeal Nos.76-R/13 of 2003, affirming the common judgment and decree dated 25.10.2000 passed by learned Sub Judge 1st Class, Court No.1, Rohru in two Civil Suits No.62-1 of 1997/135-1 of 1999 and 63-1 of 1997, whereby the suit filed by the appellant herein was dismissed and that of the respondent was decreed.

2. The main dispute between the parties relates to the land measuring 0-08-91 hectares comprising of Khata Khatauni No.31/60, Khasra No.138 old (new No.125), situate in Chak Thana, Tehsil Rohru, District Shimla. Principal contestants in the two suits were Bhagwan Chand and Jai Krishan even though some other parties were also impleaded in the suit.

3. Briefly the contention put forth by Bhagwan Chand was that he was the owner in possession of the disputed land which was earlier owned by his predecessors, who had mortgaged the same about 70 years ago in favour of the predecessors of Jai Krishan and others and this mortgage was redeemed by his father prior to 1950 and since then he claimed to be in possession of this land. It is averred that the disputed land was allotted to Bhagwan Chand by his father in a private partition in the year 1996 and since such partition, the disputed land was claimed to be in his exclusive possession. Bhagwan Chand further claimed that his father had planted 30 plants of apple on this land. It is also averred that in the year 1997, defendant Jai Krishan (appellant herein) had uprooted the apple plants from the disputed land and tried to take the forcible possession of the same against Bhagwan Chand. Jai Krishan is also said to have got revenue entries showing him to be in possession of the disputed land recorded fraudulently in connivance with settlement staff.

4. On the other hand, the contention of Jai Krishan was that he alongwith Tulsi Ram was the exclusive owner in possession of the disputed land since the times of his fore-fathers. Jai Krishan admitted that the disputed land was earlier mortgaged with possession by the predecessors of Bhagwan Chand in favour of his predecessors and others and it was claimed that such mortgage was never redeemed. Thus, Jai Krishan claimed that he alongwith Tulsi Ram became the owner of half share in the disputed land by efflux of time because of non-redemption of mortgage by the predecessors of Bhagwan Chand within the statutory period of limitation.

With regard to the remaining half share, Jai Krishan claimed that they were the owners in their own right in this land. It was claimed that share of co-owner Nanak Chand had also devolved upon Jai Krishan and Tulsi Ram at the time of family partition. Thus, Jai Krishan claimed himself and Tulsi Ram to be the exclusive owner in possession of the disputed land. It was also stated by Jai Krishan that this land was lying Barren till the year 1996, where after it was being cultivated by him.

5. On the basis of above rival contentions, Bhagwan Chand filed a Civil Suit No.62-1 of 1977/135-1 of 1999 before the trial Court on 9.4.1997. In this suit Jai Krishan and other persons, who were recorded as co-owners in the disputed land, were impleaded as defendants and relief of permanent injunction was claimed by Bhagwan Chand against the defendants for restraining them from encroaching upon or interfering with the disputed land in any manner. This suit was contested by defendant Jai Krishan. All other defendants were proceeded ex-parte in this case.

6. Jai Krishan also filed a Civil suit No.63-1 of 1997/113-1 of 1999 against Bhagwan Chand and others, wherein he raised the contentions, which have been narrated above, and sought for declaration that he along with proforma defendant Tulsi Ram was the owner of the disputed land. It was also sought to be declared that the revenue entries showing the proforma defendants as owners were wrong and illegal. It was also sought to be declared that Bhagwan Chand was having no right, title and interest in the suit land and he was sought to be restrained from dispossessing Jai Krishan and Tulsi Ram from the disputed land illegally. With regard to a part of the disputed land, it was stated to have been mortgaged by the predecessors of Bhagwan Chand in favour of predecessors of Jai Krishan and Tulsi Ram. It was sought to be declared that this mortgage was not redeemed for more than sixty years and as such, Jai Krishan and Tulsi Ram have become owner of the disputed land by efflux of time.

7. Both these suits were contested by the opposite party. The suit of Bhagwan Chand was contested by Jai Krishan and the suit of Jai Krishan was contested by Bhagwan Chand. All other defendants, except minors, were proceeded ex-parte in the suit due to their non-appearance before the trial Court. The material contentions, which have been raised by Jai Krishan and Bhagwan Chand in their suits, have been discussed above. Apart from this, both these parties took preliminary objections regarding valuation, jurisdiction, estoppel, maintainability of suit etc. in the written statements filed by them in the suit filed by the other party.

8. Both the suits were tried separately by learned trial Court earlier and issues were framed separately. However, later, both the suits were consolidated vide order dated 3.6.2000 and fresh issues were framed, which were common in both the suits.

9. Learned trial Court, on the pleadings of the parties, framed as many as 20 issues and vide his impugned judgment repelled all the preliminary objections raised by one party in the suit filed by the opposite party. With regard to the main issues on merits, that is, issues No.1, 2, 3, 10 and 11, the learned trial Court came to the conclusion that the disputed land was in exclusive possession of Bhagwan Chand at the time of filing of the suits. It has been also held that the mortgage in respect of the disputed land created by the predecessors of Bhagwan Chand has been redeemed. However, the case of Bhagwan Chand that the disputed land was allotted to him by his father in private partition or that Bhagwan Chand alone was the exclusive owner of the disputed land has been negatived by the trial Court.

10. The contention of Jai Krishan that he along with Tulsi Ram was the exclusive owner of the disputed land was also repelled by the trial Court. The contention of Jai Krishan that the mortgage in respect of the disputed land was never redeemed by the predecessors of Bhagwan Chand is also repelled by the learned trial Court. The contention of Jai Krishan that he and Tulsi Ram were in possession of the disputed land was also rejected by the learned trial Court. With these findings, the suit of the plaintiff Jai Krishan for the relief of declaration and injunction has been dismissed, whereas the suit filed by Bhagwan Chand has been decreed and

defendant Jai Krishan and others (as per Civil Suit No.62-1 of 1997/135-1 of 1999) have been restrained from interfering with the possession of Bhagwan Chand over the disputed land in any manner. The parties have been left to bear their own costs.

11. Feeling aggrieved and dis-satisfied with the common judgment, dated 25.10.2000, passed by learned Sub Judge 1st Class, Court No.1, Rohru, District Shimla, in both the Civil Suits No.62-1 of 1997/135-1 of 1999 and 63-1 of 1997, appellant herein preferred an appeal before the learned District Judge, Shimla, Camp at Rohru, who vide impugned judgment dated 20.3.2004 upheld the aforesaid judgment and decree dated 25.10.2000, passed by the learned Sub Judge 1st Class, Rohru.

12. These second appeals were admitted on the following substantial question of law:

> *"(1) Whether the findings recorded by the learned first Appellate Court are vitiated by ignoring the material evidence and misreading the evidence on record?*
>
> *2. Whether the findings arrived at by the learned first Appellate Court are contrary to settled law?"*

13. Mr.Ajay Kumar, learned Senior Counsel, representing the appellant, vehemently argued that the judgments passed by both the Courts below are not sustainable as the same are not based upon correct appreciation of evidence adduced on record by the respective parties and as such same deserve to be quashed and set aside. Mr.Sood further argued that learned first appellate Court has erred gravely in deciding the case against the appellant merely on the basis of conjectures and surmises. Mr.Sood further contended that while deciding the case against the appellant and in favour of respondent No.1, learned first appellate Court has not appreciated the evidence on the case file in its true and proper perspective as a result of which great injustice has been caused to the present appellant. Both the Courts below have acted illegally and with material irregularity and rendered a palpably erroneous finding while interpreting Ex.P-8, perusal whereof clearly suggests that suit land, allegedly owned by predecessor-in-interest of present respondent, was under mortgage. During arguments having been made by him, he also invited the attention of this Court to Ex.P-8 i.e. Jamabandi for the year 1973-74 to demonstrate that findings of the Courts below that entries of possession in Jamabandi for the year 1973-74 was sufficient to conclude that land mortgaged by predecessor-in-interest of present respondent was redeemed is totally contrary to record. As per Mr.Sood, in case suit land had redeemed in the year 1950, as claimed by respondent No.1, entry of redemption ought to have been made in the revenue record but no documents were made available on record specifically suggesting therein that land mortgaged by the predecessor-in-interest of the present respondent was ever got redeemed either by late Shri Kahan Chand or his legal heirs.

14. Mr.Sood also invited the attention of this Court to the judgment passed by the learned first appellate Court to suggest that both the Courts below have rendered contradictory findings while deciding the suit because learned first appellate Court specifically concluded that Bhagwan Chand, respondent herein, though in exclusive possession of the disputed land but it is not entitled to the relief of prohibitory injunction of absolute nature against his co-owners. Learned first appellate Court also concluded that prohibitory injunction could be issued in favour of respondent Bhagwan Chand only to protect his exclusive possession by lawful means. Whereas the defendants co-owners of the disputed land could seek remedy against Bhagwan Chand in a lawful manner; meaning thereby that first appellate Court was convinced that other respondents (present appellants) were also recorded as co-owners in the disputed land. He further stated that since Court has arrived at conclusion that appellant and respondent No.1 are also co-owners of suit land, there was no occasion for passing a decree of injunction against the co-owners and as such judgment and decree passed by both the Courts below are arbitrary, harsh, oppressive, illegal and contrary to record deserve to be quashed and set aside.

15. Apart from above, Mr.Sood, while making submissions before this Court, invited the attention of this Court to the judgment passed by both the Courts below to suggest that none

of the documents tendered in evidence by present appellant were taken into consideration by the learned trial Court as well as by the first appellate Court, resulting in returning of erroneous findings. In this regard he specifically invited the attention of this Court to Ex.P-7 and Ex.P-10 i.e. *Missalhaquiat Bandobast*, wherein present appellant has been shown to be recorded in the column of ownership as well as possession. Similarly, he invited the attention of this Court to document Ex.DW-1/A i.e. order dated 29.8.1999 passed by the Assistant Collector 2nd Grade, Tikkar, Shimla, whereby application filed by the respondent; namely; Bhagwan Chand for correction of revenue entries (Ex.P-7 and Ex.P-10) stand rejected. While referring to the aforesaid documents, especially Ex.DW-1/A, Mr.Sood strenuously argued that since Assistant Collector 2nd Grade had passed an order dated 29.8.1999 on the application moved by the respondent Bhagwan Chand, present suit field by him was not maintainable because appropriate remedy, if any, for correction of revenue entries was under HP Land Revenue Act. He further stated that since no review/appeal was ever preferred by respondent Bhagwan Chand against order dated 29.8.1999 passed by Assistant Collector 2nd Grade, same attained finality and could not be looked into by the Civil Court in the civil proceedings. He also invited the attention of this Court to the various documents Ex.DW-1/DA, Ex.DW-1/DB, Ex.DW-1/DC, Ex.DW-1/DE and Ex.DW-1/DF to demonstrate that present appellant had placed on record sufficient material on record to prove that suit land was never got redeemed by the predecessor-in-interest of the present respondent Bhagwan Chand and present appellant is in ownership and possession of the land but all these documents were not taken into consideration by the Courts below while decreeing the suit filed by present respondent No.1.

16. While concluding his arguments, Mr.Sood specifically invited the attention of this Court to the judgment passed by both the Courts below to state that documents tendered in evidence by present appellant, especially Ex.P-7 and Ex.P-10, were not taken into consideration by both the Courts below on the ground that change in the revenue entries have not been lawfully explained. Learned Courts below further concluded that the change in the entries, as reflected in documents Ex.P-7 and Ex.P-10, is said to have been incorporated at the time of recent settlement, which settlement proceedings in Shimla District Shimla hve been severely criticized and set aside by this Court in writ petition as per decision reported in ***Sh.Gian Singh and Others vs. The State of H.P. and Others, 1994(2) Sim.L.C. 104***. He stated that aforesaid judgment relied upon by both the Courts below, while rejecting the aforesaid documents tendered in evidence by the present appellant, stands nullified in light of judgment rendered by Hon'ble Apex Court in Civil Appeal No.1678 of 2002, dated 8.7.2009, wherein Hon'ble Apex Court has upheld the settlement operation carried out earlier prior to passing of judgment in ***Gian Chand's*** case *supra*.

17. Mr.Sood forcefully contended that, now, in view of the judgment passed by the Hon'ble Apex Court, wherein settlement operation carried out earlier have been upheld, as such, both the suits, which are subject matter of this appeal, need to be examined afresh in light of the judgment rendered by Hon'ble Apex Court in Civil Appeal No.1678 of 2002 on 8.7.2009.

18. To substantiate his aforesaid arguments, he also placed reliance upon judgment passed by this Court in ***Dharmi vs. Jania and Others, Latest HLJ 2011 (HP) 3,*** wherein factum with regard to upholding settlement operation by Hon'ble Supreme Court also came for discussion. In the aforesaid background Mr.Sood prayed for acceptance of appeal by setting aside the judgment passed by both the Courts below.

19. Mr.V.D. Khidta, learned counsel representing the respondent, supported the judgment passed by both the Courts below. Mr.Khidta, while inviting the attention of this Court to the judgment passed by both the Courts below, strenuously argued that same are based upon correct appreciation of evidence available on record and as such there is no scope of interference, whatsoever, of this Court in the present facts and circumstances of the case. He further stated that close scrutiny of the judgment passed by both the Courts below clearly suggests that Courts below have dealt each and every aspect of the matter meticulously and all the relevant material placed on record by the respective parties have been taken note of at the time of passing

impugned judgment and as such this Court has no occasion, whatsoever, to interfere with the well reasoned concurrent findings returned on fact and law by both the Courts below. In this regard, to substantiate his 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.**

20. However, Mr.Khidta did not dispute the upholding of settlement operation carried earlier by the Hon'ble Supreme Court in CA No.1678 of 2002 on 8.7.2009, but he stated that apart from Ex.P-7 and Ex.P-10, there was sufficient material adduced on record by the respondent Bhagwan Chand, before the Courts below to demonstrate that land mortgaged by his predecessor-in-interest was redeemed and he is in possession of the suit land and as such judgment passed by Hon'ble Apex Court may not have any bearing upon the judgments passed by both the Courts below.

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

22. In view of the detailed discussion, deliberation as well as law discussed hereinabove, I need not go into the entire factual matrix of the case as it clearly emerge from the record that Courts below misdirected themselves in deciding the controversy at hand while not taking note of the documents tendered in evidence by the present appellant especially Ex.P-7 and Ex.P-10, only substantial of law No.1 is being considered.

Question No.1:-

23. This Court had an occasion to peruse the entire material made available on the record by the respective parties, perusal whereof clearly suggests that both the Courts below, while decreeing the suit filed by respondent Bhagwan Chand and rejecting the suit filed by the present appellant, have not taken note of certain documents led in evidence by the present appellant which could be material in deciding the controversy at hand.

24. Since this Court, at the first instance, deems it proper to deal with the arguments/submissions having been made on behalf of the present appellant, wherein it has been stated that the evidence tendered in support of claim put forth on behalf of present appellant (Ex.P-7 and Ex.P-10) was solely rejected by the Courts below on the ground that change in revenue entries Ex.P-7 and Ex.P-10 was made on the basis of recent settlement, which was ultimately set aside by this Court in ***Gian Singh's*** case *supra*, at this stage, it may not be proper for this Court to critically examine the aforesaid documents tendered in evidence by the present appellant as far as merit/applicability of the same in the facts and circumstances of the case.

25. This Court, solely with a view to ascertain the genuineness and correctness of the claim put forth on behalf of the present appellant, examined the judgment passed by both the Courts below minutely, perusal whereof leaves no doubt in my mind that Courts below placed no reliance upon Ex.P-7 and Ex.P-10 led in evidence by the present appellant solely on the ground that those were based upon the entries made in the recent settlement which was set aside by this Court in ***Gian Singh's*** case *supra*.

26. True it is, settlements, on the basis of which entries were carried out in the revenue record, especially Ex.P-7 and Ex.P-10, were set aside by this Court in ***Gian Singh's*** case supra, as a result of which amendment was carried out in H.P. Land Revenue (Amendment and Validation), Act, 1996 *(for short `Act')*. The aforesaid amendment made in Act was challenged before the Hon'ble Apex Court in CA No.1678 of 2002. It is undisputed before me that in the aforesaid Civil Appeal, Hon'ble Apex Court upheld the settlement operation carried out earlier; meaning thereby that entries made in Misalhaquiat Bandobast and Khasra Girdawari Ex.P-7 and Ex.P-10, during that relevant time could not be discarded by the Courts below on the ground that settlement proceedings on the basis of which aforesaid documents Ex. Ex.P-7 and Ex.P-10 were prepared were set aside by this Court in ***Gian Singh's*** case supra.

27. This Court also perused the judgment in ***Dharmi's*** case *supra,* relied upon by the learned counsel appearing for the appellant, which also suggest that judgment passed by this Court in ***Gian Chand's*** case was lateron set aside by the Hon'ble Apex Court in CA No.1678 of 2002 on 8.7.2009 and Hon'ble Apex Court has upheld the settlement operation carried out earlier.

28. In ***Gian Chand's*** case *supra*, petitioner therein highlighted various illegalities and irregularities committed by the settlement staff in carrying out the review of existing records of rights pertaining to revenue estate in Tehsil Rohru, Chirgaon and Dodra Kabar of District Shimla. Writ Court, while accepting the writ petition No.206 of 1988, directed the respondent to complete on going land revenue settlement operations in the areas in question as "second revised settlement" in accordance with instructions contained in Paragraph 222 and Appendix XXI of the Punjab Settlement Manual with further direction to carry out amendment in the compendium of instructions in consonance with and pertaining to the procedure applicable to special revision of record-of-rights. Apart from above, Writ Court also ordered that new record-of-rights pertaining to the areas in question, prepared in the current settlement in relation to 'Mohal-Bandi', 'Naksha Bartan', 'Wazib-ul-ars', classification of land, proposed DPFs and UPFs etc., be ignored and re-settlement be started subsequent to the stage of Forecast Report.

29. Sequel to aforesaid directions passed by this Court in writ petition, State of H.P. carried out amendment by passing H.P. Land Revenue (Amendment and Validation) Act, 1996, validity of which was challenged in Hon'ble apex Court in CA No.1678 of 2002.

30. It is undisputed before me that in the aforesaid CA, Hon'ble Apex Court upheld the settlement operation carried out earlier ,which was the subject matter of the writ petition, titled ***Gian Singh & Others vs. State of H.P***.. True it is that at the time of passing of impugned judgment, settlement proceedings carried out in Shimla District i.e. Rohru, Chirgaon and Dodra Kabar on the basis of which documents Ex.P-7 and Ex.P-10 were prepared was set aside by High Court. But fact remains that Hon'ble Apex Court in appellate proceedings pending before it, wherein amendment carried out by the State of H.P. was challenged to the earlier, upheld the settlement operation carried out earlier before passing of judgment in Gian Singh's case.

31. In view of the aforesaid findings returned by the Hon'ble Apex Court, this Court is of the view that documents especially Ex.P-7 and P-10 need to be re-examined by the Courts below because Hon'ble Apex Court has upheld the settlement proceedings carried out earlier on the basis of which aforesaid documents were prepared. At the cost of repetition, it may be again stated here that this Court has no hesitation after perusing the judgment passed by both the Courts below that both the Courts below while rejecting the documents Ex.P-7 and Ex.P-10 tendered in evidence by present appellant heavily relied upon the judgment passed by this Court in ***Gian Singh's*** case supra, which was set aside by Apex Court.

32. Since this Court, in view of aforesaid development, intends to remand the case back to the trial Court for examining the matter afresh in light of findings returned by Hon'ble Apex Court, it may not be proper for it to examine the validity, genuineness and correctness of documents especially Ex.P-7 and P-10 at this stage.

33. This Court in earlier part of this judgment has already observed that perusal of the judgment passed by Courts below nowhere suggests that material documents, as referred hereinabove, have been taken note of by both the Courts below, as a result of which findings recorded by Courts below are vitiated. Hence, substantial question of law No.1 is answered accordingly.

Question No.2:-

34. As far as question No.2 is concerned, this Court is of the view that the same need not be answered at this stage, in view of remand order proposed to be made by this Court, keeping in view the subsequent developments which occurred during the pendency of the present appeal and as such the question is answered accordingly.

35. Though keeping in view the fact that appeal was pending in this Court since 2004, I was reluctant to adopt the course of action of remand, but have no other option in the facts and circumstances of the case. Accordingly, instant case is remanded back to the trial Court to consider the matter afresh in the light of findings returned by Hon'ble Alpex Court in CA No.1678 of 2002, decided on 29.9.2008. However, at this stage, it may be clarified that trial Court while deciding the matter afresh need not to afford opportunity to the respective parties to lead evidence afresh, if any, in support of their respective claims. Rather, Court below shall decide the matter afresh on the basis of material already adduced on record, be it ocular or documentary by respective parties. Since this Court, during proceedings of the case, noticed that material documents tendered in evidence by the present appellant have not been taken into consideration, trial Court may also take into consideration of the documents especially Ex.P-7, Ex.P-10 and Ex.DW-1/A, exhibited on record by the respective parties.

36. Parties are directed to remain present before the trial Court on 25.11.2016, to avoid further delay in the matter, on which date trial Court would fix a date for hearing the matter further in the light of observations made hereinabove. Trial Court is also directed to complete and decide the controversy afresh within a period of three months.

37. Consequently, in view of detailed discussion made hereinabove, as well as findings returned by Hon'ble Apex Court in CA No.1678 of 2002, this Court deems it fit to remand the case back to trial Court with the direction to examine the matter afresh in light of findings returned by the Hon'ble Apex Court in case *supra.* Registry is directed to send the records of the case to the trial Court, forthwith.

38. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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

State of H.P. and another ...Petitioners.

Versus

Natter Singh ...Respondent.

CWP No. 2536 of 2016
Decided on: 18th October, 2016

Industrial Disputes Act, 1947- Section 33 (c)(2)- The respondent was engaged as daily paid casual labourer- his services were terminated – a reference was made to Industrial Tribunal-cum-Labour Court who directed the reinstatement of the services with seniority – he was not permitted to join for want of approval from Competent Authority- he was allowed to join his duties on 10.8.2011 after getting the approval – he approached the Tribunal by filing an application, which was allowed and an order for payment of the full wages of the period when workman was not allowed to join was passed – held, that proceedings under Section 33 (c)(2) are in the nature of the execution – the award had already been passed and the petitioners had no option but to implement the same in letter and spirit – petition dismissed. (Para-4 to 14)

Case referred:
Punjab Beverages (P) Ltd. vs. Suresh Chand (1978) 2 SCC 144

For the Petitioners: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Addl. Advocate General, with Mr. J. K. Verma, Deputy Advocate General.

For the Respondent: Nemo.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral):

This petition under Section 226 of the Constitution of India is directed against the award passed by the learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla on 26.9.2015 whereby it allowed the application filed by the respondent under Section 33-C (2) of the Industrial Disputes Act, 1947 (for short 'Act') and directed the petitioners to pay full wages to the respondent w.e.f. 1.10.2010 to 8.8.2011 within a period of three months, failing which the petitioners were held liable to pay an interest @ 9% per annum.

2. The respondent was initially engaged as daily paid casual labourer on 1.6.1993 with the petitioners and worked as such till 2001, when his services came to be dispensed with. He approached the Conciliation Officer and on failure of conciliation, a reference was made to the Industrial Tribunal-cum- Labour Court (for short 'Tribunal') and the same was answered in favour of the respondent vide its award dated 10.9.2010 and the petitioners were directed to reinstate the respondent in service with seniority and continuity but without back wages from the year, 2001 and the petitioners were further directed to consider his claim for regularization sympathetically.

3. Pursuant to the award passed by the learned Tribunal, the respondent approached the petitioners for his joining, but the same was not accepted by respondent No. 2 purportedly for want of appropriate approval of the competent authority and he was eventually allowed to join his duties only on 10.8.2011 after getting the approval from the competent authority.

4. Since the respondent was not permitted to join his duties in terms of the award passed in his favour for nearly ten months, he again approached the learned Tribunal by filing an application under Section 33-C (2) of the Act and the same was allowed on 26.9.2015 and the petitioners were directed to pay full wages to the respondent for the period w.e.f. 1.10.2010 to 8.8.2011 at the rates fixed for daily wagers by the Government, from time to time, within a period of three months, failing which the same was to carry interest @ 9% per annum.

5. Aggrieved by the award passed by the learned Tribunal initially on 10.9.2010 and thereafter on 26.9.2015, the petitioners have filed the instant petition.

We have heard Mr. Shrawan Dogra, learned Advocate General for the petitioners and have gone through the material placed on record.

6. At the outset, it may be observed that the petition is bereft of any specific ground. However, what can be gathered from a reading of the petition is that the petitioners appear to be mainly aggrieved by the initial award passed by the learned Tribunal on 10.9.2010, but then it is too late in the day for them to assail the same as not only the award stands implemented in its letter and spirit, but that apart, the initial award has already merged in the later award passed by the learned Tribunal in application under Section 33-C (2) of the Act on 26.9.2015.

7. Section 33-C (2) of the Act reads thus:

"**Section 33-C. Recovery of money due from an employer**.-

1. xx xx xx

(2) Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government [within a period not exceeding three months].

> Provided that where the presiding officer of a Labour Court considers it necessary or expedient so to do, he may, for reasons to be recorded in writing, extend such period by such further period as he may think fit."

8. It is evident from the aforesaid Section that the same is in the nature of execution proceeding and can be filed to execute any award, settlement or order of an authority where the relief granted need to be computed in terms of money. It is equally settled that a workman can proceed under Section 33-C (2) only after the Tribunal has adjudicated on a complaint under Section 33-A or on a reference under Section 10 that the order of discharge or dismissal was not justified and has set aside that order and reinstated the workman.

9. The Hon'ble Supreme Court in ***Punjab Beverages (P) Ltd. vs. Suresh Chand (1978) 2 SCC 144*** held that a proceeding under Section 33-C (2) is a proceeding in the nature of execution proceeding in which the Labour Court calculates the amount of money due to a workman from the employer, or, if the workman is entitled to any benefit which is capable of being computed in terms of money, proceeds to compute the benefit in terms of money.

10. Concededly there has already been adjudication in the present case and, therefore, the petitioners have no option but to implement the award passed by the learned Tribunal i.e. on 10.9.2010 in its letter and spirit and cannot be permitted to rake-up issues that have attained finality.

11. Apart from the above, the only other visible ground which one could notice while going through the petition is that it is only on account of the opinion rendered by the Finance Department that the present petition appears to have been filed as is evident from para 5 of the petition which reads thus:

> "5. That pursuant to the award passed by Ld. Court, the applicant approached the department for his joining but the same was not accepted by the Divisional Forest Officer, Rajgarh for want of appropriate approval of the competent authorities and he was allowed to join his duties on 10.082011 after getting the approval of competent authority in consultation with Law Department conveyed vide Addl. Chief Secretary (Forests) to the Government of H.P. letter No. FFE-A(E)2-186/2011 dated 08.07.2011 in which it was requested to implement the directions of the Hon'ble Industrial Tribunal-cum-Labour Court, Camp at Solan."

12. We are at a complete loss to appreciate as to how the opinion of the Finance Department could be a ground to indulge in this frivolous litigation especially when the petitioners have not assailed the main award and had rather implemented the same by permitting the respondent to join his duties on 10.08.2011. That apart, the respondent was permitted to join his duties only after getting the approval from the competent authority in consultation with the Law Department conveyed by the Additional Secretary (Forests) to the Government of H.P. vide his letter No. FFE-A(E)2-186/2011 dated 08.07.2011 as finds mention in para -5 of the writ petition.

13. That apart, the petitioners have specifically averred in para-7 that the case had been examined in the Law Department, wherein the Law Department had clearly opined that the case was unfit for further agitation. It is high time that the State implements the 'H.P. State Litigation Policy' in its letter and spirit with a view to save time and money on the one hand and at the same time, relieves the burden of the Court from being clogged with frivolous litigation.

14. In view of the aforesaid discussion, we find no merit in this petition and the same is dismissed in limine. Though, this was a fit case where the petitioners ought to be burdened with heavy costs, but we refrain from doing so as we have not issued any notice to the respondent.

15. With the aforesaid observations, the writ petition stands disposed of, so also the pending application(s), if any.

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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
Guddu Ram ... Respondent

Cr. Appeal No. 4076 of 2013
Reserved on: 27.09.2016
Date of decision: 18.10.2016

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 895 grams charas – he was tried and acquitted by the trial Court- held, in appeal that there was tampering with the arrest memo and no explanation was given for the same- testimonies of prosecution witnesses are contradicting each other on material points – it was mentioned in the seizure memo that offence punishable under Section 20 of N.D.P.S. Act was made out against the accused, which was not possible as the contraband was not recovered till the preparation of the seizure memo- the trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-9 to 21)

Case referred:
Sunil Vs. State of H.P., 2010 (1) Shim.LC 192

For the appellant: 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 judgment passed by the Court of learned Special Judge, Kullu, in Session Trial No. 09 of 2011 dated 04.12.2012, vide which, learned trial Court has acquitted the accused for commission of offence punishable under Section 20 of Narcotic Drugs & Psychotropic Substances Act, hereinafter referred to as the NDPS Act.

2. In brief, the case of the prosecution was that on 13.11.2010 a police party headed by PW-5 SI Om Chand had gone towards Kharahal, Bijli Mahadev and Larikot etc. and when the said police party was present around 2.30 P.M. at a place known as Burgani Nallah, accused was noticed coming from Larikot side carrying a black rucksack bag. Accused was stopped by the police party and inquiry was made from him about the articles kept in the said bag. As the place was desolate and no independent witnesses were available, PW-4 HC Gian Chand was sent to bring independent witnesses, who however came back after sometime and reported that no independent witnesses were available. In these circumstances, Investigating Officer associated PSI Anil Kumar and PW-4 HC Gian Chand as witnesses. Thereafter, Investigating Officer gave his personal search to the accused and this was followed by apprising the accused of his legal right to be searched before the Gazetted Officer or Magistrate vide Memo Ext. PW4/B. As per the prosecution, accused consented to be searched by the police party and search of the bag carried by the accused revealed that the same contained Charas which when weighed was found to be 895 grams. Charas recovered was repacked and sealed in cloth parcel with six seals of A. NCB form was filled. Sample seal of seal A was drawn up on cloth pieces. Seal after use was handed over to PSI Anil Kumar. Case property was taken into possession vide seizure memo Ext. PW4/D. Rukka Ext. PW4/E was prepared and sent to Police Station, Kullu through HC Gian Chand, on the basis of which FIR Ext. PW4/F was recorded by PW-6 SHO Ashok Kumar. Investigating Officer prepared spot map and also recorded statements of witnesses as per their versions. This was followed with the arrest of the accused and he

alongwith case property were brought to the Police Station, Kullu and after the case property was produced before the SHO PW-6, the same was resealed by the SHO and same was deposited with MHC Police Station. Thereafter, the sample of the contraband as well as all other relevant documents etc. was sent for chemical examination to FSL, Junga and as per the report of FSL Ext. PW5/C, extract was found containing sample of Charas and quantity of resin was found 29.21% W/W.

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 of Narcotic Drugs & Psychotropic Substances Act, to which, he pleaded not guilty and claimed trial.

4. Learned trial Court vide its judgment dated 04.12.2012 acquitted the accused of the charged offences by holding that the prosecution had failed to prove its case against the accused beyond reasonable doubt. Learned trial Court took note of the fact that as per the prosecution the entire proceedings had taken place in presence of PW-3 HHC Tek Chand, however, HHC Tek Chand while he entered the witness box as PW-3 stated that no other proceedings of the case were conducted in his presence. Learned trial Court took note of the fact that not even a single word was deposed by this witness with regard to search, recovery and seizure of the case property. Learned trial Court also took note of the fact that as serious doubts were created about the recovery of contraband from the accused in the mode and manner as was putforth by the prosecution on the basis of the testimony of the official witnesses, in these circumstances non-joining of independent witnesses to corroborate the case of the prosecution strengthened these doubts. Learned trial Court held that though it was not necessary that in each and every case the version of the prosecution was required to be corroborated by the independent witnesses, however, in the facts of present case, non-joining of independent witnesses created serious doubts about the case of the prosecution and in such circumstances independent corroboration was required to give credence to the story of the prosecution. Learned trial Court also took note of the fact that perusal of the option memo Ext. PW4/B demonstrated that on the top of it police had mentioned offence under Section 20 of Narcotic Drugs & Psychotropic Substances Act, which demonstrated that either the police had prior knowledge with regard to accused being in possession of Charas or the memo was prepared later on. Learned trial Court also took note of the fact that even if these discrepancies were ignored, keeping in view the fact that there were great contradictions and inconsistencies in the prosecution witnesses, these inconsistencies and discrepancies gained importance. Learned trial Court also held that no percentage of tetrahydrocannabinol was mentioned in the report of the Chemical Examiner, hence the contraband so recovered could not be said to be Charas as per report Ext. PW6/D. On these basis, learned trial Court acquitted the accused for commission of offence punishable under Section 20 of Narcotic Drugs & Psychotropic Substances Act

5. Mr. Vikram Thakur, learned Deputy Advocate General, has strenuously argued that the judgment passed by learned trial Court was perverse and not sustainable in the eyes of law. Mr. Thakur argued that a perusal of the testimony of the prosecution witnesses demonstrated that the prosecution had successfully proved its case against the accused beyond reasonable doubt and this important aspect of the matter had been ignored by learned trial Court. Mr. Thakur further argued that it also stood established from the report of Chemical Examiner that the contraband which was recovered from the accused was a narcotic and on the basis of evidence produced on record by the prosecution the accused was liable to be convicted for commission of offence punishable under Section 20 of Narcotic Drugs & Psychotropic Substances Act. Mr. Thakur argued that testimony of the prosecution witnesses was cogent, reliable and trustworthy and all material points were duly proved in their statements by the prosecution witnesses and this aspect of the matter had been over looked by learned trial Court. Accordingly, on these basis, he argued that the judgment 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 offence punishable under Section 20 of Narcotic Drugs & Psychotropic Substances Act.

6. Mr. Ajay Chandel, learned counsel for the appellant argued that there was neither any perversity nor infirmity with the findings returned by learned trial Court from which it could be said that the reasons given by learned trial Court while acquitting the accused were not borne out from the records of the case. Mr. Chandel submitted that the prosecution had miserably failed to prove its case against the accused, on the basis of evidence produced on record, beyond reasonable doubt and accordingly, learned trial Court had rightly acquitted the accused because in the absence of there being any cogent material on record to nail the guilt of the accused. The accused could not have been convicted on the basis of totally unreliable and untrustworthy statements of the prosecution witnesses. Mr. Chandel further argued that though it is not necessary that in each and every case independent witnesses have to be associated by the prosecution to prove its case but in the peculiar facts of this case non-joining of independent witnesses was fatal for the prosecution because it was not as if the independent witnesses could not have been associated by them had an attempt this regard been made by the police party. According to Mr. Chandel no recovery of contraband was in fact effected from the accused by the Investigating Officer in the mode and manner in which the prosecution wants this Court to believe and it is for this reason that no independent witness was associated by the Investigating Officer in the course of search, recovery and seizure of the contraband. On these grounds, Mr. Chandel urged that there was no perversity with the findings returned by learned trial Court and the same called for no interference

7. We have heard learned counsel for the parties and have also gone through the records of the case as well as judgment passed by learned trial Court.

8. In order to prove its case, prosecution in all examined six witnesses.

9. HC Ram Krishan entered the witness box as PW-1 and he stated that on 13.11.2010 he was posted as MHC, Police Station Kullu and SI/SHO Ashok Kumar deposited the case property with him which was handed over by him to HHC Tek Chand with direction to deposit the same at FSL, Junga. He further deposed that after depositing the property at FSL, Junga, HHC Tek Chand deposited the receipt and RC with him.

10. HC Harbans Kumar entered the witness box as PW-2 and he stated that on 15.11.2010 at 10.15 A.M. Addl. S.P. Sandeep Dhawal handed over special report Ext. PW2/A to him after making his endorsement and he made entry in this regard in the concerned Register.

11. HHC Tek Chand entered the witness box as PW-3 and he deposed that on 15.11.2010 MHC Ram Krishan handed over to him one cloth parcel Ext. P-1 and as per direction of MHC he deposited the case property at FSL, Junga and obtained receipt of the Lab, which was handed over to the MHC.

12. HC Gian Chand entered the witness box as PW-4 and he stated that on 13.11.2010 he alongwith PSI Anil Kumar, HHC Tek Chand and SI Om Chand were present for the purpose of patrolling at a place known as Burgani Nallah at around 2.30 P.M.. They noticed a person coming from Larikot side towards Burgani Nallah who was carrying a rucksack. He further deposed that the accused on seeing the police party turned back and tried to escape from the spot, however, he was nabbed on the spot by SI Om Chand with the help of other police officials. He further stated that the name and address of the accused were ascertained on the basis of suspicion. As the place was secluded, accordingly no independent witness was found though SI Om Chand deputed him to search for independent witnesses. According to him, he searched for independent witnesses and reported back to the Investigating Officer after about 15 minutes that no independent witness could be found. This witness further stated that thereafter Investigating Officer associated him and PSI Anil Kumar as witnesses. He also stated that the accused was apprised about his legal right to be searched before Gazetted Officer or Magistrate. This witness further deposed that the Investigating Officer took search of the pithu bag which was carried by the accused and from inside the said pithu bag, a polythene packet was recovered and search of the said polythene packet revealed black coloured substance in the shape of chapattis which after burning and smelling was found to

be Charas. He further stated that the Charas so recovered was weighed with the help of electronic scale and was found to be 895 grams. He also stated that the Charas so recovered was repacked in the same manner and was kept in the same rucksack bag which was thereafter kept in a cloth parcel which was sealed with six seal impressions of 'A'. NCB form in triplicate was filled in the spot. Samples seal A were taken on cloth pieces. The case property was taken into possession vide seizure memo Ext. PW4/D. Seal after use was handed over to PSI Anil Kumar. Thereafter, Investigating Officer prepared Rukka and the same was handed over to him which was delivered by him at Police Station, Kullu, on the basis of which FIR Ext. PW4/F was registered. In his cross-examination, this witness deposed that they had left Police Station, Kullu, at 1.10 P.M. and had gone from Dhalpur to Gammon bridge in a small vehicle and from Gammon bridge they again took lift in a private vehicle and went upto Rogi Mour. He further stated that they had stopped at Gammon bridge for about 2-4 minutes. He admitted it to be correct that road from Gammon bridge to Rogi Mour there are frequent curves as well as steep height. He further stated that distance between Dhalpur to Rogi Mour was covered within one hour. He further stated in his cross-examination that distance from Rogi Mour to the spot was approximately 15 minutes. He also deposed that no Naka was laid at Burgani Nallah and they were going on foot. He further stated that they reached the spot at 2.30 P.M. He stated that there was a small bridge on Burgani Nallah and when they noticed accused, they had not crossed the bridge and the accused was noticed on the other side of the bridge. He further stated that the accused was nabbed at a distance of approximately 10-15 steps. He also stated in his cross-examination that he had gone to 2-3 houses, however, no one was present in the house. He admitted that October and November were apple season months. He further stated that he did not knew if apple orchardist used to reside on the side of the road in temporarily sheds/tents, he admitted that labour was employed in the apple orchards during the season. He also admitted that the spot was a katcha road and during apple season, fruits were transported in tractors, trolley and in other vehicles. He also admitted it to be correct that there were apple orchard on the side of the road from Gammon bridge upto Larikot. He further stated that he remained at the spot for about 2½ hours and did not notice any vehicle on that road. He denied the suggestion that there was frequent vehicular traffic during apple season. He admitted it to be correct that vegetables market was situated at Bandrol and Akhara Bazar and apple and other fruits were transported to these markets. He admitted it to be correct that village Larikot was very big village. He also stated that the parcel was prepared by the Investigating Officer on the spot with the help of scissor and was stitched with needle and thread. He further stated that the Investigating Officer was having approximately 3-4 meters cloth in his kit. In his cross-examination, he further stated that the Charas was weighed with the help of traditional scale. This witness was confronted with the statement Ext. D-1 and he stated that it was incorrect that portion A to A of his statement was recorded by the Investigating Officer at his instance. He further stated that though his statement was recorded by the Investigating Officer as per his version, however, he had not stated that Rukka was handed over to him at 5.45 P.M. He admitted it to be correct that Kullu bus stand was away from the main road and was situated at distance of approximately 100-150 meters. He further stated that he left Police Station with case file at 6.55 P.M. and had gone to the bus stand by shortcut and thereafter he met police party who met him at the bus stand.

13. SI Om Chand entered the witness box as PW-5 and he deposed that he was posted as SI at Police Station Kullu from January, 2010 to April, 2012. He further stated that on 13.11.2010 he alongwith PSI Anil Kumar, HHC Tek Chand and HC Gian Chand were present at Burgani Nallah at around 2.30 P.M. for patrolling when they saw accused coming from Larikot to Burgani Nallah, who was carrying a black coloured rucksack. He further stated that the accused was stopped and inquired about the articles kept in the bag. He further stated that HC Gian Chand was deputed to bring independent witness, however, he came after 15 minutes and reported that no independent witness was available. This witness deposed that thereafter PSI Anil Kumar and HC Gian Chand were associated as witnesses and he carried out the search and seizure. This witness further deposed that the accused was apprised about his legal right to be searched before Gazetted Officer or Magistrate vide memo Ext. PW4/B. The bag

carried by the accused was searched and a polythene packet was found from which Charas in the shape of chapatti and biscuit was recovered. This witness further stated that Charas so recovered was weighed with the help of weighing scale which was found to be 895 grams. He further deposed that the Charas so recovered was repacked in the same manner and was kept in a cloth parcel Ext. P-1 which was sealed with six seals of seal 'A'. He further deposed that the sample seal was drawn on pieces of cloth one of which was Ext. PW4/C and the seal after use was handed over to PSI Anil Kumar. He also stated that parcel was taken into possession vide seizure memo Ext. PW4/D. NCB form in triplicate was prepared at the spot and thereafter he sent Rukka Ext. PW4/E through HC Gian Chand to the Police Station. He further stated that thereafter they came back alongwith the accused and case property to the Police Station. The case property was produced before SHO Ashok Kumar. On the next day, he prepared special report Ext. PW2/A. In his cross-examination, this witness deposed that documents Ext.PW4/A, Ext. PW4/B and Ext. PW4/D were written by PSI Anil Kumar on his directions. He further stated that the entire contents of these documents were written on the spot and no addition or alteration were made on these documents later on. He stated that they left Police Station at 1.10 P.M. and from Dhalpur they had taken lift in small vehicle and thereafter they went to left bank via link road which leads to Larikot as well as Bijli Mahadev. He further stated that they stopped at Dhalpur for about 10 minutes. He further stated that when they noticed accused they were on the bridge. He admitted it to be correct that the month of November was apple production month and lot of vehicles plied to carry apple and other fruits to vegetables market at Bandrol and other markets. He also admitted it to be correct that from Gammon bridge to Larikot there is apple belt and apple orchards exist near the road. He further stated that PW Gian Cahnd had disclosed that he had gone to 2-3 houses, however, no one came out from the houses. He further deposed that they remained at the spot for about three hours and PW-3 HHC Tek Chand remained at the spot throughout the proceedings. This witness further deposed that they left spot at 7.00 P.M. and reached the Police Station at 8.40 P.M. He further deposed that he came back upto Gammon bridge in a small vehicle and thereafter came upto bus stand Kullu in small vehicle where PW Gian Chand delivered case file and thereafter proceeded to the Police Station on foot. This witness further deposed that PW Gian Chand had called him and he had directed Gian Chand to remain present at bus stand and meet him there. He admitted it to be correct that on Ext. PW5/B there was cutting and time 5.30 had been made 6.30. He further stated that they after sending Rukka he had put seals on the parcel, prepared zimnis, prepared memo Ext. PW5/D and spot map. According to him, all these proceedings took about three hours.

14. SI Ashok Kumar entered the witness box as PW-6 and he stated that from the year 2010 upto December, 2011 he was posted at Police Station Kullu and on 13.11.2010 he was officiating as SHO Police Station Kullu. This witness further stated that on 13.11.2010 at around 6.15 P.M. HC Gian Chand brought a Rukka to him and on the basis of the same FIR Ext. PW4/F was recorded. He also deposed that on the same day at around 8.40 P.M. SI Om Chand produced case property before him and he resealed the same and deposited the case property alongwith relevant documents with MHC.

15. Before we discuss the statements of the prosecution witnesses, it is relevant to take note of search memo Ext. PW4/B. The first line of Ext. PW4/B contains FIR No. 310 in red ink, whereas the rest of the contents are filled with blue ink but surprisingly it finds mentioned in the first line of the said search memo (i.e. even before the search of the accused or the rucksack being carried by him was conducted by the police) that FIR was being registered under Section 20 of the NDPS Act. Similarly, Ext. PW5/B which is arrest memo has been tampered with as there is over writing in the time of arrest in the same. There is no explanation given for this cutting by PW-5 Om Chand in his testimony. In fact, in his cross-examination, he admitted that there is cutting in Ext. PW5/B and the time was altered from 5.30 to 6.30 P.M.

16. Now coming to the statements of prosecution witnesses, there is contradiction in the testimonies of PW-4 and PW-5 with regard to the apprehension of the accused at the site. A perusal of the statement of the testimony of PW-4 HC Gian Chand demonstrates that according

to him the police party had noticed accused coming from Larikot side towards Burgani Nallah and as soon as the accused saw the police party he turned back and tried to escape but SI Om Chand with the help of other police officials nabbed the accused. However, SI Om Chand has given a different version in this regard. SI Om Chand has not stated that when the accused saw the police party he turned back and tried to run away but was nabbed by him with the help of other police officials. According to him, when he was present at Burgani Nallah on the fateful day at around 2.30 P.M. on patrol and noticed the accused coming from Larikot to Burgani Nallah, the accused was stopped and inquiry was made from him about the articles kept in the bag. This contradiction in the testimony of PW-4 and PW-5 in the manner of apprehension of the accused has not been satisfactorily explained by the prosecution. It is apparent from the testimony of both PW-4 and PW-5 especially their cross-examinations that the spot where the accused was allegedly appended by the police party alongtiwth contraband was not at a secluded place. In fact, it is evident from the statements of PW-4 and PW-5 that the month of November was peak apple season month. There were apple orachards on the both sides of the spot where the accused was apprehended and labour was putting up on both the sides of the road and there was lot of vehicular traffic transporting the apple produce as well as other vegetables to the markets. In these circumstances, the contention of the police that no independent witness could be associated in the search, recovery and seizure because the accused was apprehended at secluded place does not inspires confidence. It has come in the statement of PW-4 as well as PW-5 that the police party comprised of PW-4, PW-5, Anil Kumar as well as HHC Tek Chand, however, whereas Anil Kumar was not examined by the prosecution and given up as unnecessary. HHC Tek Chand who entered the witness box as PW-3 has not uttered a single word that either he was a part of the police party or that any recovery of contraband was made in his presence from the accused by SI Om Chand. This gains significance in view of the fact that it has come in the statement of PW-5 that PW-3 Tek Chand remained on the spot throughout the proceedings. Another major contradiction which has come in the testimony of the prosecution witnesses is that HC Gian Chand in his examination-in-chief has stated that the Charas so recovered from the accused was weighed with the help of electronic scale, however, in his cross-examination, he has deposed that the Charas so recovered was weighed with the help of traditional scale i.e. a small traditional scale. This contradiction in the statement of PW-4 has also not been satisfactorily explained by the prosecution.

17. Alterations/cuttings made in the documents allegedly prepared at the spot have also remained unexplained. Mentioning of the factum of the accused being booked for committing an offence under Section 20 of the NDPS Act in the search memo itself creates serious doubt about the fact that the said document was in fact prepared at the spot. It is for the reason that it is not understood as to how even before the contraband was actually recovered from the rucksack being carried by the accused, it was assumed by the police party that the accused was guilty of commission of offence punishable under Section 20 of the NDPS Act. Another major contradiction in the testimony of PW-4 and PW-5 is with regard to their meeting at Kullu bus stand after PW-4 had allegedly taken Rukka to the Police Station on the basis of which FIR was lodged. PW-4 HC Gian Chand stated that he left Police Station with case file at 6.55 P.M. and had gone to the bus stand by shortcut where he met the police party. He further stated that he noticed the police party coming on foot to the bus stand. However, a perusal of the statement of PW-5 demonstrates that as per him police party left the spot at 7.00 P.M. and reached Police Station at 8.40 P.M. and thereafter, he came back upto Gammon bridge in a small vehicle and again came to bus stand Kullu in small vehicle where PW Gian Chand delivered case file and thereafter he reached Police Station on foot.

18. The above mentioned contradictions in the testimony of PW-4 and PW-5 as to how the case file was delivered by Gian Chand to PW-5 also create a serious doubt about the veracity of the case of the prosecution. Incidentally a perusal of Ext. D-1 which is supplementary statement of PW-4 Gian Chand recorded under Section 161 Cr.P.C. demonstrates that it is recorded therein that the Rukka was handed over to him for being delivered to the Police Station at 5.45 P.M., whereas in the witness box this witness has deposed

that he came with Rukka at about 4.45 P.M. Whereas PW-4 has stated that the parcel was prepared by the Investigating Officer on the spot with the help of scissor and was stitched with needle and thread, PW-5 in his deposition has stated that the parcel was opened from one side and that side was stitched on the spot. He has stated that he had stitched open side of the parcel.

19. The above discussion makes it amply clear that the inconsistencies and discrepancies coupled with the contradictions in the statements of the prosecution witnesses shroud the case of the prosecution with suspicion and it cannot be said that on the basis of the testimony of prosecution witnesses that the prosecution had proved its case against the accused beyond reasonable doubt.

20. At the cost of repetition, we state that the more we go into the depositions of prosecution witnesses, more we are convinced that the statements of the prosecution witnesses are neither cogent nor the same are reliable or trustworthy. Their testimonies are full of contradictions and inconsistencies, which do not inspire confidence to be made basis for convicting the accused.

21. A perusal of the judgment passed by learned trial Court demonstrates that all these aspects of the matter have been dealt in detail by learned trial Court and after a careful appreciation of the evidence on record learned trial Court returned the findings of acquittal in favour of the accused. Learned trial Court took note of the fact that since in the present case no percentage of tetrahydrocannabinol was mentioned, hence the contraband so recovered could not be said to be Charas as per report Ext. PW6/D. While coming to the said conclusion, learned trial Court had relied upon a judgment of this Court passed in ***Sunil Vs. State of H.P.***, ***2010 (1) Shim.LC 192***. Be that as it may, even without going into this aspect of the matter it can be safely concluded that even otherwise it cannot be said that the prosecution was able to prove beyond reasonable doubt that any contraband in fact was recovered from the exclusive and conscious possession of the accused in the mode and manner in which the prosecution wants this Court to believe. Therefore, while upholding the findings of learned trial Court that the prosecution was not able to prove that any contraband was recovered from the exclusive and conscious possession of the accused beyond reasonable doubt on 13.11.2010 at 2.30 P.M. at Burgani Nallah, the present appeal is dismissed being devoid of any merit. Bail bonds, if any, furnished by the accused are discharged.

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

Shri Rajesh Dogra .....Petitioner.

Vs.

State of Himachal Pradesh .....Respondent.

Cr. Revision No.: 212 of 2010
Reserved on: 29.09.2016
Date of Decision: 19.10.2016

Indian Penal Code, 1860- Section 279, 337 and 304-A- An information was given to the police that S was driving the vehicle at a high speed and the vehicle had met with an accident- S died due to the injuries sustained in the accident- investigation revealed that accused was driving the vehicle and had given a wrong information that vehicle was being driven by S- accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed – the plea of the accused that S was driving the vehicle was falsified by the evidence- accused admitted in his statement recorded under Section 313 Cr.P.C that he was driving the vehicle – PW-6 who was travelling in the vehicle also deposed this fact – no mechanical defect was found in the vehicle- the road was wide at the place of incident and no explanation for the accident was given – the trial Court had rightly found the accused guilty- appeal dismissed. (Para-7 to 15)

Cases referred:
Oriental Insurance Company Limited Vs. Premlata Shukla and others (2007) 13 SCC 476
Shlok Bhardwaj Vs. Runika Bhardwaj and others (2015) 2 Supreme Court Cases 721
Sanjaysinh Ramrao Chavan Vs. Dattatray Gulabrao Phalke and others (2015) 3 SCC 123

For the petitioner: Mr. Y.P. Sood, Advocate.
For the respondent: Mr. Vikram Thakur and Mr. Puneet Rajta, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

Petitioner herein stands convicted for commission of offences punishable under Sections 279, 337 & 304-A of the Indian Penal Code by the Court of learned Judicial Magistrate 1st Class, Theog in Case No. 161-1 of 2007 decided on 21.04.2008, which conviction of the petitioner in appeal stands upheld by learned appellate Court in Criminal Appeal No. 23-S/10 of 2008 decided on 24.09.2010. Learned trial Court while convicting the accused for commission of offences punishable under Sections 279,337 and 304-A of the Indian Penal Code sentenced the petitioner to undergo simple imprisonment for three months under Section 279 of the Indian Penal Code and to pay a fine of Rs.500/-. It further sentenced the petitioner to undergo simple imprisonment for three months under Section 337 of the Indian Penal Code and to pay a fine of Rs.500/-. Besides this, learned trial Court sentenced the petitioner to undergo rigorous imprisonment for one year under Section 304-A of the Indian Penal Code and to pay a fine in the sum of Rs.1000/-. All the sentences were ordered to run concurrently. Feeling aggrieved by the said conviction of his under Sections 279, 337 and 304 of the Indian Penal Code, the petitioner has challenged the above mentioned judgments passed by both the learned Courts below by way of this revision petition.

2. The case of the prosecution was that on 12.11.2006, petitioner/accused made a statement in Civil Hospital, Theog before the police that he was owner of Maruti Car bearing registration No. HP-08-0425 and on 12.11.2006, he alongwith Subhash and Sardari Jinta were going to Maraog from Shimla in the abovementioned vehicle, which was being driven by his driver Subhash (wrongly mentioned as Satish Kumar) and when the said vehicle reached near Tarapur, the vehicle on account of its being driven in a high speed fell down in a Nalah about 40-50 feet down side the road. Thus, as per the statement of Rajesh Dogra, accident in question took place because of the rash and negligent driving of his driver who was asked by him to drive slowly. After the accident, the injured were brought to Civil Hospital, Theog by the local people. On the basis of said statement of Rajesh Dogra, FIR Ex. PW10/B was recorded. Rajesh Dogra and Subhash were medically examined in Civil Hospital, Theog, from where Subhash was referred to IGMC, Shimla, where he died because of injuries sustained in the accident. Investigation revealed that in fact at the time of accident, the car in question was not being driven by Subhash, but the same was being driven by accused Rajesh Dogra himself and he had made a false complaint by way of his statement which was recorded under Section 154 of the Code of Criminal Procedure to the effect that the accident took place on account of rash and negligent driving of Subhash. After completion of investigation, challan was filed in the Court against the accused for commission of offences punishable under Sections 279,337 and 304-A of the Indian Penal Code. Notice of accusation was put to the accused, to which he pleaded not guilty and claimed trial. On the basis of evidence produced on record both ocular as well as documentary by the prosecution, learned trial Court held that it had come in the statement of accused recorded under Section 313 of the Code of Criminal Procedure in reply to Question No. 2 that he himself was driving the vehicle, though the same was not being driven by him in a rash and negligent manner. Learned trial Court took note of the fact that no explanation was given neither any defence witness was examined by the accused to disprove the fact that he had not made a wrong statement to the police under Section 154 of the Code of Criminal Procedure. Learned trial Court also took note of

the fact that as per the accused, the accident had taken place as the stearing rod of the vehicle developed defect, which resulted in the occurrence of the accident, whereas mechanical report Ex. PW3/A fully demonstrated that the stearing system of the car which was duly checked was found to be perfectly alright and the Mechanic who had examined the Car and had entered the witness box as PW-3 had categorically stated on oath that there was no mechanical defect in the vehicle. Learned trial Court also took note of the fact that the only eye witness, i.e. PW-6 Sardar Singh who was also travelling in the fatal Car had categorically stated that he was sitting on the back seat and Subhash and accused were sitting on the front seat. He further admitted that it was the accused, who was driving the vehicle at the relevant time. It was held by the learned trial Court that the contention of the accused that it was not he but Subhash who was driving the vehicle stood falsified by the testimony of PW-6 Sardar Singh and further the conduct of the accused casts doubt as firstly he falsely stated that he was not driving the vehicle and thereafter, he stated that the accident took place on account of a defect in the stearing system of the vehicle, but both these points stood disproved by the prosecution beyond reasonable doubt. Learned trial Court further went on to hold that as per spot map Ex. PW5/A, *pucca* structure of the road at the spot of accident was 12 feet and *kacha* structure was 5 feet. Thus, the road was quite wide and as per the report furnished by the Mechanic, the vehicle was not having any mechanical fault. On these basis, it was held by the learned trial Court that non-application of skillful mind well in time while driving amounts to gross negligence and that the prosecution had duly proved that accused was driving the vehicle in a rash and negligent manner. On these basis, learned trial Court held the accused guilty for commission of offences punishable under Sections 279, 337 and 304-A of the Indian Penal Code.

3. In appeal, learned appellate Court while upholding the findings so returned by the learned trial Court held that it was an admitted fact that at the time of accident in question, it was the accused himself who was driving the vehicle, which stood proved by PW-6 as well as the accused, who had admitted in his statement recorded under Section 313 of the Code of Criminal Procedure that it was he who was driving the vehicle. Learned appellate Court further held that it was again an admitted fact that FIR in the case was registered at the instance of accused himself, in which it was alleged by him that the accident took place on account of rash and negligent driving of his driver deceased Subhash. Learned appellate Court held that in fact the accused himself had mentioned in the FIR that the Car in question was being driven rashly and negligently and further in his statement recorded under Section 313 of the Code of Criminal Procedure, accused had admitted that it was he who was driving the vehicle in question. On these basis, it was held by the learned appellate Court that when it was the accused who was driving the vehicle, it was for him to have had explained as to how the accident took place and how the vehicle went out of the road about 40-50 feet down side because such a fact was only in his knowledge, however, he had not explained how the accident took place, rather he tried to establish that the accident took place due to mechanical failure, but said version of the accused was proved to be incorrect. Learned appellate Court further held that the conduct of the accused of lodging a false FIR against the deceased, position of the road at the spot and other facts proved the guilt of the accused and on these basis, it was held by the learned appellate Court that there was no reason to interfere with the judgment passed by learned trial Court.

4. Mr. Y.P. Sood, learned counsel appearing for the petitioner has vehemently argued that the judgments passed by both the Courts below were perverse and not sustainable in law because while convicting the accused, both the Courts below erred in not appreciating that *de hors* the fact as to what was stated by the accused on the basis of which the FIR was lodged, the onus to prove that the accident took place on account of rash and negligent driving of the accused was on the prosecution and the prosecution had miserably failed to discharge and prove the said onus beyond reasonable doubt. According to Mr. Sood, the accused had been convicted by the learned Courts below simply on this ground that he had lodged a false FIR. As per Mr. Sood, there was not even an iota of evidence on record from which it could be inferred that the accident in fact had taken place because of rash and negligent driving of the accused. Mr. Sood argued that in the absence of any material on record produced by the prosecution to establish

and substantiate that the accident had taken place on account of rash and negligent driving of the accused, the findings returned in this regard by the learned trial Court and upheld by the learned appellate Court were perverse and were liable to be struck down. On these basis, it was urged by Mr. Sood that the finding of conviction returned by both the learned Courts below against the accused be set aside.

5. On the other hand, Mr. Vikram Thakur, learned Deputy Advocate General strenuously argued that there was no merit in the revision petition as the finding of conviction returned by learned trial Court and upheld by learned appellate Court was duly substantiated from the material which was produced on record by the prosecution. It was argued by Mr. Thakur that besides the accused having tried to mislead the investigation by lodging a false FIR, all other attending circumstances proved beyond any reasonable doubt that the accident had in fact taken place as a result of rash and negligent driving of the accused. Mr. Thakur argued that the contention of the accused that the vehicle was being driven by deceased Subhash stood demolished by the prosecution. He further argued that it stood proved on record by the prosecution and rather in fact it stood admitted even by the accused himself that it was he who was driving the vehicle when the accident took place. Mr. Thakur further urged that the explanation given by the accused to the effect that the accident took place due to a mechanical fault also stood dispelled by the prosecution as it stood proved on record that there was no mechanical defect in the vehicle as was alleged by the accused. On these basis, it was urged by Mr. Thakur that in the absence of there being any mechanical defect in the vehicle and it being stood duly established on record from the spot map that at the spot where the accident took place, the road was wide and there was no other extraneous circumstance or reason which resulted in the unfortunate incident, the accident took place because of rash and negligent driving of the accused. It was further submitted by Mr. Thakur that keeping in view the fact that both the learned Courts below had held that the accident had taken place due to rash and negligent driving of the accused, the said findings should not be interfered by this Court in exercise of its revisional jurisdiction because the learned counsel for the petitioner failed to point out during the course of arguments that the judgments passed by both the Courts below were either perverse or the findings returned by them were not borne out from the record. On these basis, it was urged by Mr. Thakur that there was no merit in the revision petition and the same be dismissed.

6. I have heard the learned counsel for the parties and also gone through the records as well as the judgments passed by both the learned Courts below.

7. It is a matter of record that the FIR in the present case was lodged at the behest of the accused and it was initially stated by the accused that the accident in fact had taken place due to rash and negligent driving. However, as per the accused, this rash and negligent driving which resulted in the accident was not done by him but was done by his driver who died in the accident. This contention of the accused that the Car met with an accident on account of rash and negligent driving of deceased Subhash stands falsified as it has been duly proved on record by the prosecution that the vehicle in issue was not being driven by deceased Subhash but it was being driven by the accused when it met with an accident. Therefore, the factum of the accused having lodged FIR by giving false information stands duly proved on record. The factum of the vehicle being driven by the accused at the time of fatal accident further stands corroborated by the testimony of PW-6 Sh. Sardar Singh, who was a co-passenger in the car as well as by the statement of the accused recorded under Section 313 of the Code of Criminal Procedure, wherein in answer to Question No. 2, the accused has stated that it was correct that he was driving the vehicle at the time of accident.

8. The mechanical report of the vehicle is on record as Ex. PW3/A. This report has been proved by PW-3 HC Gian Chand, who has deposed in the Court that he was serving in the Police Department since 1993 as a Mechanic and on 14.11.2006, he had mechanically examined Maruti Car bearing registration No. HP-08-0425 and as per his report, there was no mechanical defect in the Car. It is clearly mentioned in Ex. PW3/A that the stearing system of the Car was

checked which was found to be functional. It is further clearly mentioned in Ex. PW3/A that in the opinion of the Mechanic, the accident has not taken place on account of any mechanical defect in the vehicle. Site plan Ex. PW5/A demonstrates that at the spot where the accident took place, the width of the metalled road was about 12 feet and width of unmetalled road was about 5 feet. In other words, the accident has not taken place at a spot where the width of the road was either narrow or very narrow. It is nobody's case that accident either took place while taking pass etc. from any other vehicle or there was some external factor which resulted in the fatal accident. The only explanation given by the accused, i.e. that the accident took place because of mechanical defect in the stearing rod of the Car has been disproved by the prosecution. Therefore, in these circumstances, it cannot be said that the findings arrived at by both the learned Courts below to the effect that the accident has taken place due to rash and negligent driving of the accused are either perverse or not borne out from the records of the case. Further, there is no merit in the contention of the learned counsel for the petitioner that the petitioner has been convicted solely on the basis of his statement, on the basis of which FIR was lodged. In my considered view, the prosecution produced on record sufficient material to prove that the accident in fact had taken place due to rash and negligent driving of the accused and both the learned Courts below took into consideration the entire evidence placed on record by the prosecution both ocular as well as documentary and the finding of conviction returned by learned trial Court and upheld by the learned appellate Court is not solely based on being influenced by the information provided by the accused, on the basis of which, the FIR was lodged. Even if the said contents of the FIR are ignored, in my considered view, there was sufficient material on record produced by the prosecution which proved beyond reasonable doubt that the accident in fact took place because of rash and negligent driving of the accused.

9. It has been held by the Hon'ble Supreme Court in **Oriental Insurance Company Limited** Vs. **Premlata Shukla and others** (2007) 13 Supreme Court Cases 476 that the factum of an accident could also be proved from the first information report and once a part of the contents of the document is admitted in evidence, the party bringing the same on record cannot be permitted to turn round and contend that the other contents contained in the rest part thereof had not been proved.

10. In this view of the matter, in my considered view, it cannot be said that the finding of conviction returned by learned trial Court against the accused is either perverse or not borne out from the records of the case or that the learned appellate Court erred in upholding the judgment of conviction so passed by learned trial Court.

11. It is well settled law that the jurisdiction of High Court in revision is severely restricted and it cannot embark upon re-appreciation of evidence. The High Court in revision cannot absence or error on a point of law, re-appreciate evidence and reverse a finding of law. It has been further held by the Hon'ble Supreme Court in that the object of the revisional jurisdiction was to confer power upon superior criminal Courts a kind of paternal or supervisory jurisdiction in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precaution or apparent harshness of treatment which has resulted on the one hand, or on the other hand in some undeserved hardship to individuals.

12. It has been reiterated by the Hon'ble Supreme Court in **Shlok Bhardwaj** Vs. **Runika Bhardwaj and others** (2015) 2 Supreme Court Cases 721 that the scope of revisional jurisdiction of the High Court does not extend to reappreciation of evidence.

13. It has been further reiterated by the Hon'ble Supreme Court in **Sanjaysinh Ramrao Chavan** Vs. **Dattatray Gulabrao Phalke and others** (2015) 3 Supreme Court Cases 123:

> *"14. In the case before us, the learned Magistrate went through the entire records of the case, not limiting to the report filed by the police and has passed a reasoned order holding that it is not a fit case to take cognizance for the purpose of issuing process to the appellant. Unless the order passed by the Magistrate is perverse or the view taken by the court is wholly unreasonable or*

there is non- consideration of any relevant material or there is palpable misreading of records, the revisional court is not justified in setting aside the order, merely because another view is possible. The revisional court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal jurisprudence. Revisional power of the court under Sections 397 to 401 of Cr.PC is not to be equated with that of an appeal. Unless the finding 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 the judicial discretion is exercised arbitrarily or capriciously, the courts may not interfere with decision in exercise of their revisional jurisdiction.

14. Therefore, in view of what has been discussed above, I do not find any merit in the present revision petition nor it can be said that the judgment of conviction passed by learned trial Court and upheld by learned appellate Court is not sustainable either on facts or law.

15. As already held above, there is no perversity in the judgments passed by the learned Courts below. These judgments have been passed by appreciating all the material on record and the judgments are neither cryptic nor it can be said that the conclusions arrived at are not borne out from the material placed on record by the prosecution. Thus, the revision sans merit and the same is dismissed.

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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.

Versus

Satnam Singh & another ...Respondents.

Criminal Appeal No.331 of 0212
Date of Decision: October 19, 2016

Indian Penal Code, 1860- Section 458 and 307 read with Section 34- Accused S entered the house of the informant and assaulted him with a sword – accused R kept vigil – incident was witnessed by PW-6, who cried for help on which PW-7 and PW-8 arrived at the spot –accused were tried and acquitted by the trial Court- held, in appeal that the genesis of the prosecution version is doubtful as the informant was posted on a temporary duty at Kangra temple at the time of incident, the matter was not reported directly to the police, although, informant is a police officer – a complaint was also lodged by the accused against the informant – motive was not proved - the witnesses had improved upon their earlier versions – the recovery was not established – the trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para- 10 to 22)

Cases referred:

Prandas v. The State, AIR 1954 SC 36

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; Mr. Vikram Thakur & Mr. Puneet Rajta, Deputy Advocates General.

For the Respondents : Mr. Naveen Bhardwaj, Advocate, for respondent No.1.
Mr. Shashi Shirshoo, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

State has appealed against the judgment dated 16.3.2012, passed by learned Additional District Judge, Fast Track Court, Kangra at Dharamshala, Himachal Pradesh, in S.C. No.7-J/VII/2011, titled as *State of Himachal Pradesh v. Satnam Singh & another,* challenging the acquittal of respondents Satnam Singh and Ramesh Kumar (hereinafter referred to as the accused), who stand charged for having committed an offence punishable under the provisions of Sections 458 & 307, both read with Section 34 of the Indian Penal Code.

2. As per the case of prosecution, on 21.3.2010 at 8 p.m., accused Satnam Singh, without any sufficient cause or provocation, entered the house of complainant Harbans Singh Rana (PW-5) and assaulted him with a sword (Ex.P-5), as a result of which he sustained injuries on his hand. While accused Satnam Singh was assaulting the complainant, accused Ramesh Kumar kept vigil. The incident was witnessed by Neena Devi (PW-6), who cried for help, which prompted neighbours Subhash Chand (PW-7), Ranjit Singh (PW-8), Madhu Bala and Sito Devi (both not examined) reach the spot. Seeing the neighbours arrive on the spot, both the accused ran away. The complainant, who was bleeding profusely, was taken to Civil Hospital, Nurpur by Subhash Chand and Ranjit Singh, where he was examined by Dr. Ashutosh Joshi (PW-15), who also informed the police. Accordingly, police official Chaman Lal (PW-14) reached the hospital and recorded statement (Ex.PW-5/A) of the complainant, under the provisions of Section 154 of the Code of Criminal Procedure, on the basis of which FIR No.89, dated 22.3.2010 (Ex.PW-17/E), for commission of offence under Sections 307/452/34 of the Indian Penal Code, was registered at Police Station, Jawali, District Kangra, Himachal Pradesh. Investigation was further carried out by Dy.S.P. Badhri Singh (PW-17), who visited the spot and collected the blood stains splattered all over the floor, as also blood stained clothes of the complainant.

3. On 27.3.2010, investigation was handed over to ASI Deepak Kumar (PW-19), before whom, in police custody, accused Satnam Singh made a disclosure statement (Ex.PW-1/C), so recorded in the presence of Ranjit Singh (PW-8) and Constable Narinder Kumar (PW-1), and further led to the recovery of weapon of offence, i.e. sword (Ex.P-5), vide Memo (Ex.PW-8/A), in the presence of Dalku Ram (not examined).

4. Scientific evidence to link the accused was obtained by the police and report of the Forensic Science Laboratory (Ex.PA) taken on record.

5. Investigation revealed complicity of the accused in the alleged crime, which led to the filing of challan and framing of charge for commission of offences punishable under the provisions of Section 458 & 307, both read with Section 34 of the Indian Penal Code, to which the accused did not plead guilty and claimed trial.

6. In order to establish its case, prosecution examined as many as 19 witnesses and statements of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, were also recorded, in which they took plea of innocence and false implication. No evidence in defence was led.

7. Based on the testimonies of witnesses and the material on record, trial Court acquitted both the accused of the charged offences. Hence, the present appeal by the State.

8. We have heard Mr. V.S. Chauhan, learned Additional Advocate General; Mr. Vikram Thakur & Mr. Puneet Rajta, Deputy Advocates General, on behalf of the State as also Mr. Naveen Bhardwaj & Mr. Shashi Shirshoo, Advocates, on behalf of the accused. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on

record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

9. 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 essential ingredients so required to constitute the charged offence.

10. 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." "

11. There are certain unexplained circumstances, which have emerged on record, rendering the geneisis of the prosecution story to be doubtful, and that being (a) undisputedly, the complainant, who is a police official, was posted on a temporary duty at a fair at Kangra Temple. Incident did not take place at the fair. Complainant wants the Court to believe that the incident took place at his house. But then the distance between the house of the complainant and the place of his posting, remains unproven on record. It has also come on record that before leaving the place of his posting, complainant did not fulfil the procedure so required of making entries in the Rojnamcha. (b) The incident never came to be reported by the complainant directly to the police. According to him, he was assaulted by the accused at about 8 p.m., from where he was directly taken to the hospital and attended to by the doctor. Why is it that the complainant, who is a police official did not directly inform the police, remains a mystery. Also, why is it that he did not inform the police, which allegedly was present in the hospital, as is evident from endorsement on his statement (Ex.PW-5/A). Thus, genesis of the prosecution story itself is rendered doubtful. (c) Dy.S.P. Badhri Singh (PW-17) admits that he took over investigation of the case "as per verbal directions of SP". Now, why the Superintendent of Police would interfere in investigation in a case of such like nature, remains unexplained. After all there was no law and order problem on the spot. We may also observe that Dy.S.P. Badhri Singh was not posted in the concerned Police Post or Police Station, but in fact was posted as a Sub Divisional Police Officer (Dy.S.P.). Why would he take over the investigation is also not clear. (d) Accused are not

influential persons. They are not history-sheeters or have any past criminal record. ASI Deepak Kumar (PW-19) admits that on the date of the incident itself, i.e. 21.3.2010 at 8.30 p.m., accused Satnam Singh had himself got recorded a written complaint at Police Post, Kotala, that he had been abused and beaten up by complainant Harbans Singh. Now, what happened to this complaint again remains a mystery. All this renders the investigation to have been conducted by the police in a fair and impartial manner to be absolutely doubtful and further, the genesis of the prosecution case to be doubtful.

12. Now, when we examine the testimonies of the relevant witnesses, we find them not to be inspiring in confidence at all. According to the complainant, on the date of the incident at about 7.30 p.m., while he was coming from his old house to new house, he met Banty, who asked him not to proceed further as some boys were waiting to pick up a quarrel with him. Despite that he came to his house with Banty and Subhash, who thereafter left to their respective houses. At about 8 p.m., while he was taking meals in his house, accused Mani @ Satnam Singh came and gave a blow with the blunt side of the sword on his left shoulder. However, while trying to save himself, he sustained injuries on his hand and his thumb got severed. All this while, accused Ramesh Kumar was standing, witnessing the incident. When he cried, Madhu Bala, Sito Devi and Subhash arrived on the spot. Also his wife arrived on the spot. Though chased, the accused could not be caught, since it was dark. Thereafter, he was taken to the hospital by Ranjit Singh and Subhash Chand, where he was attended to by the doctor and also his statement recorded by the police.

13. When we examine the examination-in-chief part of testimony of Neena Devi (PW-6), we find such version to have been corroborated. But when we read the cross-examination part of this witness, we find her to have made exaggerations and embellishments, rendering their testimonies to be extremely doubtful and uninspiring in confidence.

14. Why would the accused assault the complainant, remains unexplained by the witness. There was no prior animosity or motive. Their statements are further rendered doubtful, in view of Banty (PW-3) not having supported the prosecution. Further, in his statement, under Section 154 of the Code of Criminal Procedure, we find him to have not disclosed the name of accused Ramesh Kumar at all. In fact, he has not even disclosed his particulars. As per the statement of the complainant, he could only recognize the companion of accused Satnam Singh. But, when police did not conduct any Test Identification Parade, then how is it that they were able to identify accused Ramesh Kumar to be the very same person, who accompanied accused Satnam Singh at the time of assault.

15. Be that as it may, in the statement (Ex.PW-5/A) with which the witness was confronted, there is no mention of the fact that accused Satnam Singh and Ramesh Kumar were accompanying those four-five boys, about whom Banti had cautioned him on his way to his house.

16. Now when we examine the statements of Subhash Chand and Ranjit Singh, we find them not to have witnessed the occurrence of the incident, though Subhash Chand does state that he had noticed the accused flee away from the spot. But, we do not find such version of Subhash Chand to be inspiring in confidence, for we find his presence on the spot to be doubtful. He admits that the house of Ranjit Singh is at some distance from his house. According to him, it was Ranjit Singh who had reached the spot earlier, whereas according to Ranjit Singh, both of them reached the spot together. Testimony of Ranjit Singh is conspicuously silent with regard to the accused having fled away from the spot, immediately after the occurrence of the incident. In fact, Ranjit Singh contradicts the complainant by stating that the names of the assailants were not disclosed by the complainant, for he was told that four-five unknown boys had followed him.

17. Even with regard to the recording of alleged disclosure statement, which led to recovery of the weapon of offence, we find the prosecution case to be doubtful. No signs of blood were found on the sword. Report of the Expert is evidently clear to such effect.

18. Also, on the issue of conspiracy and common intention, the witnesses are absolutely silent.

19. Hence, from the material placed on record, prosecution has failed to establish that the accused are guilty of having committed the offences, they have been charged with. The circumstances cannot be said to have been proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused does not stand proved beyond reasonable doubt to the hilt. The chain of events does not stand conclusively established, leading only to one conclusion, i.e. guilt of the accused.

20. Hence, it cannot be said that prosecution has been able to prove its case, by leading clear, cogent, convincing and reliable piece of evidence so as to prove that the accused persons in furtherance of their common intention committed lurking house trespass, by entering into the house of complainant Harbans Singh and thereafter with an intention of causing his death, caused grievous hurt to him with a sword, which was dangerous to life.

21. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence so placed on record by the parties.

22. The accused have had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in *Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94*, it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged.

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

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

Tilak Raj son of late Shri Joginder Nath Sood & another ....Revisionists/Tenants

Versus

Rajinder Sood alias Rajan son of late Sh. Rameshwar Nath Sood ....Non-Revisionist/Landlord

Civil Revision No. 82 of 2015
Order Reserved on 20th July 2016
Date of Order 19th October 2016

Code of Civil Procedure, 1908- Order 18 Rule 17- An eviction petition was filed on the ground of arrears of rent and bona fide requirement for reconstruction, which cannot be carried out without vacating the building- the evidence of tenants was closed by the Rent Controller- a revision petition was filed and the order of the Rent Controller was upheld- an application for recalling the tenant as witness was filed, which was dismissed- held, in revision that once the evidence of the tenants was closed by the order of the Court, it is not permissible to lead any additional evidence- the order was affirmed by the High Court and has attained finality- more than eight opportunities were granted to the tenants to lead the evidence, which is more than three opportunities prescribed by the legislature – petition dismissed. (Para- 11 to 14)

Cases referred:

Masjid Kacha Tank Nahan vs. Tuffail Mohammed, AIR 1991 SC 455
The Municipal Corporation Indore vs. K.N. Palsikar, AIR 1969 SC 579
P.Udayani Devi vs. V.V.Rajeshwara Prasad Rao and another, AIR 1995 SC 1357
Gurdial Singh vs. Raj Kumar Anjela, AIR 2002 SC 1004

Krishana vs. Smt. Vimal Chopra, 1993(2) SLC 106 H.P.
Altaf Hussain vs. Nasreen Zahra, AIR 1978 Allahabad 515

For the Revisionists: Mr. Mohan Singh Advocate
For the Non-Revisionist: Mr. Rajiv Sirkeck Advocate

The following order of the Court was delivered:

P.S. Rana, Judge.

Present civil revision petition is filed under Section 115 of the Code of Civil Procedure 1908 for setting aside order dated 27.3.2015 passed by learned Rent Controller Shimla under Order 18 Rule 17 CPC read with Section 151 CPC in case No. 230-2 of 2013/09 title Rajinder Sood vs. Tilak Raj.

Brief facts of the case

2. Landlord Rajinder Sood filed eviction petition in the year 2009 against tenant under Section 14 of H.P. Urban Rent Control Act 1987 relating to Quarter No. 17 Out House No. 3 Anand Lodge Jakhoo Shimla on the ground that tenant is in arrears of rent upto September 2009 for a sum of Rs.6000/- (Rupees six thousand) plus interest at the rate of 9% per annum and on the ground that premises in question required bonafide by landlord for carrying out reconstruction which could not be carried out without eviction of tenants. It is also pleaded that premises is hundred years old and is in dilapidated condition. Prayer for acceptance of petition sought.

3. Per contra petition is contested by tenants on the ground that present petition is not maintainable and landlord has no cause of action to file present petition and present petition is filed with malafide intention. It is pleaded that earlier eviction petitions were filed by landlord against father of tenants which were dismissed. It is pleaded that petition is liable to be dismissed under Section 11 of CPC. Prayer for dismissal of petition sought.

4. Learned Rent Controller framed issues and listed the petition for evidence of landlord. Landlord examined PW1 namely Shri Rajinder Sood and thereafter learned Rent Controller on dated 2.7.2012 closed evidence of landlord by order of Court and thereafter listed the eviction petition for evidence of tenants on 8.8.2012, 20.9.2012, 15.10.2012, 25.3.2013, 26.4.2013, 20.5.2013, 2.7.2013, 11.9.2013. Tenants examined Tilak Raj as RW1, Mukesh Sood as RW2, Chander Mohan as RW3.

5. Thereafter learned Rent Controller closed evidence of tenants by order of Court on 11.9.2013. Thereafter tenants filed civil revision petitions Nos. 4078 of 2013 and 4084 of 2013 before Hon'ble High Court of H.P. against order of learned Rent Controller closing evidence of tenants by orders of Court which were decided by Hon'ble High Court of H.P. on 30.4.2014. Hon'ble High Court of H.P. dismissed Civil Revision Petitions Nos. 4078 of 2013 and 4084 of 2013 filed by tenants and affirmed the order of learned Rent Controller dated 11.9.2013 whereby evidence of tenants closed by order of Court. Thereafter tenants filed another application under Order 18 Rule 17 read with Section 151 CPC for recalling the tenant as a witness to mark inspection report, photographs and CD on the ground that expert Mr.J.K. Mehandroo retired executive engineer died and inspection report, photographs and CD remained non-exhibited.

6. Application filed by tenants was contested by landlord pleaded therein that application is a gross abuse of process of law and application filed by tenants is moved with malafide just to delay eviction proceedings. It is pleaded by landlord that sufficient opportunities granted by learned Rent Controller to tenants to adduce evidence. It is pleaded that tenants filed revision petition before H.P. High Court against order of learned Rent Controller relating to closing of evidence of tenants by order of Court and Hon'ble H.P. High Court affirmed closure order of evidence of tenants. Prayer for dismissal of application sought.

7. Learned Rent Controller dismissed application filed under Order 18 Rule 17 read with Section 151 CPC on dated 27.3.2015.

8. Feeling aggrieved against order of learned Rent Controller dated 27.3.2015 tenants filed the present civil revision petition under Section 115 of Code of Civil Procedure 1908.

9. Court heard learned Advocate appearing on behalf of revisionists and learned Advocate appearing on behalf of non-revisionist and Court also perused entire record carefuly.

10. Following points arise for determination in civil revision petition:-

Point No.1 Whether revision petition filed under Section 115 of Code of Civil Procedure 1908 is liable to be accepted as mentioned in memorandum of grounds of civil revision petition?

Point No.2 Relief.

Findings upon point No.1 with reasons

11. Submission of learned Advocate appearing on behalf of revisionists that order of learned Rent Controller dated 27.3.2015 passed upon application filed under Order 18 Rule 17 read with Section 151 CPC is perverse and illegal and on this ground revision petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Tenants filed application under Order 18 Rule 17 read with Section 151 CPC for recalling the tenant as a witness to mark the documents i.e. inspection report, photographs and CD etc. on the ground that expert Mr. J.K. Mahendroo inspected the premises on 10.3.2013 and after personal visit by expert the expert prepared technical report along with photographs and CD. It is pleaded that Mr.J.K. Mahendroo expired and documents could not be exhibited and remained unmarked because of death of expert. Tenants sought permission of learned Rent Controller to re-examine himself for above stated purpose. It is held that once evidence of tenants was closed by order of Court and affirmed by Hon'ble H.P. High Court then tenants cannot be allowed to adduce any additional oral or documentary evidence. In present case it is proved on record that evidence of tenants was closed by order of Court of learned Rent Controller on 11.9.2013 and it is also proved on record that thereafter order of learned Rent Controller closing the evidence of tenants was challenged in Hon'ble High Court in revision petitions No. 4078 of 2013 and 4084 of 2013 and Hon'ble High Court disposed of revision petitions No. 4078 of 2013 and 4084 of 2013 on 30.4.2014 and affirmed order of learned Rent Controller dated 11.9.2013 whereby evidence of tenants closed by order of learned Rent Controller.

12. There is no evidence on record in order to prove that tenants have filed SLP before Hon'ble Apex Court of India. Order passed by Hon'ble High Court closing the evidence of tenants attained stage of finality on 30.4.2014. It is held that if tenant is permitted to re-examine himself at this stage of case then same will tantamount to interference in order of Hon'ble High Court which is not permissible in law. In view of the fact that order of learned Rent Controller closing the evidence of tenants has attained stage of finality upto the level of Hon'ble High Court it is not expedient in the ends of justice to allow the tenants to adduce any additional evidence on record. It is also proved on record that sufficient eight opportunities were granted by learned Rent Controller to tenants to adduce evidence in support of their case. As per Order XVII rule 1 of CPC proviso adjournment for more than three times should not be granted. It is well settled law that in revision petition High Court should not reverse the order of learned Rent Controller unless the order of learned Rent Controller is perverse. ***See AIR 1991 SC 455 title Masjid Kacha Tank Nahan vs. Tuffail Mohammed. See AIR 1969 SC 579 title The Municipal Corporation Indore vs. K.N. Palsikar. See AIR 1995 SC 1357 title P.Udayani Devi vs. V.V.Rajeshwara Prasad Rao and another. See AIR 2002 SC 1004 title Gurdial Singh vs. Raj Kumar Anjela.*** In view of above stated facts and case law cited supra it is held that order of learned Rent Controller is not perverse.

13. Submission of learned Advocate appearing on behalf of revisionists that application for recalling the witnesses can be moved even after closure of evidence and on this ground revision petition be allowed is rejected being devoid of any force for the reasons

hereinafter mentioned. It is well settled law that power of Court under Order 18 Rule 17 CPC is discretionary and ought to be exercised with greatest care and only in exceptional circumstances. It is also well settled law that Court ought not to recall a witness at the instance of party in order to fill up lacuna in the evidence already adduced. ***See 1993(2) SLC 106 H.P. title Smt. Krishana vs. Smt. Vimal Chopra. See AIR 1978 Allahabad 515 title Altaf Hussain vs. Nasreen Zahra.*** In view of above stated facts and case law cited supra point No.1 is answered in negative.

Point No. 2 (Relief)

14. In view of findings upon point No.1 revision petition is dismissed. Order passed by learned Rent Controller dated 27.3.2015 is affirmed. Parties are left to bear their own costs. Parties are directed to appear before learned Rent Controller on ***2.11.2016.*** Observations will not effect the merits of case in any manner and will be strictly confined for disposal of present revision petition. Record of learned Rent Controller 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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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Tilak Raj son of late Shri Joginder Nath Sood & another ....Revisionists/Tenants

Versus

Rajinder Sood alias Rajan son of late Sh. Rameshwar Nath Sood ....Non-Revisionist/Landlord

Civil Revision No. 83 of 2015
Order Reserved on 20th July 2016
Date of Order 19th October 2016

Code of Civil Procedure, 1908- Order 18 Rule 17- An eviction petition was filed on the ground of arrears of rent and bona fide requirement for reconstruction, which cannot be carried out without vacating the building- the evidence of tenants was closed by the Rent Controller- a revision petition was filed and the order of the Rent Controller was upheld- an application for recalling the tenant as witness was filed, which was dismissed- held, in revision that once the evidence of the tenants was closed by the order of the Court, it was not permissible to lead any oral or documentary evidence- the order was affirmed by the High Court and has attained finality- more than eight opportunities were granted to the tenants to lead the evidence, which is more than three opportunities prescribed by the legislature – petition dismissed. (Para- 11 to 14)

Cases referred:

Masjid Kacha Tank Nahan vs. Tuffail Mohammed, AIR 1991 SC 455
The Municipal Corporation Indore vs. K.N. Palsikar, AIR 1969 SC 579
P.Udayani Devi vs. V.V.Rajeshwara Prasad Rao and another, AIR 1995 SC 1357
Gurdial Singh vs. Raj Kumar Anjela, AIR 2002 SC 1004
Krishana vs. Smt. Vimal Chopra, 1993(2) SLC 106 H.P.
Altaf Hussain vs. Nasreen Zahra, AIR 1978 Allahabad 515

For the Revisionists: Mr. Mohan Singh Advocate
For the Non-Revisionist: Mr. Rajiv Sirkeck Advocate

The following order of the Court was delivered:

P.S. Rana, Judge.

Present civil revision petition is filed under Section 115 of the Code of Civil Procedure 1908 for setting aside order dated 27.3.2015 passed by learned Rent Controller Shimla under Order 18 Rule 17 CPC read with Section 151 CPC in case No. 231-2 of 2013/09 title Rajinder Sood vs. Tilak Raj.

Brief facts of the case

2. Landlord Rajinder Sood filed eviction petition in the year 2009 against tenants under Section 14 of H.P. Urban Rent Control Act 1987 relating to Quarter No. 14 Out House No. 2 Anand Lodge Jakhoo Shimla on the ground that tenant is in arrears of rent upto September 2009 for a sum of Rs.18000/- (Rupees eighteen thousand) plus interest at the rate of 9% per annum and on the ground that premises in question required bonafide by landlord for carrying out reconstruction which could not be carried out without eviction of tenants. It is also pleaded that premises is hundred years old and is in dilapidated condition.Prayer for acceptance of petition sought.

3. Per contra petition is contested by tenants on the ground that present petition is not maintainable and landlord has no cause of action to file present petition and present petition is filed with malafide intention. It is pleaded that earlier eviction petitions were filed by landlord against father of tenants which were dismissed. It is pleaded that petition is liable to be dismissed under Section 11 of CPC. Prayer for dismissal of petition sought.

4. Learned Rent Controller framed issues and listed the petition for evidence of landlord. Landlord examined PW1 namely Shri Rajinder Sood, PW2 Jamuna Dass. Learned Rent Controller on dated 2.7.2012 closed evidence of landlord by order of Court and thereafter listed the eviction petition for evidence of tenants on 8.8.2012, 20.9.2012, 15.10.2012, 25.3.2013, 26.4.2013, 20.5.2013, 2.7.2013. Learned Rent Controller granted last and exceptional opportunity to tenants to adduce evidence subject to cost of Rs.300/- (Rupees three hundred) with direction that evidence of tenants would be closed by order of learned Rent Controller on next date. Learned Rent Controller listed eviction petition for evidence of tenants on dated 11.9.2013. Learned Controller closed the evidence of tenants by order of Court. Tenants examined Tilak Raj as RW1, Mukesh Sood as RW2, Chander Mohan as RW3.

5. Thereafter tenants filed civil revision petitions Nos. 4078 of 2013 and 4084 of 2013 before Hon'ble High Court of H.P. which were decided by Hon'ble High Court of H.P. on 30.4.2014. Hon'ble High Court of H.P. dismissed Civil Revision Petitions Nos. 4078 of 2013 and 4084 of 2013 and affirmed the order of learned Rent Controller dated 11.9.2013 whereby evidence of tenants closed by order of Court. Thereafter tenants filed another application under Order 18 Rule 17 read with Section 151 CPC for recalling the tenant as a witness to mark inspection report, photographs and CD on the ground that expert Mr.J.K. Mehandroo retired executive engineer died and inspection report, photographs and CD remained non-exhibited.

6. Application filed by tenants was contested by landlord pleaded therein that application is a gross abuse of process of law and application filed by tenants is moved with malafide just to delay eviction proceedings. It is pleaded by landlord that sufficient opportunities granted by learned Rent Controller to tenants to adduce evidence. It is pleaded that tenants filed revision petition before H.P. High Court against order of learned Rent Controller relating to closing of evidence of tenants by order of Court and Hon'ble H.P. High Court affirmed closure order of evidence of tenants. Prayer for dismissal of application sought.

7. Learned Rent Controller dismissed application under Order 18 Rule 17 read with Section 151 CPC on dated 27.3.2015.

8. Feeling aggrieved against order of learned Rent Controller dated 27.3.2015 tenants have filed the present civil revision petition.

9. Court heard learned Advocate appearing on behalf of revisionists and learned Advocate appearing on behalf of non-revisionist and Court also perused entire record carefuly.

10. Following points arise for determination in civil revision petition:-

Point No.1 Whether revision petition filed under Section 115 of Code of Civil Procedure 1908 is liable to be accepted as mentioned in memorandum of grounds of civil revision petition?

Point No.2 Relief.

Findings upon point No.1 with reasons

11. Submission of learned Advocate appearing on behalf of revisionists that order of learned Rent Controller dated 27.3.2015 passed upon application filed under Order 18 Rule 17 read with Section 151 CPC is perverse and illegal and on this ground revision petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Tenants filed application under Order 18 Rule 17 read with Section 151 CPC for recalling the tenant as a witness to mark the documents i.e. inspection report, photographs and CD etc. on the ground that expert Mr. J.K. Mahendroo inspected the premises on 10.3.2013 and after personal visit by expert the expert prepared technical report along with photographs and CD. It is pleaded that Mr.J.K. Mahendroo expired and documents could not be exhibited and remained unmarked because of death of expert. Tenants sought permission of learned Rent Controller to re-examine himself for above stated purpose. It is held that once evidence of party is closed by order of Court then party cannot be allowed to adduce any additional oral or documentary evidence. In present case it is proved on record that evidence of tenants closed by order of Court of learned Rent Controller on 11.9.2013 and it is also proved on record that thereafter order of learned Rent Controller closing the evidence of tenants was challenged in Hon'ble High Court in revision petitions No. 4078 of 2013 and 4084 of 2013 and Hon'ble High Court disposed of revision petitions No. 4078 of 2013 and 4084 of 2013 on 30.4.2014 and affirmed order of learned Rent Controller dated 11.9.2013 whereby evidence of tenants closed by order of learned Rent Controller.

12. There is no evidence on record in order to prove that tenants filed SLP before Hon'ble Apex Court of India. Order passed by Hon'ble High Court closing the evidence of tenants became final on 30.4.2014. It is held that if tenant is permitted to re-examine himself at this stage of case then same will tantamount to interference in order of Hon'ble High Court which is not permissible in law. In view of the fact that order of learned Rent Controller closing the evidence of tenants has attained stage of finality upto the level of Hon'ble High Court it is not expedient in the ends of justice to allow the tenants to adduce any oral or documentary evidence on record. It is also proved on record that sufficient eight opportunities were granted by learned Rent Controller to tenants to adduce evidence in support of their case. As per Order XVII rule 1 of CPC proviso adjournment for more than three times should not be granted.It is well settled law that in revision petition High Court should not reverse the order of learned Rent Controller unless the order of learned Rent Controller is perverse. ***See AIR 1991 SC 455 title Masjid Kacha Tank Nahan vs. Tuffail Mohammed. See AIR 1969 SC 579 title The Municipal Corporation Indore vs. K.N. Palsikar. See AIR 1995 SC 1357 title P.Udayani Devi vs. V.V.Rajeshwara Prasad Rao and another. See 2002 SC 1004 title Gurdial Singh vs. Raj Kumar Anjela.*** In view of above stated facts and case law cited supra it is held that order of learned Rent Controller is not perverse.

13. Submission of learned Advocate appearing on behalf of revisionists that application for recalling the witnesses can be moved even after closure of evidence and on this ground revision petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that power of Court under Order 18 Rule 17 CPC is discretionary and ought to be exercised with greatest care and only in exceptional circumstances. It is also well settled law that Court ought not to recall a witness at the instance of party in order to fill up lacuna in the evidence already adduced. ***See 1993(2) SLC 106 H.P. title Smt. Krishana vs. Smt. Vimal Chopra. See AIR 1978 Allahabad 515 title Altaf Hussain vs. Nasreen Zahra.*** In view of above stated facts and case law cited supra point No.1 is answered in negative.

Point No. 2 (Relief)

14. In view of findings upon point No.1 revision petition is dismissed. Order passed by learned Rent Controller dated 27.3.2015 is affirmed. Parties are left to bear their own costs. Parties are directed to appear before learned Rent Controller on ***2.11.2016.*** Observations will not

effect the merits of case in any manner and will be strictly confined for disposal of present revision petition. Record of learned Rent Controller 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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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Smt. Vijaya Shakti Gupta .....Petitioner.

Vs.

Shri Rakesh Khanna .....Respondent.

CMPMO No.: 344 of 2014
Reserved on: 16.09.2016
Date of Decision: 19.10.2016

Code of Civil Procedure, 1908- Order 6 Rule 17- An application for amendment to enhance the claimed amount to Rs. 35,18,624/- was filed, which was rejected on the ground of delay and that amendment if allowed would lead to ouster of jurisdiction – held, that dismissal of the application on the ground that jurisdiction of the Court would be ousted is wrong – the amendment would relate back to date of filing of the suit – the question of ouster will only come into the picture after allowing the amendment and not prior to the same- the application allowed. (Para- 7 to 21)

Cases referred:

Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and others AIR 1957 SC 363

Revajeetu Builders and Developers Vs. Narayanaswamy and sons and others (2009) 10 Supreme Court Cases 84

State of Madhya Pradesh Vs. Union of India and another (2011) 12 Supreme Court Cases 268

Chander Kanta Bansal Vs. Rajinder Singh Anand (2008) 5 Supreme Court Cases 117

For the petitioner: Mr. K.D. Sood, Senior Advocate, with Mr. Sanjeev Sood, Advocate.
Respondent *ex parte.*

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this petition filed under Article 227 of the Constitution of India, the petitioner has prayed for quashing of order dated 07.07.2014 passed by the Court of learned Civil Judge (Senior Division), Kangra at Dharamshala in CMA No. 80/2014 in Civil Suit No. 451/13/2003 vide which, application filed under Order 6 Rule 17 read with Section 151 of the Code of Civil Procedure by the present petitioner/plaintiff for amendment of the suit stands dismissed. The petitioner has further prayed for direction to be issued to learned Court below to decide the application of the petitioner for possession of the premises as per the directions passed in Civil Suit No. 23 of 2003 as well as in LPA No. 9 of 2005 and order dated 27.08.2012 passed in CMPMO Nos. 470 of 2011 and 478 of 2011.

2. As per the petitioner, she filed a suit for possession of property known as (a) Whispering Winds Resorts; (b) New Whispering Hotel; and (c) Residential premises built on the land comprised in Khata No. 46/41, Khatauni No. 123, Khasra No. 391/308, measuring 0-15-36 hectares, situated in Mohal Kand, Mauja Khaniyara, Tehsil Dharamshala, District Kangra, H.P. alongwith other reliefs including a decree of Rs.10,56,437.50/- on account of rent/use and occupation charges of the suit premises. The suit was initially filed in this Court, but was

subsequently transferred to the Court of learned District Judge, Kangra and thereafter to the Court of learned Civil Judge (Senior Division), Kangra at Dharamshala.

3. During the pendency of the case before the Court of learned Civil Judge (Senior Division), Kangra, an application was filed under Order 6 Rule 17 of the Code of Civil Procedure for amendment of the suit, i.e. CMA No. 80 of 2014 on the grounds that the suit was initially filed in the year 2003 and at that relevant time, plaintiff had presented the suit for recovery of an amount of Rs.10,56,437.50/- and as more than 11 years had passed and the arrears of use and occupation charges have arisen to Rs.35,18,624/-, as such the plaint was liable to be amended to the extent that the value of the suit for the purpose of Court fee and jurisdiction was liable to be substituted alongwith other amendments, which are incorporated hereinbelow:

> *"(a) In the value of the suit for the purposes of Court fee and jurisdiction instead of Rs.10,56,437.50/- in line 11, Rs.35,18,624/- is liable to be substituted and in line No. 14 instead of the word Rs.14,68,104.50, Rs.39,30,291/-is liable to be substituted, and in line No. 15 instead of Rs.19,084/-, Rs.42,540/- is liable to be substituted.*
>
> *(b) In para No. 4 of the plaint at page 4 line No. 13, instead of the date 30.4.2003 the date 30.6.2006 is to be substituted and an amount of Rs.5,40,000/- is liable to be substituted with Rs.22,50,000/-. Similarly instead of the amount Rs.6,45,000/-, Rs.23,55,000/- is liable to be substituted. Instead of Rs.43,845/- an amount of Rs.1,35,000/- is liable to be substituted and instead of Rs. 59,625/- and amount of Rs.1,50,750/- is liable to be substituted.*
>
> *(c) In para No. 5 of the plaint instead of Rs.1,30,000/-, Rs.5,60,000/- is liable to be substituted and instead of 16.6.2003, the date 30.6.2006 is liable to be substituted and Rs.14,625/- is liable to be substituted with Rs.58,500/- and Rs.1,44,625/- is liable to be substituted with Rs.5,78,500/-*
>
> *(d) In para No. 6 of the plaint at page 5, instead of the date 30.4.2003, the date 30.6.2006 is liable to be substituted and an amount of Rs.1,70,000/- is liable to be substituted with Rs.3,60,000/-. Rs. 37,187.50 is liable to be substituted with Rs.74,374/- and The word Rs.10,56,437.50 is liable to be substituted with Rs.35,18,624/-.*
>
> *(e) In para No. 7 of the plaint Rs.10,56,437.50 is liable to be substituted with Rs. 35,18,624/-/.*
>
> *(f) In para No. 9 of the plaint at page 6, Rs.10,56,437.50 is liable to be substituted with Rs.35,18,624/- and amount of Rs.12,689.60 is liable to be substituted with Rs.38,540/-, and Rs.14,68,104.50 is liable to be substituted with Rs.39,30,291/- and an amount of Rs.19,084/- is liable to be substituted with Rs.42,540/-.*
>
> *(g) In para no. 12(ii) of the plaint Rs.10,56,437.50 is liable to be substituted with Rs.35,18,624/-."*

4. The above were the proposed amendments which the petitioner prayed for by way of an application filed under Order 6 Rule 17 of the Code of Civil Procedure to be incorporated in the plaint. However, the Court of learned Civil Judge (Senior Division), Kangra at Dharamshala vide order dated 07.07.2014 dismissed the application so filed by the petitioner under Order 6 Rule 17 of the Code of Civil Procedure on the ground that tentative use and occupation charges were granted by the High Court in the year 2006, but the application for amendment had been filed in the year 2014 and in case the applicant intended to recover the use and occupation charges @Rs.34,000/- per month, as were awarded by the High Court since 2003 to 2006, then why was the application not immediately filed after the year 2006, which as per the learned trial Court amounted to not exercising 'due diligence' by the applicant. Learned trial Court also dismissed the application on the ground that because the proposed amendment intended to oust the jurisdiction of learned trial Court, as such said application could not be allowed. It further

held that the tentative amount of use and occupation fixed by the High Court was subject to adjustment in the final order of the Court and tenancy had yet not been terminated. Accordingly, on these basis, the application so filed by the applicant was dismissed by learned trial Court.

5. Mr. K.D. Sood, learned Senior Counsel appearing for the petitioner has argued that the order passed by learned trial Court dated 07.07.2014 vide which application so filed by the petitioner/plaintiff under Order 6 Rule 17 of the Code of Civil Procedure for amendment of the plaint has been dismissed is perverse and learned trial Court while dismissing the said application has failed to exercise jurisdiction vested in it and has further not appreciated the law as it stands with regard to amendment of pleadings. Mr. Sood further argued that learned trial Court erred in dismissing the application filed by the petitioner under Order 6 Rule 17 of the Code of Civil Procedure on the ground that the said application could not be allowed because by way of proposed amendment, the applicant intended to oust the jurisdiction of the learned trial Court because as per Mr. Sood, the application praying for proposed amendment could not have been dismissed on this ground. According to Mr. Sood, because it was learned trial Court which was seized with the matter, therefore, the plaintiff could have moved an application praying for amendment of pleadings only before that Court and if after allowing the said application, the same amounted to ousting the jurisdiction of learned trial Court for want of pecuniary jurisdiction to entertain the case, then the course of action available in law to the learned trial Court would have been to return the plaint to the plaintiff for presenting the same before the appropriate Court having pecuniary jurisdiction to adjudicate the same. Mr. Sood further argued that learned trial Court also erred in holding that because the tentative amount of use and occupation charges fixed by this Court was subject to adjustment in the final order, therefore, the amendment could not be carried out. It was further argued by Mr. Sood that learned Court below erred in coming to the conclusion that 'due diligence' was not exercised by the plaintiff and as such, the plaintiff was not entitled to amend the plaint. According to Mr. Sood, it was apparent from the averments made in the application filed under Order VI Rule 17 of the Code of Civil Procedure that 'due diligence' was exercised by the plaintiff and the reasons mentioned in the application were self speaking as to why the amendment was being sought. On these grounds, it was urged by Mr. Sood that the impugned order passed by learned trial Court was not sustainable in the eyes of law and the same was liable to quashed and set aside. He further prayed that the application for amendment of the plaint filed by the petitioner/plaintiff be accordingly allowed in the interest of justice.

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

7. The application filed by the petitioner/plaintiff for amendment of the plaint primarily has been dismissed by the learned trial Court on three grounds:

(a) *that the proposed amendment intended to ousting the jurisdiction of learned trial Court;*

(b) *that the applicant had not exercised 'due diligence' and, therefore, the applicant was not entitled to amend the plaint; and*

(c) *the tentative amount of use and occupation charges fixed by this Court was subject to the adjustment in the final order which was to be passed by the learned trial Court and the tenancy had not yet been terminated.*

8. In my considered view, dismissal of the application for amendment of the plaint on the ground that by way of the proposed amendment, the plaintiff intended to oust the jurisdiction of learned trial Court and the same was not permissible in law is totally erroneous. There is no bar in law that the plaintiff cannot file an application for amendment of the plaint, which if allowed, may oust the pecuniary jurisdiction of the Court before which the case is otherwise pending.

9. A perusal of the provisions of Order VI Rule 17 of the Code of Civil Procedure demonstrates that it is contemplated therein that the Court may at any stage of the proceedings

allow either party to alter or amend its 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 amendment shall be allowed after commencement of the trial 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. Thus, as per Rule 17 of Order VI, all such amendments shall be made as may be necessary for determining the real questions in controversy between the parties. There is no bar contemplated in the bare provisions that if a proposed amendment which otherwise may be necessary for the purpose of determining the real questions in controversy between the parties ousts the pecuniary jurisdiction of a Court, then the said amendment shall not be allowed on this count alone. Besides, this finding has not been returned in the impugned order by the learned trial Court that the proposed amendment otherwise was not necessary for the purpose of determining the real questions of controversy between the parties.

10. It is true that when an amendment is allowed, then the same relates back to the date when the suit was filed and if the suit as framed was beyond the jurisdiction of the Court, then it would have no jurisdiction to allow the amendment for want of jurisdiction to entertain the suit itself. However, it has to be kept in mind that entertaining and trying a suit which, when presented is beyond the jurisdiction of the Court, is definitely not permissible, but the fact that the amendment relates back to the date of presentation of the plaint is notional and even such a notional conception will come into play only when the plaint is amended. Therefore, the question of ousting the jurisdiction would normally arise only when the claim is amended. Similarly, when a Court having jurisdiction is seized of a matter, the question whether the amendment has to be allowed or not could be considered by that Court only and the question of ouster of jurisdiction and incompetency to decide anything in the suit will come into play only when that effect is achieved by way of amendment. It is but obvious that there has to be some authority to decide whether the amendment is to be allowed or not and before that is done, the Court seized of the matter and having jurisdiction alone will have to deal with it, otherwise there will be a vaccum and whether the amendment is allowable or not is a matter which ultimately is to be decided by the Court.

11. Accordingly, in my considered view, the question of ouster will come only when the plaint is amended. It is reiterated that the Court before which the case is pending alone is the Court competent to deal with the amendment and in that process the merit of the claim and the question whether the effect will be ouster of jurisdiction are extraneous considerations which are not in consonance with the spirit of Order VI Rule 17 of the Code of Civil Procedure. The jurisdiction of the Court is ousted only when the plaint is amended and if after amendment the Court which was originally trying the suit is thereafter lacking pecuniary jurisdiction to adjudicate upon the same, then there are provisions contemplated in the Code of Civil Procedure to deal with such like situations. Therefore, in my considered view, the dismissal of the application for amendment of the plaint on the ground that the proposed amendment would amount to ousting the jurisdiction of the learned trial Court is totally erroneous and not sustainable in law.

12. None of the judgments relied upon by the learned trial Court lay down this proposition of law that a proposed amendment which may result in ouster of jurisdiction of the Court cannot be allowed by that Court on this ground alone. Besides this, the conclusion which has been arrived at by learned trial Court to the effect that the proposed amendment was neither legally permissible nor necessary for proper adjudication is also erroneous because the finding returned by the learned trial Court to the effect that the amendment was not legally permissible has not been substantiated. If the intent of the learned trial Court while it stated that the proposed amendment was not legally permissible was this that the proposed amendment was not legally permissible because it intended to oust the jurisdiction of the learned trial Court, then the learned trial Court should not have ventured to dwell on this aspect of the matter as to whether the application filed for amendment of the plaint was filed after exercising due diligence or not. This is for the reason that if the Court comes to the conclusion that it does not has jurisdiction to

adjudicate upon the issue which has been raised before it, then the said Court while declining adjudication for want of jurisdiction cannot venture upon to return its findings on the merits of the issue. On this count also, the order passed by learned trial Court is not sustainable.

13. Learned trial Court has also not elaborated as to how the factum of tentative amount of use and occupation charges fixed by this Court which was subject to the adjustment in the final order of this Court and the tenancy not yet having terminated were relevant to decide an application filed under Order VI Rule 17 of the Code of Civil Procedure. The finding returned by learned trial Court that the application for amendment was filed at a belated stage was also erroneous because by way of proposed amendment, the plaintiff was only praying for amendment in the claim of recovery on the ground that as more than 11 years had passed since the filing of the suit and the arrears of use and occupation charges has arisen from Rs.10,56,437.50/- to Rs.35,18,624/-, as such, the plaint be permitted to be amended for incorporating the same in the plaint so that the plaintiff could lay her claim for recovery of Rs.35,18,624/- instead of Rs.10,56,437.50/-. There is no discussion in the judgment as to how the learned trial Court has come to the conclusion that 'due diligence' was not exercised by the plaintiff while filing the application praying for amendment of the plaint. The reasoning given in this regard by the learned trial Court is totally perverse as the grounds given in the application by the plaintiff praying for amendment of the plaint were not appreciated by the learned trial Court in their correct perspective.

14. "Due diligence" has been defined in Advanced Law Lexicon as under:

> *"Due diligence. Such watchful caution and foresight as the circumstances of the particular case demands."*

15. "Due diligence" has been defined in Black's Law Dictionary as under:

> *"Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by , a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case."*

16. The Hon'ble Supreme Court in **Pirgonda Hongonda Patil** Vs. **Kalgonda Shidgonda Patil and others** AIR 1957 SC 363 has held that the principles to be followed while allowing amendment in the pleadings are that the amendment sought should satisfy two conditions;

> *(a) not working injustice to the other side; and*
>
> (b) *of being necessary for the purpose of determining the real questions in controversy between the parties.*

17. The Hon'ble Supreme Court in **Revajeetu Builders and Developers** Vs. **Narayanaswamy and sons and others** (2009) 10 Supreme Court Cases 84 has held:

> *"31. In our considered view, Order VI Rule 17 is one of the important provisions of the CPC, but we have no hesitation in also observing that this is one of the most misused provision of the Code for dragging the proceedings indefinitely, particularly in the Indian courts which are otherwise heavily overburdened with the pending cases. All Civil Courts ordinarily have a long list of cases, therefore, the Courts are compelled to grant long dates which causes delay in disposal of the cases. The applications for amendment lead to further delay in disposal of the cases.*
>
> *63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.*
>
> *(1) Whether the amendment sought is imperative for proper and effective adjudication of the case?*

(2) Whether the application for amendment is bona fide or mala fide?

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? and

(6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive.

64. The decision on an application made under Order VI Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments."

18. The Hon'ble Supreme Court in **State of Madhya Pradesh** Vs. **Union of India and another** (2011) 12 Supreme Court Cases 268 has held:

"6. In order to consider the claim of the plaintiff and the opposition of the defendants, it is desirable to refer the relevant provisions. Order VI Rule 17 of the Code of Civil Procedure, 1908 (in short `the Code') enables the parties to make amendment of the plaint which reads as under:

> *"17. Amendment of pleadings - The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:*
>
> *Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."*

7. The above provision deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it must be shown that in spite of due diligence, such amendment could not have been sought earlier.

8. The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations.

9) Inasmuch as the plaintiff-State of Madhya Pradesh has approached this Court invoking the original jurisdiction under Article 131 of the Constitution of India, the Rules framed by this Court, i.e., The Supreme Court Rules, 1966 (in short `the Rules) have to be applied to the case on hand. Order XXVI speaks about "Pleadings Generally". Among various rules, we are concerned about Rule 8 which reads as under:

"8. The Court may, at any stage of the proceedings, allow either party to amend his pleading in such manner and on such terms as may be just, but only such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."

The above provision, which is similar to Order VI Rule 17 of the Code prescribes that at any stage of the proceedings, the Court may allow either party to amend his pleadings. However, it must be established that the proposed amendment is necessary for the purpose of determining the real question in controversy between the parties.

10. This Court, while considering Order VI Rule 17 of the Code, in several judgments has laid down the principles to be applicable in the case of amendment of plaint which are as follows:

(i) Surender Kumar Sharma v. Makhan Singh, (2009) 10 SCC 626, at para 5:

"5. As noted hereinearlier, the prayer for amendment was refused by the High Court on two grounds. So far as the first ground is concerned i.e. the prayer for amendment was a belated one, we are of the view that even if it was belated, then also, the question that needs to be decided is to see whether by allowing the amendment, the real controversy between the parties may be resolved. It is well settled that under Order 6 Rule 17 of the Code of Civil Procedure, wide powers and unfettered discretion have been conferred on the court to allow amendment of the pleadings to a party in such a manner and on such terms as it appears to the court just and proper. Even if, such an application for amendment of the plaint was filed belatedly, such belated amendment cannot be refused if it is found that for deciding the real controversy between the parties, it can be allowed on payment of costs. Therefore, in our view, mere delay and laches in making the application for amendment cannot be a ground to refuse the amendment."

(ii) North Eastern Railway Administration, Gorakhpur v. Bhagwan Das (dead) by LRS, (2008) 8 SCC 511, at para16:

"16. Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 CPC (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 CPC postulates amendment of pleadings at any stage of the proceedings.In Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs."

(iii) Usha Devi v. Rijwan Ahamd and Others, (2008) 3 SCC 717, at para 13:

"13. Mr Bharuka, on the other hand, invited our attention to another decision of this Court inBaldev Singh v. Manohar Singh. In para 17 of the decision, it was held and observed as follows: (SCC pp. 504-05)

"17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the

trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court.That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion on the court to allow an amendment of the written statement at any stage of the proceedings."

(iv) Rajesh Kumar Aggarwal and Others v. K.K. Modi and Others, (2006) 4 SCC 385, at paras 15 & 16:

"15. The object of the rule is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties."

(v) Revajeetu Builders and Developers v. Narayanaswamy and Sons and Others, (2009) 10 SCC 84, at para 63:

"63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

The above principles make it clear that Courts have ample power to allow the application for amendment of the plaint. However, it must be satisfied that the same is required in the interest of justice and for the purpose of determination of real question in controversy between the parties."

19. The Hon'ble Supreme Court in **Chander Kanta Bansal** Vs. **Rajinder Singh Anand** (2008) 5 Supreme Court Cases 117 has held that whether a party has acted with due diligence or not, would depend upon the facts and circumstances of each case. It has further held

that this would, to some extent, limit the scope of amendment to pleadings, but would still vest enough powers in courts to deal with the unforeseen situations whenever they arise. The Hon'ble Supreme Court further held that the entire object of the said amendment is to stall filing of applications for amending a pleading subsequent to the commencement of trial, to avoid surprises and the parties had sufficient knowledge of the other's case. It also helps in checking the delays in filing the applications. It has further held that once the trial commences on the known pleas, it will be very difficult for any side to reconcile. The Hon'ble Supreme Court further held that in spite of the same, an exception is made in the newly inserted proviso. Where it is shown that in spite of **due diligence,** a party could not raise a plea, it is for the Court to consider the same. Accordingly, the Hon'ble Supreme Court has held that it is not a complete bar nor shuts out entertaining of any later application. It also held that the reason for adding proviso is to curtail delay and expedite hearing of cases. Paragraphs No. 15 and 16 of the said judgment are quoted hereinbelow:

> *"15. As discussed above, though first part of Rule 17 makes it clear that amendment of pleadings is permitted at any stage of the proceeding, the proviso imposes certain restrictions. It makes it clear that after the commencement of trial, no application for amendment shall be allowed. However, if it is established that in spite of "due diligence" the party could not have raised the matter before the commencement of trial depending on the circumstances, the court is free to order such application.*
>
> *16. The words "due diligence" has not been defined in the Code. According to Oxford Dictionary (Edition 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (Eighth Edition), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edition 13A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs."*

20. In view of the discussion held above as well as the law laid down by the Hon'ble Supreme Court, in my considered view, learned trial Court erred in disallowing the application filed by the plaintiff for amendment of the plaint. The reasons given by the learned trial Court for rejecting the said application are neither sustainable on facts nor in law.

21. Accordingly, the petition is allowed. Impugned order passed by the Court of learned Civil Judge (Senior Division), Kangra at Dharamshala in CMA No. 80/2014 in Civil Suit No. 451/13/2003 dated 07.07.2014, vide which the learned Court below had dismissed the application filed by the present petitioner praying for amendment of the plaint is set aside and the application so filed by the petitioner/plaintiff for amendment of the plaint is allowed. It is made clear that post amendment of the plaint whether the learned Court below will have pecuniary jurisdiction or not to adjudicate upon the case shall be independently decided by the Court and thereafter the learned trial Court shall proceed with the matter strictly in accordance with law. Learned Court below is also directed to decide the application of the petitioner/plaintiff for possession of the premises in pursuance to the directions passed in Civil Suit No. 23 of 2003 and LPA No. 9 of 2005 as also the order dated 27.08.2012 in CMPMO Nos. 470 of 2011 and 478 of 2011. It is further clarified that the above directions issued to the learned trial Court shall also obviously be dependent upon the factum of the said Court having pecuniary jurisdiction to adjudicate upon the lis post amendment of the plaint. Petitioner through counsel is directed to put in appearance before the learned trial Court on ***03.11.2016,*** whereafter the learned trial Court will proceed with the matter in accordance with law.

With the above directions, the present petition is disposed of, so also the pending application(s), if any. No order as to costs.

****

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

Dharam Dutt .....Petitioner.

Vs.

Shri Hari Saran and others .....Respondents.

CMPMO No.: 4156 of 2013
Reserved on: 19.10.2016
Date of Decision: 20.10.2016

Code of Civil Procedure, 1908- Order 9 Rule 7- The suit was ordered to be dismissed in default- an application for restoration was filed, which was also dismissed – an appeal was preferred, which was allowed – held, in appeal that it is not permissible for the High Court to review or reweigh the evidence on which the order was passed - the suit was dismissed in default on 7.9.2007 - application for restoration was filed on 8.10.2007 as 7.10.2007 was Sunday – hence, the application cannot be said to be barred by limitation – Appellate Court had recorded the findings on the basis of the material on record- a technical approach should not be adopted to defeat substantial justice – appeal dismissed- however, the cost increased from Rs. 500/- to Rs. 2,000/-. (Para-9 to 16)

Cases referred:
Radhey Shyam and another Vs. Chhabi Nath and other (2015) 5 Supreme Court Cases 423
State of Nagaland Vs. Lipok AO and others (2005) 3 Supreme Court Cases 752

For the petitioner: Mr. Bimal Gupta, Senior Advocate, with Mr. Vineet Vashishta, Advocate.

For the respondents: Mr. G.D. Verma, Senior Advocate, with Mr. B.C. Verma, Advocate, for respondents No. 1 to 3 and 5.
Mr. Debender Ghosh, Advocate, for respondents No. 4 and 6 to 8.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this petition filed under Article 227 of the Constitution of India, the petitioner/defendant has prayed for quashing of judgment passed by the Court of learned Additional District Judge-I, Shimla in Civil Miscellaneous Appeal No. 2-S/14 of 2012 dated 08.07.2013, vide which the learned Court below allowed the appeal filed by the present respondents/plaintiffs under Order 43 Rule 1 of the Code of Civil Procedure and while setting aside order dated 01.10.2011 passed by the Court of learned Civil Judge (Junior Division) (V), Shimla in Case No. 164-IV of 2007, learned appellate Court ordered Civil Suit filed by the respondents/plaintiffs titled Hari Saran Vs. Dharam Dutt to be restored to its original number subject to costs of Rs.500/-.

2. Brief facts necessary for the adjudication of the present case are that a Suit filed by the present respondents/plaintiffs which was pending adjudication in the Court of learned Civil Judge (Junior Division), Court No. 5 Shimla was ordered to be dismissed in default on 07.09.2007. An application filed by the respondents/plaintiffs for setting aside order dated 07.09.2007 and for restoration of Civil Suit was also dismissed by the Court of learned Civil Judge (Junior Division), Court No. 5, Shimla vide order dated 01.10.2011. The application was

rejected *inter alia* on the grounds that neither there were sufficient grounds for restoration of the Civil Suit which stood dismissed in default nor the application was maintainable and further that the application so filed was also barred by limitation.

3. In appeal, the Court of learned Additional District Judge-I vide judgment dated 08.07.2013 set aside the order so passed by the Court of learned Civil Judge (Junior Division), Court No. 5, Shimla dated 01.10.2011. It was held by the learned appellate Court that the application was not barred by limitation as the suit was dismissed in default on 07.09.2007 and application for restoration of the same was filed on 08.10.2007. Learned appellate Court further held that there was sufficient cause for the absence of the plaintiffs from the Court on 07.09.2007 as the plaintiffs had proved that due to noting of wrong date of hearing neither the plaintiffs not their counsel could put in appearance on 07.09.2007 when the Suit was ordered to be dismissed in default. Learned appellate Court also took note of the fact that while disallowing the application for restoration of the Suit, learned trial Court had discussed different dates on which the suit of the plaintiffs was fixed for evidence, which as per the learned appellate Court was not relevant at all because the fact which was to be taken into consideration was only as to whether the absence was due to some reasonable cause or it was intentional or deliberate. It was concluded by the learned appellate Court that un-rebutted statement of one of the plaintiffs was sufficient to prove that the absence of the plaintiffs or their counsel on 07.09.2007 was neither intentional nor deliberate but due to the reason of noting wrong date of hearing. On these basis, the learned appellate Court while setting aside order dated 01.10.2011, ordered the Civil Suit to be restored to its original number subject to cost of Rs.500/-.

4. Feeling aggrieved by the said judgment, the petitioner/defendant has filed this petition.

5. Mr. Bimal Gupta, learned Senior Advocate appearing for the petitioner has argued that the judgment under challenge is not sustainable as learned appellate Court erred in coming to the conclusion that the application filed for restoration of the Civil Suit was not time barred and that there was sufficient cause shown by the plaintiffs in the said application for non-appearance on 07.09.2007, on which date the case was dismissed in default. According to Mr. Gupta, the case was dismissed in default on 07.09.2007, whereas the application for restoration of the same was filed on 08.10.2007, i.e. after the expiry of the period of limitation as was provided under Article 122 of the Limitation Act, which was 30 days. It was further argued by Mr. Gupta that the learned appellate Court had failed to appreciate while allowing the appeal that the plaintiffs had failed to take any steps for summoning the witnesses and adduce any evidence from the year 2003 onwards despite the fact that issues stood framed as on 10.06.2003 and thereafter, the plaintiffs were required to furnish the list of witnesses within fourteen days from the date of framing of the issues. He further argued that learned appellate Court had further not appreciated that the averments made in the application for restoration of the suit were totally wrong as there was no averment in the application as to how and why the counsel of the plaintiffs was not present on 07.09.2007. On these basis, it was urged by Mr. Bimal Gupta that the judgment passed by the learned appellate Court was not sustainable in law and was liable to be set aside.

6. On the other hand, Mr. G.D. Verma, learned Senior Counsel appearing for respondents No. 1 to 3 and 5 argued there was no merit in the present petition as there was no perversity or infirmity with the judgment passed by the learned appellate Court ordering the restoration of the suit so filed by the respondents/plaintiffs. Mr. Verma argued that the contention of the petitioner that the application was time barred was misleading as the application for restoration of the case was in fact filed within the period of limitation. He further argued that in the application itself it was clearly mentioned by the plaintiffs that non-appearance in the Court on 07.09.2007 was on account of the date having been wrongly noted as 07.10.2007 instead of 07.09.2007 by the plaintiffs and it was only on 06.10.2007 when the plaintiffs came for the briefing of next date of hearing with respect to witnesses that this fact was revealed by counsel that the case stood dismissed in default. Mr. Verma also pointed out that it was categorically mentioned in the application itself that when the case was fixed on 18.07.2007 on

which date the case was adjourned for 07.09.2007, the next date of hearing was inadvertently noted as 07.10.2007 instead of 07.09.2007 and it was on this count that neither the plaintiffs nor their counsel could put in appearance before the Court on 07.09.2007, on which date the case was dismissed in default. It was further argued by Mr. Verma that even otherwise in exercise of its jurisdiction under Article 227 of the Constitution of India, this Court was not to sit over the judgment passed by the learned appellate Court as an appellate Court but was to see as to whether there was any error of jurisdiction committed by the learned Court below while passing the order/judgment which was under challenge. On these grounds, it was urged by Mr. Verma that neither there was any perversity nor any infirmity with the findings returned by the learned appellate Court and the petition be accordingly dismissed as there was no merit in the same.

7. Mr. Devender Ghosh adopted the arguments of Mr. Verma.

8. I have heard the learned counsel for the parties and also gone through the records of the case as well as the judgment passed by the learned appellate Court and order passed by the learned trial Court.

9. Before proceeding further, it is relevant to take note of the fact that supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an inferior Court or Tribunal has proceeded within its parameters and not to correct an error apparent on the fact of the record, much less of an error of law. It is settled law that in exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an appellate Court. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or reweigh the evidence upon which the inferior Court or Tribunal purports to have passed the order or to correct errors of law in the decision.

10. The Hon'ble Supreme Court in **Radhey Shyam and another** Vs. **Chhabi Nath and other** (2015) 5 Supreme Court Cases 423 has held that judicial orders of Civil Courts are not amenable to writ of certiorari under Article 226 of the Constitution of India. It has further held that jurisdiction under Article 227 is distinct from jurisdiction under Article 226 of the Constitution of India. It further held that all the Courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. The Hon'ble Supreme Court has further held as under:

> *"26. The Bench in Surya Dev Rai also observed in para 25 of its judgment that distinction between Articles 226 and 227stood almost obliterated. In para 24 of the said judgment distinction in the two articles has been noted. In view thereof, observation that scope of Article 226 and 227 was obliterated was not correct as rightly observed by the referring Bench in Para 32 quoted above. We make it clear that though despite the curtailment of revisional jurisdiction under Section 115 CPC by Act 46 of 1999, jurisdiction of the High Court under Article 227 remains unaffected, it has been wrongly assumed in certain quarters that the said jurisdiction has been expanded. Scope of Article 227 has been explained in several decisions including Waryam Singh and another vs. Amarnathand anotherst, Ouseph Mathai vs. M. Abdul Khadir[12], Shalini Shyam Shetty vs. Rajendra Shankar Patil[13] and Sameer Suresh Gupta vs. Rahul Kumar Agarwal[14]. In Shalini Shyam Shetty, this Court observed :*
>
> > *"64. However, this Court unfortunately discerns that of late there is a growing trend amongst several High Courts to entertain writ petition in cases of pure property disputes. Disputes relating to partition suits, matters relating to execution of a decree, in cases of dispute between landlord and tenant and also in a case of money decree and in various other cases where disputed questions of property are involved, writ courts are entertaining such disputes. In some cases the High Courts, in a routine manner, entertain petitions under Article 227 over such disputes and such petitions are treated as writ petitions.*

> *65. We would like to make it clear that in view of the law referred to above in cases of property rights and in disputes between private individuals writ court should not interfere unless there is any infraction of statute or it can be shown that a private individual is acting in collusion with a statutory authority.*
>
> *66. We may also observe that in some High Courts there is a tendency of entertaining petitions under Article 227 of the Constitution by terming them as writ petitions. This is sought to be justified on an erroneous appreciation of the ratio in Surya Dev and in view of the recent amendment to Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999. It is urged that as a result of the amendment, scope of Section 115 CPC has been curtailed. In our view, even if the scope of Section 115 CPC is curtailed that has not resulted in expanding the High Court's power of superintendence. It is too well known to be reiterated that in exercising its jurisdiction, High Court must follow the regime of law.*
>
> *67. As a result of frequent interference by the Hon'ble High Court either under Article 226 or 227 of the Constitution with pending civil and at times criminal cases, the disposal of cases by the civil and criminal courts gets further impeded and thus causing serious problems in the administration of justice. This Court hopes and trusts that in exercising its power either underArticle 226 or 227, the Hon'ble High Court will follow the time honoured principles discussed above. Those principles have been formulated by this Court for ends of justice and the High Courts as the highest courts of justice within their jurisdiction will adhere to them strictly."*
>
> *(emphasis supplied)*

11. It is in this background that this Court will examine the order under challenge in exercise of its supervisory jurisdiction.

12. The first contention of the learned counsel for the petitioner that the judgment passed by the learned appellate Court is not sustainable in law as the findings returned by the learned appellate Court to the effect that the application filed by the plaintiffs for restoration of the suit was barred by limitation is without any merit. Admittedly, the suit was dismissed in default on 07.09.2007 and the application for restoration of the same was filed on 08.10.2007. Admittedly, 07.10.2007 was Sunday. Thus, the last date of limitation for filing the application being Sunday, the limitation but obvious was to expire on 08.10.2007 and as the application for restoration of the Civil Suit was filed on 08.10.2007, it could not be said that the same was barred by limitation.

13. Coming to the other aspect of the matter, in my considered view, learned appellate Court while setting aside the order dated 01.10.2011 passed by the learned trial Court and further by ordering the restoration of the Civil Suit to its original number has neither overreached its jurisdiction nor it can be said that while deciding the said appeal, the learned appellate Court has not proceeded within its parameters. The findings so returned by the learned appellate Court are based on the appreciation of material which was placed on record by the respective parties. A perusal of the application filed by the plaintiffs for restoration of the suit as well as other material placed on record by the parties also demonstrate that it cannot be said that the conclusion which has been arrived at by the learned appellate Court to the effect that the plaintiffs had shown sufficient cause for their absence from the Court on 07.09.2007 and were entitled to the relief of restoration of the suit was a perverse conclusion. Even otherwise, in my considered view, interest of justice would not have been served if the application filed by the plaintiffs for restoration of the Civil Suit was disallowed on some technicalities. No prejudice has been caused to the defendant by allowing the application for restoration of the Civil Suit because it is not as if the application for restoration of the suit was either filed beyond the period of limitation and was filed after a long delay.

14. The Hon'ble Supreme Court in **State of Nagaland** Vs. **Lipok AO and others** (2005) 3 Supreme Court Cases 752 has held that when substantial justice and technical approach are pitted against each other, the former has to be preferred.

15. Even otherwise, it is settled law that technicalities of law cannot prevent the Court from doing substantial justice. Judiciary is not respected on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so by making justice oriented approach from this perspective.

16. Therefore, in view of the discussion held above, I do not find any merit in the present petition and the same is accordingly dismissed with a slight modification in the order dated 08.07.2013 passed by the learned appellate Court to the extent that cost assessed by the learned appellate Court of Rs.500/- is raised to Rs.2000/-, which shall be paid by the respondents/plaintiffs to the petitioner/defendant within a period of six weeks from today.

With the above modification in the judgment passed by the learned appellate Court, the present petition is disposed of.

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

Sh.Harsh s/o late Sh. Kishori Lal & others ....Revisionists

Versus

Sh. Harish Kumar s/o late Sh. Hem Chand & others ....Non-revisionists

Civil Revision Petition No. 212/2007
Order Reserved on 28.07.2016
Date of order: 20.10.2016

Code of Civil Procedure, 1908- Order 21 Rule 32- a decree of injunction was passed by the Court, which was put to the execution – the execution petition was dismissed – held, in revision that a decree for mandatory injunction can be executed within three years- the execution was filed after more than 11 years and was clearly barred by limitation- further, cogent and reliable evidence is required to prove the allegations in the execution proceedings – the findings of fact cannot be reversed unless these are perverse, which is not the case here- appeal dismissed.

(Para-10 to 15)

Cases referred:

Masjid Kacha Tank Nahan Vs. Tuffail Mohammed, AIR 1991 Apex Court page 455
Indore Municipality Vs. K.N. Palsikar, AIR 1969 Apex Court page 580
P. Udayani Devi Vs. V.V. Rajeshwara Prasad Rao, AIR 1995 Apex Court page 1357
Gurdial Singh Vs. Raj Kumar Aneja, AIR 2002 Apex Court page 1004

For revisionists : Mr. G. R. Palsra, Advocate
For non-revisionists : Ex-parte vide order dated 28.7.2016.

The following order of the Court was delivered:

P. S. Rana, J.

Present civil revision petition is filed under Section 115 Code of Civil Procedure 1908 against the order dated 17.07.2007 passed by learned Executing Court Civil Judge (Jr. Division) Court No.2 Mandi (H.P.) in Execution Petition No.8/99/25-X of 2006 whereby learned Executing Court dismissed execution petition filed under Order XXI Rule 32 Code of Civil Procedure 1908.

Brief facts of the case:

2. Deceased Kishori Lal decree holder filed execution petition under Order XXI Rule 32 CPC pleaded therein that C.S. No.142/1986 title Kishori Lal Vs. Hem Chand was decided on dated 7.5.1987 and ex-parte decree of permanent prohibitory injunction was passed against judgment debtor restraining judgment debtor from opening any window or door facing towards the land of decree holder. In addition decree of mandatory injunction was also passed in favour of decree holder and judgment debtor was directed by way of mandatory injunction to remove any window or door and close it so far it faces the land of decree holder. Execution petition filed on 7.5.1999. Before filing execution petition original judgment debtor namely Hem Chand died and execution petition filed against sons of deceased JD and against widow of deceased JD.

3. Per contra response filed on behalf of sons of JD and widow of JD pleaded therein that present execution petition is not maintainable and present execution petition is bad for non-joinder of necessary parties. It is pleaded that ex-parte decree passed in the year 1987 and original judgment debtor namely Hem Chand died in the year 1989-1990. It is further pleaded that Harish, Vinod and Shayamu sons of Hem Chand were minors and Smt. Daya Devi widow of Hem Chand is an illiterate woman and they have no knowledge about the ex-parte decree passed by Civil Court. It is further pleaded that sons and widow of deceased JD have not constructed any new window or door facing towards land of decree holder after passing decree by Civil Court. Prayer for dismissal of execution petition sought.

4. Learned executing Court framed following issues on dated 02.09.2013:

(1) Whether the DH is entitled for execution of decree against the JDs as prayed for? ….OPDH.

(2) Whether the execution petition is not maintainable as alleged? ……..OPJDs.

(3) Whether the execution petition is bad for non-joinder and mis-joinder of necessary parties? ……..OPJDs.

(4) Whether the execution petition is time barred? ……..OPJDs.

(5) Relief.

5. Learned executing Court decided issues No.1 & 3 in negative and learned executing Court decided issues No.2 & 4 in affirmative. Learned executing Court dismissed the execution petition filed under Order XXI Rule 32 CPC. Decree holder namely Kishori Lal died on 4.10.2007 and his LRs Harsh and others filed present revision petition on 28.11.2007 before H.P. High Court.

6. Court heard learned Advocate appearing on behalf of revisionists and Court also perused the entire record carefully.

7. Following points arise for determination:

1) Whether civil revision petition filed under Section 115 Code of Civil Procedure 1908 is liable to be accepted as mentioned in memorandum of grounds of revision petition?

3) Relief.

Findings upon Point No.1 with reasons:

8. AW-1 Sh. Kishori Lal has stated that he is owner of khasra No.880 and 881 of immovable property situated in Samkhetar. He has stated that in the year 1986 his neighbour Hem Chand deceased JD opened his windows and doors towards his land. He has stated that he requested deceased JD not to open windows and doors towards his land but he did not accept his request and thereafter he filed civil suit and same was decreed. He has stated that thereafter he filed execution petition against sons and widow of JD for violating judgment and decree passed against judgment debtor by the Civil Court. He has stated that JD Hem Chand died in the year 1990. He has stated that judgment debtor has four children. He has stated that Dinesh was also son of JD and he used to reside at Kullu and he has died. He has stated that he does not know

that Hem Lata is daughter of JD. He has admitted that he did not implead the family members of Dinesh and Hem Lata as co-party in execution petition. He has denied suggestion that he has filed execution petition just to harass sons and widow of JD.

9. RW-1 Sh. Harish Kumar has stated that his house is situated at Samkhetar. He has stated that residential house of Sh. Kishori Lal is situated at a distance of about 100 feet from his house. He has stated that decree holder has constructed his cattle shed and latrine adjoining residential house of deceased JD. He has stated that he does not know that civil suit was filed against deceased judgment debtor. He has stated that JD also did not disclose about ex-parte decree. He has stated that LRs of JD have not raised any door or window towards the land of decree holder after passing of decree. He has stated that execution petition is filed just to harass LRs of JD. He has denied suggestion that LRs of judgment debtor were aware about the ex-parte decree. He has admitted that ventilator is kept towards land of deceased DH. He has denied suggestion that LRs of judgment debtor have harassed deceased Kishori Lal DH in illegal manner.

10. Submission of learned Advocate appearing on behalf of revisionists that learned executing Court has illegally decided issue No.4 relating to limitation is decided accordingly for reasons hereinafter mentioned. It is proved on record that ex-parte decree of permanent prohibitory injunction was passed against deceased judgment debtor by Civil Court on 7.5.1987. It is also proved on record that in addition decree of simple mandatory injunction was passed by learned Trial Court against deceased JD on 7.5.1987. Prayer of revisionists before executing Court is to execute decree of simple mandatory injunction regarding closing of window opening towards land of DH. It is well settled law that limitation for enforcement of decree of simple mandatory injunction is three years only from date of decree or where date is fixed for performance three years from such date as per Article 135 of the Limitation Act 1963 as per schedule annexed with Limitation Act 1963.

11. It is also well settled law that any other decree can be executed within twelve years except decree of mandatory injunction as per Article 136 of the Limitation Act 1963 as per schedule annexed with Limitation Act 1963. It is also well settled law that decree of perpetual injunction is not subject to any period of limitation. Learned Trial Court did not pass decree of perpetual mandatory injunction but only pass decree of simple mandatory injunction in C.S. No.142 of 1986 title Kishori Lal Vs. Hem Chand decided on 07.05.1987. It is held that decree of simple mandatory injunction was to be executed within three years w.e.f. 07.05.1987 as per Article 135 of Limitation Act 1963 annexed with schedule of Limitation Act 1963.

12. Decree holder did not file any site plan in order to prove that LRs of JD have raised new window after passing of decree. Even decree holder did not adduce any positive cogent and reliable independent evidence on record in order to prove that LRs of JD have raised new window after passing of decree. Even decree holder did not examine any mason or labourer in order to prove that LRs of JD have raised new window after passing of decree. It is well settled law that execution proceedings under order XXI Rule 32 CPC are punitive proceedings and in order to punish LRs of JD positive cogent and reliable evidence is required.

13. Submission of learned Advocate appearing on behalf of revisionists that LR of judgment debtor namely Harish Kumar when appeared in witness box as RW-1 has admitted existence of ventilator towards the land of decree holder and on this ground execution petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Court has carefully perused the testimony of LR of judgment debtor RW-1 namely Harish Kumar. Court has also carefully perused prayer sought by DH in present execution petition. DH has sought relief of removal of window opening towards land of DH in execution petition. DH has not sought relief of removal of ventilator in execution petition. There is lot of difference between window and ventilator as per law. Window means an opening in a wall fitted with glass in a frame to let in light or air and allow people to see out. Ventilator means sky light place below lintel of room.

14. It is well settled law that in revision petition High Court cannot reverse findings of facts unless findings are perverse. See AIR 1991 Apex Court page 455 title **Masjid Kacha Tank Nahan Vs. Tuffail Mohammed**. Also see AIR 1969 Apex Court page 580 title **Indore Municipality Vs. K.N. Palsikar.** Also see AIR 1995 Apex Court page 1357 title **P. Udayani Devi Vs. V.V. Rajeshwara Prasad Rao.** Also see AIR 2002 Apex Court page 1004 title **Gurdial Singh Vs. Raj Kumar Aneja.** It is held that order of learned executing Court is not perverse. Point No.1 is decided against revisionists.

Point No.2 (Relief).

15. In view of findings upon point No.1 present civil revision petition is dismissed. Parties are left to bear their own costs. File of learned executing Court alongwith certified copy of the order be sent back forthwith. C.R. No.212/2007 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 SANDEEP SHARMA, J.

Honorary Commissioned Officers Welfare Association of Himachal Pradesh ..Petitioner

Versus

The Union of India and others ...Respondents

CWP No. 1258 of 2015
Reserved on: October 6, 2016
Decided on: October 20, 2016

Constitution of India, 1950- Article 226- Petitioner is a registered association of Honorary Commissioned Officers retired from the Army in different years- individual members of association were given and granted full power and authority to have, hold and enjoy the honorary rank with all and singular privileges- petitioner claimed that members of the association are being subjected to insult and harassment at the hands of Commissioned Officers, soldiers and also civil employees- petitioner claimed equivalent status as Commissioned Officers- held, that one of the members of the association had approached Armed Forces Tribunal for claiming similar reliefs- however, application was withdrawn - as per Armed Forces Tribunal Act, 2007, all matters relating to conditions of service of Army personnel need to be adjudicated upon by the Armed Forces Tribunal- matter raised before the High Court is a service matter and, therefore, the matter is to be adjudicated by Armed Forces Tribunal- writ petition is not maintainable- petition dismissed with liberty to approach the Armed Forces Tribunal. (Para-8 to 19)

Case referred:
Union of India and others v. Major General Shri Kant Sharma, (2015) 6 SCC 773

For the petitioner	Mr. Ravinder Singh Jaswal, 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:

Per Sandeep Sharma, Judge:

By way of the present writ petition under Article 226 of the Constitution of India, the petitioner has prayed for the following reliefs:

"i) That the respondents may kindly be directed to withdraw the Extract of Para 178 of Regulations for the Army (Revised Edition 1987) which is violation

rights guaranteed under the PARCHMENT by the Supreme Commander of Armed Forces and is in violation to the Articles 14 & 16 of the Constitution of India.

ii) That the respondents may further be directed to ensure prompt and timely restoration of facilities in Medical Sector, CSD Canteen and also in Mess as per their entitlement.

iii) That the respondents further be directed to calculate the pension of Honorary Commissioned Officers as per the ratio given under the IV Central Pay Commission which was equal to the Commissioned Officers and also release the arrear alongwith interest till the realization of the same.

iv) That the respondents may further be directed to ensure equivalent status to the Honorary Commissioned Officers to the Commissioned Officers as promised by the Supreme Commander of Armed Forces i.e. President of India."

2. Petitioner-association is a registered association of Honorary Commissioned Officers retired from active service of the Indian Army in different years from their respective Units/Regiments. Record reveals that the members of petitioner-association during their service were granted honorary rank of Lieutenant/Captain in active service on the occasion of Republic Day by the Supreme Commander of Armed Forces i.e. President of India vide office corps order (annexure P-1). With the grant of aforesaid honorary rank of Lieutenant/Captain in the Army, persons on whom such rank is conferred, gets following benefits/ facilities and privileges:-

"a). That the Honorary Commissioned Officers wears the Rank/Badges of the Commissioned Rank during the Active service till his retirement;

b). That the Honorary Commissioned Officers having the same dress code and also have been given funds for Officers Kit (Mess Uniform for entering the offices mess)

c). That the Honorary Commissioned Officers draws the rations/ allowances on the scales as is applicable to the officers equivalent to the Commissioned Officers;

d). That the Honorary Commissioned Officer when admitted in the service hospitals, their ration is drawn as per Officers entitlement and served accordingly and also charged nominally.

e). That the Honorary Commissioned Officers draws the same pay as given to the Commissioned Officers in regular Army.

f). That the Honorary Commissioned Officers having the canteen facilities equivalent to the Commissioned Officers.

g). That the Honorary Commissioned Officers have also been conferred additional power of command during service in regular army."

3. Perusal of annexure P-2 i.e. PARCHMENT given by the Supreme Commander of Armed Forces suggests that with the conferment of the honorary rank, as referred to herein above, individual, on whom such honour is conferred, is given and granted full power and authority to have, hold and enjoy the said honorary rank with all and singular privileges thereunto belonging. By way of the aforesaid order, Supreme Commander also commanded all the officers and men of the regular Army to acknowledge the individual as Honorary Lieutenant/Captain, as the case may be. In nutshell, case of the petitioner-association is that despite there being a specific order of the President of India, members of the petitioner-association are being subjected to insult and harassment at the hands of Commissioned Officers, soldiers and also civil employees, whenever they visit canteen and military hospitals run by the respondents. Petitioner-association, in the body of the petition has indicated certain instances, when they were subjected to humiliation, insult and harassment by the respondents during their visit to the canteens and Army hospitals. As per the petitioner-association, they being holders of honorary rank, though have been granted full power/ authority to have, hold and enjoy honorary

rank and all and singular privileges belonging to the rank, but respondents often do not acknowledge them to be Lieutenant/Captain, to which rank they are entitled pursuant to the specific orders. Since the petitioners were not being provided facilities as per their rank, they filed an application under Right to Information Act, seeking information on the status of ration and clothing provided to the officers and officers mess etc. Respondents, in turn, informed that all the Commissioned Officers are authorized for ration as per their scales. In reply to other queries, they have simply handed over extract copy of AG/CW-2 (annexure P-9) i.e. extract of regulation 178 of the Regulations for Army (revised Edition 1987), wherein it is provided as under:

> "178. Status (a) The status of the JCO as such is not affected by the grant to him of the honorary rank of Lieut. or Captain, nor does the commission granting him that rank confer on him any additional powers of command.
>
> (b) Such honorary commissioned officers will take rank according to their Junior Commissioned Officers rank and will accordingly be junior to all officers. No promotion to or in the cadre of JCOs will be made in the place of a JCO granted a commission as honorary officer.
>
> (c) Similarly, the seniority of a Naib Subedar Head Clerk will not be affected by the grant of honorary rank as a Risaldar or Subedar."

4. Perusal of aforesaid Regulation suggests that status of Junior Commissioned Officers upon whom honorary rank of Lieutenant/Captain is conferred is neither affected by such conferment, nor the commission granting him that rank confers on him any additional powers of command. It further suggests that the already commissioned officers would take rank according to their JCO rank and they would be junior to all the officers. As per petitioner-association, Junior Commissioned Officers stand defined under the Army Act, 1950, which provides as under:

> "Section 3 (xii) " junior commissioned officer" means a person commissioned, gazetted or in pay as a junior commissioned officer in the regular Army or the Indian Reserve Forces, and includes a person holding a junior commission in the Indian Supplementary Reserve Forces. or the Territorial Army, 2[who is for the time being subject to this Act;

5. Similarly, para-177 of the Regulations of Army provides about honorary officers, which is as under:

> "(a) JCOs who have rendered specially distinguished service, and who are serving, in the Regular Army, may be granted commissions as Honorary Officers in the rank of Captain or Lieutenant.
>
> (b) Nomination for the grant of commissions as honorary officers and for promotion to Captain of JCOs holding the commission of Honorary officer with the rank of Lieutenant will be made by the Chief of the Army Staff.
>
> (c). the ratio of honorary commissions for each Republic Day and Independence Day will be:
>
> (i). Hony. Capts. – 1 for every 4 Hony Lieuts.
>
> (ii). Hony. Lieuts – 12 for every 1000 JCOs."

6. Case of the petitioner-association is that once they are conferred honorary commissioned rank of the officers by the Supreme Commander of Armed Forces, they are entitled to equivalent status as of Commissioned Officers. Hence, para-178, as reproduced hereinabove, needs to be withdrawn because otherwise same would be in violation of specific order as contained in aforesaid PARCHMENT, Annexure P-2.

7. We have heard the learned counsel for the parties and gone through the records of the case carefully.

8. Close scrutiny of the documents made available on record reveals that before approaching this Court by way of instant petition, one of the members of the petitioner-

association had approached the Armed Forces Tribunal by way of OA No. 2430/2012, praying therein similar reliefs as have been claimed in the present petition. Further, order dated 3.4.2014 (annexure P-27) suggests that aforesaid member withdrew the said Original Application, before the matter could be adjudicated by the Tribunal on the merits.

9. Perusal of order passed by the Tribunal clearly suggests that pursuant to Original Application filed by said member, respondents and the applicant had filed reply and replication, respectively. Aforesaid order nowhere spells out reasons, if any, for withdrawing the Original Application. Aforesaid order suggests that the applicant withdrew the Original Application to seek remedy before this Court. There is no order, if any, of the Tribunal, on merits qua the claim of the original applicant, who is admittedly a member of the petitioner-association. Hence, it can not be concluded that the Original Application referred to herein above was returned by the Armed Forces Tribunal on the ground of jurisdiction.

10. Since, during the proceedings of the instant case, counsel representing the respondents raised specific issue with regard to maintainability and jurisdiction, this Court intends to take up issue of maintainability and jurisdiction, at the first instance, before proceeding to decide the case on merits.

11. It is undisputed before us that the Armed Forces Tribunal Act, 2007 (herein after referred to as 'Act') was assented by the President of India on 25.12.2007 and published in the Gazette of India on 28.12.2007, meaning thereby that the Act is in operation. It would be relevant to reproduce herein Section 2 of the Act:

> "2. Applicability of the Act :(1) The provisions of this Act shall apply to all persons subject to the army Act, 1950, (46 of 1950) the Navy Act, 1957 (62 of 1957) and the Air Force Act, 1950 (45 of 1950)
>
> (2) This Act shall also apply to retired personnel subject to the Army Act, 1950 (46 of 1950) or the Navy Act, 1957 (62 of 1957) or the Air Force Act, 1950 (45 of 1950) including their dependants, heirs and successors, in so far as it relates to their service matters."

12. Perusal of aforesaid Section clearly suggests that the provisions of this Act apply to all the persons subject to the Army Act, 1950, the Navy Act, 1957 and the Air Force Act, 1950. It further suggests that the Act also applies to retired personnel subject to the aforesaid Acts. It also includes their dependants, heirs and successors, in so far as it relates to their service matters. Close reading of Section 2 clearly suggests that the service matters relating to Army personnel, who are in active service or retired, would be adjudicated by the Armed Forces Tribunal in terms of the Act ibid. At this stage, it would be profitable to refer to the definition of 'Service Matters', as provided under Section 3(o) of the Act:

> "3. (o) "service matters", in relation to the persons subject to the Army Act, 1950 (46 of 1950) the Navy Act, 1957 (62 of 1957) and the Air Force Act, 1950 (45 of 1950) mean all matters relating to the conditions of their service and shall include—
>
> (i) remuneration (including allowances), pension and other retirement benefits;
>
> (ii) tenure, including commission, appointment, enrolment, probation, confirmation, seniority,
>
> training, promotion, reversion, premature retirement, superannuation, termination of service and penal deductions;
>
> (iii) summary disposal and trials where the punishment of dismissal is awarded;
>
> (iv) any other matter, whatsoever, but shall not include matters relating to—

(i) orders issued under section 18 of the Army Act, 1950 (46 of 1950) sub-section (1) of section 15 of the Navy Act, 1957 (62 of 1957) and section 18 of the Air Force Act, 1950; (45 of 1950) and

(ii) transfers and postings including the change of place or unit on posting whether

individually or as a part of unit, formation or ship in relation to the persons subject to the Army Act, 1950 (46 of 1950) the Navy Act, 1957 (62 of 1957) and the Air Force Act, 1950 (45 of 1950);

(iii) leave of any kind;

(iv) summary court martial except where the punishment is of dismissal or imprisonment for more than three months;

13. Definition, as provided under Section 3 of the Act clearly provides that all the matters relating to conditions of service of Army personnel need to be adjudicated upon by the Armed Forces Tribunal in terms of the Act ibid. Section 3(o)(ii) of the Act includes the matters, if any, relating to the tenure, commission, appointment and enrolment, probation, confirmation, seniority, training, promotion and reversion, premature retirement, superannuation, termination of service and penal deductions. Service matters relating to the Commission are also included in the aforesaid definition. Section 3(o)(iv) includes other matters, whatsoever, meaning thereby any matter relating to service can be adjudicated by the Armed Forces Tribunal in terms of the Act. Under section 3 of the Act, following are the matters which have not been included in the definition of 'Service Matters': -

"(iv) any other matter, whatsoever, but shall not include matters relating to—

(i) orders issued under section 18 of the Army Act, 1950 (46 of 1950) sub-section (1) of section 15 of the Navy Act, 1957 (62 of 1957) and section 18 of the Air Force Act, 1950; (45 of 1950) and

(ii) transfers and postings including the change of place or unit on posting whether

individually or as a part of unit, formation or ship in relation to the persons subject to the Army

Act, 1950 (46 of 1950) the Navy Act, 1957 (62 of 1957) and the Air Force Act, 1950 (45 of 1950);

(iii) leave of any kind;

(iv) summary court martial except where the punishment is of dismissal or imprisonment for more than three months;"

14. Perusal of aforesaid clause suggests that the grievances put forth on behalf of the petitioner-association, as emerged from the record, fall in the category of 'service matters'.

15. This Court, after bestowing thoughtful consideration on the pleadings as well as provisions of law, as have been detailed herein above, has no hesitation to conclude that the present matter is a 'Service Matter' and needs to be adjudicated, at the first instance, by the Armed Forces Tribunal in terms of the Act ibid, and, this Court has no jurisdiction to entertain the present petition. At the cost of repetition, it may be stated that the petitioner-association is aggrieved by the action of the respondents, whereby its members are being denied certain benefits, powers and privileges, to which the members of the petitioner-association are entitled to, in terms of PARCHMENT issued by the Supreme Commander of Armed Forces i.e. President of India, whereby it has been specifically ordered that the Honorary Commissioned Officers would get full power and authority to have, hold and enjoy the honorary rank with all and singular of the privileges thereunto belonging. Since the members of the petitioner-association are claiming "service benefits" in terms of the honorary rank conferred upon them, it can be safely inferred that the instant matter is purely a service matter in terms of Section 3 of the Act.

16. In view of above, this Court is of the view that the present writ petition is not maintainable, in view of the specific mechanism provided under the Act. Moreover, perusal of the relief clause, especially clause iii) itself suggests that a direction has been sought against respondents to calculate the pension of Honorary Commissioned Officers in terms of recommendations of 4th Central Pay Commission, which was allegedly equal to Commissioned Officers. Similarly, petitioner has prayed for a direction to the respondents to ensure prompt and timely restoration of facilities in medical sector, CSD Canteen and also in Mess as per their entitlement. Perusal of aforesaid reliefs leaves no doubt in the mind of the Court that these all are "service benefits", to which an individual is entitled, in lieu of the service rendered by him in the Organization. Though, in clause i) of the reliefs, petitioner-association has prayed that respondents may be directed to withdraw extract of para-178 of the Regulations for the Army (Revised Edition 1987) being in violation to the right granted under PARCHMENT issued by the President of India, petitioner-association has nowhere laid challenge to the vires, if any, of the aforesaid provisions, rather, prayer has been made for withdrawing the para 178. This Court after perusing the provisions as contained in the Act, is of definite view that Armed Forces Tribunal has the jurisdiction to adjudicate upon the correctness, if any, of para-178 of the Regulations. Otherwise also, there is no challenge to the provisions contained in para-178.

17. Having said so, this Court sees no force in the contentions put forth on behalf of the petitioner-association that the present matter needs to be adjudicated by this Court, while exercising powers under Article 226 of the Constitution of India. To the contrary, this Court is of the view that the Armed Forces Tribunal has the power to decide the controversy at hand, in terms of the provisions of the Act ibid.

18. Hon'ble Apex Court has categorically held that Courts of law, while exercising jurisdiction should have due regard to the legislative intent evidenced in various statutes and exercise jurisdiction consistent therewith. In the present case also, dispute, if any, raised in the petition, can be adjudicated by the Armed Forces Tribunal and this Court has no power to exercise powers under Article 226 of the Constitution of India. Reliance is placed on (2015) 6 SCC 773, **Union of India and others v. Major General Shri Kant Sharma**, wherein their Lordships of the Hon'ble Apex Court have held as under:

> "16. Constitution of India In this context, it is also necessary to notice Articles 32 and 33 of the Constitution. Article 32 falls under Chapter III of the Constitution which deals with fundamental right. The said article guarantees the right to move before the Supreme Court by appropriate proceedings for the enforcement of the fundamental rights conferred by the Part III. Article 32 reads as follows:
>
> > "Article 32. Remedies for enforcement of rights conferred by this Part.-(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
> >
> > (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
> >
> > (3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
> >
> > (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."
>
> 17. Article 33 empowers the Parliament to restrict or abrogate the application of fundamental rights in relation to Armed Forces, Para Military Forces, the

Police etc. (refer: Ous Kutilingal Achudan Nair vs.Union of India, (1976) 2 SCC 780). The said article reads as follows:

> "Article 33. Power of Parliament to modify the rights conferred by this Part in their application to Forces, etc.-Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to,-
>
> (a) the members of the Armed Forces; or
>
> (b) the members of the Forces charged with the maintenance of public order; or
>
> (c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or
>
> (d) person employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation referred to in clauses (a) to (c), be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them."

18. Article 226 empowers High Court to issue prerogative writs. The said Article reads as under:

> "Article 226. Power of High Courts to issue certain writs.- (1) Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including 1[writs in the nature of habeas corpus, mandamus, prohibition, quo warran to and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.
>
> (2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.
>
> (3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without-
>
> (a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and
>
> (b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32."

19. Article 227 relates to power of superintendence of High Courts over all Courts and Tribunals. It reads as follows:

> "Article 227. Power of superintendence over all courts by the High Court.- (1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.
>
> (2) Without prejudice to the generality of the foregoing provision, the High Court may-
>
> (a) call for returns from such courts;
>
> (b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and
>
> (c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.
>
> (3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:
>
> Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.
>
> (4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces."

20. In this context, it is also necessary to notice Article 136 of the Constitution which provides special leave to appeal to Supreme Court:

> "136. Special leave to appeal by the Supreme Court.-(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.
>
> (2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces."

In view of clause (2) of Article 136 which expressly excludes the judgments or orders passed by any Court or Tribunal constituted by or under any law relating to Armed Forces, the aggrieved persons cannot seek leave under Article 136 of Constitution of India; to appeal from such judgment or order. But right to appeal is available under Section 30 with leave to appeal under Section 31 of the Armed Forces Tribunal Act, 2007.

21. We may also refer to Article 227(4) of the Constitution, which reads as under:

> "Article 227(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces."

22. Judicial review under Article 32 and 226 is a basic feature of the Constitution beyond the plea of amendability. While under Article 32 of the Constitution a person has a right to move before Supreme Court by appropriate

proceedings for enforcement of the rights conferred by Part III of the Constitution, no fundament right can be claimed by any person to move before the High Court by appropriate proceedings under Article 226 for enforcement of the rights conferred by the Constitution or Statute.

23. In L. Chandra kumar vs. Union of India, (1997)3 SCC 261 a Bench of seven-Judge while dealing with the essential and basic features of Constitution - power of review and jurisdiction conferred on the High Court under Article 226/227 and on the Supreme Court under Article 32 held as follows:

> "75. In Keshav Singh, (1965) 1 SCR 413 while addressing this issue, Gajendragadkar, C.J. stated as follows: (SCC at pp. 493-494)
>
> > "129 If the power of the High Courts under Article 226 and the authority of this Court under Article 32 are not subject to any exceptions, then it would be futile to contend that a citizen cannot move the High Courts or this Court to invoke their jurisdiction even in cases where his fundamental rights have been violated. The existence of judicial power in that behalf must necessarily and inevitably postulate the existence of a right in the citizen to move the Court in that behalf; otherwise the power conferred on the High Courts and this Court would be rendered virtually meaningless. Let it not be forgotten that the judicial power conferred on the High Courts and this Court is meant for the protection of the citizens' fundamental rights, and so, in the existence of the said judicial power itself is necessarily involved the right of the citizen to appeal to the said power in a proper case."
>
> 76. To express our opinion on the issue whether the power of judicial review vested in the High Courts and in the Supreme Court under Articles 226/227 and 32 is part of the basic structure of the Constitution, we must first attempt to understand what constitutes the basic structure of the Constitution. The doctrine of basic structure was evolved in Kesavananda Bharati case (1993 4 SCC 225). However, as already mentioned, that case did not lay down that the specific and particular features mentioned in that judgment alone would constitute the basic structure of our Constitution. Indeed, in the judgments of Shelat and Grover, JJ., Hegde and Mukherjea, JJ. and Jaganmohan Reddy, J., there are specific observations to the effect that their list of essential features comprising the basic structure of the Constitution are illustrative and are not intended to be exhaustive. In Indira Gandhi case, (1975 Supp SCC 1), Chandrachud, J. held that the proper approach for a Judge who is confronted with the question whether a particular facet of the Constitution is part of the basic structure, is to examine, in each individual case, the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of our Constitution as a fundamental instrument for the governance of the country. (supra at pp. 751- 752). This approach was specifically adopted by Bhagwati, J. in Minerva Mills case [(1980) 3 SCC 625] (at pp. 671-672) and is not regarded as the definitive test in this field of Constitutional Law.
>
> 77. We find that the various factors mentioned in the test evolved by Chandrachud, J. have already been considered by decisions of various Benches of this Court that have been referred to in the course of our analysis. From their conclusions, many of which have been extracted by us in toto, it appears that this Court has always considered the power of

judicial review vested in the High Courts and in this Court under Articles 226 and 32 respectively, enabling legislative action to be subjected to the scrutiny of superior courts, to be integral to our constitutional scheme. While several judgments have made specific references to this aspect [Gajendragadkar, C.J. in Keshav Singh case, Beg, J. and Khanna, J. in Kesavananda Bharati [pic]case, Chandrachud, C.J. and Bhagwati, J. in Minerva Mills, Chandrachud, C.J. in Fertilizer Kamgar[(1981) 1 scc 568], K.N. Singh, J. in Delhi Judicial Service Assn. [(1991)4 scc 406], etc.] the rest have made general observations highlighting the significance of this feature."

24. In S.N. Mukherjee vs.Union of India, (1990)4 SCC 594, this Court noticed the special provision in regard to the members of the Armed Forces in the Constitution of India and held as follows:

[pic]" 42. Before referring to the relevant provisions of the Act and the Rules it may be mentioned that the Constitution contains certain special provisions in regard to members of the Armed Forces. Article 33 empowers Parliament to make law determining the extent to which any of the rights conferred by Part III shall, in their application to the members of the Armed Forces be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline amongst them. By clause (2) of Article 136 the appellate jurisdiction of this Court under Article 136 of the Constitution has been excluded in relation to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces. Similarly clause (4) of Article 227 denies to the High Courts the power of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces. This Court under Article 32 and the High Courts under Article 226 have, however, the power of judicial review in respect of proceedings of courts martial and the proceedings subsequent thereto and can grant appropriate relief if the said proceedings have resulted in denial of the fundamental rights guaranteed under Part III of the Constitution or if the said proceedings suffer from a jurisdictional error or any error of law apparent on the face of the record."

25. A three-Judge Bench of this Court in R.K. Jain vs. Union of India & ors., (1993) 4 SCC 119, observed:

"66. In S.P. Sampath Kumar v. Union of India this Court held that the primary duty of the judiciary is to interpret the Constitution and the laws and this would predominantly be a matter fit to be decided by the judiciary, as judiciary alone would be possessed of expertise in this field and secondly the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. The Constitution has, therefore, created an independent machinery i.e. judiciary to resolve disputes, which is vested with the power of judicial review to determine the legality of the legislative and executive actions and to ensure compliance with the requirements of law on the part of the executive and other authorities. This function is discharged by the judiciary by exercising the power of judicial review which is a most potent weapon in the hands of the judiciary for maintenance of the rule of law. The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. The judicial review, therefore, is a

> basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. The basic and essential feature of judicial review cannot be dispensed with but it would be within the competence of Parliament to amend the Constitution and to provide alternative institutional mechanism or arrangement for judicial [pic]review, provided it is no less efficacious than the High Court. It must, therefore, be read as implicit in the constitutional scheme that the law excluding the jurisdiction of the High Court under Articles 226 and 227 permissible under it, must not leave a void but it must set up another effective institutional mechanism or authority and vest the power of judicial review in it which must be equally effective and efficacious in exercising the power of judicial review. The tribunal set up under the Administrative Tribunals Act, 1985 was required to interpret and apply Articles 14, 15, 16 and 311 in quite a large number of cases. Therefore, the personnel manning the administrative tribunal in their determinations not only require judicial approach but also knowledge and expertise in that particular branch of constitutional and administrative law. The efficacy of the administrative tribunal and the legal input would undeniably be more important and sacrificing the legal input and not giving it sufficient weightage would definitely impair the efficacy and effectiveness of the Administrative Tribunal. Therefore, it was held that an appropriate rule should be made to recruit the members; and to consult the Chief Justice of India in recommending appointment of the Chairman, Vice-Chairman and Members of the Tribunal and to constitute a committee presided over by Judge of the Supreme Court to recruit the members for appointment. In M.B. Majumdar v. Union of India when the members of CAT claimed parity of pay and superannuation as is available to the Judges of the High Court, this Court held that they are not on a par with the judges but a separate mechanism created for their appointment pursuant to Article 323-A of the Constitution. Therefore, what was meant by this Court in Sampath Kumar case ratio is that the tribunals when exercise the power and functions, the Act created institutional alternative mechanism or authority to adjudicate the service disputations. It must be effective and efficacious to exercise the power of judicial review. This Court did not appear to have meant that the tribunals are substitutes of the High Court under Articles 226 and 227 of the Constitution. J.B. Chopra v. Union of India merely followed the ratio of Sampath Kumar."

26. From the aforesaid decisions of this Court in L. Chandra and S.N. Mukherjee, we find that the power of judicial review vested in the High Court under Article 226 is one of the basic essential features of the Constitution and any legislation including Armed Forces Act, 2007 cannot override or curtail jurisdiction of the High Court under Article 226 of the Constitution of India.

Basic principle for exercising power under Article 226 of the Constitution:

27. In Babubhai Muljibhai Patel vs. Nandlal Khodidas Barot and others, AIR 1974 SC 2105 this Court held as follows:

> "10.....Exercise of the jurisdiction is no doubt discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises complex questions of fact, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute should not appropriately be tried in a writ petition, the High Court may decline to try a petition (See Gunwant Kaur v.Bhatinda Municipality, AIR 1970 SC 802). If,

however,on consideration of the nature of the controversy, the High Court decides, as in the present case, that it should go into a disputed question of fact and the discretion exercised by the High Court appears to be sound and in conformity with judicial principles, this Court would not interfere in appeal with the order made by the High Court in this respect."

28. In Mafatlal Industries Ltd. and others vs.Union of India and others, (1997) 5 SCC 536, a nine-Judge Bench of this Court while considering the Excise Act and Customs Act held that the jurisdiction of the High Court under Article 226 and this Court under Article 32 though cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. This Court held:

"108. The discussion in the judgment yields the following propositions. We may forewarn that these propositions are set out merely for the sake of convenient reference and are not supposed to be exhaustive. In case of any doubt or ambiguity in these propositions, reference must be had to the discussion and propositions in the body of the judgment.

(i).....While the jurisdiction of the High Courts under Article 226 - and of this Court under Article 32 - cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the [pic]provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

29. In Kanaiyalal Lalchand and Sachdev and others vs. State of Maharasthra and others, (2011) 2 SCC 782, this Court considered the question of maintainability of the writ petition while an alternative remedy is available. This Court upheld the decision of the Bombay High Court dismissing the writ petition filed by the appellants therein on the ground of existence of an efficacious alternative remedy under Section 17 of SARFASI Act and held:

"23. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See Sadhana Lodh v. National Insurance Co. Ltd., Surya Dev Rai v. Ram Chander Rai and SBI v. Allied Chemical Laboratories7.)

24. In City and Industrial Development Corpn. v. Dosu Aardeshir Bhiwandiwala this Court had observed that: (SCC p. 175, para 30) "30. The Court while exercising its jurisdiction under Article 226 is duty- bound to consider whether:

(a) adjudication of the writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;

(b) the petition reveals all material facts;

(c) the petitioner has any alternative or effective remedy for the resolution of the dispute;

(d) the person invoking the jurisdiction is guilty of unexplained delay and laches;

(e) ex facie barred by any laws of limitation;

(f) grant of relief is against public policy or barred by any valid law; and host of other factors."

30. In Nivedita Sharma vs. Cellular Operators Association of India and others, (2011)14 SCC 337, this Court noticed that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. The Court further noticed the previous decisions of this Court wherein the Court adverted to the rule of self-restraint that writ petition will not be entertained if an effective remedy is available to the aggrieved person as follows:

13. In Titaghur Paper Mills Co. Ltd. v. State of Orissa this Court observed: (SCC pp. 440-41, para 11) "11. ... It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford in the following passage: (ER p. 495)

'... There are three classes of cases in which a liability may be established founded upon a statute. ... But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. ... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.' The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd. and has been reaffirmed by the Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd. and Secy. of State v. Mask and Co. It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

14. In Mafatlal Industries Ltd. v. Union of India B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed: (SCC p. 607, para 77)

"77. ... So far as the jurisdiction of the High Court under Article 226-or for that matter, the jurisdiction of this Court under Article 32-is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while [pic]exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment."

15. In the judgments relied upon by Shri Vaidyanathan, which, by and large, reiterate the proposition laid down in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad, it has been held that an alternative remedy is not a bar to the entertaining of writ petition filed for the enforcement of any of the fundamental rights or where there has been a violation of the principles of natural justice or where the order under

challenge is wholly without jurisdiction or the vires of the statute is under challenge.

16. It can, thus, be said that this Court has recognised some exceptions to the rule of alternative remedy. However, the proposition laid down in Thansingh Nathmal v. Supt. of Taxes8 and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field."

31. In Southern Electricity Supply Co. of Orissa Ltd vs. Sri Seetaram Rice Mill, (2012) 2 SCC 108, a three-Judge Bench held:

"80. It is a settled canon of law that the High Court would not normally interfere in exercise of its jurisdiction under Article 226 of the Constitution of India where statutory alternative remedy is available. It is equally settled that this canon of law is not free of exceptions. The courts, including this Court, have taken the view that the statutory remedy, if provided under a specific [pic]law, would impliedly oust the jurisdiction of the civil courts. The High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India can entertain writ or appropriate proceedings despite availability of an alternative remedy. This jurisdiction, the High Court would exercise with some circumspection in exceptional cases, particularly, where the cases involve a pure question of law or vires of an Act are challenged. This class of cases we are mentioning by way of illustration and should not be understood to be an exhaustive exposition of law which, in our opinion, is neither practical nor possible to state with precision. The availability of alternative statutory or other remedy by itself may not operate as an absolute bar for exercise of jurisdiction by the courts. It will normally depend upon the facts and circumstances of a given case. The further question that would inevitably come up for consideration before the Court even in such cases would be as to what extent the jurisdiction has to be exercised.

81. Should the courts determine on merits of the case or should they preferably answer the preliminary issue or jurisdictional issue arising in the facts of the case and remit the matter for consideration on merits by the competent authority? Again, it is somewhat difficult to state with absolute clarity any principle governing such exercise of jurisdiction. It always will depend upon the facts of a given case. We are of the considered view that interest of administration of justice shall be better subserved if the cases of the present kind are heard by the courts only where they involve primary questions of jurisdiction or the matters which go to the very root of jurisdiction and where the authorities have acted beyond the provisions of the Act. However, it should only be for the specialised tribunal or the appellate authorities to examine the merits of assessment or even the factual matrix of the case."

32. In Cicily Kallarackal vs. Vehicle Factory 2012(8) SCC 524, the Division Bench of this Court held:

"4. Despite this, we cannot help but state in absolute terms that it is not appropriate for the High Courts to entertain writ petitions under Article 226 of the Constitution of India against the orders passed by the Commission, as a statutory appeal is provided and lies to this Court under the provisions of the Consumer Protection Act, 1986. Once the legislature has provided for a [pic]statutory appeal to a higher court, it cannot be proper exercise of

jurisdiction to permit the parties to bypass the statutory appeal to such higher court and entertain petitions in exercise of its powers under Article 226 of the Constitution of India. Even in the present case, the High Court has not exercised its jurisdiction in accordance with law. The case is one of improper exercise of jurisdiction. It is not expected of us to deal with this issue at any greater length as we are dismissing this petition on other grounds.

XXX XXX XXX XXX

9. ....., we hereby make it clear that the orders of the Commission are incapable of being questioned under the writ jurisdiction of the High Court, as a statutory appeal in terms of Section 27-A(1)(c) lies to this Court. Therefore, we have no hesitation in issuing a direction of caution that it will not be a proper exercise of jurisdiction by the High Courts to entertain writ petitions against such orders of the Commission."

33. Another Division Bench of this Court in Commissioner of Income Tax and others vs. Chhabil Dass Agrawal, (2014)1 SCC 603 held:

"11. Before discussing the fact proposition, we would notice the principle of law as laid down by this Court. It is settled law that non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy. However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under Article 226. (See State of U.P. v. Mohd. Nooh, Titaghur Paper Mills Co. Ltd. v. State of Orissa, Harbanslal Sahnia v. Indian Oil Corpn. Ltd. and State of H.P. v. Gujarat Ambuja Cement Ltd.

12. The Constitution Benches of this Court in K.S. Rashid and Son v. Income Tax Investigation Commission, Sangram Singh v. Election Tribunal, Union of India v. T.R. Varma, State of U.P. v. Mohd. Nooh2 and K.S. Venkataraman and Co. (P) Ltd. v. State of Madras have held that though Article 226 confers very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of the principles of natural justice or the procedure required for decision has not been adopted. [See N.T. Veluswami Thevar v. G. Raja Nainar, Municipal [pic]Council, Khurai v. Kamal Kumar, Siliguri Municipality v. Amalendu Das, S.T. Muthusami v. K. Natarajan, Rajasthan SRTC v. Krishna Kant, Kerala SEB v. Kurien E. Kalathil, A. Venkatasubbiah Naidu v. S. Chellappan, L.L. Sudhakar Reddy v. State of A.P., Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha v. State of Maharashtra, Pratap Singh v. State of Haryana and GKN Driveshafts (India) Ltd. v. ITO.]

13. In Nivedita Sharma v. Cellular Operators Assn. of India, this Court has held that where hierarchy of appeals is provided by the statute, the party

must exhaust the statutory remedies before resorting to writ jurisdiction for relief and observed as follows: (SCC pp. 343-45, paras 12-14)

> "12. In Thansingh Nathmal v. Supt. of Taxes this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed: (AIR p. 1423, para 7)
>
> > '7. ... The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by the statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.'
>
> 13. In Titaghur Paper Mills Co. Ltd. v. State of Orissa this Court observed: (SCC pp. 440-41, para 11) '11. ... It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford in the following passage: (ER p. 495) xxx xxx xxx xxx
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> 14. In Mafatlal Industries Ltd. v. Union of India B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed: (SCC p. 607, para
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> 77) '77. ... So far as the jurisdiction of the High Court under Article 226-or for that matter, the jurisdiction of this Court under Article 32-is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.'"
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> (See G. Veerappa Pillai v. Raman & Raman Ltd., CCE v. Dunlop India Ltd., Ramendra Kishore Biswas v. State of Tripura, Shivgonda Anna Patil v. State of Maharashtra, C.A. Abraham v. ITO, Titaghur Paper Mills Co. Ltd. v. State of Orissa, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath and Sons, Whirlpool Corpn. v. Registrar of Trade Marks, [pic]Tin Plate Co. of India Ltd. v. State of Bihar, Sheela Devi v. Jaspal Singh and Punjab National Bank v. O.C. Krishnan.)
>
> 15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case, Titaghur Paper Mills case and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory

forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

34. Statutory Remedy In Union of India vs. Brigadier P.S. Gill, (2012) 4 SCC 463, this Court while dealing with appeals under Section 30 of the Armed Forces Tribunal Act following the procedure prescribed under Section 31 and its maintainability, held as follows:

"8. Section 31 of the Act extracted above specifically provides for an appeal to the Supreme Court but stipulates two distinct routes for such an appeal. The first route to this Court is sanctioned by the Tribunal granting leave to file such an appeal. Section 31(1) in no uncertain terms forbids grant of leave to appeal to this Court unless the Tribunal certifies that a point of law of general public importance is involved in the decision. This implies that Section 31 does not create a vested, indefeasible or absolute right of filing an appeal to this Court against a final order or decision of the Tribunal to this Court. Such an appeal must be preceded by the leave of the Tribunal and such leave must in turn be preceded by a certificate by the Tribunal that a point of law of general public importance is involved in the appeal.

9. The second and the only other route to access this Court is also found in Section 31(1) itself. The expression "or it appears to the Supreme Court [pic]that the point is one which ought to be considered by that Court" empowers this Court to permit the filing of an appeal against any such final decision or order of the Tribunal.

10. A conjoint reading of Sections 30 and 31 can lead to only one conclusion viz. there is no vested right of appeal against a final order or decision of the Tribunal to this Court other than those falling under Section 30(2) of the Act. The only mode to bring up the matter to this Court in appeal is either by way of certificate obtained from the Tribunal that decided the matter or by obtaining leave of this Court under Section 31 for filing an appeal depending upon whether this Court considers the point involved in the case to be one that ought to be considered by this Court.

11. An incidental question that arises is: whether an application for permission to file an appeal under Section 31 can be moved directly before the Supreme Court without first approaching the Tribunal for a certificate in terms of the first part of Section 31(1) of the Act?

12. In the ordinary course the aggrieved party could perhaps adopt one of the two routes to bring up the matter to this Court but that does not appear to be the legislative intent evident from Section 31(2) (supra). A careful reading of the section shows that it not only stipulates the period for making an application to the Tribunal for grant of leave to appeal to this Court but also stipulates the period for making an application to this Court for leave of this Court to file an appeal against the said order which is sought to be challenged.

13. It is significant that the period stipulated for filing an application to this Court starts running from the date beginning from the date the application made to the Tribunal for grant of certificate is refused by the Tribunal. This implies that the aggrieved party cannot approach this Court directly for grant of leave to file an appeal under Section 31(1) read with Section 31(2) of the Act.

14. The scheme of Section 31 being that an application for grant of a certificate must first be moved before the Tribunal, before the aggrieved party can approach this Court for the grant of leave to file an appeal. The purpose underlying the provision appears to be that if the Tribunal itself

grants a certificate of fitness for filing an appeal, it would be unnecessary for the aggrieved party to approach this Court for a leave to file such an appeal. An appeal by certificate would then be maintainable as a matter of right in view of Section 30 which uses the expression "an appeal shall lie to the Supreme Court". That appears to us to be the true legal position on a plain reading of the provisions of Sections 30 and 31."

35. Thus, we find that though under Section 30 no person has a right of appeal against the final order or decision of the Tribunal to this Court other than those falling under Section 30(2) of the Act, but it is statutory appeal which lies to this Court.

36. The aforesaid decisions rendered by this Court can be summarised as follows:

(i) The power of judicial review vested in the High Court under Article 226 is one of the basic essential features of the Constitution and any legislation including Armed Forces Act, 2007 cannot override or curtail jurisdiction of the High Court under Article 226 of the Constitution of India.(Refer: L. Chandra and S.N. Mukherjee).

(ii) The jurisdiction of the High Court under Article 226 and this Court under Article 32 though cannot be circumscribed by the provisions of any enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the Acts and would exercise their jurisdiction consistent with the provisions of the Act.(Refer: Mafatlal Industries Ltd.).

(iii) When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. (Refer: Nivedita Sharma).

(iv) The High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance. (Refer: Nivedita Sharma).

19. In view of the discussion made herein above, the present petition is dismissed alongwith pending applications, if any. However, petitioner-association is at liberty to approach appropriate forum, in accordance with law, for the redressal of the grievances as highlighted in the present petition.

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

CWP No. 1046/2016 with
CWP No. 1600/2016
Reserved on: October 5, 2016
Decided on: October 20, 2016

1. CWP No. 1046/2016

Pushpinder Kumar ...Petitioner

Versus

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

2. CWP No. 1600/2016

Baghal Educational Society ...Petitioner

Versus

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

Constitution of India, 1950- Article 226- Petitioner claimed that respondent No. 5, School is being run by the authorities in complete violation of the Right of Children to Free and Compulsory Education Act, 2009- school is being run in a residential accommodation and there are no qualified teachers to teach the students- students keep sitting on railings where space is very congested- school was shifted without any approval- school is being run without recognition and obtaining any affiliation from Himachal Pradesh Board of School Education- writ petition was also filed by the School against a direction to close it- both the writ petitions were consolidated- held, that school had shifted without obtaining any permission – it was recognized at a place 3.5 k.m. from the existing place - permission was granted to run school at R, whereas, it was shifted to D- if a new school is to be established, permission has to be sought under the Act and the authority should grant the permission after complying with the codal formalities – writ petition disposed of with a direction to the authorities to ensure that no school runs without completion of codal formalities. (Para-7 to 23)

For the petitioner(s) Mr. Sanjeev Bhushan, Senior Advocate with Mr. Rakesh Chauhan, Advocate, in CWP No. 1046/2016 and for respondent No. 7 in CWP No. 1600/2016.

Mr. Ashwani Pathak, Senior Advocate with Mr. Sandeep Sharma, Advocate in CWP No. 1600/2016 and for respondent No. 5 in CWP No. 1046/2016.

For the respondents: Mr. Anoop Rattan, Mr. M.A. Khan and Mr. Varun Chandel, Additional Advocate Generals with Mr. Kush Sharma, Deputy Advocate General, for respondents No.1 to 3 in CWP No. 1046/2016 and for respondents No. 1 to 4 and 6, in CWP No. 1600/2016.

Mr. Lovneesh Kanwar, Advocate, for respondent No.4 in CWP No. 1046/2016.

Mr. Diwakar Dev Sharma, Advocate, for respondent No.5 in CWP No. 1600/2016.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge:

Since in both the petitions, common questions of facts and law are involved, same are being taken up together with the consent of the parties. However, for the sake of clarity, facts of CWP No. 1046/2016 are being discussed herein.

2. Petitioner in CWP No. 1046/2016 approached this Court seeking following main reliefs:

> "i) That directions may very kindly be issued to the respondents No.1 to 4 to take immediate action to stop the running of respondent No.5 school.
>
> ii) That respondents may very kindly be directed to inspect all privately managed schools being run in the State of Himachal Pradesh and to take stern action against all those who are running schools without any affiliation from respondent No.4 or any recognition or No Objection Certificate from the Education Department and action may very kindly be ordered to be taken against authorities who have taken recognition or affiliation either by forging documents or by concealment of facts which would be evident once inspection of all the schools is carried out, in the interests of justice and fair play. "

3. In nutshell, petitioner claimed that since the authorities concerned failed miserably to perform their duties as enshrined under the Right of Children to Free and Compulsory Education Act, 2009 (in short 'Act'), he was compelled to file petition under Article 226 of the Constitution of India, seeking therein directions to the respondents to ensure

compliance of the provisions contained in the Act. Petitioner further averred in the petition that respondent No.5-School is being run by the authorities in complete violation of the provisions as contained in the Act and as such same needs to be closed immediately. Petitioner specifically stated in the petition that respondent No.5-school is being run in a residential accommodation which is very small in size and there are no qualified teachers to teach the students. Petitioner further averred that there is no space outside the residential accommodation for the children to even stand and there is constant threat to their lives as the students keep sitting on railings where space is very congested. Since respondent No. 5 School, despite there being representation made by the residents of the area, failed to address the genuine problems highlighted in the representation (annexure P-1), petitioner issued a legal notice to respondent No. 5 School, and authorities including the Deputy Directors of Higher/Elementary Education, Solan, District Solan, vide annexure P-2. Pursuant to the aforesaid notices, the Deputy Director of Elementary Education, Solan sent a communication to the Director Elementary Education, (annexure P-4), relevant portion of which is reproduced hereinbelow:

> "Para 1 In this regard, the department of Education has granted NOC to Gaytri Vidya Mandir Village Rauri which is situated 2 kilometers far from Darlaghat in the year 2006 vide Director of Elementary Education Himachal Pradesh vide letter No. EDN-(Ele)H(3)G-I/2006-NOC dated 10-08-2006 and Dy. Director of Education Solan Distt. Solan vide letter No. EDN-SLN(G-II)3/2006 (NOC)-10855 dated 11-08-2006 after the inspection of the school situated at village Rauri (Darlaghat) and on the basis of issuance of NOC's the school was recognized in the year 2012 for five years i.e. upto 2017. The school was granted recognition for the Gaytri Vidya mandir Village Rauri not for Darlaghat. As per statement of the Principal school management has shifted the school from village Rauri to Darlaghat without obtaining permission of Education Department. In this regard the school is being issued show cause notice for this serious lapse as to why the recognition may not be withdrawn. The Easwaramma public school is running at Darlaghat market since 2006 after getting NOC in the year 2006 and recognition in the year 2012. The school is running in a rented building and som portion of the building being used for residences and top floor is being used for shop purpose. The school is having about 200 students from class 1st to 8th. This school is also being issued a show cause notice taking the steps for the withdrawal of recognition.
>
> Para.2 The EPS School is running since 2006 at Darlaghat hence shifting of students from another village is denied. However it is well known to the then Dy. Director of Elementary Education that why this school was issued recognition. The facts of the teachers could not be inquired as the school were closed for winter vacation and record of school was under lock and key.
>
> In view of the above, after getting the reply of the show cause notice being issued to both the schools, temporarily, renewal of recognition will not be granted for next academic session. The academic session of both schools is ending and if the school recognition is withdrawn immediately the school students will have to face great difficulty. Keeping in view the future and studies of the students the school is being allowed to be opened till the exams are over. Hence, the above stated parawise comments are submitted for favour of further necessary action please."

4. Perusal of aforesaid communication sent by the Deputy Director of Elementary Education to the Director Elementary Education, clearly suggests that No Objection Certificate was issued by the Department to Gayatri Vidya Mandir School in the year 2006, on the basis of which school was recognized in the year 2012. Interestingly, No Objection Certificate as well as recognition to the school was granted for a place called, 'Rauri', whereas management of respondent No.5 shifted the school to Darlaghat without obtaining prior permission from the Education Department. Aforesaid communication clearly suggests that the school was granted recognition for Gayatri Vidya Mandir village Rauri and not for Darlaghat where, at present, school

is being run by respondent No. 5. It also emerges from the communication referred to herein above that the school is being run by respondent No.5 in a rented building and some portion of the building is being used for residence and top floor of the same is being used as shop. At present more than 200 students are studying in classes 1st to 8th. Since the Deputy Director of Elementary Education noticed various discrepancies as have been pointed out herein above, he intended to issue a show cause notice to the school before taking steps for withdrawal of recognition. However, keeping in view the future of the students studying in the school, authorities allowed the school to be opened till the exams were over.

5. Similarly, the Himachal Pradesh Board of School Education in its reply to the legal notice issued to it, also informed vide annexure P-5 that respondent No.5 i.e. Gayatri Public School, Darlaghat is not affiliated with the Board. In the aforesaid background, petitioner by way of CWP No. 1046/2016 approached this Court praying therein for reliefs as have been reproduced herein above.

6. During the pendency of the aforesaid petition, respondent No.3 filed a short reply in compliance with order passed by this Court on 16.5.2016. It would be apt to reproduce the following paras of the reply:

> "2. That as information received from the Dy. Director of Elementary Education vide his letter No . EDN-SLN(G-I)21/2016-17 dated 15.06.2016 he visited the concerned school and it was noticed by him that the school was running without recognition and obtaining any affiliation from Himachal Pradesh Board of School Education, Dharmshala . In the month of December 2015 the classes were started in this school from class Ist to 10th and fee etc. were charged from the students .
>
> 3. That When the Dy. Director of Elementary Education, Solan asked the concerned Principal to submit the documents of building alongwith the certificate from Public Works Department of Himachal Pradesh and fire safety certificate from Fire Department . The concerned Principal failed to submit the same .
>
> 4. That the Dy. Director of Elementary Education, Solan has directed the Principal, Gayarti Vidya Mandir, Darlaghat to close the School, w.e.f. 15.06.2016 and the copy of same is annexed as Annexure R-1 for kind perusal of the Hon'ble Court please.
>
> 5. That the statement of 9 local residents of Darlaghat and surrounding villages were also recorded by the Dy. Director of Elementary Education, Solan and it has been stated that when the school was started in December 2015 the name of this school was Gayarti Public School Darlaghat , but after April,2016, the name of this school was changed by Smt. Vinati Mukul and was renamed as Gayatri Vidya Mandir Darlaghat . The copy of the same is annexed as Annexure R-II for kind perusal of this Hon'ble Court please ."

7. It clearly emerges from the reply referred to herein above that the Deputy Director of Elementary Education visited the respondent No. 5-school and found that the school was being run without recognition and without obtaining any affiliation from the Himachal Pradesh Board of School Education, Dharamshala. It further emerges from the reply that the Principal of the concerned school failed to submit required documents of building alongwith certificate from HP PWD as well as fire safety certificate from Fire Department, as a result of which, respondent No. 4 i.e. Deputy Director of Elementary Education, Solan directed the Principal of respondent No. 5 to close the school w.e.f. 15.6.2016 (annexure R-1). It also emerges from the reply as referred to herein above, that the school was started in December 2015 at Darlaghat by changing name of school from Gayatri Vidya Mandir, Rauri to Gayatri Public School, Darlaghat without obtaining prior permission of the authorities concerned. However, the fact remains that the Principal of the School lateron in April, 2016 herself changed the name of school to Gayatri Vidya Mandir, Darlaghat.

8. Contents of letter dated 15.6.2016 are reproduced as under:

> "The undersigned has visited the school running without recognition and obtaining any affiliation from H.P.B.S. Education Dharamshala. In the month of December 2015, you have started the classes from 1st to 10th in this school and charging fees from the students.
>
> When undersigned asked you to submit the documents of building alongwith the certificate of PWD and fire safety department, you failed to submit the same.
>
> Under the powers of the R.T.E. Act 2009 and H.P. Govt. R.T.E. amended rules, 2011, it is ordered to get your school closed with immediate effect i.e. from 15/06/2016. The S.D.M. Arki has also informed to close the School. It is also suggested in future not to open the School anywhere else without observing all the codal formalities as specified under RTE Rules, 2009."

9. Since vide aforesaid communication, respondent No.5 was directed to close the school with immediate effect, respondent No.5 i.e. Gayatri Public School Darlaghat filed CWP No. 1600/2016, in the name of Baghal Educational Society vs. State of Himachal Pradesh, praying therein for the following reliefs:

> "(I) That the impugned order dated 15.06.2016 may kindly be quashed and set aside.
>
> (ii) That the inquiry may be initiated to investigate the antecedents of respondents No. 6 to 8 in as much as false complaint against the petitioner society before this Hon'ble Court in the name of public interest litigation.
>
> (iii) That the respondents No. 6 to 8 may be ordered to pay the cost of this litigation alongwith interim damages to the tune of Rs.5 Lakhs, in case, the complaint against the present petitioner is found false."

10 In the petition referred to herein above, petitioner-society claimed that it was running school to impart education to the children of the area after obtaining necessary No Objection Certificate, annexure P-2, from respondent No.4. Petitioner-society further claimed that since recognition certificate of school was further renewed vide letter dated 9.7.2012, wherein time was extended from 2012-13 to 2016-17, as such, there is no violation of the conditions contained in the No Objection Certificate granted by the authorities. In nutshell, petitioner in CWP No. 1600/2016 claimed that since the school in question is running in conformity with the guidelines contained in the No Objection Certificate as well as provisions contained in the Act ibid, there was no occasion, whatsoever, for the authorities to issue notice dated 15.6.2016, whereby direction was issued to close the school on the false complaints of the petitioner in CWP No. 1046/2016. Petitioner-society further claimed that the school was running in a safe building after completion of requisite codal formalities necessary to run the school including building safety certificate. Society also placed on record copy of fire safety certificate and No Objection Certificate issued by the authorities to demonstrate that the school is being run after obtaining necessary permission from the authorities concerned and there was no violation, if any, of the provisions enshrined in the Act. To the contrary, petitioner-society claimed that decision to close the school was taken by the authorities on the basis of frivolous complaints made by respondents No.7 and 8, who had leased out building to the society for running school. As per the petitioner-society, since respondent No. 8 failed to perform certain duties in terms of the rent agreement dated 6.12.2013, entered into between the society and respondent No. 8, respondent No. 8 started harassing petitioner-society by creating mischief in order to get the building vacated from the petitioner-society. Petitioner-society also claimed that respondent No. 7 (petitioner in CWP No. 1046/2016) also signed as a witness to the rent agreement dated 6.12.2013 and as such, by no stretch of imagination, petition filed by him can be termed to be a 'public interest litigation', rather the same is sheer abuse of process of law.

11. Respondents, in their reply to the petition filed by the society, reiterated that the Deputy Director of Elementary Education visited the Gayatri Vidya Mandir, Darlaghat and

noticed that school was being run without recognition from Education Department and affiliation from Himachal Pradesh Board of School Education. Respondents also stated that the concerned Principal failed to submit documents of the building alongwith certificate of PWD and fire safety certificate from the Fire Department and as such there was no illegality in issuing letter dated 15.6.2016, whereby the petitioner-society was ordered to close the school with immediate effect. Apart from above, respondents also stated that affiliation, if any, was granted to Gayatri Vidya Mandir, Rauri and not to Gayatri Public School, Darlaghat, no school can be allowed to be run without there being necessary affiliation from the authorities concerned, at Darlaghat, District Solan, Himachal Pradesh.

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

13. Since the issue in both the petitions was with regard to affiliation of Gayatri Vidya Mandir School, Rauri/Darlaghat, District Solan, this Court vide order dated 18.7.2016, consolidated both the petitions for hearing. However, vide order dated 11.8.2016, this Court, after perusing the pleadings made available on record by the respective parties as well as submissions having been made on behalf of the counsel appearing for the petitioner-society in CWP No. 1600/2016, wherein he stated at Bar that the Deputy Director of Elementary Education be directed to examine all the documents of the petitioner and to submit a detailed report, directed the parties to cause appearance before respondent No. 3 on 12.8.2016 with all the documents. This Court also directed respondent No.3 to examine all the documents and submit report pursuant to aforesaid directions.

14. Respondent No.3 submitted compliance report in a sealed cover, copies whereof were made available to the learned counsel representing the parties. Respondent No. 5, in CWP No. 1046/2016 (petitioner in CWP No. 1600/2016) filed response to the report. It would be apt to reproduce herein below report submitted by respondent No.3 in compliance to order dated 11.8.2016 of this Court:

> "2. That in compliance to the above directions the petitioner Ms. Vinti Mukul, Principal, Gayatri Vidya Mandir, School, Rauri at Darlaghat appeared before the undersigned on 12.08.2016, 16.08.2016, and respondent No. 7 did not appear . During the course of hearing Ms. Vinti Mukul, Principal, Gayatri Vidya Mandir, School, Rauri at Darlaghat contended/ stated as under: -
>
> i) That Baghal Education Society was registered in the year 2004 vide Registration No. 59/Arki/2004 dated 03.06.2004. The Headquarter of Baghal Shikksha Samiti is at Darlaghat.
>
> ii) That the society had started a school under the name Gayatri Vidya Mandir at Rauri/Khatta near Darlaghat District Solan, and necessary No Objection Certificate was obtained from the office of Dy. Director of Education, Solan vide his letter No . EDN-SLN(G-II)3/2006 (NOC)-10585 dated 11.08.2006. Further she stated that she is also working as President of the Society.
>
> iii) That the School was initially started in the building of Sh. Kirpa Ram resident of Village Rauri for the first one year, then it was shifted to the building of Sh. Bhagirath at Rauri/Khatta and remained functioning there up to November 2015.
>
> iv) That with the coming into force the RTE Act, 2009 the fresh Recognition and affiliation was obtained to run the school, on 09.07.2012 and 04.03.2016 with certain conditions from the Dy. Director of Elementary Education Solan to complete the shortcomings of the school and only to the extent of conducting the examination of the students who were to appear in the examination of 10th class so that the students should not suffer . Further, the recognition was also obtained from Himachal

Pradesh Board of School Education Dharmshala by the concerned school.

v) That due to some unavoidable circumstances , the School was shifted on 15.11.2015 from earlier location to the building owned by Sh. Narender Sharma situated at Darlaghat. Factum of shifting of the school was informed to the Board of School Education on 16.11.2015 and subsequently to the Dy. Director of Elementary Education Solan on 02.02.2016.

vi) That right from the starting of the school she is working as Principal of the School and also looking after the affairs of the school. The School was upgraded to the High Standard after obtaining the NOC from the Directorate of Elementary Education, Himachal Pradesh and the school has 18 rooms, five toilets and a playground also.

vii) That in January 2016 she had received a Show Cause Notice from the Dy. Director of Elementary Education , Solan but she does not remember whether the same was replied or not.

viii) That the Fire Safety Certificate in respect of new premises at Darlaghat has been issued by the Chief Fire Officer Shimla-2 vide Certificate No . 381 dated 18.01.2016 and Building Safety Certificate has been issued by the Assistant Engineer HPPWD, Darlaghat vide his letter No DSD/Building/2016-17 dated 06th June 2016. She has also produced the building map in respect of" Gayatri Vidya Mandir School at Darlaghat alongwith the balance sheet of the Society.

ix) That the landlord and one his relative i.e. Sh. Pushpender Kumar are stressing to vacate the premises occupied by the School thus are making false complaints against the Society/School. "

15. Perusal of aforesaid report suggests that the Baghal Educational Society (petitioner in CWP No. 1600/2016) was registered in the year 2004 with its headquarters at Darlaghat. Aforesaid society started school in the name and style of Gayatri Vidya Mandir at Rauri/ Khatta near Darlagaht District Solan, and in this regard, No Objection Certificate was obtained from the office of Deputy Director of Elementary Education vide letter dated 11.8.2006. It also emerges from the report that the school was initially started at village Rauri and it remained functional there upto November 2015. After coming into force the Right of Children to Free and Compulsory Education Act, 2009, petitioner-society obtained fresh recognition/ affiliation to run the school subject to completion of shortcomings pointed out by the Deputy Director of Elementary Education Solan. It also emerges from the record that necessary recognition was also obtained from Himachal Pradesh Board of School Education for the school at Rauri. However, it clearly emerges from the record as well as admission having been made by the Principal of the School that the School was shifted on 15.11.2015 from Rauri to Darlaghat without obtaining necessary permission from the authorities concerned. Petitioner-society also produced fire safety certificate in respect of premises at Darlaghat which was issued by Chief Fire Officer, Shimla vide Certificate No. 381 dated 18.1.2016 and building safety certificate issued by Assistant Engineer, HP PWD, Darlaghat on 16.6.2016. Deputy Director of Elementary Education specifically stated in his report that on 15.1.2016, on visit, the Gayatri Vidya Mandir School was not found at Rauri. But later on, on inquiry from local residents at Rauri, it transpired that the school stands shifted to Darlaghat and was not functioning at Rauri. Accordingly, on 21.1.2016, a show cause notice was issued to the Principal qua shifting of the school without completing codal formalities as per the Act ibid but aforesaid communication was never replied to by the Principal of the concerned school, as a result of which Deputy Director of Elementary Education again visited Gayatri Vidya Mandir School Darlaghat on 15.6.2016, on which date, management of the school failed to make available required documents, and the school was found to have been running without recognition and affiliation from Himachal Pradesh Board of School Education, in

the name and style of Gayatri Vidya Mandir School, Darlaghat. Since the Principal of the school concerned failed to produce the relevant documents, direction was issued to the Principal, Gayatri Vidya Mandir School, Darlaghat to close down the school. Deputy Director of Elementary Education, Solan also recorded the statements of local residents, who categorically stated that when the school was shifted in 2015, name of school was Gayatri Public School Darlaghat but after April, 2016, name of the school was restored by Ms. Vinti Mukul, Principal, as Gayatri Vidya Mandir School, Darlaghat. Director Elementary Education, Himachal Pradesh has unambiguously stated in his report that perusal of record produced by the Principal, Gayatri Vidya Mandir School, Darlaghat as well as Deputy Director of Elementary Education, Solan, clearly suggests that the school was recognized and affiliated as Gayatri Vidya Mandir School, Rauri which was at a distance of 3.5 kms from Darlaghat. Director Elementary Education, Himachal Pradesh reiterated that aforesaid school was shifted from Rauri to Darlaghat without any prior permission/completion of codal formalities. Since, the Principal, Gayatri Vidya Mandir School during inquiry produced fire safety certificate and building safety certificate issued by concerned authorities qua the building at Darlaghat, same could not be taken into consideration by the Director Elementary Education while submitting his report because, admittedly, affiliation/ recognition, if any, was issued by the authorities to the petitioner-society for running school in the name and style of Gayatri Vidya Mandir at Rauri and not Gayatri Vidya Mandir at Darlaghat. It stands duly proved on record by way of the aforesaid report submitted by Director Elementary Education that recognition/ affiliation, if any, was granted by the authorities for running school at Rauri in the name and style of Gayatri Vidya Mandir, admittedly, not at Darlaghat where, at present, school was being run in the name of Gayatri Vidya Mandir, Darlaghat.

16. Close scrutiny of aforesaid report submitted by Director Elementary Education as well as documents placed on record by the petitioner-society and the respondents clearly suggests that the petitioner-society had no authority to run the school in the name and style of Gayatri Vidya Mandir School at Darlaghat because permission, if any, was only granted to run the school at Rauri, which is at a distance of 3.5 kms from Darlaghat.

17. Hence, this Court sees no illegality in issuance of communication dated 15.6.2016 by respondent No.3 to the petitioner-society, wherein direction has been issued to close down the school with immediate effect with further direction not to open school anywhere else without observing codal formalities as envisaged under the Act ibid.

18. Consequently, in view of the detailed discussion herein above, especially report submitted by Director Elementary Education pursuant to the orders passed by this Court, this court sees no illegality or infirmity in the orders issued by respondent authorities to close down the school till the completion of necessary codal formalities as provided under the Act. It stands duly proved on record that no permission, whatsoever, was ever taken by the petitioner-society /respondent-school before shifting the school from Rauri to Darlaghat. As such, this Court has no hesitation to conclude that the action of the petitioner-society/ respondent School in shifting the school from Rauri to Darlaghat without obtaining necessary permission from the authorities concerned was in complete violation of the affiliation/ recognition granted to run the school at Rauri. Similarly, this Court is of the view that the fire safety and building safety certificates produced by the petitioner-society for running school at Darlaghat have no relevance especially in view of the fact that original affiliation/ recognition was for setting up school at Rauri and not at Darlaghat. In case, petitioner-society wanted to open school at Darlaghat, it was incumbent upon it to obtain necessary No Objection Certificate/affiliation from the concerned authorities and, by no stretch of imagination, society can be allowed to open school at Darlaghat on the basis of affiliation granted to it to run school at Rauri.

19. At this stage, it may be observed that the law-makers of the Country solely with a view to ensure compliance of the Directive Principles of State Policy enumerated in our Constitution, wherein it has been specifically stated that the State shall provide free and compulsory education to all the children upto the age of 14 years, enacted the Right of Children

to Free and Compulsory Education Act, 2009 to ensure that number of children particularly the children of disadvantageous groups and weaker sections, who drop out of school before completing their elementary education, may get free education. Apart from this, the Parliament by bringing aforesaid Act also intended to improve the standard of education because, admittedly, quality of learning achievements has not been entirely satisfactory even in case of the children who complete elementary education. Accordingly, Right of Children to Free and Compulsory Education Bill, 2008 was proposed to be enacted with the following objects to be achieved:

i. that every child has a right to be provided full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards;

ii. 'compulsory education' casts an obligation on the appropriate Government to provide and ensure admission, attendance and completion of elementary education;

iii. 'free education' means that no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate Government, shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education;

iv. The duties and responsibilities of the appropriate Governments, local authorities, parents, schools and teachers in providing free and compulsory education; and

v. A system for protection of the right of the children and a decentralized grievance redressal mechanism.

20. Sections 18 and 19 of the Act ibid specifically deal with the recognition, norms and standards of the schools as under:

> "18. No school to be established without obtaining certificate of recognition. – (1) No school, other than a school established, owned or controlled by the appropriate Government or the local authority, shall after the commencement of this Act, be established or function, without obtaining a certificate of recognition from such authority, by making an application in such form and manner, as may be prescribed.
>
> (2) The authority prescribed under sub-section (1) shall issue the certificate of recognition in such form, within such period, in such manner, and subject to such conditions, as may be prescribed.
>
> Provided that no such recognition shall be granted to a school unless it fulfils norms and standards specified under section 19.
>
> (3) On the contravention of the conditions of recognition, the prescribed authority shall, by an order in writing, withdraw recognition:
>
> Provided that such order shall contain a direction as to which of the neighbourhood school, the children studying in the derecognized school, shall be admitted:
>
> Provided further that no recognition shall be so withdrawn without giving an opportunity of being heard to such school, in such manner, as may be prescribed.
>
> (4) With effect from the date of withdrawal of the recognition under sub-section (3), no such school shall continue to function.
>
> (5) Any person who establishes or runs a school without obtaining certificate of recognition, or continues to run a school after withdrawal of recognition, shall be liable to fine which may extend to one Lakh rupees and in case of continuing contraventions, to a fine of ten thousand rupees for each day during which such contravention continues."
>
> 19. Norms and standards for school. – (1) No school shall be established, or recognized, under section 18, unless it fulfills the norms and standards specified in the Schedule.

(2) Where a school established before the commencement of this Act does not fulfill the norms and standards specified in the Schedule, it shall take steps to fulfill such norms and standards at its own expenses, within a period of three years from the date of such commencement.

(3) Where a School fails to fulfill the norms and standards within the period specified under sub-section (2), the authority prescribed under sub-section (1) of section 18 shall withdraw recognition granted to such school in the manner specified under sub-section (3) thereof.

(4) With effect from the date of withdrawal of recognition under sub-section (3), no school shall continue to function.

(5) Any person who continues to run a school after the recognition is withdrawn, shall be liable to fine which may extend to one lakh rupees and in case of continuing contraventions, to a fine of ten thousand rupees for each day during which such contravention continues.

21. Similarly, Rule 4 of Right of Children to Free and Compulsory Education Rules, 2010 provides for preparation of school development plan as under:

4. Preparation of School Development Plan. – (1) The School Management Committee shall prepare a School Development Plan at least three months before the end of the financial year in which it is first constituted under the Act.

(2) The School Management Plan shall be a three year plan comprising three annual sub plans.

(3) The School Development Plan, shall contain the following details, namely: --

(a) estimates of class-wise enrolment for each year;

(b) requirement of the number of additional teachers, including Head Teachers, subject teachers and part-time instructors, separately for Classes I to V and for classes VI to VIII, calculated with reference to the norms specified in the Schedule;

(c) physical requirement of additional infrastructure and equipments, calculated with reference to the norms and standards specified in the Schedule;

(d) financial requirement in respect of (b) and (c) above, including for providing special training facility specified in section 4, entitlements of children such as free text books and uniforms, and any other additional requirement for fulfilling the responsibilities of the school under the Act.

(4) The School Development Plan shall be signed by the chairperson or vice-chairperson and convenor of the School Management Committee and submitted to the local authority before the end of the financial year in which it is prepared.

22. Perusal of aforesaid provisions enshrined under the Act as well as Rules clearly cast a duty upon the authorities, before granting recognition/ affiliation, to ensure minimum standards to be maintained by the schools while imparting education to the children. In the present case, as clearly emerges from the record, school at Darlaghat was being run in complete violation of the provisions contained under the Act and there are no basic facilities as required under the Act, as such, this Court sees no reason to allow Gayatri Vidya Mandir School at Darlaghat to continue until it complies with all the codal formalities.

23. Having said so, there is no illegality or infirmity in order dated 15.6.2016 issued by the Deputy Director of Elementary Education.

24. Accordingly, while disposing of the present petitions, this Court deems it fit to direct the authorities concerned to ensure that no school in the name of Gayatri Vidya Mandir School, Darlaghat runs at Darlaghat without completion of necessary codal formalities as

envisaged under the Act ibid. All pending applications, in both the petitions, are also disposed of and, interim directions, if any, are vacated.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Ram Dev ... Appellant.
Vs.
Dhameshwar Sharma & others. ... Respondents

Criminal Appeal No. 38 of 2010
Date of judgment :20.10.2016.

Indian Penal Code, 1860- Section 436 read with Section 34- Accused had set the shop on fire causing loss of Rs.1 lac to the informant – the accused were tried and acquitted by the trial Court- held in appeal that there was delay in lodging the FIR – there was no murmur till 3 A.M. that accused had set the shop on fire- the trial Court had rightly appreciated the evidence- appeal dismissed. (Para-7 to 23)

Cases referred:
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the Appellant: Mr. G.R. Palsara, Advocate.
For the respondents: Mr. Sanjeev Kuthiala, Advocate for respondents No.1 to 3.
Mr. D.S. Nainta and Mr. Virender Verma, Additional Advocate Generals for respondent No.4.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge *(oral).* .

The present appeal is preferred by the appellant under Section 372 of the Code of Criminal Procedure assailing the judgment of acquittal dated 29.7.2009, passed by the learned Sessions Judge, Mandi, H.P., in Sessions Trial No.54 of 2008, whereby, the accused persons have been acquitted of the charges framed against them.

2. Briefly stating, as per prosecution story, facts giving rise to the present appeal, are that on 16.7.2007 at about 12.00 noon, Ram Dev, complainant was intimated by his brother Chiranji Lal that his shop, which was existing on the government land, had been set on fire. Chiranji Lal noticed his brother, accused Dhameshwar and his sons, namely Lalit Kumar and Dimple, running from the side of the shop. The said shop along with one room had been constructed by him on government land during the year 1979, when Dhameshwar and his brother Chiranji Lal were joint, the same had fallen to his share and the other shop had fallen to the share of his brother Dhameshwar, after partition in the year 1988. It has been averred that on such information, the complainant and other co-villagers reached at the spot and the Fire Brigade controlled the fire. Damage was caused to the furniture, bedding, utensils and confectionary items, which was stated to the tune of Rs.1,00,000/-. It has further been averred that the accused had set the shop on fire to occupy the land. The incident was reported to the police, on which, FIR Ext.PW1/A was registered. During the course of investigation, the police took into possession ash, burnt wood and coal from the spot, vide memo Ext. PW5/A, which was stated to be signed by Ms. Ram Pyari, PW5 and Ghanshyam. Photographs of the scene of crime were also taken, which are Exts. PW12/A to PW12/F and negatives whereof are Exts. PW12/G to

PW12/M. The demarcation of the land was conducted by Hem Singh, Patwari PW9 and Tatima Ext.PW9/A and jamabandi Ext.PW9/B were procured. Exts. PW8/A and PW11/A respectively were the records of the sanction of water and electricity connection.

3. The prosecution in order to prove its case has examined thirteen witnesses. The statement of the accused under Section 313 Cr.P.C. was recorded. No defence witness was examined by the accused.

4. After the completion of the trial, the learned trial Court acquitted the accused for the offences punishable under Sections 436 read with Section 34 of Indian Penal Code.

5. Heard. The learned counsel appearing for the appellant/complainant (hereinafter to be called as 'the complainant') has argued that the Court below has not appreciated the facts, which have come on record to its true perspective. On the other hand, learned counsel appearing for respondents No.1 to 3 argued that as the prosecution has failed to prove its case beyond reasonable doubt, therefore, the judgment passed by the Court below needs no interference. The learned Additional Advocate General has submitted that the State has not assailed the impugned judgment.

6. To appreciate the arguments of the learned counsel for the complainant and the learned counsel for respondents No.1 to 3, we have gone through the record of the case in detail.

7. PW-1, Ram Dev, complainant has deposed that he and his brother jointly constructed two shops having slate roof on the government land in the year 1979 and in partition, which took place in the year 1988, one shop had fallen to his share and the other to accused Dhameshwar. It has further been stated that the complainant started running a tea stall in the shop in the year 1991. He further deposed that accused Dhameshwar purchased adjacent land from Shri Yadav Verma in the year 2006 and thereafter the dispute started. Accused Dhameshwar had asked him to leave the shop otherwise he will set the same on fire. On 16.7.2007, the complainant was unwell and he alongwith his son, Yadvinder (PW-2) returned home after closing the shop. They reached home at about 10.30 p.m. and at about 12:00 p.m. the brother of the complainant (PW-4) intimated them that accused Dhameshwar and his sons, Lalit and Dimlple, had set the shop on fire. The fire was controlled by the Fire Brigade and loss was estimated to the tune of Rs.1,00,000/-. In cross-examination, he has admitted that the complainant/accused and Chiranji Lal were residing in the same house situated at a distance of about one kilometre from the shop. The house was having telephone facility. He further stated that when he and Chiranji Lal reached on the spot, at about 1.00 a.m., people were present there. He has stated that Chiranji Lal did not tell when the accused set the shop on fire nor he raised any hue and cry or shouts. He also admitted that accused No.1 had filed a civil suit regarding construction allegedly to be raised by him and Chiranji Lal

8. PW-2 Yadvinder, who was son of the complainant, deposed that on 16.7.2007, he was looking after the shop at village Devagan, as his father was ill on that day. He further deposed that he closed the shop on that day at about 10.30 p.m. and thereafter went to attend the marriage at village Khamradha in his relations. He returned from the marriage in a vehicle at about 11.30 /11.45 pm, he noticed that the shop was set on fire and the accused Dhameshwar, Lalit and Dimple were running through shortcut. On raising of the alarm, co-villagers reached and tried to extinguish the fire. He further stated that the accused were earlier threatening them to vacate the shop. Subsequently, they did so and extensive damage to the tune of Rs.1,00,000/- was caused. He suspected that the accused had set the shop on fire. In cross-examination, he deposed that on 16.7.2007, accused Lalit Kumar closed the shop at about 8.00 p.m. He further deposed that he reached at Khamarada at 10.40 p.m. and after dinner returned in a private jeep of Himachal number at about 11.45 p.m. The shop was noticed on fire from a distance of 10 feet and when he reached about 100 metres towards his house, through pedestrian short cut, the accused were seen from a distance of 10 metres. He did not remember the colour of the clothes of the accused. He also did not raise any alarm/noise about setting the shop on fire till the lodging of the report. Accused Dhameshwar had filed a civil suit against Ram Dev and

Chiranji Lal about the adjacent land to the shop. He had seen Chiranji Lal in a marriage at Khamrada, who returned prior to him. He did not wake up Devender Nath and Chaman Lal, whose houses were situated near to his shop. He further deposed that he told his father at about 2.30 a.m. that he had seen accused near the shop.

9. PW-3 Tek Chand has stated that accused Dhameshwar used to extend threats to Ram Dev to vacate the shop, else he would set the shop on fire. He has further stated that on 16.7.2007 at about 11/12 pm., on way to village Devkhan, he noticed the accused Dhameshwar, Lalit and Dimple had torches in their hands and they set the shop on fire in his presence. He went to Bhatwari and then raised noise about the incident of fire. He has also resiled from his previous statement. This witness, in his cross-examination, has deposed that his house was situated in village Thach at about 200-250 metres downward and the shop was not visible from his house. He crossed pedestrian path and saw the accused from a distance of about 6 feet and then focused the torch. He further deposed that there was a marriage in the village and accused Dhameshwar set the shop on fire from middle and the other accused set the shop on fire from the other side. He raised alarm without shouting that accused had set the shop on fire. He further stated that his son Roshan lal was involved in a N.D.P.S. case and was released on parole when his wife died and he did not return to jail. He also deposed that Roshan Lal was residing with him.

10. PW-4 Chiranji Lal, who was the brother of the complainant, has deposed that out of two shops situated at village Devkhan, one shop was in possession of complainant and the other was with the accused Dhameshwar since the time when they were joint. He further deposed that on 16.7.2007 at about 11/11.30 p.m. on way to home, on return from a marriage at Khamarda at the time of parking his vehicle, he noticed that shop of the complainant had been set on fire and the accused were running from the shop towards their house. He informed the complainant and came with him to the shop. Loss to the tune of Rs.1,00,000/- was caused. In his cross-examination, he deposed that he had seen the burning shop from a distance of 100 metres. He further stated that 5-6 houses with telephone facility were situated near the shop. He further deposed that the accused were about 40-50 metres away from his shop. He did not remember the colour of their clothes. The accused were running with their back towards him on the motorable road and they continued running for about 100 to 200 metres. He kept on watching the shop for 5-10 minutes without raising any alarm and then went to Bhatwari. He woke up the complainant and did not tell anybody else about the fire. The people came to know about the fire about 5-10 minutes later. He did not go to the police station as his vehicle was not having petrol. The accused Dhameshwar had filed a civil suit against him and complaint about the digging of land.

11. PW-5 Ram Pyari, who was Pradhan, Gram Panchayat, Bhatwari proved memo Ext.PW5/A with respect to the taking of ash, pieces of burnt wood and coal in possession by the police.

12. PW-6 HC Dina Nath No. 888, stated that during the year 2007, he was posted as Head Constable in Police Station, Aut. He further stated that during the period 7.7.2007 to 27.7.2007, he was officiating as MHC. He also stated that on 17.7.2007, S.I./Additional SHO deposited with him one sealed parcel sealed with seal impression 'T' and that on 27.7.2007, said parcel was sent through Constable Bhup Singh to F.S.L., Junga vide RC No.90/2007 and after depositing the same he delivered receipt to him. In his cross-examination, he denied that neither parcel with seal impression 'T' was deposited with him nor was sent to FSL. He further denied that no receipt was handed over to him.

13. PW-7, MHC, Police Station, Aut during the year 2007 deposed that SHO had deposited with him a sealed parcel which was sent by him through Constable Bhup Singh, to the F.S.L., Junga.

14. PW-8 Arvind Verma stated that he remained posted as S.D.O., I&PH, Kandrour, and was posted as SDO, IPH, Panarsa during the period from May, 2006 to April, 2008. He also

proved letter Ext.PW8/A about the sanction of public tap near the premises of the complainant, which was converted into a private tap as per the instructions of the government.

15. PW-10 Daya Ram stated that he demarcated the land and verified Tatima Ext.PW9/A, which was prepared by the Patwari.

16. PW-11 Devinder Kumar has deposed with respect to the sanction of electricity connection vide letter Ext. PW11/A.

17. PW-12 Inspector Mangat Ram was the Investigating Officer, who has taken into possession ash, burnt pieces of wood and coal vide memo Ext.PW5/A sealed with seal impression "T" and specimen seal impression was also taken separately vide Ext.PW12/N. He also prepared the spot map Ext.PW12/O and recorded the statement of witnesses. Thereafter, ASI Bansi Lal, who appeared as PW13, has collected the information from the S.D.O., I&PH and S.D.O., H.P.S.E.B and got the land demarcated after obtaining the order from Tehsildar. Close scrutiny of the testimony of Chiranji Lal (PW4) reveals that he did not apprehend the accused after seeing them setting on fire the shop of the complainant. He also did not raise any alarm so as to attract the attention of the persons residing in the vicinity that the shop had been set on fire. PW4 stated that there was telephone facility near the shop and house of the complainant. When the telephone facility was available in the house situated in the vicinity and when the shop of his brother was set on fire, as a prudent man, he should have gone to extinguish the fire and intimate his brother telephonically. He has not adopted any of these two courses. The act and conduct of this witness reflects that he was complacent, as he kept on proceeding towards his house, when the said shop was set ablaze. He neither made any telephonic call nor tried to extinguish the fire, so his act and conduct is not trustworthy.

18. Sh. Yadvinder (PW-2) son of the complainant, happens to be another witness having seen the accused setting the shop on fire. His conduct is also un-natural and improbable and it is not sufficient to hold that he had seen the accused running from the spot of occurrence after setting the shop on fire. He had left the spot at about 10.30 p.m. to attend the marriage. So, it is evident that it was hard to believe that immediately after taking dinner, he returned back at about 11.30 or 11.45 p.m. He also did not react spontaneously and naturally and did not try to apprise his father, through telephone, about setting of the shop on fire. He continued walking to the village without raising any alarm and the same was raised by him when he had covered half kilometer. He did not find his father and Chiranji Lal at the spot nor at the house. Such un-natural conduct can hardly be believed so as to provide any credence to the case of the prosecution.

19. PW-3 Tek Chand after noticing the fire, continued proceedings towards Bhatwari without reacting to the fire by making any effort to awake the persons residing in the vicinity or making any effort to extinguish the fire. He identified the accused in torch light and this statement also appears to be made with a view to settle score with them. He also tried to save his son from prosecution from the Court in N.D.P.S. case.

20. So far as the threat is concerned, the motive disclosed for the act by the complainant, PW3 and PW4 is that the accused wanted to get the shop vacated, consequently, the accused set the shop on fire. This sole circumstance is not conclusive to prove that it is the accused, who has set the shop on fire. There may be other reasons or enmity with some other person, which has led to the incidence. The delay in lodging the FIR is also one of the considerations, which show that there was considerable thinking before lodging the FIR coupled with the fact that there is no murmur till 3.00 a.m. that the shop was set on fire by the accused persons. All this goes to show that the prosecution has failed to prove the guilt of the accused conclusively and beyond all reasonable doubt. In these circumstances, we do not find any infirmity with the well reasoned judgment of the learned Court below acquitting the accused persons holding that the prosecution has failed to prove the guilt of the accused conclusively and beyond reasonable doubt.

21. It has been held in **K. Prakashan** vs. **P.K. Surenderan (2008) 1 SCC 258**, that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/mis-appreciation of evidence on record, reversal thereof by High Court was not justified.

22. The Hon'ble Supreme Court in **T. Subramanian** vs. **State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

23. In view of the above circumstances, the prosecution has failed to prove the guilt of the accused persons conclusively and beyond a shadow of doubt. This Court finds that learned Appellate Court has rightly dealt with the evidence and found the same not worthy of credence. We, thus, find no merit and substance to interfere with the well reasoned judgment passed by learned Appellate Court and the appeal filed by the appellant is accordingly dismissed.

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

Santosh ...Petitioner.

Versus

The State of Himachal Pradesh and others ...Respondents.

CWP No.1796 of 2015.
Judgment reserved on : 05.10.2016.
Date of decision: 20th October, 2016.

Constitution of India, 1950- Article 226- Petitioner applied for the post of T.G.T. and Language Teacher through School Management Committee on period basis – respondent no. 6 was appointed after the interview- petitioner challenged the appointment on the ground of favouritism - held, that respondent No. 6 was awarded 9.33 marks in interview, whereas, the petitioner was awarded 0.83 marks out of 10 marks – the petitioner is well qualified – her marks have been reduced from 4 to 2 by the President, S.M.C., whereas, the marks of respondent No. 6 have been increased from 7 to 9- 9 marks were awarded by the Headmaster to respondent No. 6, which were increased to 9½, whereas, 0 marks were awarded by him to the petitioner – S.D.M. awarded 9.5 marks to respondent No. 6 and only 0.5 marks to the petitioner- Selection Committee had acted arbitrarily and capriciously - it is difficult to believe that petitioner would have scored only 0, 0.5 and 2 marks while respondent No. 6 would have scored 9, 9½ and 9½ marks - the disparity in the marks shows that they were awarded only to select the respondent No. 6 – petition allowed and appointment of respondent No. 6 set aside. (Para-5 to 21)

For the Petitioner: Mr.Ramesh Kaundal, Advocate.

For the Respondents: Ms. Meenakshi Sharma, Additional Advocate General with Mr.J.S. Guleria, Assistant Advocate General, for respondents No.1 to 5.

Mr.Bhuvnesh Sharma, Advocate, for respondent No.6.

Smt.Jyoti Rana (SDM), Smt.Mithlesh Gupta (Retd. Principal), Mr.Suresh Kumar (TGT Arts) and Mr.Devender Singh (ex-SMC President) are present in persons.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan Judge.

By medium of this petition, the selection of respondent No.6 to the post of Language Teacher (TGT) through SMC on period basis in Government High School, Nehar Swar,

District Sirmaur, has been assailed by the petitioner on the ground that the same is an outcome of favouritism as private respondent No.6 has been awarded unduly high marks in viva-voce/interview to ensure her selection, whereas, the petitioner has been awarded disastrously low marks making it impossible for her to bridge the difference so as to get selected.

2. Certain relevant facts leading to the filing of the instant petition may be stated thus.

3. An advertisement by way of news item appeared in the daily newspaper 'Amar Ujala' wherein applications for the post of TGT and Language Teacher through SMC on period basis in the concerned school were invited. The petitioner being eligible also applied for the post. The interviews for which were held on 17.12.2014 in the Office of SDM, Nahan, in which respondent No.6 was selected and eventually came to be appointed.

4. The official respondents have justified the selection of respondent No.6 on the ground that she was more meritorious. Respondent No.6 has also justified her selection by claiming that she was more meritorious and was, therefore, rightly selected and thereafter appointed by the official respondents.

I have heard the learned counsel for the parties and also gone through the material placed on record.

5. It is not in dispute that as per the notification dated 30.07.2014 which modified the earlier notification dated 17.07.2012, the members of the Selection Committee comprised of the following:-

i) SDM of the concerned Sub-Division - Chairman
ii) President of SMC of concerned school- Member
iii) Head of the Institution - Member
Secretary of the SMC.

6. It is further not in dispute that the petitioner belongs to the same Patwar Circle and was thus awarded 10 marks for the same, whereas, respondent No.6, admittedly, did not belong to the concerned Patwar Circle and was thus deprived of these 10 marks. The comparative chart of the marks obtained by the petitioner and respondent No.6 is as under:-

The List of Candidates for the post of L.T. to be filled through SMC on Period Basis in G.H.S. Nehar Swar U/C Govt. Sen. Sec. School, Bechar Ka Baag, District Sirmour, H.P. on Dated 17.12.2014 and Merit

S. No	Name of the	Father's Name	D.O.B.	Metric (5)	10+2 (5)	Graduation (10)	B.Ed.	Post Graduation (10)	T.E.T. (10)	Concerned	Total (50)	Interview (10)	Grand Total (60)	Remarks
3	Parul Pundi	Sh. Vineet	17-02-	385/700	326/500	569/1000	442+226=66	940/1600	92/150	No	23.7	9.33	33.03	

	r	**Kumar**	**85**				**8/1000**						
				55%	**65.20%**	**56.90%**	**66.80%**	**58.75%**	**61.30%**				
				2.75	**3.26**	**5.69**	**-------**	**5.87**	**6.13**				
10	**Kumari Santosh**	**Sh. Sadanand Sharma**	**4-3-1982**	**364/700**	**287/500**	**519/1000**		**834/1600**	**88/150**	**Yes (10)**	**21.73+10/31.73**	**0.83**	**32.56**
				52%	**57.40%**	**51.90%**	**---**	**52.12%**	**58.60%**				
				2.6	**2.87**	**5.19**		**5.21**	**5.86**				

7. It would be noticed that in the interview, respondent No.6 was awarded 9.33 marks, whereas, the petitioner was awarded 0.83 marks, out of 10 marks and the individual break-up of these marks is as under:-

Score sheet of Candidates Applying for the post of L.T. in G.H.S. Nehar Swar U/C Govt. Sen. Sec. School Bechar ka Baag Distt. Sirmour, H.P. on dated 17.12.14.

Sr. No.	Name of the candidate	Father's Name	S.D.M Chairperson (10)	H.M. Member (10)	S.M.C. Member (10)	Total (30)	Average (10)
3	**Parul Pundir**	**Sh.Vineet Kumar**	**9.5**	**9.5**	**9**		**9.33**
10	**Kumari Santosh**	**Sh.Sadanand Sharma**	**0.5**	**Zero**	**2**		**0.83**

8. It is vehemently contended by the learned counsel for the petitioner that private respondent No.6 has been awarded unduly high marks in the viva voce/interview to ensure her selection, whereas, disastrously low marks have been awarded to the petitioner to ensure that she is not selected because even if 2 marks out of 30 marks could have been awarded to her, then the same would have resulted into her selection.

9. Normally, this Court would not sit in appeal over the assessment of an individual candidate made by the respondents and would also not adopt a role of supervisory authority and revaluate the performance of a candidate at the viva voce/interview merely because of a whisper of favouritism has been levelled. But then can the Court ignore a selection which is an amalgam of favouritism and nepotism and uphold the same.

10. I observe so because not only is the petitioner well-qualified and may be even more qualified than the members of the Selection Committee itself, but that apart the marks in favour of respondent No.6 have been increased from 7 to 9 in the individual marking conducted by the President, SMC and, on the other hand, as regards the petitioner, her marks have arbitrarily been reduced from 4 to 2.

11. Similarly, the Headmaster, the head of the Institution-cum-Member Secretary of the SMC had initially awarded 9 marks to respondent No.6 which have thereafter been scored of to make it 9½ and as regards the petitioner, she has been awarded "*zero marks*" .

12. The S.D.M., on the other hand, has awarded 9.5 marks out of 10 marks to respondent No.6, whereas, the petitioner has only been granted 0.5 marks. Evidently, even after awarding such high marks, the difference of marks between the petitioner and respondent No.6 is only 0.47 marks and the petitioner has been awarded ridiculously low marks 0.83 out of 30 marks in the viva voce.

13. The members of the Selection Committee were called on by this Court to appear before it and explain the conduct and would claim that they had awarded marks strictly on the basis of the performance of the candidates. I am afraid that such contention on behalf of the members of the Selection Committee is not at all acceptable in teeth of the material placed on record. The Selection Committee, to say the least, has acted in a highly arbitrary and capricious manner and the selection is nothing but an outcome of favouritism and nepotism. The Selection Committee has shown complete insensitivity while dealing with the selection that too of candidates, who were highly qualified. The petitioner, admittedly, is a Post-Graduate in Political Science and has also qualified the Language Teacher Eligibility Test and the members of the Selection Committee would have this Court to believe that she was so dumb so as to be awarded 0 marks, 0.5 and 2 marks in the interview, whereas, respondent No.6 was so intelligent so as to be awarded 9, 9½ and 9½ marks each.

14. I have no hesitation to conclude that the marks have been awarded to different candidates at the whims and caprice of the members of the Selection Committee to facilitate the selection of respondent No.6 or else such disparity in allocation of marks would not exist. There is virtually no element of selection and so-called process of selection was only a farce and mockery.

15. The learned Additional Advocate General would vehemently contend that simply because a candidate obtains more marks in the interview is not a ground to reach a conclusion that her candidature was in any manner favoured. I find no merit in this contention for the reasons already stated above.

16. The learned counsel for the private respondent would however vehemently argue that his client deserves the allocation of marks so awarded by the Selection Committee as after the appointment she has been giving 100% results in the school in her subject i.e. Hindi. I am afraid that this contention also cannot be accepted because it is not only the duty but the responsibility of a teacher to produce 100% results and in doing so he/she does no favour either to the student or the State.

17. As observed earlier, the only explanation given by the members of the Selection Committee was that respondent No.6 answered all the questions correctly and, therefore, was awarded high marks.

18. Undoubtedly, interview is one of the best modes of assessing the suitability of a candidate for a particular position. While, the written examination will testify the candidate's academic knowledge, the oral test alone can bring out and disclose his overall intellectual and personal qualities like alertness, resourcefulness, dependability, capacity for discussion, ability to take decisions, qualities of leadership, dependableness, cooperativeness, capacity for clear and logical presentation, effectiveness in meeting and dealing with others, adaptability, ability to lead intellectual and moral integrity etc.

19. It is difficult to fathom that the petitioner lacked all such qualities so as to be awarded 0 marks by the Principal, 0.5 by the SDM and only 2 marks by the President of the SMC, who himself is only 7th class pass. To say the least, the entire process of selection was nothing, but a farce and clear eye-wash to appoint respondent No.6, by hook or crook.

20. After having concluded that there has been favouritism and nepotism in conducting the selection, the further question that arises for consideration is as to what action should be taken against the members of the Selection Committee, who had been entrusted and assigned with the responsibility of making a fair selection. Although, this is a fit case where stern action is called for against the members of the Selection Committee. However, taking into consideration the fact that the President of the SMC is not a Government servant and further taking into consideration that the head of the Institution has already retired, it will not be proper to single out and initiate any kind of proceedings against the Sub Divisional Magistrate, who is still serving and currently posted as such at Manali, District Kullu, particularly, taking into consideration her long career ahead. However, at the same time, she is warned to be careful in future.

21. In view of the aforesaid discussion, I find merit in this petition and the same is accordingly allowed. The appointment of respondent No.6 is quashed and set aside and in her place, the official respondents are directed to forthwith offer appointment to the petitioner.

22. The petition is allowed in the aforesaid terms, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

The Secretary Agriculture Produce Market Committee, Una. ....Petitioner.

Versus

Bhajan Singh Maan ....Respondent.

CMPMO No. 70 of 2015.
Reserved on: 5/10/2016
Date of decision: 20.10.2016.

Code of Civil Procedure, 1908- Section 80(2)- **H.P. Agriculture and Horticulture Produce Marketing (Development and Regulation) Act, 2005 -** Section 70 - An application for dispensing with the requirement of serving notice under Section 80 C.P.C. was filed by the plaintiff, which was allowed- aggrieved from the order, the present petition has been filed- held, that the matter is regulated by special statute which does not provide any exception as has been provided under Section 80 – trial Court had wrongly applied the provision of Section 80 in this case - petition allowed – order of the trial Court set aside.

Case referred:
V.Padmanabhan Nair vs. State Electricity Board AIR 1989 Kerala 86

For the petitioner: Mr. Sanjay Ranta, Advocate.
For the respondent: Mr. Y.K.Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.

The plaintiff-respondent herein instituted a suit qua the suit premises against the defendant/petitioner herein for declaration and permanent prohibitory injunction. The suit was instituted before the Court of the learned Civil Judge, Senior Division, Una, yet prior thereto the plaintiff omitted to serve upon the defendant petitioner herein a mandatory notice as

envisaged under Section 80 of the CPC. However, during the pendency of the suit, the plaintiff respondent herein instituted an application under Section 80(2) of the CPC before the learned trial Court whereupon he sought relief for dispensing with the mandatory requirement envisaged in Sub section 1 of Section 80 of the CPC wherein a mandate is constituted, qua a suit against the Government or against a public officer in respect of any act purported to be done by such public officer in his official capacity, being not institutable theiragainst until the expiration of two months next after notice in writing standing delivered upon the authorized officer of the Government or upon the public servant concerned. The learned trial Court allowed the application. The defendant/petitioner herein stands aggrieved by the rendition of the learned trial Court leading it to assail it herebefore by instituting a petition under Article 227 of the Constitution of India. The defendant/petitioner herein owes its birth to a statute nomenclatured as H.P. Agriculture and Horticulture Produce Marketing (Development & Regulation) Act, 2005, (hereinafter referred to as the Act), wherewithin in Section 70 thereof, which stands extracted hereinafter:-

> "70. Bar to sue in the absence of notice.-
>
> Notwithstanding anything contained in this Act, no suit shall be instituted against the Board or any Committee, until the expiration of two months next after notice in writing stating the cause of action, name and place of abode of the intending plaintiff, and the relief which he claims has been delivered or left at its office. Every such suit shall be dismissed unless it is instituted within six months from the date of the accrual of the alleged cause of action."

a preemptory mandate stands encapsulated qua no suit being institutable against the Board or any Committee until expiry of two months next after notice in writing stating the cause of action, name and place of abode of the intending plaintiff and the relief which he claims, has been delivered and left at its office. A circumspect reading of the mandate constituted in Section 70 of the Act aforesaid wherefrom the defendant/petitioner herein has taken birth unveils of, unlike the provisions engrafted in sub section 2 of Section 80 of the CPC wherewithin an exception is constituted vis.a.vis the operation of sub section 1 of Section 80 CPC holding therein mandatory obligation cast upon the plaintiff to prior to institute a suit within its ambit serve a notice upon the entity or public officer concerned enumerated therein, exception whereof on emergence of exigencies or contingencies spelt therein hence standing galvanized, no exception to the mandate held therewithin is carved therein. In sequel, with the Act being a special statute also with hence it ousting the provisions of Section 80 of the CPC, its mandate holds sway and clout whereas the mandate of Section 80 of the CPC holds no play or command vis.a.vis the material factum of institution of a suit against a committee owing its genesis to the Act, in respect whereof the special mechanism contemplated in the special statute holds the field whereupon the inevitable effect is of the application preferred by the plaintiff/respondent herein before the learned trial Court under Section 80(2) of the CPC being neither maintainable nor an order in affirmation to the relief canvassed therein holding any virtue of legal solemnity. The learned counsel appearing for the respondent herein on the anvil of a judgement of the Kerala High Court reported in **V.Padmanabhan Nair vs. State Electricity Board** ***AIR 1989 Kerala 86*** wherewithin the Kerala High Court has pronounced a view qua given the distinctivity in parlance or in coinage borne by the parlance Government or public officer embodied in Section 80 of the CPC vis.a.vis an Electricity Board or its Officers surgingforth on the anvil of the political concept of 'Government' holding no congruity or analogoty vis.a.vis the jurisprudential concept of 'State' within ambit whereof an instrumentality or an agency of a State may fall, mantle whereof may stand donned by the Electricity Board besides when hence it may be rendered to carry the characteristic traits of a 'State' contemplated in Article 12 of the Constitution of India whereupon it is rendered amenable to writ jurisdiction, yet it not for the purpose of applicability of Section 80 of the CPC nor within its ambit bearing any tinge, trait or element of a 'Government' whereupon it is not construable to be Government nor its Officers are construable to be Public Officers, has contended of likewise the petitioner herein being unamenable qua operation qua it of the mandate of Section 80 of the

CPC. True it is qua the petitioner herein in congruity with the mandate of the verdict aforesaid of the Kerala High Court may be holding the trait of an agency or an instrumentality of 'State' whereupon it may be amenable to writ jurisdiction yet the mandate of Section 80 of the CPC may stand unattracted vis.a.vis. it. However, yet conspicuously when the mandate of Section 70 of the Act is trite besides categorical in rendering a suit against a Committee owing its birth to its provisions being unmaintainable unless the mechanism contemplated therein stands resorted to also when unlike Section 80 of the CPC wherein sub section 2 stands carved to operate as an exception to the mandate of sub section (1) thereof, no exception to the rigour of the mandate of Section 70 of the Act stands engrafted therein. Consequently, it was mandatorily incumbent upon the plaintiff for rendering his suit to be maintainable to prior thereto in consonance with its provisions serve a notice upon the defendant whereas the plaintiff not serving a notice upon the defendant rendered his suit to be not statutorily maintainable. Consequently, for reasons aforestated the provisions of sub section 2 of Section 80 of the CPC are neither invokable hereat nor the order rendered thereon by the learned trial Court holds any legal tenacity. This Court while building the aforesaid legal postulation finds succor from a decision of the Hon'ble Supreme Court reported in Nagar Palika Parishad, Mihona and another Vs. Ramnath and another, *(2014) 6 SCC 394.* In view of the above the impugned order is set-aside. No costs.

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

Valley Iron & Steel Company Ltd. ...Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

CWP No. 1689 of 2016
Reserved on: 01.09.2016
Decided on: 20.10.2016

Constitution of India, 1950- Article 226- Writ petitioner participated in the auction proceedings initiated in terms of the order of the Court – sale certificate was issued in favour of the petitioner but entries were not made in the revenue record on the ground that permission under Section 118 of H.P. Tenancy and Land Reforms Act was not obtained – held, that Section 118 contains the word decree and other modes of alienation/transfer – a bonafide auction purchaser does not fall within this definition – sale becomes complete on its confirmation and there is no need for registration- it was not stated in the auction notice that there is requirement of compliance of Section 118 – it is the duty of the Court to provide protection to the auction purchaser-authorities have defeated the purpose of conducting auction- right of auction purchaser cannot be defeated by pressing any other law- sale becomes final on confirmation and the sale certificate does not require any registration- no person can be prejudiced by the act of the Court- land which is occupied as a site of any building or machinery does not fall within the definition of land under Tenancy and Land Reforms Act- in the present case also land was not let out for agricultural purposes or purposes subservient to agriculture – writ petition allowed. (Para-7 to 73)

Cases referred:

Mt. Ram Sri versus Jai Lal, AIR (34) 1947 Allahabad 171

S.M. Jakati and another versus S.M. Borkar and others, AIR (46) 1959 Supreme Court 282

M/s. Ouchterloney Valley Estates Ltd. Versus State of Kerala, (1965) 1 Supreme Court Reports 803

Sagar Mahila Vidyalaya, Sagar versus Pandit Sadashiv Rao Harshe and others, (1991) 3 Supreme Court Cases 588,

Nellikkottu Kolleriyil Madhavi versus Kavakkalathil Kalikutty and others, (1997) 1 Supreme Court Cases 749
The Ahmedabad Municipal Corporation of the City of Ahmedabad versus Haji Abdulgafur Haji Hussenbhai, 1971 (1) Supreme Court Cases 757
Chinnammal and others versus P. Arumugham and another, (1990) 1 Supreme Court Cases 513
Gurjoginder Singh versus Jaswant Kaur (Smt.) and another, (1994) 2 Supreme Court Cases 368
Padanathil Ruqmini Amma versus P.K. Abdulla, (1996) 7 Supreme Court Cases 668
Ashwin S. Mehta and another versus Custodian and others, (2006) 2 Supreme Court Cases 385
Janatha Textiles and others versus Tax Recovery Officer and another, (2008) 12 Supreme Court Cases 582
Sadashiv Prasad Singh versus Harendar Singh and others, (2015) 5 Supreme Court Cases 574
Bai Dosabai versus Mathurdas Govinddas and others, (1980) 3 Supreme Court Cases 54
B. Arvind Kumar versus Govt. of India and others, (2007) 5 Supreme Court Cases 745
Som Dev and others versus Rati Ram and another, (2006) 10 Supreme Court Cases 788
K. Chidambara Manickam versus Shakeena & Ors., AIR 2008 Madras 108
Sudarshna Devi versus Union of India and another, ILR 1978 H.P. 355
Som Kirti alias Som K. Nath and others versus State of H.P. and others, Latest HLJ 2013 (HP) 1223
Raja Sahib of Poonch versus Kirpa Ram, AIR 1954 Jammu & Kashmir 23
State of Gujarat & Ors. versus Essar Oil Limited and Anr., 2012 AIR SCW 1008
Nemi Chand Jain versus The Financial Commissioner, Punjab and another, 1963 PLJ 137
Munshi Ram and others versus Financial Commissioner, Haryana and others, (1979) 1 Supreme Court Cases 471
The State of Himachal Pradesh versus Maharani Kam Sundri, ILR 1984 HP 397
Peter Butt and others versus Sister Roseline Kokara, 1992 (2) Sim.L.C.124
Nirmal Singh versus Randhir Sharma, 1994 (2) Sim.L.C. 255
Krishan Singh (Shri) & Anr. Versus Smt. Krishna & Ors., 2006 (2) Current Law Journal 203
K.N. Farms Industries (Pvt.) Ltd. versus State of Bihar & Ors., 2009 AIR SCW 4869
Som Kirti alias Som K. Nath and others versus State of H.P. and others, Latest HLJ 2013 (HP) 1223
Sudarshana Devi versus Union of India, ILR 1978 HP 355
Society for Preservation of Kasauli and its Environs versus State of Himachal Pradesh and others, 1994 (Suppl.) Sim. L.C. 450

For the petitioner:	Ms. Jyotsna Rewal Dua, Senior Advocate, with Ms. Charu Bhatnagar, 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, for respondents No. 1 to 4. Mr. Sanjeev Kuthiala, Advocate, for respondent No. 5.

Mansoor Ahmad Mir, Chief Justice.

By the medium of this writ petition, the writ petitioner has sought the following reliefs amongst others on the grounds taken in the memo of the writ petition:

> *"That in view of the submissions made hereto before, it is therefore respectfully prayed that an appropriate writ, order or direction may kindly be issued to the respondents to the following effect:-*

i) *For holding that sale deed is not required to be registered in respect of land comprised in khata No. 106, khatauni No. 200, khasra Nos. 42, 43, 44, 45, 47, 56, 57, 58, 59, 67; kita 10 measuring 02-13-80 hectare situated in Mahal Ban Atarian Tehsil Indora District Kangra, of which, sale certificate stands issued in favour of the petitioner/auction purchaser by the Official Liquidator pursuant to conformation of sale in favour of the petitioner/auction purchaser by this Hon'ble Court and to direct the respondents to enter the name of the petitioner as owner in the revenue record on the basis of sale certificate.*

OR in the Alternative to above:-

a) for directing the respondents to register the sale deed of the property mentioned in relief clause No. i) in a time bound schedule without insisting upon compliance of procedure detailed under Ss. 118 of the HP Tenancy and Land Reforms Act, Rules, and Instructions framed there under and

b) For directing the respondents to register the sale deed of the property mentioned in relief clause No. i), without insisting upon the petitioner to seek permission to purchase the property under Ss. 118 of the HP Tenancy and Land Reforms Act and Rules and Instructions framed there under and to hold that provisions of Ss. 118 of the Act are not applicable to the Court Auction Purchaser or in the Alternative to direct the respondents to grant such permission straightaway without insisting upon completion of any other formality/procedure required under the Act ibid/Rules and Instructions framed thereunder, in view of the petitioner being Court Auction Purchaser.

ii) *For directing the respondents to exempt the petitioner from applicability of Ss. 118 of HP Tenancy and Land Reforms Act for the purpose of directly selling the land in question, in favour of third parties/Himachalis, in whose favour the sale deed of the land in question, can then be registered directly."*

2. Respondents No. 1 to 4 have filed the reply and have contended that Section 118 of the H.P. Tenancy and Land Reforms Act, 1972 (for short "the Act") is mandatory in nature and the writ petitioner has to seek permission as required in terms of Section 118 of the Act.

3. It has been averred in the writ petition that the writ petitioner participated in the auction proceedings with respect to the assets of M/s HIM Ispat Ltd. (in liquidation) Village Kandrori, Tehsil Indora, District Kangra, H.P., which were initiated in terms of the orders made by this Court and being the highest bidder, paid ₹ 14.52 crore, which was accepted and confirmed by this Court vide order, dated 28th September, 2011 (Annexure P-5). Thereafter, a direction was passed by this Court in Company Petition No. 7 of 2001, titled as IFCI Ltd. versus Him Ispat Ltd. and another, vide order, dated 18th March, 2013, in Company Application No. 54 of 2012 to the concerned authority to execute the sale deed in favour of the auction purchaser, i.e. writ petitioner. In compliance to order, dated 18th March, 2013 (supra), sale certificate was issued by the Registrar of Companies-cum-Official Liquidator, Himachal Pradesh, Chandigarh, on 25th June, 2014 (Annexure P-8), perusal of which does disclose that the possession was handed over to the writ petitioner on 11th November, 2011. It would be profitable to reproduce the sale certificate herein:

"TO WHOM SO EVER IT MAY CONCERN

In pursuance to the order dated 28/09/2011 passed by the Hon'ble High Court of Himachal Pradesh, it is certified that M/s. Valley Iron & Steel Co. Ltd. is the successful auction purchaser of the assets of M/s HIM Ispat Ltd. (in liquidation), Village Kandrori, Tehsil Indora, District HP and the same has been confirmed by the Hon'ble bench of Hon'ble High Court of Himachal Pradesh vide order dated 28/09/2011. The auction purchaser has been given the possession of the movable and immovable assets of the company by us on 11/11/2011.

Sd/-

(D.P. OJHA)

Registrar of Companies cum Official Liquidator

Himachal Pradesh, Chandigarh."

4. The writ petitioner approached the concerned authorities for recording necessary entries in the revenue record, which they have not made so far and made it to run from pillar to post and post to pillar without there being any fault on its part.

5. The auction notice/terms and conditions of sale find place at pages No. 78 to 82 of the paper book. The writ petitioner, after noticing the auction notice and the terms and conditions, participated in the auction proceedings. The auction notice nowhere contains any such condition whereby it was made known to public that in order to have registration of the sale deed, the successful bidder has to obtain necessary permission in terms of Section 118 of the Act. The writ petitioner bonafidely participated in the auction proceedings and became the highest bidder, rather successful bidder. After depositing the bid amount to the tune of ₹ 14.52 crore, the writ petitioner has not been able to reap the fruits. Registration is yet to be made. It appears that the writ petitioner has been made to suffer due to the act of the Court without there being any fault on its part.

6. The question, which arises for consideration in this writ petition, is – whether a bona fide auction purchaser has to obtain necessary permission in terms of Section 118 of the Act in order to have registration of the sale certificate?

7. It is profitable to notice the relevant provisions of the Acts applicable and the judgments occupying the field.

8. It is apt to reproduce relevant portion of Section 118 of the Act herein:

> ***118. Transfer of land to non-agriculturists barred.*** *- (1) Notwithstanding anything to the contrary contained in any law, contract, agreement, custom or usage for the time being in force otherwise provided in this Chapter, no transfer of land (including sales in execution of a decree of a civil court or for the arrears of land revenue), by way of sale, gift, exchange, lease, mortgage with possession or creation of a tenancy shall be valid in favour on a person who is not an agriculturist.*
>
> *xxx xxx xxx*
>
> *(3) No Registrar or the Sub-Registrar appointed under the Indian Registration Act, 1908 shall register any document pertaining to a transfer of land, which is contravention to sub-section (1).*
>
> *Provided that the Registrar or the Sub-Registrar may register any transfer-*
>
> *(i) where the lease is made in relation to a part or whole of a building; or*
>
> *(ii) where the mortgage is made for procuring the loans for construction or improvements over the land either from the Government or from any other financial institution constituted or established under any law for the time being in force or recognised by the State Government.*
>
> *xxx xxx xxx*
>
> *(4). .....*
>
> *Explanation-I - For the purpose of this section, the expression "land" shall include -*
>
> *(i) land recorded as "Gair-mumkin", "Gair-mumkin Makan" or any other Gai-mumkin land, by whatever name called in the revenue records; and*

(ii) land which is a site of a building in a town or a village and is occupied or let out not for agricultural purposes or purposes subservient to agriculture but shall not include a built-up area in the municipal area."

9. Section 118 of the Act contains the word decree and other modes of alienation/transfer. A bona fide auction purchaser does not fall within the said definition. The moment sale is confirmed, his title becomes perfect and there is no need to have registration of the said sale. It is beaten law of the land that mutation does not confer title, is for recording entries in the record.

10. The Allahabad High Court in a case titled as **Mt. Ram Sri versus Jai Lal,** reported in **AIR (34) 1947 Allahabad 171,** held that on confirmation of the sale, title passes to the auction purchaser and the said title is perfect. It is apt to reproduce para 2 of the judgment herein:

"2. Learned counsel for the appellants has raised the point that it was clear from the judgment of the trial Court that though the sale was confirmed on 31.7.1934, theplaintiff did not apply for a sale certificate and he has urged that without a sale certificate the title in the trees did not pass to the plaintiff. Learned counsel has relied on the decision of their Lordships of the Judicial Committee in 48. I. A. 155 in which it was held that a certificate of sale was a document of title. It is no doubt a document of title and the rules make it perfectly clear that this is to be treated as such and then property may be situate with the object of having a note made in the necessary registers, whether the title to the property can or cannot pass till the issue of the sale certificate. Under O. 22, R. 92, Civil P.C., where no application is made under R. 89, R. 90 or 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute. Under S. 65 of the Code where immovable property is become absolute, the property shall be deemed to have vested in the purchased from the time when the property is sold and not from the time when the sale becomes absolute. These sections make it perfectly clear that it is the confirmation of the sale that passes the title of the property from the date of the sale. Under O. 21, R. 94, Civil P.C., it is the duty of the Court to grant a certificate specifying the property sold and the name of the person who at the time of the sale is declared to be the purchaser, but such certificate shall bear date the day on which the sale became absolute. The vesting of time is not make dependant on the issue of the sale certificate. To my mind, the law on the point is perfectly clear that the property vested in the plaintiff after the auction sale was confirmed from the date of the said sale and there was therefore no title left in the judgment-debtor which the defendants could purchase in the year 1940. The decision of the lower appellate Court is, therefore, correct and I dismiss this appeal with costs."

11. It would also be profitable to reproduce para 19 of the judgment rendered by the Apex Court in the case titled as **S.M. Jakati and another versus S.M. Borkar and others,** reported in **AIR (46) 1959 Supreme Court 282,** herein:

"19. In cases where the sons do not challenge the liability of their interest in the execution of the decree against the father and the Court after attachment and proper notice of sale sells the whole estate and the auction-purchaser purchases and pays for the whole estate, the mere fact that the sons were eo nomine not brought on the record would not be sufficient to defeat the rights of the auction-purchaser or put an end to the pious obligation of the sons. As was pointed out by Lord Hobhouse in Malkarjan v. Narhari, 27 Ind App 216 at p. 225 (PC) :

"Their Lordships agree with the view of the learned Chief Justice that a purchaser cannot possibly judge of such matters, even if he knows the facts; and that if he is to be held bound to enquire into the accuracy of the Court's conduct of its own business, no purchaser at a

Court sale would be safe. Strangers to a suit are justified inbelieving that the Court has done that which by the directions of the Court it ought to do."

In 13 Ind App 1 (PC) Lord Hobhouse said at p. 18 :

"But If the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the executing proceedings."

The question which assumes importance in an auction sale of this kind therefore is what did the Court intend to sell and did sell and what did the auction purchaser purport to buy and did buy and what did he pay for. One track of decision of which Simbhu Nath v. Golap Singh, 14 Ind App 77 (PC) is an instance, shows when the father's share alone passes. In that case the father alone was made a party to the proceedings. The mortgage, the suit of the creditor and the decree and the sale certificate all purported to affect the rights of the father and his interest alone. It was therefore held that whatever the nature of the debt, only the father's right and interest was intended to pass to the auction-purchaser. In Minakshi Nayudu v. Immudi Kanaka Ramya Gounden, 16 Ind App 1 (PC) which represents the other track of decision the Privy Council held that upon the documents the Court intended to sell and did sell the whole of the coparcenary interest and not any partial interest. The query in decided cases has been as to what was put up for sale and was sold and what the purchaser had reason to think he was buying in execution of the decree. 13 Ind App 1 (PC) (Supra), Bhagabut Pershad v. Mt. Girja Koer, 15 Ind App 99 (PC), 16 Ind App 1 (PC) and Mahabir Persad v. Rai Markunda Nath Sahai, 17 Ind App 11 at p. 16 (PC) and Daulat Ram v. Mehar Chand, 14 Ind App 187 (PC)."

12. The Apex Court in the case titled as **M/s. Ouchterloney Valley Estates Ltd. Versus State of Kerala,** reported in **(1965) 1 Supreme Court Reports 803,** held that the title to the goods passed to the buyer as soon as the sale was completed. It is apt to reproduce relevant portion of the judgment herein:

"We have carefully considered all the rules under which sales in question have been held by public auction, and we are satisfied that title to the goods passed to the buyer under s. 64(2) of the Act as soon as the sale was completed by the auctioneer announcing its completion by the fall of the hammer. The initial auction cannot, in our opinion, be treated as an executory contract which became a conditional contract on the fall of the hammer. The auction was an auction sale in respect of ascertained goods and it was concluded in every case on the fall of the hammer. On that view of the matter, we must hold that the High Court was in error in coming to the conclusion that the Sales-tax authorities were justified in imposing sales-tax against the appellants in regard to the transactions which have given rise to the present appeals."

13. In the case titled as **Sagar Mahila Vidyalaya, Sagar versus Pandit Sadashiv Rao Harshe and others,** reported in **(1991) 3 Supreme Court Cases 588,** the Apex Court has held that once an order confirming the sale has been made, thereafter, the title in the property vests in the auction purchaser. It is apt to reproduce para 14 of the judgment herein:

"14. The High Court while dealing with the question of limitation held that the plaintiff in this case was not required to file a suit for getting the sale set aside when he is pleading that the sale itself is void. A void sale could be ignored by a true owner and it did not affect his title. The High Court in our view was totally wrong in holding that it was a case of void sale. It may be noted that Govind Rao Harshe had already taken steps for getting the sale set aside by moving a petition under Order XXI Rule 90 CPC and his sons had filed a suit for declaration but all

those proceedings finally terminated against them. Even if for argument's sake the objection now raised in the present suit is considered, it is only in respect of the sale-certificate being wrongly issued in favour of Mahila Vidyalaya. So far as the sale in favour of Gopal Rao Mutatkar is concerned, there is no illegality and the sale was rightly confirmed in his favour under Order XXI Rule 92 CPC by order dated 10th April, 1943. It may be noted that once an order was made under Order XXI Rule 92 confirming the sale, the title of the auction-purchaser related back to the date of sale as provided under Section 65 CPC. The title in the property thereafter vests in the auction-purchaser and not in the judgment-debtor. The issue of sale certificate under Order XXI Rule 94 CPC in favour of the auction-purchaser though mandatory but the granting of certificate is a ministerial act and not judicial. Thus looking into the matter from this angle also it is clear that no right or title remained with Govind Rao Harshe after confirmation of sale in favour of Gopal Rao Mutatkar which related back to the date of sale i.e. 20th August, 1942. Thus there is no question of holding that it was a case of a void sale which could be ignored by a true owner and it did not affect his title. Govind Rao Harshe and as such the respondents who are his legal representatives were not entitled to take the stand that they were true owner as the sale itself was void and they were not required to file a suit for getting the sale set aside. With the risk of repetition it is held that it was not a case of the sale being void and in any case so far as issue of sale certificate in favour of Mahila Vidyalaya is concerned, the same was determined by a judicial order dated 26th February, 1944 and the executing Court was competent to pass such order, such order cannot be held to be void on the ground of being without jurisdiction as determined by the High Court and it was necessary to challenge the said order within limitation. Even if the residuary Article 120 of the Limitation Act, 1908 is applied, it should have been challenged within 6 years and as such the present suit filed on 26th November, 1960 was hopelessly barred by time." *(Emphasis added)*

14. The Apex Court in the case titled as **Nellikkottu Kolleriyil Madhavi versus Kavakkalathil Kalikutty and others,** reported in **(1997) 1 Supreme Court Cases 749,** held that a person, who purchases the property in a court auction-sale, gets title to the property by issuance of sale certificate as true owner. It is apt to reproduce para 3 of the judgment herein:

"3. This appeal by special leave arises from the judgment and decree of the Kerala High Court dated 24/5/1993, made in SA No. 368 of 1989. The respondents had purchased the Plaint Schedule property in execution of the decrees in OS No. 262 of 1955 on the file of the court of the District Munsif, Parappanangadi. The sale certificate, Exh. A-2 dated 28/1/1958 was given to the respondents. They had also filed an application for delivery of possession of the property which had come to be delivered under Exh. A-3 dated 21/7/1961. After taking delivery of the possession on 20/10/1961, they assigned the Plaint Schedule property to the plaintiff. Under those circumstances, the question arises whether they are entitled to a decree of perpetual injunction restraining the appellant from interfering with his possession. Though the trial court and the appellate court had accepted the case of the appellant, the High court has pointed out that aforesaid documents are material for deciding the controversy and the courts below had not considered those documents in proper perspective. Accordingly, in second appeal, the High court has gone into that question. It is settled law that the person who purchases the property in a court auction-sale, gets title to the property by sale certificate issued by the court as true owner and after confirmation of the sale, he gets possession thereof. In view of the fact that Plaint Schedule property was delivered to Sankaran under Exh. A-3 on 21/7/1961, he lawfully came into possession and the same was delivered in turn to the plaintiffs. Non-consideration of the material evidence is a substantial question of law." *(Emphasis added)*

15. As discussed hereinabove, the terms and conditions of sale contained in the auction notice were read by the writ petitioner and was not supposed to go beyond the same. It was the duty of the State and the authorities, who conducted the auction, to record all the terms and conditions in the auction notice. How can it lie in the mouth of the State that the auction purchaser has to do something more after making payment of such a huge amount.

16. It is profitable to reproduce paras 12 and 13 of the judgment rendered by the Apex Court in the case titled as **The Ahmedabad Municipal Corporation of the City of Ahmedabad versus Haji Abdulgafur Haji Hussenbhai,** reported in **1971 (1) Supreme Court Cases 757,** herein:

> *"12. Adverting now to the case before us, as already noticed, the property in question had vested in the receivers in insolvency proceedings since March, 1949 by an interim order, and in October, 1950 the original owner was adjudicated as an insolvent and the property finally vested in the receivers in insolvency. The Plaintiff purchased the property in November, 1954 and in our opinion it could not have reasonably been expected by him that the receivers would not have paid to the municipal corporation, since 1949 the taxes and other dues which were charged on this property by statute. According to Section 61 of the Provincial Insolvency Act, 1920 the debts due to a local authority are given priority, being bracketed along with the debts due to the State. Merely because these taxes are charged on the property could not constitute a valid ground for the official receiver not to discharge this liability. In fact we find from the record that on January 15, 1951 the receivers had submitted a report to the insolvency Court about their having received bills for Rs. 628-3-0 in respect of municipal taxes of the insolvent's property and leave of the Court was sought for transferring the said property to the names of the receivers in the municipal and Government records. The Court recorded an order on February 8, 1951 that the municipal taxes had to be paid. On the receivers stating that they did not possess sufficient funds the Court gave notice to the counsel for the opposite party and on February 24, 1951 made the following order :*
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> > *"Mr. Pandya absent. The taxes have to be paid. The Receivers state that they can pay only by sale of some properties of the insolvent from which they want Sanctioned. The property in which the insolvent stays should first be disposed of. The terms are accordingly so authorised."*
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> *It is not known what happened thereafter. It is, however, difficult to appreciate why after having secured the necessary order from the Court municipal taxes were not paid off by the receivers and why the Municipal Corporation did not pursue the matter and secure payment of the taxes due May be that the Municipal Corporation thought that since these dues were a charge on the property they need not pursue the matter with the receivers and also need not approach the insolvency Court. If so, then this, in our opinion, was not a proper attitude to adopt. In any event the plaintiff could not reasonably have thought that the Municipal Corporation had not cared to secure payment of the taxes due since, 1949. On the facts and circumstances of this case, therefore, we cannot hold that the plaintiff as a prudent and reasonable man was bound in enquire from the Municipal Corporation about the existence of any arrears of taxes due from the receivers. It appears from the record, however, that he did in fact make enquiries from the receivers but they did not give any intimation. The p1aintiff made a statement on oath that when he purchased the building in question it was occupied by the tenants and the rant used to be recovered by the receivers. There is no rebuttal to this evidence. Now, if the receivers were receiving rent from the tenants, the reasonable assumption would be that the Municipal taxes which were a charge on the property and which*

were also given priority under Section 61 of the Provincial Insolvency Act. 1920, had been duly paid by the receivers out of the rental income. The plaintiff could have no reasonable ground for assuming that they were in arrears. From the plaintiff's testimony it is clear that he did nevertheless make enquiries from the receivers if there were any dues against the property though the enquiry was not made specifically about Municipal dues. Apparently he was not informed about the arrears of Municipal taxes. This seems to us explainable on the ground that the receivers had, after securing appropriate orders, for some reason not clear on the record, omitted to pay the arrears of Municipal taxes and they were, therefore, reluctant to disclose this lapse on their part. On these facts and circumstances we do not think that the plaintiff could reasonably be fixed with any constructive notice of the arrears of Municipal taxes since 1949. So far as the legal position is concerned we are inclined to agree with the reasoning adopted by the Allahabad High Court in Roop Chand Jain's case. ILR 1940 All 669 : AIR 1940 All 456 (supra) in preference, to the reasoning of the Full Bench of that Court in Nawal Kishore's case, ILR 1943 All 453 (supra) or of the Division Bench of Oudh Chief Court in Ramji Lal's case. ILR 1916 (16) Luck 607 : AIR 1941 Oudh 305 (supra). We do not think there is any principle or firm rule of law as suggested in Nawal Kishore's case, ILR 1943 All 453 (supra) imputing to all intending purchasers of property in Municipal area where Municipal taxes are a charge on the property, constructive knowledge of the existence of such Municipal taxes and of the reasonable possibility of those taxes being in arrears. The question of constructive knowledge or notice has to be determined on the facts and circumstances of each case. According to the Full Bench decision in Nawal Kishore's case, ILR 1943 All 453 (supra) also the question of constructive notice is a question of fact and we do not find that the material on the present record justifies that the plaintiff should be fixed with any constructive notice of the arrears of Municipal taxes.

13. We may add before concluding that as the question of constructive notice has to be approached from equitable consideration we feel that the Municipal Corporation in the present case was far more negligent and blameworthy than the plaintiff. We have, therefore, no hesitation in holding that the High Court took the correct view of the legal position with the result that this appeal must fail and is dismissed. As there is no representation on behalf of the respondent there will be no order as to costs."

17. The Apex Court in the case titled as **Chinnammal and others versus P. Arumugham and another,** reported in **(1990) 1 Supreme Court Cases 513,** has made the distinction between bona fide auction purchaser and decree holder and held that if a person is decree holder, he is bound to restore the property when the decree is reversed or modified, but if a person is not a decree holder, is a stranger auction purchaser, he does not lose title to the property and cannot be divested with. It is apt to reproduce para 10 of the judgment herein:

"10. There is thus a distinction maintained between the decree holder who purchases the property in execution of his own decree which is afterwards modified or reversed, and an auction purchaser who is not party to the decree. Where the purchaser is the decree holder, he is bound to restore the property to the judgment debtor byway of restitution but not a stranger auction purchaser. The latter remains unaffected and does not lose title to the property by subsequent reversal or modification of the decree. The Courts have held that he could retain the property since he is a bona fide purchaser. This principle is also based on the premise that he is not bound to enquire into correctness of the judgment or decree sought to be executed. He is thus distinguished from an eo nomine party to the litigation."

18. A question arose before the Apex Court in the cases titled as **Gurjoginder Singh versus Jaswant Kaur (Smt.) and another,** reported in **(1994) 2 Supreme Court Cases 368; Padanathil Ruqmini Amma versus P.K. Abdulla,** reported in **(1996) 7 Supreme Court Cases 668; Ashwin S. Mehta and another versus Custodian and others,** reported in **(2006) 2 Supreme Court Cases 385;** and **Janatha Textiles and others versus Tax Recovery Officer and another,** reported in **(2008) 12 Supreme Court Cases 582,** as to what is the status of a bona fide purchaser and a tenant inducted by the landlord. It has been held that the status of a bona fide purchaser in an auction sale stands on a distinct and different footing from that of a tenant. Further held that the stranger auction purchaser does not derive his title from either the decree holder or the judgment debtor and restitution cannot be granted against him and the rights of the auction purchaser cannot be defeated. It is profitable to reproduce paras 18 and 20 of the judgment in **Janatha Textiles case (supra)** herein:

> *"18. It is an established principle of law that in a third party auction purchaser's interest in the auctioned property continues to be protected notwithstanding that the underlying decree is subsequently set aside or otherwise. This principle has been stated and re-affirmed in a number of judicial pronouncements by the Privy Council and this court. Reliance has been placed on the following decisions:*
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> *(i) The Privy Council in Nawab Zain-Ul-Abdin Khan v. Muhammad Asghar Ali Khan, (1887-88) 15 IA 12, for the first time crystallized the law on this point, wherein a three Judge Bench held as follows: (IA p. 16)*
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> *"A great distinction has been made between the case of bona fide purchasers who are not parties to a decree at a sale under execution and the decree-holders themselves. In Bacon's Abridgment,titi. 'Error' it is laid down, citing old authorities, that "if a man recovers damages, and hath execution by fieri facias, and upon the fieri facias the sheriff sells to a stranger a term for years, and after the judgment is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself, because the sheriff had sold it by the command of the writ of fieri facias." ... So in this case, those bona fide purchasers who were no parties to the decree which was then valid and in force, had nothing to do further than to look to the decree and to the order of sale."*
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> *(ii) In Janak Raj v. Gurdial Singh, AIR1967 SC 608 : (1967) w2 SCR 77, the Division Bench comprising Wanchoo. J. and Mitter, J. held that in the facts of the said case the appellant auction-purchaser was entitled to a confirmation of the sale notwithstanding the fact that after the holding of the sale, the decree was set aside. It was observed: (AIR p. 613, para 24)*
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> *"24. ... The policy of the Legislature seems to be that unless a stranger auction-purchaser is protected against the vicissitudes of the fortunes of the suit, sales in execution would not attract customers and it would be to the detriment of the interest of the borrower and the creditor alike if sales were allowed to be impugned merely because the decree was ultimately set aside or modified."*
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> *(iii) In Gurjoginder Singh v. Jaswant Kaur, (1994) 2 SCC 368, this Court relying on the judgment rendered by the Privy Council held that the status of a bona fide purchaser in an auction sale in execution of a decree to which he was not a party stood on a distinct and different footing from that of a person who was inducted as a tenant by a decree-holder-landlord. It was held as follows: (SCC p. 370, para 3)*
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> *"3. ..... A stranger auction purchaser does not derive his title from either the decree-holder or the judgment-debtor and therefore restitution may not be granted against him but a tenant who obtains possession from the decree-holder landlord cannot avail of the same right as his possession as a tenant is derived from the landlord."*
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> *(iv) In Padanathil Ruqmini Amma v. P. K. Abdulla, (1996) 7 SCC 668, this Court in para 11 observed as under: (SCC p. 672)*

"11. In the present case, as the ex parte decree was set aside, the judgment-debtor was entitled to seek restitution of the property which had been sold in court auction in execution of the ex parte decree. There is no doubt that when the decree-holder himself is the auction-purchaser in a court auction sale held in execution of a decree which is subsequently set aside, restitution of the property can be ordered in favour of the judgment-debtor. The decree-holder auction-purchaser is bound to return the property. It is equally well settled that if at a court auction sale in execution of a decree, the properties are purchased by a bona fide purchaser who is a stranger to the court proceedings, the sale in his favour is protected and he cannot be asked to restitute the property to the judgment-debtor if the decree is set aside. The ratio behind this distinction between a sale to a decree-holder and a sale to a stranger is that the court, as a matter of policy, will protect honest outsider purchasers at sales held in the execution of its decrees, although the sales may be subsequently set aside, when such purchasers are not parties to the suit. But for such protection, the properties which are sold in court auctions would not fetch a proper price and the decree- holder himself would suffer. The same consideration does not apply when the decree- holder is himself the purchaser and the decree in his favour is set aside. He is a party to the litigation and is very much aware of the vicissitudes of litigation and needs no protection."

In Para 16, the Court further elaborated the distinction between the decree-holder auction purchaser and a stranger who is a bona fide purchaser in auction. Para 16 reads as under: (P.K. Abdulla case, (1996) 7 SCC 668, p. 674)

"16. The distinction between a stranger who purchases at an auction sale and an assignee from a decree-holder purchaser at an auction sale is quite clear. Persons who purchase at a court auction who are strangers to the decree are afforded protection by the court because they are not in any way connected with the decree. Unless they are assured of title; the court auction would not fetch a good price and would be detrimental to the decree- holder. The policy, therefore, is to protect such purchasers. This policy cannot extend to those outsiders who do not purchase at a court auction. When outsiders purchase from a decree-holder who is an auction-purchaser clearly their title is dependent upon the title of decree-holder auction-purchaser. It is a defeasible title liable to be defeated if the decree is set aside. A person who takes an assignment of the property from such a purchaser is expected to be aware of the defeasibility of the title of his assignor. He has not purchased the property through the court at all. There is, therefore, no question of the court extending any protection to him. The doctrine of a bona fide purchaser for value also cannot extend to such an outsider who derives his title through a decree-holder auction-purchaser. He is aware or is expected to be aware of the nature of the title derived by his seller who is a decree-holder auction- purchaser."

(v) In Ashwin S. Mehta v. Custodian, (2006) 2 SCC 385, this Court whilst relying upon the aforementioned two judgments stated the principle in the following words: (SCC p. 407), para 70)

"70. ..... In any event, ordinarily, a bona fide purchaser for value in an auction sale is treated differently than a decree holder purchasing such properties. In the former event, even if such a decree is set aside, the interest of the bona fide purchaser in an auction sale is saved."

19. .....

20. Law makes a clear distinction between a stranger who is a bona fide purchaser of the property at an auction sale and a decree holder purchaser at a court auction. The strangers to the decree are afforded protection by the court because they are not connected with the decree. Unless the protection is extended to them the court sales would not fetch market value or fair price of the property."

19. The purpose of conducting auction is to enable the decree holder and the bona fide purchaser, who is a stranger, to reap its fruits on taking steps in pursuance of the terms and conditions contained in the auction notice. It is the duty of the Court to provide and afford protection to such purchaser. In case, the Court will not protect such bona fide purchaser, nobody will come forward to participate in the auction proceedings. Viewed thus, the interest of a third party auction purchaser is to be protected notwithstanding that the decree is subsequently set aside.

20. The Apex Court in a case titled as **Sadashiv Prasad Singh versus Harendar Singh and others,** reported in **(2015) 5 Supreme Court Cases 574,** held that the rights of a third party bona fide auction purchaser in the property purchased by him in a sale in compliance with a court order cannot be extinguished except in cases where the said purchase can be assailed on grounds of fraud or collusion. It would be profitable to reproduce paras 17 to 19 and 23.6 of the judgment herein:

> "17. The learned counsel for the auction- purchaser Sadashiv Prasad Singh, in the first instance vehemently contended, that in terms of the law declared by this Court, property purchased by a third party auction purchaser, in compliance of a court order, cannot be interfered with on the basis of the success or failure of parties to a proceeding, if auction purchaser had bonafidely purchased the property. In order to substantiate his aforesaid contention, learned counsel representing Sadashiv Prasad Singh placed emphatic reliance, firstly, on a judgment rendered by this Court in *Ashwin S. Mehta & Anr. vs. Custodian, (2006) 2 SCC 385.* Our attention was drawn to the following observations recorded therein : (SCC p. 407, para 70)
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> > "70. In that view of the matter, evidently, creation of any third-party interest is no longer in dispute nor the same is subject to any order of this Court. In any event, ordinarily, *a bona fide purchaser for value in an auction-sale is treated differently than a decree-holder purchasing such properties. In the former event, even if such a decree is set aside, the interest of the bona fide purchaser in an auction-sale is saved.* (See *Nawab Zain-ul-Abdin Khan v. Mohd. Asghar Ali Khan, (1887-88) 15 IA 12.)* The said decision has been affirmed by this Court in Gurjoginder Singh v. Jaswant Kaur, 1994 2 SCC 368)."
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> (emphasis supplied)
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> 18. On the same subject, and to the same end, learned counsel placed reliance on another judgment rendered by this Court in *Janatha Textiles & Ors. vs. Tax Recovery Officer, (2008) 12 SCC 582,* wherein the conclusions drawn in *Ashwin S. Mehta's case, (2006) 2 SCC 385,* came to be reiterated. In the above judgment, this Court relied upon the decisions of the Privy Council and of this Court in *Nawab Zain-Ul-Abdin Khan v. Mohd. Asghar Ali Khan, 1(1887-88) 15 IA 12; Janak Raj vs. Gurdial Singh, AIR 1967 SC 608; Gurjoginder Singh vs. Jaswant Kaur, (1994) 2 SCC 368; Padanathil Ruqmini Amma vs. P.K. Abdulla, (1996) 7 SCC 668,* as also, on *Ashwin S. Mehta* in order to conclude, that: (*Janatha Textiles case,(2008) 12 SCC 582, SCC p. 586, para 18)*
>
> > "18. It is an established principle of law, that a third party auction purchaser's interest, in the auctioned property continues to be protected, notwithstanding that the underlying decree is subsequently set aside or otherwise."
>
> It is, therefore, that this Court in its ultimate analysis observed as under: (*Janatha Textiles case,(2008) 12 SCC 582, SCC p. 588-89, para 20)*
>
> > "20. *Law makes a clear distinction between a stranger who is a bona fide purchaser of the property at an auction-sale and a decree-holder purchaser at a court auction. The strangers to the decree are afforded protection by the*

court because they are not connected with the decree. Unless the protection is extended to them the court sales would not fetch market value or fair price of the property." (emphasis supplied)

On the issue as has been dealt with in the foregoing paragraph, this Court has carved out one exception. The aforesaid exception came to be recorded in *Velji Khimji and Co. vs. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd., (2008) 9 SCC 299,* wherein it was held as under : (SCC p. 305, paras 30-31)

"30. *In the first case mentioned above i.e. where the auction is not subject to confirmation by any authority, the auction is complete on the fall of the hammer, and certain rights accrue in favour of the auction-purchaser. However, where the auction is subject to subsequent confirmation by some authority* (under a statute or terms of the auction) the auction is not complete and no rights accrue until the sale is confirmed by the said authority. *Once, however, the sale is confirmed by that authority, certain rights accrue in favour of the auction-purchaser, and these rights cannot be extinguished except in exceptional cases such as fraud.*

31. *In the present case, the auction having been confirmed on 30.7.2003 by the Court it cannot be set aside unless some fraud or collusion has been proved. We are satisfied that no fraud or collusion has been established by anyone in this case.*" (emphasis supplied)

19. It is, therefore, apparent that the rights of an auction-purchaser in the property purchased by him cannot be extinguished except in cases where the said purchase can be assailed on grounds of fraud or collusion.

xxx xxx xxx

23.6. Finally, the public auction under reference was held on 28.8.2008. Thereafter the same was confirmed on 22.09.2008. Possession of the property was handed over to the auction-purchaser Sadashiv Prasad Sinha on 11.3.2009. The auction-purchaser initiated mutation proceedings in respect of the property in question. Harender Singh did not raise any objections in the said mutation proceedings. The said mutation proceedings were also finalized in favour of Sadashiv Prasad Sinha. Harender Singh approached the High Court through CWJC No.16485 of 209 only on 27.11.2009. We are of the view that the challenged raised by Harender Singh ought to have been rejected on the grounds of delay and latches, especially because third party rights had emerged in the meantime. More so, because the auction purchaser was a bona fide purchaser for consideration, having purchased the property in furtherance of a duly publicized public auction, interference by the High Court even on ground of equity was clearly uncalled for."

21. Applying the tests to the instant case, the writ petitioner has participated in the auction proceedings, has deposited a huge amount and is still wandering for registration of sale documents and to conduct re-sale of the property.

22. The authorities have defeated the purpose of conducting the auction. Not only the purpose of conducting the auction has been defeated, but the writ petitioner has been made to understand and believe as to how the authorities can defeat the Court proceedings and orders. It is a glaring example of injustice where the Court should step in and pass appropriate directions, as required in the interest of justice.

23. The Apex Court in the case titled as **Bai Dosabai versus Mathurdas Govinddas and others,** reported in **(1980) 3 Supreme Court Cases 545,** held that right of decree holder/auction purchaser cannot be defeated by pressing into service any other law. It is apt to reproduce relevant portion of para 15 of the judgment herein:

> *"15. Shri Vakil finally submitted that the contract had become impossible of performance as a result of the enactment of the Urban Land (Ceiling and Regulation) Act, 1976. It is true that Section 5 (3) of the Act prohibits every person holding vacant land in excess of the ceiling limit before the commencement of the Act from transferring such land or part thereof by way of sale, mortgage, gift, lease or otherwise until he has furnished a statement as prescribed by the Act and a notification has been published after the prescribed procedure has been gone through. The Act came into force subsequent to the passing of the decree by the High Court. The question for our consideration is what is the effect of the Urban Land (Ceiling and Regulation) Act, 1976 on the decree passed by the High Court. While it is true that events and changes in the law occurring during the pendency of an appeal are required to be taken into consideration in order to do complete justice between parties and so that a futile decree may not be passed. It is also right and necessary that the decree should be so moulded as to accord with the changed statutory situation. The right obtained by a party under a decree cannot be allowed to be defeated by delay in the disposal of the appeal against the decree, if it is possible to save the decree by moulding it to conform to the statutes subsequently coming into force. …."*

24. Learned Senior Counsel appearing on behalf of the writ petitioner argued that the authorities concerned have refused to register the sale and make the entries in the revenue records on the ground that the necessary permission was to be obtained as per the mandate of Section 118 of the Act.

25. It is also contended that the sale certificate and the confirmation of sale issued by the authorities, i.e. Annexures P-6 and P-8, are necessary to be registered before the authority concerned in terms of the mandate of Section 17 of the Registration Act, 1908 (for short "the Registration Act"), which is not legally correct.

26. Section 17 of the Registration Act, though mandatory in nature, provides which of the documents are compulsory to be registered. It does not include sale by auction and sale certificate issued by the concerned authorities including confirmation of sale, which are outcome of the auction proceedings conducted in terms of Court orders. The provision is speaking one and without any ambiguity. Thus, registration was not required.

27. The Apex Court in the case titled as **B. Arvind Kumar versus Govt. of India and others,** reported in **(2007) 5 Supreme Court Cases 745,** held that a sale certificate issued by a Court or an officer authorized by the Court does not require registration. It is apt to reproduce para 12 of the judgment herein:

> *"12. The plaintiff has produced the original registered sale certificate dated 29.8.1941 executed by the Official Receiver, Civil Station, Bangalore. The said deed certifies that Bhowrilal (father of plaintiff) was the highest bidder at an auction sale held on 22.8.1941, in respect of the right, title, interest of the insolvent Anraj Sankla, namely the leasehold right in the property described in the schedule to the certificate (suit property), that his bid of Rs. 8,350.00 was accepted and the sale was confirmed by the District Judge, Civil and Military Station, Bangalore on 25.8.1941. The sale certificate declared Bhowrilal to be the owner of the leasehold right in respect of the suit property. When a property is sold by public auction in pursuance of an order of the court and the bid is accepted and the sale is confirmed by the court in favour of the purchaser, the sale becomes absolute and the title vests in the purchaser. A sale certificate is issued to the purchaser only when the sale becomes absolute. The sale certificate is merely the evidence of such title. It is well settled that when an auction purchaser derives title on confirmation of sale in his favour, and a sale certificate is issued evidencing such sale and title, no further deed of transfer from the court is contemplated or required. In this case, the sale certificate itself was registered, though such a sale certificate issued by a*

court or an officer authorized by the court, does not require registration. Section 17(2)(xii) of the Registration Act, 1908 specifically provides that a certificate of sale granted to any purchaser of any property sold by a public auction by a civil or revenue officer does not fall under the category of non testamentary documents which require registration under sub-sec. (b) and (c) of sec. 17(1) of the said Act. We therefore hold that the High Court committed a serious error in holding that the sale certificate did not convey any right, title or interest to plaintiff's father for want of a registered deed of transfer." (Emphasis added)

28. The same principle has been laid down by the Apex Court in the case titled as **Som Dev and others versus Rati Ram and another,** reported in **(2006) 10 Supreme Court Cases 788.** It would be profitable to reproduce para 15 of the judgment herein:

"15. Almost the whole of the argument on behalf of the appellants here, is based on the ratio of the decision of this Court in Bhoop Singh v. Ram Singh Major, (1995) 5 SCC 709 : 1995 Supp (3) SCR 466, (supra). It was held in that case that exception under clause (vi) of Section 17(2) of the Act is meant to cover that decree or order of a Court including the decree or order expressed to be made on a compromise which declares the pre-existing right and does not by itself create new right, title or interest in praesenti in immovable property of the value of Rs.100/- or upwards. Any other view would find the mischief of avoidance of registration which requires payment of stamp duty embedded in the decree or order. It would, therefore, be the duty of the Court to examine in each case whether the parties had pre-existing right to the immovable property or whether under the order or decree of the Court one party having right, title or interest therein agreed or suffered to extinguish the same and created a right in praesenti in immovable property of the value of Rs.100/- or upwards in favour of the other party for the first time either by compromise or pretended consent. If latter be the position, the document is compulsorily registrable. Their Lordships referred to the decisions of this Court in regard to the family arrangements and whether such family arrangements require to be compulsorily registered and also the decision relating to an award. With respect, we may point out that an award does not come within the exception contained in clause (vi) of Section 17(2) of the Registration act and the exception therein is confined to decrees or orders of a Court. Understood in the context of the decision in Hemanta Kumari Debi v. Midnapur Zamindari Co. Ltd., (1918-19) 46 IA 240 : AIR 1919 PC 79 : ILR (1920) 47 Cal 485 (supra) and the subsequent amendment brought about in the provision, the position that emerges is that a decree or order of a court is exempted from registration even if clauses (b)and (c) of Section 17(1) of the Registration Act are attracted, and even a compromise decree comes under the exception, unless, of course, it takes in any immovable property that is not the subject matter of the suit." (Emphasis added)

29. A question arose before the Madras High Court in a case titled as **K. Chidambara Manickam versus Shakeena & Ors.,** reported in **AIR 2008 Madras 108,** whether the sale of secured assets in public auction which ended in issuance of a sale certificate is a complete and absolute sale or whether the sale would become final only on the registration of the sale certificate? It has been held that the sale becomes final when it is confirmed in favour of the auction purchaser, he is vested with rights in relation to the property purchased in auction on issuance of the sale certificate and becomes the absolute owner of the property. The sale certificate does not require any registration. It is apt to reproduce paras 10.13, 10.14, 10.17 and 10.18 of the judgment herein:

*"**10.13** Part-III of the Registration Act speaks of the Registration of documents. Section 17(1) of the Registration Act enumerates the documents which require compulsory Registration. However, sub-section (2) of Section 10 sets out the documents to which clause (b) and (c) of sub-section (1) of Section 17 do not apply. Clause (xii) of sub-section (2) of Section 17 of the Registration Act reads as under:*

> *"Section 17(2)(xii) – any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue Officer."*
>
> ***10.14*** *A Division Bench of this Court in Arumugham, S. v. C.K. Venugopal Chetty, 1994 (1) LW 491, held that the property transferred by Official Assignee, under order of Court, does not require registration under Section 17 of the Registration Act. The Division Bench has held as follows:*
>
> > *"Under Ex. D-7, the Court permitted the Official Assignee to transfer to the guarantor the assets of the insolvent that are in excess. Being a transfer by order of Court, the document does not require registration under S. 54 of the Transfer of Property Act, since S. 2(d) of the Transfer of Property Act says that nothing in the Act (except S. 57 and Chapter IV) applies to transfers by orders of Court. The document in question does not require registration and there was a valid conveyance of the 2nd defendant's 1/4th share to G."*
> >
> > *xxx xxx xxx*
>
> ***10.17*** *The ratio laid down by the Division Bench of this Court in Arumugham, S. v. C.K. Venugopal Chetty and the Supreme Court in B. Arvind Kumar v. Government of India, referred supra, squarely applies to the case on hand and we, therefore, have no incertitude to hold that the sale which took place on 19-12-2005 has become final when it is confirmed in favour of the auction purchaser and the auction purchaser is vested with rights in relation tot he property purchased in auction on issuance of the sale certificate and he has become the absolute owner of the property. Further, as held by the Division Bench of this Court in Arumugham, S. v. C.K. Venugopal Chetty and the Supreme Court in B. Arvind Kumar v. Government of India, referred supra, the sale certificate issued in favour of the appellant does not require any registration in view of Section 17(2)(xii) of the Registration Act as the same has been granted pursuant to the sale held in public auction by the authorised officer under SARFAESI Act.*
>
> ***10.18*** *The finding of the learned single Judge that the sale is not complete without registration of sale certificate, therefore, not sustainable in law and the same is liable to be set aside."*

30. Learned Advocate General argued that the validity of Section 118 of the Act was questioned and upheld by this Court in a case tiled as **Smt. Sudarshna Devi versus Union of India and another,** reported in **ILR 1978 H.P. 355,** and thereafter in the case titled as **Som Kirti alias Som K. Nath and others versus State of H.P. and others,** reported in **Latest HLJ 2013 (HP) 1223,** is mandatory in nature, thus, the writ petitioner has to seek permission as required in terms of Section 118 of the Act.

31. The argument, though attractive, is devoid of any force for the reason that in the cases (supra) the constitutional validity of Section 118 of the Act was questioned. The validity of Section 118 of the Act is not involved in this lis, but, what is the subject matter of the lis is interpretation and applicability of the said provision.

32. While going through Section 118 of the Act, one comes to an inescapable conclusion that the word 'decree' does not include bona fide auction purchaser. It is an act of the Court, not the act of an individual and the act of the Court should not cause prejudice to any person.

33. The action of the Court or Court order/ judgment/decree or any action drawn in sequel to the order/ judgment/decree cannot cause any prejudice to any person.

34. It is beaten law of land that no person should be prejudiced by the act of the Court based on latin maxim *'actus curiae neminem gravabit'.*

35. The High Court of Jammu and Kashmir, while dealing with the issue of the similar nature in the case titled as **Raja Sahib of Poonch versus Kirpa Ram,** reported in **AIR 1954 Jammu & Kashmir 23,** held that the Court has inherent power to amend the decree in terms of Sections 151 and 152 CPC. It is apt to reproduce para 10 of the judgment herein:

> *"10. The appellant did not take the two proceedings for the execution of the decree and for its amendment simultaneously. The application for amendment of the decree was made after the application for execution of the decree was finally rejected by the High Court. It is also unfortunate that the District Judge in exercise of his appellate jurisdiction after he had interpreted the operative part of his judgment as laying down no time limit for the payment of the increased amount and that the decree was executable, did not exercise his inherent jurisdiction to amend the decree so as to bring it in conformity with the judgment. And his order directing the execution of the decree simpliciter without amending the decree led the High Court to set aside his order on the ground that the executing Court could not go behind the decree. Whether something could not be done by the District Judge or by the High Court in the exercise of their inherent jurisdiction to prevent this unnecessary litigation, it is now unnecessary to consider and in the events that have happened it is not necessary to disturb the decree of the High Court dated Maghar 28, 2002. (Emphasis added)"*

36. In the case titled as **State of Gujarat & Ors. versus Essar Oil Limited and Anr.,** reported in **2012 AIR SCW 1008,** the Apex Court has laid down the same principle. It is apt to reproduce paras 70 and 71 of the judgment herein:

> *"70. The second principle that an act of court cannot prejudice anyone, based on latin maxim "actus curiae neminem gravabit" is also encompassed partly within the doctrine of restitution. This actus curiae principle is founded upon justice and good sense and is a guide for the administration of law.*
>
> *71. The aforesaid principle of "actus curiae" was applied in the case of A.R. Antulay v. R.S. Nayak & another, 1988 2 SCC 602, wherein Sabyasachi Mukharji, J (as his lordship then was) giving the majority judgment for the Constitution Bench of this Court, explained its concept and application in para 83, page 672 of the report. His lordship quoted the observation of Lord Cairns in Rodger v. Comptoir D escompte De Paris,1871 3 LR 465 which is set out below:*
>
> > *"Now, their Lordships are of opinion, that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the Suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court."*

37. The next question, which arises for determination in this petition, is – whether rigour of Section 118 of the Act is applicable to the case in hand?

38. The word used in Section 118 of the Act is 'land'. Section 2 (7) of the Act defines 'land' as under:

> *"2. .....*
>
> *(7) "land" means land which is not occupied as the site of any building in a town or village and is occupied or has been let for agricultural purposes or for purposes subservient to agriculture, or for pasture and includes -*
>
> *(a) the sites of buildings and other structures on such land,*

(b) orchards,

(c) ghasnies,

(d) banjar land, and

(e) private forests."

39. It provides that the land, which is occupied as site of building in a town or village, does not fall within the ambit of Section 118 of the Act, but the land which is not occupied or has been let for agricultural purposes or for purposes subservient to agriculture or for pasture comes in the rigours of Section 118 of the Act.

40. The plain reading of this Section suggests that a property, which is not agricultural land, but is a site of any building or machinery, does not fall within the definition of land.

41. The same question arose before the Punjab and Haryana High Court in the case titled as **Nemi Chand Jain versus The Financial Commissioner, Punjab and another,** reported in **1963 PLJ 137,** wherein the word 'land' came to be interpreted. It is apt to reproduce paras 4 to 6 herein:

"4. According to Section 2(8) of the Act, the word "land" shall have the same meaning as is assigned to it in the Punjab Tenancy Act of 1887. The definition of the word "land" as given in Section 4(1) of the Punjab Tenancy Act is as under:

"Land means land which is not occupied as the site of any building in a town or village and is occupied or has been let for agricultural purposes or for purposes subservient to agriculture, or for pasture, and includes the sites of buildings and other structures on such land."

It would appear from the above definition that before land can fall under the definition of the land as given above, two factors are essential to be proved:

(1) that it should not be land which is occupied as the site of any building in a town or village, and

(2) is occupied or has been let for agricultural purposes or for purposes subservient to agriculture, or for pasture.

The first part of the definition is obviously not applicable as the land in question is not occupied as the site of any building in a town or village. The second part of the definition, in my, opinion, also does not cover the land in question because it has not been shown that the land is occupied or has been let for agricultural purpose or for purposes subservient to agriculture or for pasture. On the contrary the fact that the land is banjar jadid or banjar qadim goes to show that it has not been occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture. According to Land Revenue Assessment Rules of 1929 uncultivated land, which has remained unsown for four successive harvests, is classified as banjar jadid land, while the land, which has remained unsown for eight successive harvests, is described as banjar qadim. As such the banjar jadid or banjar qadim land cannot be held to answer to the description of the word "land" as given in the Act.

5. Land was also defined in Section 2(3) of the Punjab Alienation of Land Act, 1900, and the definition read as under:

"the expression "land" means land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture, and includes--

(a) the sites of buildings and other structures on such land;

(b) a share in the profits of an estate or holding:

(c) any dues or any fixed percentage of the land-revenue payable by an inferior landowner to a superior landowner;

(d) a right to receive rent,

(e) any right to water enjoyed by the owner or occupier of land as such;

(f) any right of occupancy;

(g) all trees standing on such land."

Although the definition of the word "land" as given in the Punjab Alienation of Land Act, 1900, had a wider scope because of the addition of the clauses (a) to (g) in the definition, the comparison of the two definitions would go to show that but for the addition of those clauses the definition was identical. While dealing with the above definition of the word "land", as given in the Punjab Alienation of Land Act, it was held in Gopi Mal v. Muhammad Yasin, (A.I.R. 1924 Lahore 657), that where the land had not been used for agricultural purposes for the six years preceding the sale and was subsequently sold as a building site, the land was not covered by that definition. The above case was followed in Mandir Gita Bhawan Sri Kurukshetra v. Sadhu Ram, (A.I.R. 1939 Lahore 554), and it was hold that where the land had not been used for agricultural purposes or for purposes subservient to agriculture for a period of twenty years but had been lying uncultivated except for one year, when there was a garden on a small portion of it, it could not be said to fall within the definition of the word "land". The above authorities clearly lay down the principle that the non-cultivation of land for a number of years goes to show that it does not answer to the definition of the word "land".

6. Learned Additional Advocate General has argued that even though the land in question is banjar jadid or banjar qadim, the possibility of its being brought under cultivation in future cannot be ruled out, and when the land is so brought under cultivation it would fall within the definition of the word "land". This contention is however, devoid of force because the definition of the word "land", as given in the Punjab Tenancy Act, looks to the actual state of the land and the use to which it has been put and not to its future potentialities."

42. Viewed thus, it is held that the land, which is not used for agricultural purpose or the purpose subservient to agriculture, does not fall within the purview of Section 118 of the Act.

43. The Apex Court in a case titled as **Munshi Ram and others versus Financial Commissioner, Haryana and others,** reported in **(1979) 1 Supreme Court Cases 471,** laid down the same principle. It is apt to reproduce paras 16, 17 and 20 of the judgment herein:

"16. According to sub-section (8) of Section 2 of the Act 'land' shall have the same meaning as is assigned to it in the Punjab Tenancy Act, 1887. Sec. 2 (c) of that Act defines 'land' to mean 'land which is not occupied as the site of any building in a town or village and is occupied or has been let for agricultural purposes or for purposes subservient to agriculture, or for pasture, and includes the sites of buildings and other structures on such land'.

17. In Nemi Chand Jain v. Financial Commissioner, Punjab, AIR 1964 Punj 373: (1964) 66 PLR 278, H. R. Khanna, J. speaking for a Division Bench of the High Court, held that Banjar Qadim and Banjar Jadid land cannot be taken into account while computing the surplus area, under the Act, because not being occupied or let for agricultural purposes or purposes subservient to agriculture, it does not fall within the purview of 'land' under the Act. This ruling has been consistently followed by the High Court in its subsequent decisions, some of which are reported as Sadhu Ram v. Punjab State, 1965 Pun LJ 84; Amolak Rai v. Financial Commissioner, Planning, Punjab, (1966) 45 Lah LT 195; Jaggu v. Punjab State,

(1967) 46 Lah LT 64 : 1967 Pun LJ 248 and Jiwan Singh v. State of Punjab, AIR 1972 P & H 430 : 1971 Punj LJ 65.

18. In our opinion, this view taken by the High Court proceeds on a correct interpretation of the statutory provisions as it stood at the relevant time.

19. .....

20. We will, therefore, while upholding the view taken by the High Court in regard to the interpretation and application of Section 2 (3) Proviso (ii) of the Act, allow this appeal and set aside the decision of the High Court and the impugned orders of the Assistant Collector, Collector, and the Commissioner and remit the case to the Collector concerned of Hissar District with the direction that he should ascertain the extent of the Banjar Qadim and Banjar Jadid and Gair Mumkin land of the appellants-allottees at the relevant date and recompute their permissible area after excluding such Banjar and Gair Mumkin land; and then dispose of the applications of the appellants under S. 9 (1) (i) afresh. In the circumstances of the case, there will be no order as to costs."

44. The word 'land' also came to be interpreted by a Division Bench of this Court in a case titled as **The State of Himachal Pradesh versus Maharani Kam Sundri,** reported in **ILR 1984 HP 397.** It would be profitable to reproduce paras 21 and 38 of the judgment herein:

"21. These two decisions, in our opinion, which have a direct bearing on the statutory construction, have correctly apprehended the true scope and meaning of the expression "land" as defined. In order to be covered by the main part of the definition contained in Section 2(5), "land" must satisfy two conditions: first, it must not have been occupied as the site of any building in a town or village and, secondly, it must have been occupied or let for agricultural purposes, or for purposes subservient to agriculture, or for pasture. By virtue of the inclusive part of the definition, however, sites of buildings and other structures, which are not situate in a town or village but form part of the "land" which is occupied or has been let for agricultural purposes, or for purposes subservient to agriculture, or for pasture, would constitute "land" within the meaning of the Act. So far as orchards and ghasnis are concerned, they would be "land" within the meaning of the Act, whether or not they satisfy the conditions prescribed in the main part of the definition. The question whether the suit land is "land" within the meaning of the Act will require determination against the aforesaid background.

xxx xxx xxx

38. The question may be examined form another angle. Under Section 11(1) of the Act, a tenant is entitled to acquire "the right, title and interest of the landowner in the land of the tenancy held by him under the landowner. The right conferred by Section 11(1) is thus exercisable in respect of the "land of the tenancy" held by a tenant. The two material words "land" and "tenancy have both been defined. The true meaning and content of the definition whether the suit land comprising several Khasra numbers if "land" within the meaning of the definition has been determined on the basis of evidence pertaining to the actual user of each Khasra number on the material date. However, having regard to the fact that in Section 11(1) of the Act, the word "land" occurs in conjunction with the words "of the tenancy" held by a tenant, it would be more appropriate to determine the real nature and character of the occupation with reference to the land as a whole by treating it as a single unit. The word "tenancy" is defined in Section 2(19) of the Act to mean "a parcel of land held by a tenant of a landlord under one lease or one set of conditions". This definition clearly indicates that the land in respect of which the proprietary rights are claimable should be a piece or parcel of land held by a tenant under one lease or one set of conditions. Even if the land so held is divided into several sub-divisions (Khasra numbers) by the revenue authorities with

references to its actual user, the tenancy is not consequently split up and, in the eyes of law, the tenant can not be regarded as holding each of such sub-divisions (Khasra numbers) under a separate lease or under a separate set of conditions. The contract of tenancy is a single and in-division contract, and in the absence of any statutory provisions to that effect, it is not open to divide it into two or more contracts. (See: Miss S. Sanyal v. Gian Chand, AIR 1968 SC 438). For the purpose of determining whether the tenant can claim proprietary rights in respect of the land held by him under the landowner, therefore, what has to be seen is whether the entire piece or parcel of land held by a tenant under the landowner is covered by the definition given in Section 2(5) of the Act. In a case, therefore, where the purpose of letting is not ascertainable, but the land or a substantial part thereof is not occupied as the site of any building in a town or village and is occupied for agricultural purposes, or for purposes subservient thereto, or for pasture, or for any of the purposes set out in the inclusive part of the definition, the land would be regarded as one to which the provisions of section 11(1) of the Act are applicable. Even if a small portion of such land is found to have been used by the tenant incidently for an ancillary or even for an alien purpose, his entitlement to a claim proprietary rights in respect of whole land is not thereby affected and it would not be proper or permissible to dissect the tenancy and to confine the conferment of proprietary rights to that portion of the land of the tenancy held by him which is actually used for the stated purposes and to reject the claim qua that small portion which is incidently used for ancillary or even alien purposes. Approaching the case in hand from that view point, it is manifest that a predominant or substantial portion of the suit land (29 Bighas 10 Biswas) out of 32 Bighas 7 Biswas is actually occupied for the purposes mentioned in Section 2(5). Since predominant or substantial portion of land consists of Ghasni, Orchard, open land with planted trees and land under actual cultivation incidental or ancillary use of a small portion of such land for the purpose of residence, road, Mali quarters and Cowshed, etc. cannot defeat the claim of the respondent to the conferment of proprietary rights in respect of whole of the suit land. The decision of the learned single Judge, therefore, is eminently correct, even if it is examined from this different angle. In fact, on the aforesaid reasoning, the respondent ought to have been held entitled to the conferment of proprietary rights even in respect of Khasra No. 19/1 and, to that extent, the learned single Judge's decision may be regarded as not being in conformity with law. There being no appeal by the respondent, however, against that part of the decision of the learned single Judge, no relief can be granted to her on that score."

45. It would also be profitable to reproduce para 11 of the judgment rendered by a Division Bench of this Court in the case titled as **Mrs. Peter Butt and others versus Sister Roseline Kokara,** reported in **1992 (2) Sim.L.C.124,** herein:

"11. In view of what has been stated above, in order to determine as to whether the land is agricultural land as defined in the Act or not, what is required to be seen is the main and primary purpose for which it was or had been let out or taken. In case where the purpose of letting is ascertainable, the question has to be decided on the basis of main and primary purpose for which it was let out. In case the land was or had been let out for a purpose which cannot be said to be agricultural purpose or purpose subservient to agriculture, the same will not fall within the definition of 'land' under the Act and in such a situation, the court will be precluded from considering the use of the land to which it has subsequently been put. A person should not be permitted by any action of his to take undue advantage of the situation by himself changing the main and primary purpose for which the land is let out. In other words, what is to be seen is the character and nature of the land and the purpose for which it had been let out, when such a

purpose is ascertainable from the evidence or material on record and not the use of the property to which it has subsequently been put. But where the purpose of letting the same is not ascertainable from the evidence and material on record and the land, substantial part whereof, is not used or occupied as the site of any building in a town or village and is used or occupied for agricultural purpose, or for purpose subservient thereto then it will fall within the definition of 'land'. What are the purposes subservient to agriculture can be ascertained from the definition part as the same have been set out in the inclusive part of it. The words 'is occupied' and 'has been let' occurring in the definition of 'land' in Sub-section (7) of Section 2 of the Act are indicative of two different situations. Firstly, when the purpose is ascertainable, that is the purpose of letting was agricultural or subservient to agriculture, then it is that purpose alone which would be seen but when the purpose is not ascertainable then it is the use to which the property is found to be put which will be taken into consideration."

46. Another Division Bench of this Court in a case titled as **Nirmal Singh versus Randhir Sharma,** reported in **1994 (2) Sim.L.C. 255,** while considering the constitutional validity of Section 118 of the Act held as to which 'land' falls within the ambit of Section 118 of the Act. It is worthwhile to reproduce paras 10, 11, 13, 17 and 18 of the judgment herein:

"10. For the first time, a provision was made in this State for control or transfer of agricultural land to a non-agriculturist, when in Chapter X(sic) of the Act Section 118 was included under the heading "Transfer of Land to Non-Agriculturists Barred". The constitutional validity of Section 118 was upheld by a Division Bench of this Court in Smt. Sudarshna Devi v. Union of India and another,ILR 1978 HP 355.

11. Section 118 prohibits transfer of land by any mode including sale in execution of a decree of a civil court or for recovery of arrears of land revenue, by way of sale, gift, exchange, lease, mortgage with possession or creation of tenancy, in favour of a person, who is not an agriculturist. This prohibition is subject to the provisions of Sub-section (2) of Section 118, wherein certain transfers are made permissible. The prohibition in Sub-section (1) extends to the transfer of 'land'. Land in the Act has been defined under Clause (7) of Section 2 to mean land which is not occupied as a site of any building in a town or a village and is occupied or has been let for agricultural purposes or purposes subservient to agriculture or for pasture. It includes sites of buildings and Ors. structures on such land, orchards, ghasnies, banjar land, and private forests within the definition of 'land'.

12. .....

13. On the one hand, Clause (7) of Section 2 excludes from the definition of 'land' all categories of land, which are not occupied as the site of any building in a town or a village, Except the one which are occupied or has been let for agricultural purposes or for purposes subservient to agriculture or for pasture, but in Clause (iii) to Explanation in Section 118, it expressly includes the same within the expression 'land'. A site of a building in a town, which is occupied or has been let or even a site of a building in a village which is occupied or has been let for any purpose, is included in the expression 'land'. Reading Clause (iii) to explanation to Section 118 alongwith Clause (7) of Section 2 of the Act would make the intention of legislature abundantly clear and unambiguous that any site of a building whether in a town or village and occupied or let for any purpose including agricultural purpose or purpose subservient to agriculture is included in the expression 'land' for the purpose of prohibition contained in Section 118 of the Act.

14 to 16. .....

17. Reading of the three clauses collectively alongwith Clause (7) of Section 2 of the Act would make it clear that all type of land situate in Himachal Pradesh including sites and Ors. structures on such lands, whether let for agricultural purposes or for the purpose of subservient to agriculture including orchards, Ghasnis, Banjar lands and private forests are included within the expression 'land', for the purposes of Section 118 of the Act. The only category of land, which is excluded from the operation of Section 118 is that land or area which is constructed but which is not subservient to agriculture. Even an area, if recorded in revenue records as "Gair-mumkin" or "Gair-mumkin Makaan", the same would be included in the expression of land irrespective of the purpose for which the same is occupied or let out, except a constructed area which is not subservient to agriculture. In Ors. words, prohibition contained in Section 118 of the Act will not apply to a constructed area which is not subservient to agriculture.

18. Since the property in suit is the 'constructed area', which admittedly is not subservient to agriculture, there is no ground to interfere with the findings recorded by the learned Single Judge that the property is not covered by the definition of land within the ambit of Section 118 of the Act."

47. In a case titled as **Krishan Singh (Shri) & Anr. Versus Smt. Krishna & Ors.,** reported in **2006 (2) Current Law Journal 203,** the Financial Commissioner (Appeals), Himachal Pradesh, being the Head of the Revenue Department and exercising the powers of revisional authority, held that the land which is not being used for agricultural purpose and is not subservient to agriculture purposes is not 'land' in terms of Section 2 (7) of the Act and does not fall within the scope of Section 118 of the Act. It is apt to reproduce paras 9 and 10 of the judgment herein:

"9. The property that was the subject of sale transaction by which Smt Krishna acquired interest in the area is in Muhal Swarg Ashram, Nurpur town and is clearly not subservient to agriculture. It is also notable that as per the description of land in the copy of the sale deed which is available on the record of the collector, Distt. Kangra, built up area has been sold to Smt Krishna. Besides the classification of land as per jamabandi for the year 1991-92 also available on record further proves that the land in question in which Smt. Krishna has 2/3 share comprises mainly of built up area with some 'sehan'. The complainant is a co-owner in the same and perhaps has intention in opposing the sale is to claim the entire area by preventing the respondent No. 1 from enjoying her legal rights upon the same.

10. Having heard the learned counsel for the parties and in view of the above discussion, it is clearly established that the area that was the subject of sale transaction in whcih Smt Krishna was the purchaser is not 'land' as per the definition in section 2(7) of the H.P. Tenancy and Land Reforms act as the same is not being used for agriculture purpose and is not subservient to agriculture. Therefore the sale transaction by which Smt Krishna acquired land in Khasra No. 283, 284, 285, 286 and 287 to the extent of 2/3rd share was not in violation of Section 118 of the H.P. Tenancy and Land Reforms Act, 1972 as the provisions of Section 188 (c) do not apply in this case."

48. The Apex Court in the case titled as **K.N. Farms Industries (Pvt.) Ltd. versus State of Bihar & Ors.,** reported in **2009 AIR SCW 4869,** while making a distinction, came to the conclusion as to what is 'land' and held that the Courts, while interpreting the provisions of any Act should, no doubt, adopt an object oriented approach keeping in mind the principle that legislative futility is to be avoided so long as interpretative possibility permits. But, at the same time, the Courts will have to keep in mind that the object oriented approach cannot be carried to

the extent of doing violence to the plain language used in the statue, by re-writing the words of a statute in place of the actual words used.

49. Coming to the case in hand, it is to be seen what was the subject matter of the auction proceedings, whether it was 'land' or building and machinery, which was sold.

50. The sale notices, dated 15th November, 2010 and 25th April, 2011 (Annexure P-2) contain the description of the property. It is apt to reproduce relevant portion of sale notice, dated 15th November 2010, herein:

Lot No.	*Description of Property*	*Earnest Money*
I.	***LAND & BUILDING: Land :*** *25 Kanal and 6 Marlas* *Building : Office/ADM Block RCC frame type structure with RCC Silab roofing, Work Sheds have brick masonry & M. Steel Pillars with ACC sheet roofing on M. Steel trusses, Water Softening Plant is RCC frame structure typed building etc.*	*Rs. 22 lacs*
II.	***PLANT & MACHINERIES:*** *Freehold : Steel rolling Mill Complete SECID IMIR (1973), 4 No. Bell Annealing Furnaces and 4 colling hoods, Picking Line 6000 TPA, HR slitting line, CR slitting Mill Skin Pass Mill, 20 Mt Crane, 30 MT capacity Crane 15 M span 1 No.*	*Rs. 34 lacs*
III.	*Scrap in the Unit 800 MT (Approx.) & Misc. Assets*	*Rs. 27 lacs*
IV.	*Leased Machinery : S. Rolling Mill complete (IFCI Finance)*	*Rs. 9 lacs*
V.	*Composite Lot*	*Rs. 92 lacs*

51. While going through the same, it is crystal clear that the land in question has not been let for agricultural purpose or purposes subservient to agriculture, but consists of a constructed building and machinery. Thus, on the face of it, the rigours, fetters and restrictions contained in Section 118 of the Act are not applicable.

52. Our this view is also fortified by para 18 of the judgment rendered by the Division Bench of this Court in **Nirmal Singh's case (supra),** as quoted hereinabove.

53. It is also apt to record herein that the perusal of the record does disclose that there was some litigation qua the auction proceedings viz-a-viz the property, subject matter of this writ petition, i.e. Co. Appeal No. 3 of 2011 (Annexure P-4) and the writ petitioner was also a party to that lis. This Court has passed the directions to conduct the auction and accepted the bid of the writ petitioner. The description of the said property is also given in the Company Appeal and the judgment, dated 19th September, 2011. By no stretch of imagination, it can be said that it is the 'land' as defined in Section 2 (7) of the Act, which can be said to be agricultural land or subservient to agricultural land.

54. Learned Advocate General argued that the latest Division Bench judgment of this Court in the case titled as **Som Kirti alias Som K. Nath and others versus State of H.P. and others,** reported in **Latest HLJ 2013 (HP) 1223,** will prevail wherein it has been held that Section 118 of the Act includes buildings also.

55. The argument is not tenable for the following reasons:

56. It is apt to reproduce paras 53 and 80 of the judgment (supra) herein:

"53. After amendments carried out in the Act in the year 1987 onwards, the Act is now no more an agrarian reforms legislation. The 'land; has been defined in section 2 (7) of the Act but in explanation-I to sub section (4) of Section 118, the land which is site of a building in a town or a village and is occupied or let out not for agricultural purpose or purpose subservient to agriculture has also been included. Thus, practically every type of land is covered by the Act, and therefore, the Act cannot be termed an agrarian reform legislation. The amendments carried out in the Act are not included in 9th Schedule of the Constitution.

xxx xxx xxx

80. The legislature with a purpose has used the expression 'land' in Explanation-I to Section 118. The Section 2 of the Act opens with; "in this Act, unless there is anything repugnant in the subject or context". The expression 'land' used in Section 118 is to be understood and interpreted in the manner expression 'land' has been explained in Explanation-I to Section 118 where it has been used for specific purpose as against the definition of land given in the definition clause to be applied for other purposes in the Act if not specifically explained or used otherwise. The specific purpose for which expression 'land' has been used in Explanation-I will over-ride the general purpose for which expression land has been defined in Section 2 (7) of the Act. Therefore, there is no force in the contention of the petitioners that the term 'land' used in Explanation-I to Section 118 is illegal in presence of definition of land in sub section 7 of Section 2 of the Act. There is no absolute bar for purchasing land by non-agriculturist under Section 118. A non-agriculturist still can purchase land with the permission of State Government under Section 118. The Section 118 of the Act as enacted is within the legislative competence of State Legislature referable to entry 18, List-II of Seventh Schedule."

57. The Division Bench in **Som Kirti's case (supra)** has not discussed the judgment made by the Division Bench in **Nirmal Singh's case (supra),** wherein it has been specifically held in para 17, quoted hereinabove, that the land or area which is constructed and is not subservient to agriculture is not 'land' within the meaning of Section 118 of the Act.

58. The Division Bench in **Nirmal Singh's case (supra)** has upheld the judgment made by a learned Single Judge of this Court in Civil Suit No. 88 of 1990, titled as **Randhir Sharma versus Nirmal Singh,** whereby the learned Single Judge has made thread-bare discussion of Sections 2 (7) and 118 of the Act. It is apt to reproduce relevant portion of the judgment in Civil Suit No. 88 of 1990, which has been upheld by the Division Bench in **Nirmal Singh's case (supra),** herein:

".....The suit property in this case constitutes of constructed area being put to residential as also commercial use, which is admittedly not subservient to agriculture as I apparent from the entries in the jamabnandi for the year 1981-82 annexed with the plaint and reference to which has also been made in the agreement (Ex. P-1). Thus, the aforesaid suit property is not included in the definition of land as envisaged in the aforesaid Section. In other words, there is no bar with respect to the transfer of the suit property in this case by the defendant to the plaintiff. In that view of the matter, a lawful decree can be passed in favour of the plaintiff and against the defendant....."

59. We are also of the view that the judgment made by the learned Single Judge in Civil Suit No. 88 of 1990 (supra), which has been upheld by the Division Bench in **Nirmal Singh's case (supra)** is in accordance with the judgments made by the apex Court and also in view of the aim, object and scope of Section 118 of the Act read with the Act, as discussed hereinabove.

60. The next significant and important question is – what was the aim, object and scope of Section 118 of the Act?

61. This Court in the case titled as **Sudarshana Devi versus Union of India,** reported in **ILR 1978 HP 355,** has highlighted the aim of inserting the said provision in the Act. It is apt to reproduce relevant portion of para 39 of the judgment herein:

> *"39. The statement of objects and reasons (quoted above) makes a further reference to restrictions imposed on purchase of land by non-agriculturists with a view to avoid. Concentration of wealth in the hands of non-agriculturists moneyed class. It is obvious that the agricultural land in the State like Himachal Pradesh would be very much limited in view of its mountainous terrain. If this land is allowed to go indiscriminately in the hands of those who can over bid an usual customer, it is very obvious that ultimately the very object for which the Act was enacted would be lost. Non-agriculturists, who have not evinced any interest in the agriculture uptil now, would, by the sheer strength of their money power be able to over bid the agriculturists, and a class of society would emerge which would be interested not so much in the improvement of agriculture but in the investment of un-used, and in some cases, undisclosed, finances. Such an incentive would be more to them in view of the fact that income from agriculture is exempt from Income Tax. Therefore, if one of the objects of the legislature was to prevent the limited land resources of the State from going in the hands of financial sharks, it cannot be said that that objective was purposeless. ..... "*

62. It appears that the basic foundation of the insertion of the said provision in the Act is that the land should not go into the hands of the persons who are not bonafide Himachalis. Meaning thereby, it was just to boost the Himachalis and in order to prevent vanishing of the small holdings of the State of Himachal Pradesh.

63. It would also be profitable to reproduce relevant portion of para 68 and para 122 of the judgment rendered by this Court in another case titled as **Society for Preservation of Kasauli and its Environs versus State of Himachal Pradesh and others,** reported in **1994 (Suppl.) Sim. L.C. 450,** herein:

> *"68. The object of section 118 of the H.P. Tenancy and Land Reforms Act, 1972 is that the local population should have opportunity to utilise the land for their benefits and outsiders are not permitted to encroach upon the rights of the sons of the soil....."*
>
> *xxx xxx xxx*
>
> *122. The reason for placing restrictions on the transfer of land in favour of non-agriculturists in the Act was to avoid concentration of wealth in the hands of non-agriculturists moneyed-class. Agricultural land in Himachal Pradesh is very limited in view of mountainous terrain and in case it is allowed to pass indiscriminately into the hands of this class by sheer strength of money power, utilising the same through remote control by use of black money in agriculture sector and avoid payment of tax, the small land holdings of the poor people of the State would vanish and the object of the land reforms legislation becoming totally inconsequential and purposeless. In order to check this problem, particularly in rural areas, the transfer of land in favour of non-agriculturists was, therefore, prohibited. Exception has been created in favour of certain cases described in Sub-section (2) of Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972."*

64. Thus, the classification was made only to prevent the persons, who are moneyed-class and who, on the sheer strength of their money power, are in a position to purchase the land from poor land owners at the throw-away prices and that will have effect of doing away with the economy of the State. It was also noticed at that time that so many rich people had started purchasing land in order to raise orchards in the entire State of Himachal Pradesh. Thus, the

only object is to prevent the outsiders to come in, to save the Himachali land owners/holders and it creates a right in their favour.

65. Viewed thus, it can be safely held that a bona fide auction purchaser, who has purchased the land in the auction proceedings pursuant to the Court directions, cannot be deprived of the said property. The rigour is not applicable to the case in hand.

66. It is also apt to record herein that the writ petitioner, in the alternative, has prayed that if, at all, the rigour of Section 118 of the Act is applicable, it may be permitted to sell the said property to a Bonafide Himachali. If only this prayer is granted, that will strictly be as per the mandate of Section 118 of the Act and will also achieve the purpose. But, how can it lie in the mouth of the respondents not to grant permission or not to allow the writ petitioner to sell the property, for the reason that the writ petitioner is a bona fide auction purchaser and had bonafidely made the payment of ₹ 14.52 crore, is waiting for the day to come enabling it to reap the fruits, was not allowed to do so, is really a travesty of justice.

67. Having said so, the writ petitioner has made out a case for interference.

68. The question is – what direction is to be made in the given circumstances of the case in order to redress the grievance of the writ petitioner, who is suffering because of the auction conducted in terms of the Court orders and has been made to part with money, that too, a huge amount to the tune of ₹ 14.52 crore?

69. Admittedly, it was not prescribed in the auction notice or it was not made known in the auction proceedings that the successful bidder has to follow the rigour and mandate of Section 118 of the Act in order to have the registration and no mutation can be effected without obtaining the permission.

70. It is also not contained in the auction notice that the person/auction purchaser, who is an outsider, non- Himachali or a non-agriculturist, cannot participate in the auction proceedings and cannot conduct re-sale of the property.

71. Much water has flown down and there is no chance that the bid amount can be paid back to the writ petitioner. Even otherwise, that will not redress the grievance of the writ petitioner for the reason that the inflation rate has gone very high and had the writ petitioner invested the said amount in business or somewhere else for the period of these five years, he would have earned a considerable amount, may be, in crores.

72. Keeping in view the facts and circumstances of the case read with the discussions made hereinabove, we make the following commands/directions in the interest of justice:

(i) That in the given circumstances of the case, rigour of Section 118 of the Act is not applicable to the case in hand;

(ii) That petitioner is the absolute owner of the property, subject matter of the lis;

(iii) That the revenue record is not the proof of title, is just for collection of rent and will not change the status of the petitioner as owner of the said property in any way;

(iv) That petitioner, being the absolute owner of the said property, is within its rights, power and competence to sell the property in favour of any Bonafide Himachali;

(v) That the Registering Authority to register the said sale deed without asking for any permission or registration of sale deed executed in favour of the petitioner as auction purchaser;

(vi) That the Revenue authorities to attest the mutation in favour of Bonafide Himachali in terms of direction (iv) supra;

(vii) That this order will not confer any rights upon the petitioner of being Bonafide Himachali.

73. The writ petition is disposed of, as indicated hereinabove, alongwith all pending applications.

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

Amerjeet Singh ....Petitioner
Versus
State of Himachal Pradesh ....Respondent

Cr. Revision No. 49 of 2014.
Reserved on 15.06.2016.
Decided on: 21.10.2016

Indian Penal Code, 1860- Section 279, 337, 338 and 304-A- Accused was driving a truck, which hit the motorcycle- Y succumbed to the injuries and PW-1 sustained injuries in the accident – the accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that accident had taken place on national highway where two vehicles could have easily crossed the road- the truck was being driven towards the right side of the road, which led to the accident- motorcyclist had tried to save himself by applying the brakes which is evident from the skid marks, whereas, the driver of the truck had not tried to do so, which proves negligence on the part of the driver – the prosecution case was proved beyond reasonable doubt and accused was rightly convicted- revision dismissed. (Para-11 to 21)

Cases referred:
Rabindra Kumar Dey versus State of Orissa, (1976)4 SCC 233
Mohan Shyam versus State reported in 2013 (1) Crimes 129 (Del)
Syad Akbar versus State of Karnataka, AIR 1979 Supreme Court 1848
Jacob Mathew Versus State of Punjab and another, (2005) 6 SCC 1

For the petitioner : Mr. Dinesh Kumar, Advocate.
For the respondent : Mr. Ramesh Thakur & Mr. Pankaj Negi, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

The petitioner has preferred present revision petition assailing his conviction and sentence affirmed by learned Sessions Judge (Forest) Shimla in Criminal Appeal No. 127-S/10 of 2012/10 vide judgment dated 03.09.2013 under Sections 279, 337, 338 and 304-A of IPC and under Section 187 of Motor Vehicles Act as imposed by learned Judicial Magistrate, Ist Class, Theog, District Shimla in case No. 255-I of 2005 vide judgment dated 10.11.2009.

2. On fateful day dated 02.09.2005, one Yogesh, pillion rider of motorcycle No. MFW-4878 being driven by injured PW-1 Aman Thakur had succumbed to his injuries on hitting motorcycle by truck No. HP-12-3325 being driven by petitioner Amerjeet Singh at about 1.00 PM at place near Sarog-Gali on National Highway-22. Petitioner did not stop on the spot. Injured were shifted from spot to Civil Hospital Theog by passersby in their vehicle. Yogesh was referred to Indira Gandhi Medical Hospital, Shimla but he succumbed to his injuries on the way. On completion of investigation conducted in pursuance to FIR Ex. PW-13/B registered on the basis of statement Ex. PW-13/A, Challan was put in the Court.

3. On conclusion of trial, petitioner was convicted under Sections 279, 338, 304-A IPC and Section 187 of Motor Vehicles Act. Petitioner was sentenced to undergo rigorous

imprisonment for one year and to pay fine of Rs.1000/- under Section 338 IPC and in default of payment of fine to undergo simple imprisonment for three months. He was sentenced to undergo rigorous imprisonment of six months each and to pay fine of Rs.500/- and Rs.1000/- respectively under Sections 279 and 338 IPC and in default of payment of fine to undergo simple imprisonment for one months for each default. He was also sentenced for three months simple imprisonment and to pay fine of Rs.500/- under Section 187 of Motor Vehicles Act and in default of payment of fine to further undergo simple imprisonment for 15 days. All the sentences to run concurrently.

4. Appeal preferred by petitioner has been dismissed by learned Sessions Judge (Forest) Shimla affirming conviction and sentence imposed upon petitioner.

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

5. There is no dispute regarding principle of criminal jurisprudence relied upon by learned counsel for petitioner as laid down in case titled as **Rabindra Kumar Dey versus State of Orissa reported in (1976)4 SCC 233** which reads as under:-

> *"In our opinion three cardinal principles of Criminal Jurisprudence are well settled, namely:*
>
> *(1) that onus lies affirmatively on the prosecution to prove its case beyond reasonable doubt and it cannot derive any benefit from weakness or falsity of the defence version while proving its case;*
>
> *(2) that in a criminal trial the accused must be presumed to be innocent unless he is proved to be guilty; and*
>
> *(3) that the onus of the prosecution never shifts".*

6. Learned counsel for petitioner has relied upon observations made in short note of judgment in case titled as **Mohan Shyam versus State reported in 2013 (1) Crimes 129 (Del),** which is as under:-

> *"There were no skid marks on the road to show that the truck was being driven rashly and had come to a sudden halt after hitting the motorcycle of the deceased".*

7. It is argued by learned counsel for petitioner that in present case also, there is 5 meters skid mark of motorcycle but no skid marks of truck and therefore it was rash and negligent driving on the part of motorcyclist which resulted hitting of motorcycle with truck. I find no force in the contentions raised because observations made in the short note of judgment, referred supra was on the basis of given facts and circumstances of that case. In that case motorcycle driver had shifted his motorcycle suddenly in the lane in which truck was going on its correct side and truck was at halt immediately after striking with motorcycle without any skid marks on the road. Therefore for deciding the speed of truck absence of skid marks of the tyres of truck was found sufficient to hold that truck was moving in a normal speed as truck was stopped with sudden application of brakes but without any skid marks whereas in present case truck was not stopped even for a while and truck driver did not apply brakes even after hitting motorcycle with front tyre of truck which is evident from scratches and bend on silencer of truck which was near rear tyre of truck. Therefore the judgment and observation therein referred by petitioner on this issue is not applicable in present case. Absence or presence of skid marks on the road cannot be considered in isolation to decide whether driver was negligent or not.

8. It is contended on behalf of petitioner that motorcycle was being driven in high speed and foot rest of motorcycle had struck with truck causing accident for which motorcycle driver was responsible. In support of this contention site plan Ex. PW-13/C has been referred which indicates that there was 5 meters long skid mark of motorcycle on the spot. According to learned counsel for petitioner it means that motorcycle was in high speed and despite applying brakes motorcycle was in movement for a distance of 5 meters which caused accident as motorcycle driver could not control motorcycle and hit the truck.

9. Learned counsel for petitioner has relied upon judgment in case titled as **Syad Akbar versus State of Karnataka reported in AIR 1979 Supreme Court 1848** which reads as under:-

> *26. From the above conspectus, two lines of approach in regard to the application and effect of the maxim res ipsa loquitur are discernible. According to the first, where the maxim applies it operates as an exception to the general rule that the burden of proof of the alleged negligence is, in the first instance, on the plaintiff. In this view, if the nature of an accident is such that the mere happening of it is evidence of negligence, such as, where a motor vehicle without apparent cause leaves the highway, or overturns, or in fair visibility runs into an obstacle; or brushes the branches of an overhanging tree, resulting in injury or where there is a duty on the defendant to exercise care; and the circumstances in which the injury complained of happened are such that with the exercise of the requisite care no risk would in the ordinary course ensue, the burden shifts or is in the first instance on the defendant to disprove his liability. Such shifting or casting of the burden on the defendant is on account of a presumption of law arising against the defendant from the constituent circumstances of the accident itself, which bespeak negligence of the defendant. This is the view taken in several decisions of English Courts. [For instance, see Burke v. Manchester, Sheffield & Lincolnshire Rly (1870) 22 LT 442; Moore v. Fox ® & Sons (1956) 1 AB 596. Also see Paras 70 79 and 80 of Halsbury Laws of England, Third Edition, Vol. 28, and the rulings mentioned in the Foot Notes thereunder]".*
>
> *27. According to the other line of approach, res ipsa loquitur is not a special rule of substantive Law; that functionally, it is only an aid in the evaluation of evidence, "an application of the general method of inferring one or more facts in issue from circumstances proved in evidence". In this view, the maxim res ipsa loquitur does not require the raising of any presumption of law which must shift the onus on the defendant. It only, when applied appropriately, allows the drawing of a permissive inference of fact, as distinguished from a mandatory presumption properly so-called, having regard to the totality of the circumstances and probabilities of the case. Res ipsa is only a means of estimating logical probability from the circumstances of the accident. Looked at from this angle, the phrase (as Lord Justice Kennedy put it). Russell v. London & South Western Rly. Co. (1908) 24 TLR 548 only means, 'that there is, in the circumstances of the particular case, some evidence which, viewed not as a matter of conjecture, but of reasonable argument, makes it more probable that there was some negligence, upon the facts as shown and undisputed, than that the occurrence took place without negligence..... It means that the circumstances are, so to speak, eloquent of the negligence of somebody who brought about the state of thing which is complained of."*
>
> *28. In our opinion, for reasons that follow, the first line of approach which tends to give the maxim a larger effect than that of a merely permissive inference, by laying down that the application of the maxim shifts or casts even in the first instance, the burden on the defendant who in order to exculpate himself must rebut the presumption of negligence against him, cannot, as such, be invoked in the trial of criminal cases where the accused stands charged for causing injury or death by negligent or rash act. The primary reasons for non- application of this abstract doctrine of res ipsa loquitur to criminal trials are: Firstly, in a criminal trial, the burden of proving everything essential to the establishment of the charge against the accused always rests on the prosecution, as every man is presumed to be innocent. Until the contrary is proved, and criminality is never to be presumed subject to statutory exception. No such statutory exception has been made by requiring the drawing of a mandatory presumption of negligence against the accused where the accident "tells its own story" of negligence of somebody. Secondly, there is a marked difference as to the effect of evidence, viz. the proof in*

civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt, but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment. As pointed out by Lord Atkin in Andrews v. Director of Public Prosecutions (1937) 2 All ER 552: 1937 AC 576, "simple lack of care such as will constitute civil liability, is not enough;" for liability under the criminal law "a very high degree of negligence is required to be proved. Probably, of all the epithets that can be applied, 'reckless' most nearly covers the case".

10. Learned counsel for the petitioner has also relied upon the judgment in case titled ***Jacob Mathew Versus State of Punjab and another, reported in (2005) 6 SCC 1*** by referring paras 33 and 48(6) and has argued that because of rash driving of motorcycle the accident could not have foreseen by any prudent person and therefore present accident cannot be said to have occurred on account of negligence on the part of petitioner. He has further contended that for the purpose of convicting petitioner under Section 304-A IPC not only negligence but gross negligence is required to be proved on the part of petitioner which is lacking in present case.

11. I am not convinced by arguments advanced by learned counsel for petitioner because evidence on record is contrary to the contentions of learned counsel for petitioner. The accident has taken place on National Highway where two vehicles could easily cross the road. Site plan Ex. PW-13/C is not disputed by petitioner. The said site plan and photographs Ex. PA to PD indicate that width of road on the spot is 24½ feet and accident has occurred on the correct side i.e. left hand side of motorcycle and wrong side i.e. right side of truck. There is distance of 4½ feet from edge of road to left side of motorcycle and 20 feet from right side of motorcycle to another edge of road. Photographs Ex. PA, PB, PD and PE reveal that motorcycle was hit by truck after coming deep towards right hand side of truck leaving considerable space on its left hand side.

12. Skid mark of motorcycle indicates that on confrontation by truck driver by driving vehicle towards its wrong side i.e. right hand side of truck, the motorcycle driver had tried to save himself by applying sudden brakes causing skid mark on the road but truck driver had not bothered to apply his brakes to avoid hitting motorcycle.

13. It is also evident from photographs that rear portion of motorcycle was badly damaged which belies the stand of petitioner that only foot rest of motorcycle struck with the truck. Mechanical report of truck Ex. P-5/A also reveals that beside scratches on front tyre, silencer of truck was also bent and scratched which substantiated the plea that even after striking motorcycle with front tyre, petitioner did not stop his vehicle and silencer which was on the rear portion of truck also hit the motorcycle which proves not only negligence but gross negligence on the part of petitioner.

14. The truck in question was taken in possession by police vide seizure memo PW-6/A. It is also mentioned in the said memo that there were scratches on front right side tyre of the truck and silencer pipe was also damaged on the said side. There is no cross examination disputing correctness to Ex. PW-6/A on behalf of petitioner.

15. In 24½ feet vide road motorcycle was being driven on one side of road at 4½ feet distance from its left side leaving 20 feet wide road on right side of motorcycle and motorcycle was on its correct side. On National Highway where two heavy vehicles coming from opposite side can cross easily, hitting motorcycle by the truck coming from opposite side by coming deep on wrong side of truck is sufficient to infer that truck was being driven on wrong

side that too without caring for two-wheeler coming from opposite side but on its own correct side. It is a case of gross negligence on the part of petitioner.

16. There is ample evidence on record to infer that motorcycle was hit by truck by coming deep on its right hand side which was wrong side of truck but correct side of motorcycle. Petitioner has not brought on record any evidence explaining the circumstances so as to justify driving of truck towards its right hand after leaving much space on its left side despite the fact that the road in question was double lane National Highway. Prosecution has proved the case against the driver of truck beyond all reasonable doubts.

17. In present case, petitioner is not convicted by applying principle of ipsa loquitur but there is sufficient evidence on record to hold that it was rash and negligent driving of petitioner which caused accident in question. On the basis of evidence on record, as discussed supra, prosecution has successfully discharged its burden of proving essential ingredients to establish charge against petitioner. On the basis of evidence on record, it can be said beyond all reasonable doubts that petitioner was negligent in driving truck at the time of accident in question.

18. The defence of petitioner regarding his identity as a driver of truck involved in the accident is also not tenable as vehicle in question taken in possession by police was got released by its owner with petitioner.

19. PW-7 Gurcharan Singh owner of truck admitted that petitioner was his driver in truck No. HP 12-3325. PW-9 Paramjeet Singh son of Shri Gurcharan Singh (PW-7) stated in examination in chief that their truck HP-12-3325 had met with an accident beyond Theog (Shimla) in which Amarjeet petitioner was driver. He admitted in cross-examination that petitioner on 03.09.2005 came to them after accident and thereupon his father and petitioner came to Theog for release of truck. He further admitted that when they reached Fagu on 5.09.2005 driver (petitioner) was sitting in their vehicle. PW-7 Gurcharan Singh also produced log book of truck Ex. P-4. As per entries of this logbook, it was filled up by drivers driving the truck on relevant dates. Perusal of this logbook proves that as per these entries truck had gone to Narkanda from Baddi and was coming from Narkanda to Baddi. Entries are duly signed by petitioner. From logbook, it also transpires that maximum entries in it were made by petitioner indicating that petitioner was regular driver of truck in question. As discussed supra, there is sufficient evidence on record proving that petitioner was driver of the truck involved in accident on the fateful day.

20. No other point urged. Learned trial Court as well as appellate Court have correctly appreciated the evidence on record in consonance with settled law of the land. The petition is devoid of merit and no grounds of interference are made out.

21. In the result, I find no force in this revision and therefore, no interference under revisional jurisdiction of this Court is warranted and as such revision petition is dismissed and impugned judgment passed by learned Sessions Judge (Forest) Shimla, in Appeal No. 127-S/10 of 2012/10 titled Amarjeet Singh versus State of H.P., affirming conviction and sentence, as awarded by trial Court, is upheld.

21. It is stated at bar by counsel of petitioner personal and surety bond were not executed by petitioner and he has already served sentence of imprisonment. This fact is to be verified through SHO of concerned Police Station by Superintendent of Police, Shimla and in case sentence is yet to be served then petitioner shall surrender himself within 30 days before of trial Court to serve the sentence. Bail and surety bonds, if any, executed by respondents are cancelled. Superintendent of Police, Shimla is further directed to ensure execution of sentence imposed upon petitioner within two months unless already executed. Record be sent to lower courts alongwith copy of judgment.

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

FAOs No. 13 & 437 of 2012
Decided on: 21.10.2016

FAO No. 13 of 2012

Anant Ram ...Appellant.

Versus

Karam Dev and others ...Respondents.

FAO No. 437 of 2012

Shri Vijender Singh Chandel ...Appellant.

Versus

Smt. Soma Devi and others ...Respondents.

Motor Vehicles Act, 1988- Section 166- MACT awarded compensation in favour of the claimants –A, co-owner and his son V were held liable - it was contended that vehicle was in possession of V and he was responsible for the accident- thus, he should be saddled with liability- held, that A and deceased P were co-owners of the vehicle – the Tribunal had rightly saddled them with liability- V is son of deceased P and is his legal representatives- hence, he was rightly held liable in the capacity of legal representative. (Para- 3 to 6)

FAO No. 13 of 2012

For the appellant: Mr. Tara Singh Chauhan, Advocate.

For the respondents: Mr. Neel Kamal Sharma, Advocate, for respondents No. 1 and 2.
Mr. B.C. Verma, Advocate, for respondent No. 3.

FAO No. 437 of 2012

For the appellant: Mr. B.C. Verma, Advocate.

For the respondents: Mr. Neel Kamal Sharma, Advocate, for respondents No. 1 to 3.
Mr. Tara Singh Chauhan, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Both these appeals are outcome of a common award, thus, I deem it proper to determine both these appeals by this common judgment.

2. Challenge in both these appeals is to award, dated 6th August, 2011, made by the Motor Accident Claims Tribunal, Ghumarwin, District Bilaspur, Himachal Pradesh (for short "the Tribunal") in M.A.C. No. 19 of 2006/05, titled as Karam Dev and another versus Vijender Singh Chandel and another, whereby compensation to the tune of ₹ 2,50,000/- with interest @ 7.5% per annum from the date of the petition till its realization alongwith costs assessed at ₹ 5,000/- came to be awarded in favour of the claimants and Shri Vijender Singh Chandel (son of registered owner of the offending vehicle) and Shri Anant Ram (co-owner of the offending vehicle) came to be saddled with liability (for short "the impugned award").

2. Learned counsel for the appellants in both the appeals have not contested the impugned award on quantum and other grounds.

3. The only argument advanced by Mr. Tara Singh Chauhan, learned counsel for the appellant in FAO No. 13 of 2012, is that the offending vehicle was in the possession of Vijender Singh Chandel as the owner and he was responsible for the accident, thus, he should be saddled with the entire liability.

4. Mr. B.C. Verma, learned counsel for the appellant in FAO No. 437 of 2012, argued that Vijender Singh Chandel is not the registered owner of the offending vehicle, but was

only driving the offending vehicle at the time of the accident, thus, it were the registered owners only, who were to be saddled with the liability. However, he frankly admitted that one of the registered owners, namely Shri Prem Singh, had expired on 19th May, 2004, and Vijender Singh Chandel is his son, thus, is the legal heir/representative of deceased-Prem Singh.

5. It is an admitted fact that deceased-Prem Singh and Anant Ram were the co-owners of the offending vehicle.

6. I have perused the record and gone through the impugned award. The Tribunal has rightly made the discussions in paras 24 to 28 of the impugned award and saddled them with liability.

7. Having said so, the impugned award is well reasoned and legal one, needs no interference.

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

9. The awarded amount be deposited within eight weeks, if not already deposited.

10. At this stage, it is stated that one of the claimants, namely Shri Karam Dev has expired during the pendency of the appeal and his legal representatives have already been brought on record in FAO No. 437 of 2012 vide order, dated 23rd October, 2013.

11. Registry is directed to release 50% of the awarded amount in favour of claimant-Soma Devi and rest 50% in favour of claimant-Raj Kumar and claimant-Kumari Kumkum in equal shares through payee's account cheque or by depositing the same in their respective bank accounts.

12. 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.

Smt. Anjana Devi and others ...Appellants

Versus

Badri Prasad and another ...Respondents.

FAO (MVA) No. 164 of 2012.
Date of decision: 21.10.2016.

Motor Vehicles Act, 1988- Section 166- Deceased was 27 years – multiplier of 16 is applicable – the income of the deceased was not less than Rs. 7,000/- per month and Tribunal had wrongly held that income of the deceased was Rs. 5,000/- per month - claimants are 4 in number- 1/4th amount is to be deducted and the loss of dependency is Rs. 5,300/- per month and the claimants are entitled to Rs. 5300 x 12 x 16= Rs. 10,17,600/- under the head 'loss of dependency'- claimants are entitled to Rs. 10,000/- each under the heads 'loss of love and affection', 'loss of estate', 'funeral expenses' and 'loss of consortium'- thus, claimants are entitled to Rs. 10,57,600/- with interest @ 7.5% per annum. (Para-5 to 8)

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 appellants: Mr. Manoj Thakur, Advocate.
For the respondents: Mr. Nipun Sharma, Advocate, for respondent No.1.
Mr.Ratish Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

This appeal is directed against the judgment and award dated 28.12.2011, passed by the Motor Accident Claims Tribunal, Bilaspur, H.P. hereinafter referred to as "the Tribunal", for short, in MAC No.26 of 2010, titled *Anjana Devi and others versus Badri Prashad and another*, whereby compensation to the tune of Rs.7,90,000/- alongwith interest @ 7.5% per annum came to be awarded in favour of the claimants and insurer was saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Insurer, owner and 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 claimants have questioned the impugned award 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 following reasons.

5. Admittedly, the deceased Hukam Chand 27 years of age was driver by profession. The claimants are four in numbers. In view of the 2nd Schedule attached to the Motor Vehicles Act, 1988, for short "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***., the multiplier applicable was "16" and the Tribunal has fallen in an error in applying the multiplier of "17". Thus, it is held that the multiplier of "16" is just and appropriate multiplier applicable.

6. The claimants have pleaded that the income of the deceased was not less than 8000/- per month. They have led evidence and one of the witnesses has stated that he was paying Rs.6000/- per month to the deceased and Rs.100/- per day as daily expenses. Meaning thereby the minimum income of the driver was not less than Rs.9000/- per month. Keeping in view the pleadings and evidence on record, after making a guess work, it can be safely held that the income of the deceased was not less than Rs.7000/- per month. The Tribunal has wrongly held that the income of the deceased was Rs.5000/- per month. Accordingly, it is held that the income of the deceased was not less than Rs.7000/- per month. Claimants are four in number and as per ***Sarla Verma's*** case supra, 1/4th was to be deducted. After deducting 1/4th, it is held that the claimants have lost source of dependency to the tune of Rs.5300/- per month. Thus, the claimants are held entitled to compensation to the tune of Rs.5300x12x16= Rs.10,17,600/- under the head loss of source of dependency.

7. In addition, the claimants are also held entitled to compensation under the following four heads:

(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/-

8. Accordingly, the claimants are held entitled to compensation to the tune of Rs.10,17,600+ Rs.40,000= Rs.10,57,600/- with interest @7.5% per annum, as awarded by the Tribunal.

9. 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 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, after proper verification.

10. The amount already deposited by the insurer in the Registry, be released in favour of the claimants, forthwith, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification.

11. Viewed thus, the appeal is disposed of along with pending applications, compensation is enhanced and the impugned award is modified as indicated hereinabove.

12. 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. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Court on its own motion .....Petitioner

Versus

State of HP and others .....Respondents.

CWPIL No. 12 of 2015.
Date of decision: 21st October, 2016.

Constitution of India, 1950- Article 226- There is shortage of staff in IGMC- direction issued to take steps to fill up the vacancies in various medical colleges- further, direction issued to establish endocrinology super specialty, to make nephrology department workable to make available kidney transplant facilities and to construct super specialty block in IGMC. (Para-1 to 8)

Present: Mr. Vikas Rathore, Advocate, as Amicus Curiae.
Mr. Shrawan Dogra, Advocate General, with M/s Anup Rattan, Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General for the respondents-State.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

In compliance to the order dated 7th September, 2016, the Principal Secretary (Health), to the Government of Himachal Pradesh-respondent No.2 has filed the affidavit, which does disclose the present functioning of the Health Department, particularly various departments in the Indira Gandhi Medical College Shimla, for short "IGMC". Annexure R-1 is the chart showing the faculty position, including vacancy position in various departments at IGMC, Shimla.

2. It appears that almost all the sanctioned posts are being manned and only a few posts are vacant.

3. The Endocrinology department is not in place in IGMC, Shimla and it is stated that the steps are being taken to create super specialist faculty member and one medical officer is undergoing DM course in Endocrinology, sponsored by the Government.

4. The Nephrology Department is in place and the Government has taken steps to create Dialysis Units under the National Dialysis Program in various Districts. The suitable site has been identified for construction of the Specialty Block.

5. Kidney Transplant facility is not in place at IGMC and steps are being taken to create the said facility.

6. The Himachal Pradesh Public Service Commission, through its Secretary is arrayed as party respondent in this petition, who shall figure as respondent No. 8 in the array of the respondents. Registry to carry out necessary correction in the memo of the petition.

7. Issue notice to the newly arrayed respondent. Mr. D.K. Khanna, Advocate, waives notice on behalf of the said respondent.

8. Keeping in view the orders passed by this Court from time to time and the status reports filed, particularly the status report filed by the Principal Secretary (Health), to the Government of Himachal Pradesh, we deem it proper to pass the following directions.

(i) The Principal, IGMC Shimla as well as the concerned authorities, including respondent No. 8 is directed to take steps to fill-up all the vacancies which are lying vacant in IGMC Shimla, Rajinder Prashad Government Medical College, Tanda, other medical colleges, all the districts hospitals, sub divisional level hospitals and Taluka level hospitals, as early as early possible.

(ii) The Chief Secretary, the Principal Secretary (Health), to the Government of Himachal Pradesh, Principal IGMC Shimla, Secretary H.P. Public Service Commission, are directed to take steps within two weeks, in order to establish the Endocrinology super specialty. They are directed not to wait for the doctor(s) who is/are undergoing DM Course sponsored by the Government.

(iii) Respondents are directed to ensure that the Nephrology Department is made workable in full and additional posts of all the cadres are created and filled-up, so that, the poor patients are not made to run pillar to post and post to pillar and to run for treatment outside the Himachal Pradesh State.

(iv) The kidney Transplant Facilities be made available at IGMC Shimla and all steps shall be taken, as required, to make the said facility available. Steps be taken within two weeks.

(v) Steps be also taken for undertaking construction of Super Specialty Block in terms of the directions already passed read with the status report filed by the Principal Secretary (Health).

Respondents to file status reports and also to file status report relating to the facilities available in Taluka Level/, Sub Divisional level/District level hospitals and all the Medical Colleges, functioning in the entire State of Himachal Pradesh.

List on **3rd November, 2016.** Dasti copy.

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

Sh.Dalip Singh Himral @ Dainy. ....Petitioner/Accused.

Vs.

State of HP and others. ...Non-petitioners.

Cr.MMO No. 98 of 2014.
Order reserved on: 6.10.2016.
Date of Order: October 21, 2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Section 302 and 506 of I.P.C.- challan was filed against the accused – Court framed charges against the accused – petition was filed for cancellation of FIR – held, that statement recorded under Section 161 Cr.P.C cannot be used for any purpose except contradiction – statements have to be appreciated after the conclusion of trial – police can file supplementary report after investigation- there is no requirement of consulting public prosecutor

before filing the challan- the evidence is not required to be sifted at the time of taking cognizance and framing charges- petition dismissed. (Para-5 to 15)

Cases referred:
Mohd. Akbar Dar and others Vs. State of Jammu and Kashmir and others, AIR 1981 SC 1548
Yashpal Mittal Vs. State of Punja, AIR 1977 SC 2433
State of Orissa Vs. Debendra Nath Padhi, AIR 2005 SC 359
Ajay Kumar Vs. State of Rajasthan, AIR 2013 SC 633
Supdt. & Remembrance of Legal Affairs West Bengal Vs. Anil Kumar, AIR 1980 SC 52
State of Bihar Vs. Ramesh Singh, AIR 1977 SC 2018
State of Delhi Vs. Gyan Devi, AIR 2001 SC 40
State of M.P. Vs. S.B. Johari and others, AIR 2000 SC 665
State of Maharashtra Vs. Priya Sharan Maharaj, AIR 1977 SC 2041
State of Delhi Vs. Gyan Devi, 2008 (8) SCC 329
CBI Vs. K.M.Sharan, 2008 (4) SCC 471
M.P. Vs. Surendra Kori, 2012 (10) SCC 155
Taramani Parakh Vs. State of M.P, JT 2015 (3) SC 185
State of Tamil Nadu Vs. Thirukkural Perumal, 1995 (2) SCC 449
State of Haryana Vs. Bhajan Lal, 1992 Supplement (1) SCC 335

For the petitioner: Mr. Prashant Pandey, Advocate.
For non-petitioner: Mr. M.L.Chauhan, Addl. Advocate General and 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 for quashing criminal proceedings and FIR No. 40 of 2011 dated 17.6.2011 registered under sections 302 and 506 IPC in criminal case No.31-R/7 of 2012 title State of HP Vs. Dalip Singh Himral @ Dainy.

BRIEF FACTS OF THE CASE:

2. Tilak Raj filed FIR alleging therein that on dated 16.6.2011 at about 1.30 noon he received a phone call and he was informed by way of phone call that since night of 14th & 15th June 2011 deceased Kamlesh Kumar had left for his residential house. It is alleged that deceased Kamlesh Kumar did not reach in his residential house and on search it was found that motor cycle No. HP 06A-2293 and the bag of deceased were found at a place about ½ Km towards Pandoya in a lonely place. It is further alleged that deceased had love affairs with Prabha Devi since one year. It is further alleged that on 22.7.2011 dead body of deceased was found in Govind dam District Bilaspur H.P. It is further alleged that post mortem of deceased body was conducted on 23.7.2011 in regional hospital Bilaspur H.P. It is further alleged that investigation was handed over to State CID Bharari Shimla as per direction of police head quarter vide letter No. CB-3-19/11/2010-31699-31702 dated 11.8.2011. It is further alleged that on 29.9.2011 accused produced before learned Judicial Magistrate Rampur Bushahr District Shimla and investigating officer moved an application stating therein that there is no evidence against accused. It is further alleged that thereafter learned Judicial Magistrate Ist Class Rampur discharged accused qua offence punishable under sections 302 and 506 IPC on dated 29.9.2011. It is further alleged that thereafter cancellation report prepared but learned Director Prosecutor did not agree with cancellation report submitted by State CID Bharari Shimla. It is further alleged that thereafter further investigation under section 173(8) Code of criminal procedure 1973 conducted as per direction of competent authority. It is further alleged that statement of Prabha Devi sole eye

witness recorded under section 164 of the Code of criminal procedure 1973 and thereafter challan was filed against accused under sections 302 and 506 IPC.It is further alleged that thereafter on dated 17.10.2012 learned Judicial Magistrate Ist Class Rampur District Shimla HP committed the case under section 209 Cr.PC to learned Sessions Judge Kinnaur at Rampur for trial and thereafter learned Sessions Judge Kinnaur on dated 20.2.2014 held that there are sufficient grounds for proceeding against accused for criminal offence punishable under sections 302 and 506 IPC on the alleged facts that accused hit deceased Kamlesh with a stone on his head and when he become unconscious accused threw deceased in river Satluj and thereafter dead body of deceased was recovered on 22.7.2011 near Swarghat in District Bilaspur H.P and on the alleged additional facts that accused also intimidated Prabha Devi sole eye witness of incident and threatened her to kill her in case she disclosed the incident to anyone. Learned Sessions Judge Kinnaur at Rampur framed charge against accused under sections 302 and 506 IPC on dated 20.2.2014. Accused did not plead guilty and claimed trial. Thereafter accused challenged entire criminal proceedings under section 482 Cr.PC with prayer to quash entire criminal proceedings against accused pending before learned Sessions Judge Kinnaur at Rampur Bushahr.

3. Court heard learned Advocate appearing on behalf of petitioner and learned Additional Advocate General appearing on behalf of non-petitioners and also perused entire record carefully.

4. Following points arise for determination in present petition:

1. Whether petition filed under Section 482 Cr.PC 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 accused that on 29.9.2011 learned Judicial Magistrate Ist Class Rampur discharged accused under sections 302 and 506 IPC and discharge order of learned Judicial Magistrate Ist Class was not challenged before competent authority of law and after discharge order by learned Judicial Magistrate dated 29.9.2011 fresh challan against accused cannot be filed in the present case under sections 302 and 506 IPC is rejected being devoid of any force for reasons hereinafter mentioned. It is held that offence punishable under section 302 IPC is exclusively triable by court of Sessions. It is held that offence punishable under section 302 IPC is not triable by learned Judicial Magistrate Ist Class Rampur. It is held that learned Judicial Magistrate Ist Class Rampur was not legally competent to discharge the accused qua offence punishable under section 302 IPC. It is held that Judicial Magistrate cannot pass order of discharge in sessions trial under section 227 of Code of criminal procedure 1973. It is held that only learned Sessions Judge Kinnaur at Rampur was legally competent to discharge accused qua criminal offence punishable under section 302 IPC triable by Sessions Court under section 227 of Code of criminal procedure 1973. It is held that whole approach of learned Judicial Magistrate Ist Class Rampur while discharging accused qua criminal offence under section 302 IPC triable by Sessions Judge exclusively on dated 29.9.2011 is erroneous, void ab-initio and impermissible. See AIR 1978 SC 514 title Sanjay Gandhi Vs. Union of India and others**.** In the present case thereafter learned Judicial Magistrate Rampur has legally committed the case to learned Sessions Judge under section 209 Cr.PC on dated 17.10.2012 for trial.

6. Submission of learned Advocate appearing on behalf of accused that Prabha Devi sole eye witness of the incident in her earlier statement has stated that accused hit deceased on his head with stone but when her statement was recorded before CID official she stated that her earlier statement was incorrect and she made her earlier statement under threat and pressure from Smt. Neelam who is serving in police department as constable and who is real sister of the mother of deceased and on this ground petition be accepted is rejected being devoid of any force for reasons hereinafter mentioned. Judicial finding whether Prabha Devi has given her earlier

statement under pressure or not cannot be given at this stage of case because same fact is a complicated issue of fact and complicated issue of fact will be decided by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case and the same fact will be decided by learned Trial Court after recording statement of sole eye witness namely Prabha Devi in the Court in accordance with law. It is well settled law that statement recorded under section 161 Cr.PC during investigation cannot be used for any purpose in judicial proceedings except for contradiction purpose only in the manner provided by section 145 of Indian Evidence Act 1872 as per section 162 of Code of criminal procedure 1973.

7. Submission of learned Advocate appearing on behalf of accused that investigating officer inspected the place of incident in the presence of Prabha Devi along with her father Lal Chand, Pradhan gram panchayat Parlog Hem Raj Verma, Satish Mehta, Surinder Kumar and Sandeep Kumar and she gave statement before police authority under section 161 Cr.PC that deceased Kamlesh @ Papi jumped into river Satluj and statement of Prabha Devi was also corroborated by the statement of Sanjeev Kumar, Gayatri Devi, Hem Raj Verma, Satish Mehta, Surender Kumar and Sandeep Kumar and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Judicial finding relating to the fact whether sole eye witness Prabha Devi has given statement before above stated persons that deceased Kamlesh himself jumped into river Satluj cannot be given at this stage of case. Judicial finding relating to statement of Prabha Devi will be given after recording statement of Prabha Devi in accordance with law during judicial proceedings. Fact whether deceased Kamlesh jumped into Satluj river voluntarily is also a complicated issue of fact and judicial finding relating to complicated issue of fact would be given by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case and it is not expedient in the ends of justice to give judicial finding at this stage of case that deceased had jumped into river voluntarily because statements recorded by police during investigation cannot be used for any purpose except for contradiction purpose in the manner provided by section 145 of Indian Evidence Act 1872.

8. Submission of learned Advocate appearing on behalf of accused that investigation was conducted by State CID and without assigning any plausible reason challan against accused filed under sections 302 and 506 IPC by other investigating agency contrary to law and on this ground petition be allowed is also rejected being devoid of any force for reasons hereinafter mentioned. Investigating agency has submitted supplementary investigation report under section 173 Cr.PC alleging that accused has committed cognizable criminal offence punishable under sections 302 and 506 IPC. It is well settled law that investigating agency can submit supplementary investigation report under section 173 (8) of the Code of criminal procedure 1973 even after taking cognizance by Judicial Magistrate. It is held that notwithstanding that a Magistrate had taken cognizance of the offence upon a police report submitted under section 173 of the Code of criminal procedure 1973 the right of the investigating agency to further investigate was not exhausted and investigating agency could exercise such right when further evidence oral or documentary came to light under section 173(8) of Code of criminal procedure 1973. In the present statement of Prabha Devi recorded under section 164 of the Code of criminal procedure 1973 before learned Judicial Magistrate and Prabha Devi has specifically stated under section 164 of the Code of criminal procedure 1973 that accused hit deceased with stone and thereafter deceased became unconscious and thereafter accused threw deceased in river Satluj. In the present case only eye witness is Prabha Devi. In view of the statement of sole eye witness Prabha Devi that accused hit deceased with stone and thereafter deceased became unconscious and thereafter accused threw deceased into river is sufficient to frame charge against accused under sections 302 and 506 IPC. Judicial finding relating to evidentiary value of the statement of Prabha Devi recorded under section 164 Cr.PC cannot be given at this stage of case because it is complicated issue of fact. Judicial finding relating to statement of sole eye witness Prabha Devi recorded under section 164 of the Code of criminal procedure 1973 will be given by learned Trial Court after recording testimony of Prabha Devi in judicial proceeding in trial of case and after giving due opportunities to both parties to lead evidence in support of their case.

9. Submission of learned Advocate appearing on behalf of accused that Prabha Devi has stated that accused hit deceased with stone upon his head but in the post mortem report and medical examination report when dead body was recovered from river Satluj at Swarghat Bilaspur on dated 22.7.2011 no injury was found on the head of deceased and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Judicial finding relating to medical examination report cannot be given at this stage of case. Judicial finding relating to medical examination report 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 finding relating to medical report submitted by medical officer without examination of medical officer in Court in accordance with law.

10. Submission of learned Advocate appearing on behalf of accused that accused is respectable member of the society and he has been falsely implicated in the present case and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Issue of absence of mensrea or actus reus will be decided by learned Trial Court after giving due opportunities to both the parties to adduce oral as well documentaries evidence in support of their case. It is not expedient in the ends of justice to give judicial findings relating to complicated issue of facts at this stage of criminal proceeding.

11. Submission of learned Advocate appearing on behalf of accused that Public Prosecutor has no role to play and investigating officer cannot be directed to consult Public Prosecutor before filing report in view of ruling in AIR 2000 SC 1731 title R.Sarala Vs. T.S.Velu and others and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Judicial finding relating to fact whether Public Prosecutor has interfered in the investigation of present case cannot be given at this stage of case. Judicial finding will be given by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case. Whether Public Prosecutor has interfered in the investigation is also complicated issue of fact and judicial findings against Public Prosecutor cannot be given at this stage of case unless opportunity granted to Public Prosecutor to rebut allegation in accordance with law. It is well settled law that in judicial proceedings no one should be condemned un-heard on the concept of audi alteram partem. It is well settled law that report filed under section 173 Cr.PC and statement of witness recorded under section 161 Cr.PC can be used only for contradictions purpose in the manner provided by section 145 of Indian Evidence Act 1872 and cannot be used for any other purpose in judicial proceedings. See AIR 1999 SC 1969 title Ramparsad Vs. State of Maharashtra.

12. Submission of learned Advocate appearing on behalf of accused that there are no sufficient grounds against accused to proceed under sections 302 and 506 IPC and accused be discharged under section 227 of the Code of Criminal Procedure 1973 is also rejected being devoid of any force for reasons hereinafter mentioned. In the present case after perusal of testimony of Prabha Devi recorded under section 161 Cr.PC and under section 164 Cr.PC and after perusal of testimony of corroborative prosecution witnesses and after perusal of documentary evidence annexed with challan i.e. post mortem report and chemical analyst report placed on record it is held that there are sufficient grounds for proceedings against accused under sections 302 and 506 IPC. It is held that it is not expedient in the ends of justice to discharge accused under section 227 of the Code of criminal procedure in sessions trial pending under sections 302 and 506 IPC.

13. It is well settled law that at the time of framing charge meticulous consideration of evidence and other materials is not necessary. It is well settled law that at the stage of framing charge trial court is not required to marshal materials on record but only has to prima facie consider whether there are sufficient materials against accused or not proved. It is well settled law that at the time of framing of charge materials filed by accused should not be considered. See AIR 1981 SC 1548 title Mohd. Akbar Dar and others Vs. State of Jammu and Kashmir and others. See AIR 1977 SC 2433 title Yashpal Mittal Vs. State of Punja. See AIR 2005 SC 359 title State of Orissa Vs. Debendra Nath Padhi. See AIR 2013 SC 633 title Ajay Kumar Vs. State of

Rajasthan. See AIR 1980 SC 52 title Supdt. & Remembrance of Legal Affairs West Bengal Vs. Anil Kumar. See AIR 1977 SC 2018 title State of Bihar Vs. Ramesh Singh. See AIR 2001 SC 40 title State of Delhi Vs. Gyan Devi. See AIR 2000 SC 665 title State of M.P. Vs. S.B. Johari and others. See AIR 1977 SC 2041 State of Maharashtra Vs. Priya Sharan Maharaj.

14. It is well settled law that powers of High Court to quash criminal proceedings under section 482 of the Code of criminal procedure 1973 should be exercised in exceptional case. It is well settled law that normal process of criminal Trial should not be cut short in casual manner. See 2008 (8) SCC 329 title State of Delhi Vs. Gyan Devi. See 2008 (4) SCC 471 title CBI Vs. K.M.Sharan. See 2012 (10) SCC 155 title M.P. Vs. Surendra Kori. See JT 2015 (3) SC 185 title Taramani Parakh Vs. State of M.P. See 1995 (2) SCC 449 title State of Tamil Nadu Vs. Thirukkural Perumal. See 1992 Supplement (1) SCC 335 title State of Haryana Vs. Bhajan Lal. In view of above stated facts and case law cited supra point No.1 is answered in negative.

Point No.2 (Final order).

15. In view of findings upon point No.1 petition filed under section 482 Cr.PC is dismissed. Parties are directed to appear before learned Trial Court on 15.11.2016. Learned Trial Court will dispose of case expeditiously in accordance with law because present sessions trial is pending since 2012. File of learned Trial Court along with certify copy of order be sent back forthwith. Observations will not effect merits of the case in any manner. Cr.MMO No. 98 of 2014 is disposed of. All pending application(s) if any also disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Jarnail Singh. ...Petitioner.

Versus

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

CWP No. 1471/2016
Reserved on: 30.9.2016
Decided on: 21.10. 2016

Constitution of India, 1950- Article 226- A tender for transportation of milk was issued – the petitioner was the lowest tenderer but the tender was not awarded to him – respondents stated that RCs of the truck were not submitted, father of the petitioner is an accused in FIR involving pilferage of the milk and the writ petition is not maintainable in view of the arbitration clause- held, that arbitration clause by itself is not an absolute bar to the maintainability of the petition – the Court has to examine illegality and irregularity leading to the award of the contract – there is no condition in the tender which deals with the transit loss – a notice should have been issued to the petitioner prior to the rejection of his tender - the tender process ordered to be cancelled and fresh tender ordered to be issued. (Para-6 to 25)

Cases referred:

Union of India and others vs. Tantia Construction Private Limited (2011) 5 SCC 697

M/s Ram Barai Singh & Co. vs. State of Bihar & ors. JT 2014 (14) SC 357

Mahanadi Coalfields Ltd. & Ors. vs. M/s Dhansar Engineering Co. Pvt. Ltd. & Anr. JT 2016 (9) SC 385

Michigan Rubber (India) Limited vs. State of Karnataka and others, (2012) 8 SCC 216

Meerut Development Authority vs. Association of Management Studies and another, 2009 (6) SCC, 171

For the Petitioner: Mr. H.S. Rana, Advocate.

For the Respondents: Mr. J.S. Guleria, Asstt. Advocate General for respondent No.1.
Mr. M.R. Verma, Advocate for respondent Nos. 2 and 3.
Mr. Rajiv Jiwan, Advocate for respondent No.4.

Justice Tarlok Singh Chauhan, Judge:

By means of this writ petition, petitioner has questioned the award of tender in favour of respondent No.4 on various grounds, as taken in the memo of petition.

2. The facts, as pleaded in the petition, are that respondent Nos. 1 to 3 called for tenders for the transportation of milk from its Plant, Dutt Nagar, Tehsil Rampur, District Shimla to various places, within and outside the State of Himachal Pradesh. Petitioner submitted his tender alongwith requisite fee well before the stipulated time and when the same was opened on 21.3.2016, despite the petitioner's being the lowest tender; the same was not awarded to him, but was awarded to respondent No.4.

3. Respondent Nos. 1 to 3 have filed the reply wherein it has been averred that the petitioner neither submitted the RCs of the trucks nor the tender in accordance with the terms and conditions thereof. In addition thereto, it is averred that the father of the petitioner is one of the accused in an FIR involving pilferage of milk and mother dairy being prime bulk consumers of Milk Federation would not like to procure milk from the petitioner. It is also averred that as per valuation, the transit loss per kilo meter comes to Rs. 7.93 paisa and the difference between the rates accepted comes as under:

(i) "Actual rate calculation without transit loss in respect of Sh. Jarnail Singh comes to Rs. 24.45 P + 7.93 P=32.38 P.

(ii) However, the work have been allotted @ of Rs. 29.80 Ps per K.M. per 12000 Kg for 0% transit loss in fat and SNF & quantity which is lower than the rate of respondent i.e. by Rs. 2.58 Ps per K.M. and the same have been approved keeping in view the interest of the Federation."

4. Apart from contesting the petition on merits, the respondents have raised preliminary objection regarding very maintainability of the petition on the ground that the tender form contains an arbitration clause and without taking recourse to the same, the writ petition is not maintainable.

5. We have heard the learned counsel for the parties and have perused the record of the case carefully.

6. As regards, the question of non-maintainability of the petition on the ground that there exists an arbitration clause contained in clause No. 37 of the tender form, the Hon'ble Supreme Court in the case of **Union of India and others** vs. **Tantia Construction Private Limited (2011) 5 SCC 697**, while making observation on arbitration clause held that it is now well settled that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, writ petition would be maintainable. It is further held that injustice whenever and wherever takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution. The relevant observation reads thus:

> "33. Apart from the above, even on the question of maintainability of the writ petition on account of the Arbitration Clause included in the agreement between the parties, it is now well-established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various

decisions cited by Mr. Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution."

7. In **M/s Ram Barai Singh & Co.** vs. **State of Bihar & ors. JT 2014 (14) SC 357** the Hon'ble Supreme Court set aside the order passed by the Division Bench of Patna High Court, which had dismissed the writ petition on the ground of maintainability in view of existence of an arbitration clause. It was held that though existence of alternative remedy can be a ground of refusal to exercise writ jurisdiction, but the same cannot *ipso facto,* render a writ petition not maintainable and it was held as follows:-

> "9. We find ourselves in agreement with case of the appellant that the Division Bench failed to notice the relevant facts including the history of earlier litigation. It also failed to notice that the agreement itself had worked out long back and in the earlier round of litigation as well as in the present round the respondents never raised any objection on the basis of arbitration clause.
>
> 10. The Division Bench noticed the judgment of this Court in the case of State of U.P. & Ors. v. Bridge & Roof Company (India) Ltd.(1996) 6 SCC 22 as well as in the case of ABL International Ltd. & Anr. v. Export Credit Guarantee Corporation of India Ltd. & Ors. (2004) 3 SCC 553 for coming to the conclusion that where the contract itself provides an effective alternative remedy by way of reference to arbitration, it is good ground for declining to exercise extraordinary jurisdiction under Article 226 of the Constitution of India and that the Court will not permit recourse to other remedy without invoking the remedy by way of arbitration, "unless, of course, both the parties to the dispute agree on another mode of dispute resolution."
>
> 11. In our considered view, the aforesaid two decisions did not warrant setting aside of the judgment of learned Single Judge without going into merits and dismissing the writ petition at appellate stage on ground of alternative remedy when no such objection was taken by the respondents either before the writ court or even in the Memorandum of Letters Patent Appeal.
>
> 12. "In our view, a constitutional remedy by way of writ petition is always available to an aggrieved party and an arbitration clause in an agreement between the parties cannot ipso facto render a writ petition "not maintainable" as wrongly held by the Division Bench". Availability of alternative remedy is definitely a permissible ground for refusal by a writ court to exercise its jurisdiction in appropriate cases. But once the respondents had not objected to entertainment of the writ petition on ground of availability of alternative remedy, the final judgment rendered on merits cannot be faulted and set aside only on noticing by the Division Bench that an alternative remedy by way of arbitration clause could have been resorted to."

8. Similar reiteration of law is found in a recent judgment of the Hon'ble Supreme Court in ***Mahanadi Coalfields Ltd. & Ors. vs. M/s Dhansar Engineering Co. Pvt. Ltd. & Anr. JT 2016 (9) SC 385***, wherein after quoting the ***Tantia Construction*** (supra), it was held as under:

> "25. Similarly, it is not necessary for us to burden this judgment with the decisions relied on by the respondents, to contend that existence of alternative remedy is no bar to entertain a Writ Petition under Article 226 of the Constitution of India, as held in the cases of **Popcorn Entertainment vs. City Development Corporation** [JT 2007 (4) SC 70: 2007 (9) SCC 593], **Harbanslal Sahnia & Anr. V. Indian Oil Corporation Ltd. & Ors**. [JT 2002 (10) SC 561 : 2003(2) SCC 107],

Union of India & Ors. vs. Tantia Construction Pvt. Ltd. [JT 2011 (5) SC 59 : 2011 (5) SCC 697], **M.P. State Agro Industries Development Corpn. & Anr. Vs. Jahan Khan** [JT 2007 (10) SC 571] and **Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai** [JT 1998 (7) SC 243: 1998 (8) SCC 1]."

9. From the conspectus of the above judgments of the Hon'ble Supreme Court, what emerges is that a constitutional remedy by way of writ petition is always available to an aggrieved party and an arbitration clause in an agreement between the parties cannot *ifso facto* render a writ petition "not available". Though availability of alternative remedy is definitely a permissible ground for refusal by a writ court to exercise its jurisdiction in appropriate case, but the same is a rule of discretion and not one of the compulsion.

10. Thus, it can safely be held that an alternative remedy is not an absolute bar to the exercise of extraordinary jurisdiction under Article 226 of the Constitution of India but where the statute provides efficacious and alternative remedy, the High Court will do well in not entertaining a petition under Article 226 of the Constitution of India because of misplaced consideration, statutory procedure cannot be allowed to be circumvented.

11. However, in the present case, as noticed above, there is no statutory bar and it is only on account of the arbitration clause that the respondents have challenged the maintainability of the writ petition. This contention in view of the aforesaid discussion cannot be upheld and accordingly the writ petition despite there being an arbitration clause in the agreement is held to be maintainable.

12. Before adverting to the merits of the case, it would be necessary to understand the scope of judicial review available in such like matters. It is more than settled that in the matter of award of contract, the Government and its agencies have to act reasonably and fairly at all points of time. In ***Michigan Rubber (India) Limited*** vs. ***State of Karnataka and others***, (2012) 8 SCC 216, decision on the subject was summed up after comprehensive review and principles of law applicable to the process for judicial review were identified in the following words:

> 23. From the above decisions, the following principles emerge:
>
> (a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
>
> (b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;
>
> (c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;
>
> (d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and
>
> (e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive

since no person can claim fundamental right to carry on business with the Government.

24. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and

(ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226.

13. It is equally settled that the bidder, who has participated in tender process has no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested person in response to the notice inviting tenders in a transparent manner and free from hidden agenda. This was so held by the Hon'ble Supreme Court in ***Meerut Development Authority*** vs. ***Association of Management Studies and another***, 2009 (6) SCC, 171 wherein, the Court, in detail, has held as follows:

"26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor made to suit the convenience of any particular person with a view to eliminate all others from participating in the biding process.

27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the Authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

29. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favoritism."

14. There is no gainsaying that in any challenge to the award of contract before the Court, what is to be examined is the illegality and irregularity of the process leading to award of contract. The Court will only examine whether the decision making process was fair, reasonable and transparent.

15. It is not in dispute that tender submitted by the petitioner was the lowest wherein he had quoted Rs. 24.45 paisa per kilo meter as against the rate of Rs. 29.90 paisa per kilo meter, quoted by respondent No.4, but the same has been rejected by the committee constituted by respondent Nos. 1 to 3 by recording the following reasons:

"Therefore, the case of the third lowest party at Sr. No.03 i.e. Sh. Harpreet Transport Company Moga was considered which has deposited the requisite EMD

of Rs. 5 Lac as well as produced the sufficient proof of ownership of vehicles and satisfies other terms and conditions, has quoted two rates i.e. Rs. 25 per km per 12000 kg with our terms and condition of permissible transit loss limit of 0.1% fat and 0.15% variation in SNF, and the second rate of Rs. 32/Km/12000 kg with zero percent transit loss of fat and SNF, the calculation of which in terms of money is as under:

Rate per km per 12000 kgs = Rs. 25.00

Permissible transit loss of 0.1% in fat for 12000 kgs-12000x0.1%=12 kg fat

Permissible transit loss of 0.15% in SNF for 12000 kgs=12000x0.15%=18 kg SNF

Value of 12 kg fat @ Rs. 288/kg fat (current NMG rate)=3456.00

Value of 18 kg fat @ Rs. 288/kg SNF (current NMG rate)=3456.00

Permissible transit loss of 40 kg (4.2% fat and 9.2% SNF) in Qty. @ 29.76/kg (40x4.2%x288+40x9.2%x192) /40 = 40x29.76= Rs. 1190.40

Total value of permissible transit loss (3456+3456+1190.40)=8102.40

Total to and fro km from Milk Plant Duttnagar to Mother Dairy Delhi=1022

Total value of transit loss per km=8102.40/1022 Rs. 7.93

Therefore, actual rate calculation without transit loss=Rs. 25+7.93= Rs.32.93"

16. Indubitably, there is no condition in the tender document apart from condition No. 22, which touches upon the question of transit loss and the same reads as under:

"22. The milk in the tanker will be tested/sealed properly in the presence of the Transporter or his Representative at the outlet point and it will be responsibility of the transporter to deliver the milk at the destination without causing any loss. Normally there should not be any transit loss of Fat and SNF in milk. However, a variation of 0.1% of Fat and 0.15 % of SNF respectively in the testing of milk at the receiving Dairies shall be allowed trip wise. There should not be any transit loss in quantity of milk also. However, a variation of maximum of 40 kg of milk variation in Fat, SNF and or quantity takes place beyond permissible limit then full recovery for such parameter(s) will be made from contractor's pending payments. The HP Milk Federation, Duttnagar, Shimla Unit shall not consider cases where the losses are in excess of the above permissible limit. However, in case seals are found broken or tempered or driver/helper are found indulging in malpractice enroute or if flunches, nut bolts of the tanker are found broken, then penalty as deemed fit by the HP Milk Federation, Duttnagar, Shimla Unit shall be imposed alongwith full recovery for the loss of quantity / Fat / SNF in Kgs. If the transporter causes transit losses of milk and its constituents regularly whether in the above specified limits or above, then the HP Milk Federation, Duttnagar, Shimla Unit, reserves the right to recover the full amount of losses incurred thereof apart from termination of the contract without assigning any notice and forfeiture of his security/EMD."

17. It would be evident from the aforesaid clause that the same would apply only after the award of tender had been made in favour of the party and not earlier to that.

18. In addition to the aforesaid, the only other reason for rejecting the claim of the petitioner is that there was an FIR against certain persons, including the father of the petitioner, who were alleged to have been involved in pilferage of milk and also that the petitioner had failed to show sufficient numbers of possession of vehicles with him, as was required in the terms and conditions at Sr. No.2 of the tender form. This aspect of the matter is dealt with by the Committee in the following manner:

"The party at Sr. No.4, the second lowest i.e. Jarnail Singh s/o Sh. Uttam Singh village Khanpur, Tehsil Rajpura, Distt. Patiala is also rejected as there has been

> complaint/FIR againt the party which is attached herewith which has been published in the newspaper 16th March, 2016 Pipli (Sukram). The contents of the FIR reveals that Jarnail Singh, father Uttam Singh at Sr. No.5 is one of the accused in above referred FIR involved in pilferage of milk. The H.P. Milkfed thrives in its reputation and goodwill in the market and as such the party cannot be considered which is involved in unfair criminal act of malpractice of adulteration, brings ill-repute to the organization in the highly competitive market. The aforesaid FIR also shows that there is an allegation against the person that while transporting milk to Mother Dairy, he was nabbed mixing water in the milk. Mother Dairy is one of the prime bulk consumers of H.P. Milk Federation and engaging the services of such person as involved in the FIR would result in putting the business of H.P. Milkfed with Mother Dairy at high risk and peril of breakdown. The party has also not shown sufficient proof of the possession of vehicles with it as required in the terms and conditions at Sr. No.2, hence rejected."

19. Having gone through the record of the case, we are at a complete loss to understand as to how and on what basis did the members of the Committee come across the newspaper dated 16th March, to conclude that an FIR has been registered against various persons, including the father of the petitioner. That apart, we really fail to appreciate as to how fault of the father could work to the disadvantage of his son.

20. That apart, before adopting such course the least that was expected from the respondents was to have complied with the principles of natural justice calling upon the petitioner to explain his position. Not only this, the official respondents further owed a duty to have meted out equal and fair treatment to all the parties by applying common yardsticks in case of each of the participants. After all, it has come on record that one of the trucks of respondent No. 4 had earlier been caught red handed by selling milk to a private person, which led to registration of an FIR No. 72 dated 12.2.2016.

21. As regards the petitioner having not submitted the details of six numbers of road milk tanker, it would be apposite to refer to condition No. 2 of the tender, which reads as under:

> "The transporter should have atleast fleet of 6 Nos. road Milk Tanker in his name. He has to produce the photocopy of RC of all the tanker at the time of opening of tender, which will be verified/counter checked from the office of District Transport Office of concerned area before award of contract."

22. The aforesaid clause makes it abundantly clear that the tenderer is required to have at least a fleet of six numbers of road milk tankers, that too, in his own name, whereas the list of trucks supplied by respondent No.4 would reveal that these trucks do not belong to him and in fact belong to M/s Kathpal Transport Company, making respondent No.4 ineligible for the award of tender.

23. It is evidently clear from the aforesaid discussion that neither the petitioner nor respondent No. 4 were fully eligibly for the award of tender. Even otherwise the decision to award the tender in favour of respondent No. 4 is tainted with extraneous consideration.

24. To say the least, the members of the Committee which evaluate the tenders have not conducted themselves with high probability, candour and fairness that was expected of them. Thus, we are left with no option but to cancel the entire tender process. Ordered accordingly.

25. Respondent No. 1 is directed to issue a fresh tender notice, which shall be published in one English and two vernacular daily newspapers having wide circulation throughout India, within a period of one week from today and thereafter complete the entire codal formalities within a period of one week thereafter. Till the time, tender is not finalized, the respondents shall continue with the existing arrangements. However, it is made clear that none of the members of the present committee shall be associated or form part of evaluation committee

and the same shall now comprise of respondent No.1 & 2 and the General Manager of the H.P. State Cooperative Milk Producers Federation.

26. Accordingly, the writ petition is disposed of in the aforesaid terms. Pending application(s), if any, also stands disposed of, leaving the parties to bear their own costs.

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

Jyoti Parkash .....Appellant
Versus
Dalip Singh and others ..... Respondents.

FAO (MVA) No. 201 of 2012.
Date of decision: 21.10.2016.

Motor Vehicles Act, 1988- Section 149- Vehicle was not insured at the time of the accident and therefore, respondent No. 1 and 2 were rightly saddled with liability- appeal dismissed.

(Para-1 to 6)

For the appellant: Mr. Sunil Chaudhary, Advocate.
For the respondents: Mr. Anup Rattan, Advocate, for respondents No. 1 and 2.
Mr. Ashok Verma, Advocate, for respondent No.3.
Mr. Praneet Gupta, 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 judgment and award dated 21.1.2012, passed by the Motor Accident Claims Tribunal-II Kangra at Dharamshala, H.P. hereinafter referred to as "the Tribunal", for short, in MACP No.19-D of 2005, titled *Dalip Singh and another versus Jyoti Parkash and others*, whereby compensation to the tune of Rs.1,47,000/- alongwith interest @ 7.5% per annum with cost of Rs.3,000/- came to be awarded in favour of the claimants and respondent No. 1 Jyoti Parkash and respondent No.2 Suneen Thakur in the claim petition were saddled with the liability in equal shares, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Jyoti Parkash has filed the appeal on the grounds taken therein. Suneen Thakur has not filed appeal. Thus, the award so far as it relates to him has attained the finality.

3. The claimants, Insurer, and owner have not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to them.

4. Learned counsel for the appellant and respondent No. 3 herein were asked to show whether the vehicle was insured at the time of accident. They have frankly conceded that the vehicle was not insured at the time of the accident.

5. I have gone through the impugned award, is well reasoned needs no interference.

6. Learned counsel for the appellant stated at the Bar that the appellant has deposited the amount in the Registry, be released to the claimants. His statement is taken on record.

7. Learned counsel for respondent No. 3 stated that respondent No. 3 is ready to deposit the amount within six weeks from today. His statement is taken on record.

8. 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, after proper verification.

9. The amount already deposited by the appellant in the Registry, be released in favour of the claimants, forthwith, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification.

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

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.

Ms. Kubja Devi and others ...Appellants.

Versus

Smt. Amrita Devi and others ...Respondents.

FAO No. 82 of 2012
Decided on: 21.10.2016

Motor Vehicles Act, 1988- Section 166- Claimants pleaded that deceased was a contractor and was earning Rs. 20,000/- per month- no evidence was produced in support of the same- even if, he is treated to be a labourer, his income cannot be less than Rs. 4,500/- per month- 1/3rd was to be deducted towards his personal expenses and the loss of the dependency would be Rs. 3,000/- per month- age of the deceased was 54 years and multiplier of 11 is applicable- claimants are entitled to Rs. 3,000 x 12 x 11= Rs. 3,96,000/- under the head 'loss of income/dependency' – claimants are also entitled to Rs.10,000/- each under the heads 'loss of consortium', 'loss of estate', 'loss of love and affection' and 'funeral expenses'- thus, claimants are entitled to Rs. 4,36,000/- with interest @ 7.5% per annum from the date of the claim petition till realization. (Para-6 to 11)

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

For the appellants: Mr. Surinder Saklani, Advocate.

For the respondents: Nemo for respondents No. 1 to 3.
Mr. Aman Sood, Advocate, for respondent No. 4.

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is award, dated 27th October, 2011, made by the Motor Accident Claims Tribunal (I), Mandi, H.P. (for short "the Tribunal") in Claim Petition No. 6 of 2009, titled as Ms. Kubja Devi and others versus Smt. Amrita Devi and others, whereby, compensation to the tune of ₹ 2,89,000/- with interest @ 7% per annum from the date 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 insurer and the legal representatives of deceased owner-cum-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. Appellants-claimants have called in question the impugned award only on the ground of adequacy of compensation.

4. Heard.

5. I have gone through the impugned award and perused the record. It appears that the Tribunal has fallen in an error while assessing the income of the deceased for the reasons to be recorded hereinafter.

6. The claimants have pleaded that the deceased was a contractor and was earning ₹ 20,000/- per month. Though, the claimants have placed on record the documents relating to allotment of tender in favour of the deceased but there is no *prima facie* proof on the file, which can be made the basis for holding that the monthly income of the deceased was ₹ 20,000/-.

7. The fact of the matter is that the deceased was 54 years of age and even if he is considered to be a labourer, he would not have been earning less than ₹ 4,500/- per month. One third was to be deducted towards his personal expenses 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.** Accordingly, it is held that the claimants have lost source of dependency to the tune of ₹ 3,000/- per month.

8. The Tribunal has rightly applied the multiplier of '11' in view of **Sarla Verma's** and **Reshma Kumari's cases (supra)** read with the Second Schedule appended with the Motor Vehicles Act, 1988 (for short "MV Act").

9. Thus, the claimants are held entitled to ₹ 3,000/- x 12 x 11 = ₹ 3,96,000/- under the head 'loss of income/dependency'.

10. The claimants are also held entitled to ₹ 10,000/- each under the heads 'loss of consortium', 'loss of estate', 'loss of love and affection' and 'funeral expenses'.

11. Viewed thus, it is held that the claimants are entitled to compensation to the tune of ₹ 3,96,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- = ₹ 4,36,000/- with interest @ 7.5% per annum from the date of the claim petition till its realization.

12. The enhanced awarded amount be deposited 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.

13. Having glance of the above discussions, the impugned award is modified, as indicated hereinabove, and the appeal is disposed of accordingly.

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.

MBD Printographics Pvt. Ltd. ..... Appellant

Versus

Satya Devi and Others ..... Respondents

FAO No.144 of 2012
Decided on : 21.10.2016

Motor Vehicles Act, 1988- Section 149- Tractor met with an accident - unladen and laden weight of the vehicle was 2065 kg. and 3065 kg. respectively- thus, it falls within the definition of light motor vehicle – the driver possessed a valid licence to drive light motor vehicle and there was no breach of the terms and conditions of the policy – insurer had not led any evidence to prove the breach of the policy – appeal allowed and insurer saddled with liability. (Para-5 to 15)

Cases referred:

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

For the appellant:	Mr.Aman Sood, Advocate.
For the respondents:	Mr.Abhishek Sood, Advocate, for respondents No.1 and 2. Nemo for respondent No.4. Mr.Ratish Sharma, Advocate, for respondent No.5. Mr.Dheeraj K. Vashista, Advocate, for respondent No.6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This appeal is directed against the award, dated 21st January, 2012, passed by Motor Accident Claims Tribunal-II, Una, District Una, H.P., (for short, the Tribunal), whereby compensation to the tune of Rs.2,69,000/-, with interest at the rate of 9% per annum from the date of filing of the petition till realization and costs to the tune of Rs.1,000/-, 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. The claimants, 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 owner/insured has challenged the impugned award by way of instant appeal, on the grounds taken in the memo of appeal.

4. After hearing the learned counsel for the parties and having gone through the record, I am of the considered view that the Tribunal has fallen into an error in exonerating the insurer from its liability, for the reasons mentioned hereinbelow.

5. The vehicle involved in the accident was Tractor bearing No.HP-19A-8254. Registration certificate of the offending tractor has been proved on record as Ext.R-1 and the goods carriage permit is Ext.RY. The Registration Certificate and Goods/contract carriage permit (Exts.R-1 and RY, respectively), show that the unladen and laden weight of the offending vehicle was 2065 Kg. and 3065 Kg., respectively. Thus, the offending vehicle, in terms of Section 2(21) of the Motor Vehicle Act, 1988, (for short, the Act), which is reproduced hereinbelow, comes under the definition of "light motor vehicle".

> *"2. ....*
>
> *(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either or which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms."*

6. The above provision clearly shows that the vehicle, with unladen weight not exceeding 7,500 kilograms, would fall within the definition of "light motor vehicle".

7. This Court in a catena of judgments has held that the tractor-trolley falls within the definition of light motor vehicle. Latest decision on the similar principle is in **FAO No.396 of**

2010, titled Rajiv Kumar @ Raju vs. Raksha Devi and others, decided on 23rd September, 2016. It is apt to reproduce paragraphs 4 to 9 of the said decision hereunder:

> *"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)."*
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> *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'.*
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> *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.***
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> *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."*

8. Viewed thus, the offending vehicle i.e. tractor-trolley with loader is a light motor vehicle. Admittedly, at the time of accident, the driver of the offending vehicle was having a valid and effective driving licence to drive a light motor vehicle, as has been observed by the Tribunal in paragraph 28A of the impugned award. However, I have gone through the copy of the driving licence produced on record as Ext.R-2, which shows that the driver of the offending vehicle was having a valid and effective driving licence to drive a light motor vehicle.

9. Having said so, it can safely be held that the owner had not committed any willful breach.

10. It is beaten law of the land that the insurer has to plead and prove that the owner of the offending vehicle has committed willful breach of the terms and conditions contained in the policy and mere plea here and there cannot be a ground for seeking exoneration.

11. The Apex Court in case titled as **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531,** has taken the similar view**.** 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 the Act."

12. 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 ingh case. If despite such information with the owner that the licence possessed by his driver is 8 *: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."*

13. Thus, it was for the insurer to plead and prove that the offending vehicle was being driven in violation of the terms and conditions contained in the insurance policy, has not led any evidence to that effect, has failed to discharge the onus.

14. Having regard to the above discussion, the appeal is allowed and the insurer is saddled with the liability. The insurer is directed to deposit the amount, alongwith interest as awarded by the Tribunal, within eight weeks from today in the Registry of this Court.

15. At this stage, the learned counsel for the appellant stated that the award amount deposited by the insurer before the Tribunal has already been released in favour of the claimants. He, therefore, stated that the amount deposited by the appellant in the Registry may be ordered to be refunded to the insured/appellant. His statement is taken on record. Accordingly, the Registry is directed to refund the amount, alongwith interest accrued thereon, in favour of the appellant/owner forthwith.

16. The appeal stands disposed of accordingly.

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

Nota Ram .....Petitioner
Versus
State of Himachal Pradesh .....Respondent

Cr. Revision No. 67/2009
Decided on : October 21, 2016

Indian Penal Code, 1860- Section 379- **Indian Forest Act, 1927**- Section 41 and 42- Accused were found sitting in a tractor, which was carrying 8 slippers of different sizes of Devdar in the trolley – the petitioner/accused was convicted of the commission of offence punishable under Section 41 and 42 of Indian Forest Act while other accused were acquitted – an appeal was filed by petitioner/accused, which was dismissed- held, in revision that the prosecution version was duly proved by the testimonies of prosecution witnesses- it was duly established that accused was driving the tractor, which was carrying 8 slippers- no permit was produced by the accused- he was rightly convicted by the trial Court- however, considering the time lapsed since the incident, the benefit of Probation of Offenders Act granted to the accused. (Para-8 to 23)

Cases referred:
State of Kerala versus Puttumana Illath Jathavedan Namboodiri (1999)2 SCC 452
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241
Yudhbir Singh versus State of Himachal Pradesh 1998(1)S.L.J. 58
Ramesh Kumar @ Babla versus State of Punjab 2016 AIR (SC) 2858
Hari Kishan and State of Haryana versus Sukhbir Singh 1988 AIR (SC) 2127

For the petitioner : Ms. Archna Dutt, Advocate.
For the respondent : Mr. Rupinder Singh Thakur, Additional Advocate General with Mr. Rajat Chauhan, Law Officer.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral):

Present criminal revision petition filed under Sections 397 and 401 CrPC is directed against Judgment dated 21.4.2009 passed by the Sessions Judge, Kullu, HP in Cr. Appeal No. 7/2008 affirming judgment/order dated 18.3.2008/31.3.2008 passed by learned

Chief Judicial Magistrate, L & S at Kullu in Criminal Case No. 436-I of 2002/46-ii of 2005, whereby present petitioner-accused (herein after referred to 'accused') was held guilty of offence under Sections 41 and 42 of Indian Forest Act whereas he was acquitted under Section 379 IPC. Accordingly, present petitioner was convicted and sentenced to undergo imprisonment for a period of six months and to pay a fine of Rs.1,000/- for the commission of offence under Sections 41 and 42 Indian Forest Act.

2. Briefly stated the facts of the case as emerge from the record are that on 19.3.2002, a police team led by HC Lal Singh, HHC Darshan Singh and HHC Pitamber Lal of Police Station Kullu was on patrolling duty near Angan Nallah in government vehicle bearing registration No. HP34A-0162. It also emerges from the record that at later point of time, aforesaid team of Police Station was joined by Gita Ram, Forest Block Officer, Gumat Ram, Forest Guard of Pah Beat and Poshu Ram, Chowkidar of Forest Department. The police alongwith forest officials went to Pah Nallah in the said vehicle. When they were 100 metres short of Pahnalah, they found a Tractor baring registration No. HP-34-3582 parked in start condition. As per prosecution story, one Suresh Kumar son of Dola Ram was found sitting on the driver seat, whereas other persons including the present petitioner were found sitting in the Tractor. However, the fact remains that that after seeing the police and forest officials, Suresh Kumar, Driver stopped the tractor and taking advantage of darkness, ran away from the spot. Police and forest officials checked the trolley of tractor and found 8 sleepers of different sizes of Deodar lying in the trolley. Police immediately took into possession the trolley as well as timber lying in the same vide memo Ext. PW-3/A. Head Constable Lal Singh prepared *Rukka* Ext. PW-9/A and sent to the Police Station, Kullu, where on the basis of same, FIR Ext. PW-9/B was registered. Police also prepared site plan Ext. PW-11/A and produced the case property alongwith tractor trolley before the Authorized Officer-cum-Divisional Forest Officer, Shamsi for disposal under Section 52A of Indian Forest Act. During investigation, police found tractor in question to be owned by one Bhag Chand, who claimed that he had given this tractor to the accused for a period of seven months on monthly rent of Rs.7,000/- per month from 1.3.2002 to 30.9.2002, vide contract agreement Ext. PW-1/A. Police also took into possession, aforesaid agreement and insurance of the tractor vide memo Ext. PW-6/A and PW-1/A, respectively, in the presence of witnesses. Accused were arrested and during the course of interrogation, accused Piar Chand led the police to a place 100 metres short of Pahnalah and got the place identified where tractor had been parked alongwith trolley in start condition with eight sleepers. Accordingly, the police prepared demarcation memo Ext. PW-7/A. It also emerges from the prosecution story that accused and Chatter Dass led police alongwith witnesses and got place identified where tractor trolley had been kept in start condition. However, the fact remains that the police after completion of investigation found present petitioner and co-accused guilty of offence under Section 379 IPC and Sections 41 and 42 of Indian Forest Act, accordingly, police presented challan in the competent court of law on the allegations that they had cut Deodar sleepers from Government forest and were transporting the same during night without export permit.

3. Learned trial Court, on the basis of material made available on record, came to the conclusion that a prima facie case exists against the present petitioner as well as co-accused, accordingly framed charges under Sections 379 IPC and Sections 41 and 42 Indian Penal Code, to which accused pleaded not guilty and claimed trial. Subsequently, learned trial Court, on the basis of material adduced on record by the prosecution, held the accused guilty of having committed offences under Sections 41 and 42 Indian Forest Act. However, he was acquitted under Section 379 IPC. Other co-accused namely Piar Chand and Chatter Dass were acquitted by the Court for want of evidence. Present petitioner being aggrieved and dissatisfied with the judgment of conviction recorded against him, approached the Court of Sessions Judge under Section 374 CrPC. However, the fact remains that the appeal preferred by the accused was dismissed vide judgment dated 21.4.2009 by the learned Sessions Judge. In the aforesaid background, accused filed this criminal revision petition. At this stage, it may be noticed that judgment dated 18.3.208 whereby co-accused namely Piar Chand and Chatter Dass were

acquitted, was not assailed by the State in any court of law and as such same has attained finality qua said accused.

4. Ms. Archna Dutt, Advocate, representing the accused vehemently argued that the judgments passed by both the Courts below are not sustainable since same are not based on correct appreciation of evidence placed on record and as such required to be quashed and set aside. She further contended that bare perusal of impugned judgments passed by the Courts below clearly suggests that both the Courts below failed to appreciate evidence placed on record by the prosecution in its right perspective and wrongly arrived at the conclusion that the accused is guilty of offence under Sections 41 and 42 of the Indian Forest Act. While referring to the judgments passed by both the Courts below, Ms. Dutt strenuously argued that both the Courts below appreciated evidence on record in a slipshod and perfunctory manner and great prejudice has been caused to the accused as both the Courts below failed to appreciate the evidence in proper perspective and as such same deserve to be set aside. During arguments having been put forth by her, she made the Court to travel through the evidence of the prosecution to demonstrate that there are material contradictions in the statements having been made by the witnesses adduced on record by the prosecution and as such no conviction of petitioner could be recorded on the said evidence. She forcefully contended that perusal of statements made by prosecution witnesses clearly suggests that there was no cogent, reliable, trustworthy and confidence inspiring evidence on which petitioner could be held guilty under Sections 41 and 42 of the Indian Forest Act. While concluding her arguments, she referred to judgment of the first appellate Court to suggest that it also failed to analyze statements of PW-3, PW-9 and PW-11, because bare perusal of same suggests that same were contradictory to the stand taken by each of them on material particulars and could not be made basis by the Courts below to record conviction against accused. She also stated that on the same set of evidence, other accused were acquitted by the learned trial Court, whereas accused was convicted under Sections 41 and 42 of Indian Forest Act, which itself suggests that the evidence was not read in its right perspective as far as case of accused is concerned and as such same also deserved to be set aside like other co-accused.

5. Mr. Rupinder Singh Thakur, Additional Advocate General duly assisted by Mr. Rajat Chauhan, Law Officer, supported the judgments passed by both the learned Courts below. Mr. Thakur, while referring to the judgments passed by both the learned Courts below vehemently argued that there is no scope of interference whatsoever in the findings of evidence adduced on record by the prosecution. During arguments having been made by him, he specifically invited attention of the Court to the statements adduced on record by the prosecution to suggest that both the learned Courts below have dealt with each and every aspect of the matter meticulously. There is no reason for this Court to interference in the well reasoned judgments passed by learned Courts below. While refuting the contentions put forth on behalf of the accused, that there are material contradictions and inconsistencies in the statements of the prosecution witnesses, Mr. Thakur made this Court to peruse evidence adduced on record by the prosecution to demonstrate that all the prosecution witnesses clearly stated that tractor in question at the relevant time was being driven by the accused, which was sufficient for the prosecution to connect him with the offences allegedly having been committed by him. Lastly, Mr. Thakur, reminded this Court of its limited jurisdiction, while exercising powers under Section 397 Cr.P.C. He stated that this Court enjoys very limited powers under Section 397 Cr. P.C. to re-appreciate the evidence adduced on record by the prosecution to prove its case, especially when it stands proved on record that both the Courts below have dealt with each and every aspect of the matter meticulously. Mr. Chauhan, also submitted that while exercising revisional jurisdiction, Court has very limited powers to re-appreciate the evidence available on record. Learned law Officer, has placed reliance upon the judgment passed by Hon'ble Apex Court in case **State of Kerala** versus **Puttumana Illath Jathavedan Namboodiri** (1999)2 Supreme Court Cases 452, wherein it has been held as under:-

> " 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 Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."

6. In the aforesaid background, he prayed that the present petition deserves to be dismissed being devoid of any merit.

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

8. True, it is that while exercising the power under Section 397 of Criminal Procedure Code, this Court has very limited power to re-appreciate the evidence available on record. But in the present case, where accused has been convicted and sentenced under Sections 279, 304-A of the Indian Penal Code, this Court solely with a view to ascertain that the judgments passed by both the Courts below are not perverse and same are based upon correct appreciation of evidence available on record, undertook an exercise to critically examine the evidence available on record to reach fair and just decision in 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 Case241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order. The relevant para of the judgment is reproduced as under:-

> "8. The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order."

10. During proceedings of the case, this Court had occasion to peruse the entire evidence placed on record by the prosecution as well as statement made by petitioner under Section 313 CrPC, perusal whereof clearly suggests that on 19.3.2002, police party which was duly assisted by forest officials, found tractor bearing No. HP-34-3582 parked in start condition at Angan Nallah. It also stands duly proved that while checking tractor and its trolley, police as well as forest officials found eight sleepers of Deodar, in different sizes in the trolley. It is also undisputed that at the time of occurrence, all the accused including accused had fled away from the scene but later on apprehended by the police and during investigation of case, accused led

police to the place of occurrence fromwhere allegedly eight deodar sleepers were loaded in the tractor involved in the incident.

11. Police with a view to prove its case, examined as many as eleven witnesses, whereas under Section 313 CrPC, accused denied the case of the prosecution in toto and pleaded innocence. However, the fact remains that he did not lead any evidence in defence. As has been noticed above, all the other co-accused were acquitted by the learned trial Court for want of evidence and their acquittal was never challenged by the respondent-State. Perusal of judgment passed by the learned trial Court which was further upheld by first appellate Court, suggests that the accused was held guilty of having committed offence under Sections 41 and 42 of Indian Forest Act solely on the ground that at the relevant time, he was in possession of the tractor. In this regard, prosecution specifically placed reliance on the statement of PW-8 Bhag Chand, original owner of the tractor, who during investigation of the case, handed over documents including agreement Ext. PW-1/A allegedly entered into between accused and Bhag Chand wherein tractor bearing registration No. HP-34-3582 was given on monthly rent of Rs.7,000/- from 1.3.2002 to 30.9.2002 to the accused. Aforesaid factum of having entered into agreement Ext. PW-1/A has been nowhere disputed by the accused meaning thereby that he admitted the contents of Ext. PW-1/A, perusal whereof clearly suggests that from 1.3.2002 to 30.9.2002, tractor was to remain with the accused on monthly rent of Rs.7,000/-, payable to Bhag Chand, original owner of the tractor. Since alleged incident took place on 19.3.2002, police rightly relied upon the contract agreement Ext. PW-1/A and charged the accused under sections 41 and 42 of Indian Forest Act and Section 379 IPC.

12. Careful perusal of judgment passed by learned trial Court suggests that the prosecution was not able to connect other co-accused namely Chatter Dass as well as Piar Chand with the alleged offence because no prosecution evidence was led to prove identity of these persons and as such they were acquitted by the learned trial Court but the learned trial Court, on the basis of statement of PW-8 Bhag Chand, original owner of the tractor, wherein he stated that he is original owner of tractor No. HP-34-3582 and he has executed agreement Ext. PW-1/A, wherein tractor was given on monthly rent to the accused on 1.3.2002 till 30.9.2002 on monthly rent of Rs.7,000/- found petitioner guilty of offence. Perusal of Ext. PW-1/A clearly suggests that tractor was given to accused with effect from 1.3.2002 to 30.9.2002 on monthly rent of Rs.7,000/-. It also finds mention in the agreement that accused would be liable for all the case and offences in respect of aforesaid vehicle from 1.3.2002 to 30.9.2002 and accused himself used to ply the vehicle during this period. Interestingly, in cross-examination conducted upon aforesaid witness, defence was not able to extract anything contrary to what he stated in his examination-in-chief. Moreover, no suggestion worth the name was ever put to this prosecution witness to the effect that Ext. PW-1/A was never entered into by the accused with Bhag Chand. Hence, the learned trial Court rightly came to the conclusion that at the relevant time, tractor in question was in the custody /possession of accused in terms of Ext. PW-1/A.

13. PW-3 Gita ram, Deputy Ranger and PW-9 Dardhan Singh and PW-11 Lal Singh, who investigated the case, unequivocally stated that at the time of raid, all the miscreants had fled away from the spot taking advantage of darkness but tractor No. HP-34-3582 remained there and on checking, eight sleepers of Deodar were found in the trolley of tractor. They further stated that timber and tractor were taken into possession vide memo Ext. PW-3/A and given on *Sapurdari* to Karam Chand, Forest Guard. It has also come in the statement that vehicle of accused was found laden with timber at a place 100 metres short of Pahnalah on 19.3.2002 at 2.05 AM.

14. Conjoint reading of evidence led by the prosecution to connect the accused with the commission of alleged offence clearly suggest that at the relevant time, tractor in question was being plied by the accused in terms of agreement Ext. PW-1/A and he was liable for all cases, if any, during said period. PW-8 Bhag Chand categorically stated that during relevant period, tractor in question was being driven by the accused in terms of agreement. As has been discussed above, in the cross-examination, defence was not able to extract anything contrary to what PW-8

stated in his examination-in-chief as such Courts below rightly held accused guilty of having committed offence under Sections 41 and 42 of the Indian Forest Act. It also emerges from the record that at the relevant time, nobody was found in the tractor and evidence led on record by the prosecution was not sufficient to prove identity of the other persons who were allegedly carrying eight sleepers of Deodar in the tractor. However, the fact remains that the prosecution was able to prove on record that on 19.3.2002, tractor bearing No. HP-34-3582 was carrying eight sleepers of Deodar without there being any export permit of Forest Department. Similarly, this Court while sifting the record found that defence was not able to disprove recovery of sleepers allegedly recovered from tractor being driven by accused. This Court, solely with a view to ascertain correctness of the submissions having been made by accused under Section 313 CrPC, perused cross-examination conducted upon prosecution witnesses, perusal whereof clearly suggests that at no point of time, any suggestion worth the name was put to the prosecution witnesses that at the relevant time, no sleepers were found in the trolley of tractor being plied/used by accused. Accused in his statement under Section 313 CrPC only stated that he is innocent and has been falsely implicated but, interestingly, he nowhere led evidence on record to suggest that at the relevant time, tractor was being driven by some other person, who was transporting Deodar sleepers illegally without informing him. Since no evidence to this effect was made available on record, courts below rightly held accused guilty of commission of offence under Sections 41 and 42 of the Act. It is undisputed that on 19.3.2002, tractor No. HP-34-3582 was taken into custody by Police with eight sleepers. There is nothing on record to prove that no illegal timber was being taken/transported in the vehicle. Similarly, this Court found that averment contained in Ext. PW-1/A i.e. agreement entered into between accused and Bhag Chand, were nowhere objected to by the defence in the cross-examination, meaning thereby contents of same were admitted to be correct by the accused and as such Courts below rightly came to the conclusion that on the date of occurrence, i.e. 19.3.2002, legal possession of tractor was with accused.

15. This Court, after carefully perusing entire evidence on record finds it difficult to accept the contention put forth by Ms. Dutt that the prosecution was not able to connect accused with the alleged offence because it stands duly proved on record that on the relevant date, tractor was in possession of the accused and accused himself used to drive the tractor. Since prosecution was able to prove on record that on the date of occurrence, tractor was carrying eight sleepers of Deodar of different sizes illegally, accused was rightly held guilty of having committed offence under Sections 41 and 42 of Indian Forest Act. This Court, while sifting/analyzing documents also found that during the course of investigation, accused had led police party to the place, 100 metres short of Pah Nalah and had identified the place vide Ext. PW-5/A in the presence of Ram Singh, Inder Singh. Ram Singh PW-5 specifically stated that 23.3.2002, accused Nota Ram had led police party to the place of crime at Pahnalah and identified the place vide Ext PW-5/A. Similarly, scrutiny of cross-examination conducted on this witness also suggests that defence was not able to extract anything contrary to what he stated in his examination-in-chief. Similarly, no suggestion worth the name with regard to false implication of the accused was put to this witnesses and as such this Court has no reason to believe the version of the petitioner that there was enmity between the parties which led to false implication of the accused in the present case.

16. Similarly, this Court sees no suggestion on record put to prosecution witness that police or forest officials had any motive to falsely implicate the accused.

17. Hence, after bestowing thoughtful consideration, this Court finds no reason to differ with the concurrent findings of fact recorded by the Courts below and as such judgment of conviction recorded by learned trial Court and affirmed by first appellate Court deserves to be upheld.

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

interfere with the well reasoned judgments passed by learned Courts below. Accordingly, the present petition is dismissed.

19. Faced with this situation, counsel representing accused stated that in view of the fact that accused is a first offender and all other co-accused allegedly involved in the case have been acquitted for want of proper evidence, benefit of Section 4 of the Probation of Offenders Act can be extended to the accused. She stated that the mitigating circumstance in the present case is that the alleged offence was committed on 19.3.2002 i.e. 14 years back and more than seven years have passed after rendering of judgment by the learned trial Court, wherein accused was held guilty of offence committed under Sections 41 and 42 of Indian Forest Act. She also stated that the accused is the sole bread-winner of the family and in case he is sent behind bars, entire family would be placed in precarious circumstances. She also stated that no loss has been caused to the State exchequer because the sleepers allegedly recovered from the tractor were seized and sold by the Forest Department.

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

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

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

> "7. Accordingly the appeal is allowed in part by converting appellant's conviction under Section 307 IPC to one under Section 324 IPC. On the question of sentence, it is pertinent to note that the occurrence took place in 1997. In his statement under Section 313 of the code of Criminal Procedure the appellant gave his age in 2002 as 36 years. He claimed that he and others went to the place of occurrence on getting information that his brother Sanjay Kumar was assaulted by Ramesh Kumar (Complainant). He brought his brother to Police Station and lodged a report. As noticed by trial court, parties are involved in civil as well as criminal litigation from before. High Court has noted that appellant, as per custody certificate, is not involved in any other case. In such circumstances, it is not deemed necessary to send the appellant immediately to Jail custody after about 19 years of the occurrence when he appears to be 50 years of age and fully settled in life.
>
> 8. In view of aforesaid, in our view the ends of justice would be met by granting benefit of Probation of Offenders Act to the appellant. We order accordingly and direct that the appellant be released on executing appropriate bond before the trial court to appear and receive sentence of rigorous imprisonment for 1 (one)

year when called upon to do so and in the meantime to keep the peace and be of good behaviour."

22. The reliance is also placed upon Hon'ble Apex Court judgment ***Hari Kishan and State of Haryana versus Sukhbir Singh 1988 AIR (SC) 2127***, wherein it has been held as under:

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

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

"357. Order to pay compensation:

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

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

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

Xxxxxxxxxxxxxx

Xxxxxxxxxxx

Xxxxxx

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation. Such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been sentenced.

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

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

11. The payment by way of compensation must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. If

there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by installments, may also be given. The Court may enforce the order by imposing sentence in default."

23. In view of the aforesaid law as well as submissions having been made by Ms. Dutt, learned counsel appearing on behalf of the accused and after taking into consideration the facts and circumstances of the present case, I am of the considered opinion that the present petitioner-accused can be granted benefit of Section 4 of the Probation of Offenders Act, 1958 subject to payment of adequate compensation which would be determined after the receipt of the report of Probation Officer.

24. Accordingly, Registry is directed to call for the report of the Probation Officer, Mandi, District Mandi, H.P. on or before **5.12.2016**. Registry to list this matter on **5.12.2016.**

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

Om Parkash ...Appellant.

Versus

H.R.T.C. and others ...Respondents.

FAO No. 127 of 2012
Decided on: 21.10.2016

Motor Vehicles Act, 1988- Section 166- It was stated on behalf of respondents No. 1 and 2 that they are ready to settle the matter by paying Rs. 1,25,000/- in lump sum in addition to the amount already awarded- in view of this, the award is modified by providing that claimant is entitled to Rs. 2,70,800/- with interest @ 7.5% per annum + Rs. 1,25,000/- in lump sum.

(Para- 1 to 4)

For the appellant: Mr. Yashveer Singh Rathore, Advocate, vice Mr. Virender Singh Rathore, Advocate.

For the respondents: Mr. Jagdish Thakur, Advocate, for respondents No. 1 and 2.
Nemo for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Mr. Jagdish Thakur, learned counsel appearing on behalf of respondents No. 1 and 2, stated at the Bar that he is under instructions to make a statement that respondents No. 1 and 2 are ready to settle the claim by paying ₹ 1,25,000/- in lump-sum in addition to the amount already awarded. His statement is taken on record.

2. Mr. Yashveer Singh Rathore, learned proxy counsel appearing on behalf of the appellant, stated at the Bar that he has no objection to the same. His statement is also taken on record.

3. In the given circumstances, the impugned award is modified by providing that the appellant-claimant is held entitled to compensation to the tune of ₹ 2,70,800/- with interest @ 7.5% per annum plus ₹ 1,25,000/- in lump-sum.

4. Respondents No. 1 and 2 are directed to deposit the enhanced awarded amount, i.e. ₹ 1,25,000/- in lump-sum, before the Registry within six weeks. On deposition, the awarded

amount be released in favour of the appellant-claimant strictly as per the terms and conditions contained in the impugned award by depositing the same in his bank account or through payee's account cheque.

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

6. 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.

FAOs No. 213 & 337 of 2011
Decided on : 21.10.2016.

FAO No. 213 of 2011

Oriental Insurance Company .....Appellant
Versus
Shri Krishan Singh Shyam & others .....Respondents

FAO No. 337 of 2011

Himachal Pradesh Road Transport Corporation .....Appellant
Versus
Sh. Krishan Singh Shyam & others .....Respondents

Motor Vehicles Act, 1988- Section 166-Deceased was a house wife- her monthly income was rightly held to be not less than Rs. 4500/- per month after deducting 1/3rd towards her personal expenses – the claimants have lost source of dependency of Rs.3,000/- per month- the age of the deceased was 50 years at the time of accident and multiplier of 13 was rightly applied- however, interest was wrongly awarded @ 9% per annum from the date of filing of the claim petition and is reduced to 7.5% per annum. (Para- 15 to 18)

Cases referred:

United India Insurance Co. Ltd. Versus K.M. Poonam and others, 2011 ACJ 917

Manager, National Insurance Co. Ltd. versus Saju P. Paul and another, 2013 ACJ 554

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 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 Supreme Court Cases 738

Savita versus Binder Singh & others, 2014 AIR SCW 2053

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

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

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

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

FAO No. 213 of 201

For the Appellant : Mr. Ramakant Sharma, Advocate.
For the Respondents: Mr. Neeraj Gupta, Advocate, for respondents No. 1 to 5.
Mr. Jagdish Thakur, Advocate, for respondent No. 6.
Nemo for respondent No. 7.
Mr. Vivek Sharma, Advocate, for respondent No. 8.

FAO No. 337 of 2011

For the Appellant : Mr. Jagdish Thakur, Advocate.

For the Respondents: Mr. Neeraj Gupta, Advocate, for respondents No. 1 to 5.
Nemo for respondent No. 6.
Mr. Vivek Sharma, Advocate, for respondent No. 7.
Mr. Ramakant Sharma, Advocate, for respondent No. 8.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

FAO No. 213 of 2011 is directed against the interim award dated 25.03.2009, made by the Motor Accident Claims Tribunal, (Fast Track Court), Shimla at Shimla, Himachal Pradesh (for short 'the Tribunal') in Claim Petition No. 5-S/2 of 2007, titled as Shri Krishan Singh Shyam and other versus Himachal Road Transport Corporation and others, whereby interim compensation to the tune of Rs. 50,000/- was awarded in favour of the claimants.

2. FAO No. 337 of 2011 is directed against the judgment and award dated 23.04.2011, made by the Tribunal in the aforesaid claim petition, whereby compensation to the tune of Rs. 4,78,000/- with interest at the rate of 9% per annum and costs quantified at Rs. 2,000/- was awarded in favour of the claimants and the Himachal Road Transport Corporation, for short 'HRTC' was saddled with liability, for short 'the impugned award'.

3. Both these appeals are outcome of the one claim petition relating to the same accident, thus I deem it proper to determine both these appeals by this common judgment.

FAO No. 213 of 2011

4. Interim award was made at the initial stage and thereafter, the claim petition came to be decided, whereby the insurer was exonerated, which merits to be allowed and the interim impugned award is to be satisfied by the HRTC instead of the insurer. FAO No. 213 of 2011 is disposed of accordingly.

FAO No. 337 of 2011

5. Learned Counsel for the HRTC argued that the Tribunal has fallen in an error in awarding compensation on the grounds taken in the memo of appeal.

6. I have gone through the entire record.

7. The claimants filed the claim petition for grant of compensation to the tune of Rs. 10,00,000/-, as per the break-ups given in the claim petition.

8. The respondents resisted and contested the claim petition by filing replies.

9. Following issues came to be framed by the Tribunal:

"1. *Whether Smt. Krishna Devi died because of the rash and negligent driving of the bus No. HP-19B-6032 by respondent No. 2, as alleged?...OPP*

2. If issue No. 1 is proved in affirmative, whether the petitioner is entitled to the compensation as claimed. If so, its quantum and from whom? ...OP Parties

*3. Whether the petition is not maintainable in the present form?...*OPR

4. *Whether the petition is bad for non-joinder of necessary parties. If so, its effect...OPR*

4(a) Whether the drivers of both the vehicles were not holding and possessing valid and effective driving licences, as alleged. If so, its effect? .OPR-4

4(b) Whether the offending vehicle was being driven in contravention of the terms and conditions of the insurance policy. If so, its effect? …OPR-4

4(c) Whether the bus was overloaded, as alleged? ….OPR-4

4(d) Whether the petition is bad for non-joinder and mis-joinder of necessary parties, as alleged? …OPR-4

5. Relief."

10. The parties have led evidence. The Tribunal after scanning the evidence, oral as well as documentary, held that driver, namely, Sanjeev (respondent No. 2 in the claim petition) had driven HRTC bus bearing registration No. HP-19B-6032, rashly and negligently and caused the accident, in which Krishna Devi sustained injuries and succumbed to the same. The owner and driver have not questioned the impugned award. Thus, 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 4(d).

Issues No. 3 & 4.

12. It was for the respondents to plead and prove that the claim petition was not maintainable and suffers from non-joinder and mis-joinder of necessary parties, have not led any evidence, thus have failed to discharge the onus. Thus, the findings returned by Tribunal on Issues No. 3 & 4 are upheld.

Issues No. 4(a) to 4(d)

13. It was for the insurer to plead and prove that the drivers of both the vehicles were not holding valid and effective driving licences and the offending vehicle was being driven in contravention of the terms and conditions of the insurance policy, has not led any evidence.

14. I have gone through the entire record. The driver was having a valid and effective driving licence. Thus, it cannot be said that the owner has committed willful breach. The offending vehicle was owned by HRTC. The Tribunal has rightly saddled the HRTC with liability. Accordingly, the findings returned by the Tribunal on Issues No. 4(a) to 4(d) are upheld.

Issue No. 2.

15. Admittedly, the deceased was a house wife. The Tribunal has rightly held that her monthly income was not less than Rs.4500/- and after deducting 1/3rd towards her personal expenses, the claimants have lost source of dependency to the tune of Rs.3,000/- per month.

16. The age of the deceased was 50 years at the time of accident and the Tribunal has rightly applied the multiplier of '13'.

17. The Tribunal has fallen in an error in awarding interest at the rate of 9% per annum from the date of filing of the claim petition, which was to be awarded as per the prevailing rates, i.e. 7.5% per annum.

18. 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.

19. 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.

20. Accordingly, the impugned award is modified, as indicated above.

21. 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 after deducting Rs.50,000/- with interest payable, through payee's account cheque or by depositing the same in their respective bank accounts.

22. The amount of Rs.50,000/- with interest be released in favour of the insurer-appellant.

23. The excess amount, if any, be released in favour of the HRTC through payee's account cheque or by depositing the same in its account.

24. 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.

The HDFC ERGO General Insurance Co. .....Appellant

Versus

Shrimati Progri Devi and others .....Respondents.

FAO (MVA) No. 241 of 2012.
Date of decision: 21.10.2016.

Motor Vehicles Act, 1988- Section 166- Deceased was carpenter by the profession- he was also growing and selling the vegetables – the income of Rs. 4400/- per month cannot be said to be excessive- after making deduction, claimants have lost source of dependency of Rs.3,300/- per month- multiplier of 13 is applicable – the interest was wrongly allowed @ 9% per annum and should have been awarded @ 7.5% per annum- rate of interest reduced to 7.5% per annum from the date of claim petition till realization. (Para-11 to 15)

Cases referred:

United India Insurance Co. Ltd. Versus K.M. Poonam and others, 2011 ACJ 917

Manager, National Insurance Co. Ltd. versus Saju P. Paul and another, 2013 ACJ 554

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 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 Supreme Court Cases 738

Savita versus Binder Singh & others, 2014 AIR SCW 2053

Kalpanaraj & Ors. 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. Rajesh Kumar, Advocate, for respondents No. 1 to 5.
Mr. Naveen K. Bhardwaj, Advocate, for respondents No. 6 and 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 14.3. 2012, passed by the Motor Accident Claims Tribunal Kullu, H.P. hereinafter referred to as "the Tribunal", for short, in MAC No.29 of 2010, titled *Smt. Progri Devi and others versus Pyare Chand and others*, whereby compensation to the tune of Rs.5,39,800/- alongwith interest @ 9% per annum came to be awarded in favour of the claimants and insurer was saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. The claimants, owner, and 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. I have gone through the impugned award, is well reasoned, needs no interference, for the following reasons.

5. The claimants have filed claim petition 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.

(1) Whether Tara Chand in a roadside accident on 14.11.2009 at about 6.45 pm near Shildhari Nalla involving vehicle No. HP-66-1184 being driven by respondent no.2 in a rash or negligent manner? OPP

(2) If issue no. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled to and from whom? OPP

(3) Whether the claim petition is not maintainable? OPR-3.

(4) Whether the petitioners have not approached to the court with clean hands and have suppressed the material facts, if so, its effect? OPR-3.

(5) Whether the driver of the vehicle in question was not having valid and effective driving licence, if so, it effect? OPR-3.

(6) Whether the present claim petition has been filed in collusion with respondents 1 and 2? OPR-3.

(7) Whether the vehicle was being plied in contravention to the provisions of M.V. Act as well as contract of insurance policy? OPR-3.

(8) Relief.

6. The claimants have examined witnesses and one of the claimants, namely, Progri Devi also stepped into the witness box. Respondents have not examined any witness except the Investigating Officer Tej Ram.

7. The Tribunal, after scanning the evidence, held that the claimants have proved issue No. 1 and driver and owner have not questioned the said findings returned on issue No.1. Thus, the same have attained the finality so far as it relates to them.

8. I have gone through the record. The claimants have proved that the driver, namely, Kishan Chand has driven the offending vehicle rashly and negligently and caused the accident in which Tara Chand sustained the injuries and succumbed to the injuries. Accordingly, the findings returned on issue No. 1 are upheld.

9. Before I determine issue No. 2, I deem it proper to determine issues No. 3 to 7. Respondent-insurer has to discharge the onus on these issues, has not led any evidence. Only Investigating officer was examined. He has stated nothing relating to these issues. The Tribunal has rightly held that the insurer has failed to discharge the onus and decided issues No. 3 to 6 in

favour of the claimants and against the driver owner and the insurer. I have gone through the record. The insurer has not led any evidence to prove these issues. Thus, the findings returned on these issues are upheld.

Issue No.7.

10. It was for the insurer to prove that the owner has committed willful breach, has not led any evidence. Accordingly, findings returned on this issue are upheld.

Issue No.2.

11. The deceased was 46 years of age at the time of the accident. He was a carpenter by profession and was also growing and selling the vegetables. The Tribunal has made discussion in paras 18 to 22 of the impugned award. I am of the considered view that the Tribunal has rightly made the assessment that the deceased was earning Rs.4400/- per month and after making deduction held that the claimants have lost source of dependency to the tune of Rs.3300/- per month and applied the multiplier of "13" and also granted the compensation on other heads.

12. Having said so, no interference is called for.

13. 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.

14. 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.

15. Accordingly, interest @7.5% per annum is awarded from the date of claim petition till realization of the amount.

16. The Registry is directed to release the amount in favour of the claimants, alongwith interest @7.5% per annum from the date of filing the claim petition till its realization, forthwith, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification and excess amount, if any, be released in favour of the appellant, through payees cheque account.

17. Viewed thus, the appeal is allowed and the impugned award is modified, as indicated hereinabove.

18. 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.

The New India Assurance Co. Ltd. .....Appellant

Versus

Rajshwari and Anr. .....Respondents

FAO No.149 of 2012
Decided on : 21.10.2016

Motor Vehicles Act, 1988- Section 149- It is for the insurer to plead and prove that insured had committed willful breach of the terms and conditions of the policy – mere plea is not sufficient to exonerate the insurer – no evidence was led to prove the breach of the terms and conditions of the policy and insurer was rightly saddled with liability- appeal dismissed. (Para-4 to 9)

Cases referred:
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

For the appellant:	Mr.Praneet Gupta, Advocate.
For the respondents:	Mr.Lalit K. Sharma, Advocate, for respondent No.1. Nemo for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This appeal is directed against the award, dated 31st December, 2011, passed by Motor Accident Claims Tribunal, Mandi, District Mandi, H.P., (for short, the Tribunal), whereby compensation to the tune of Rs.1,72,000/-, with interest at the rate of 7.5% per annum from the date of filing of the petition till deposit, came to be awarded in favour of the claimant, and the insurer was saddled with the liability, (for short, the impugned award).

2. The claimant, the owner and the driver have not challenged the impugned award on any count, thus, the same has attained finality so far as it relates to them.

3. Feeling aggrieved, the insurer has challenged the impugned award by way of instant appeal, on the grounds taken in the memo of appeal.

4. During the course of hearing, learned counsel for the appellant/insurer submitted that at the time of accident, the offending vehicle was being driven without fitness certificate. Thus, it is submitted that the Tribunal has fallen in an error in saddling the appellant/insurer with the liability. The learned counsel for the appellant/insurer frankly conceded that the insurer has no other ground available in order to seek exoneration.

5. It is beaten law of the land that the insurer has to plead and prove that the owner of the offending vehicle has committed willful breach of the terms and conditions contained in the policy and mere plea here and there cannot be a ground for seeking exoneration.

6. The Apex Court in case titled as **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531,** has taken the similar view**.** 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 the Act."

7. 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 ingh 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."

8. Thus, it was for the insurer to plead and prove that the offending vehicle was being driven in violation of the terms and conditions contained in the insurance policy, has not led any evidence, has failed to discharge the onus.

9. Having said so, no case is made out for interference. Accordingly, the impugned award is upheld and the appeal is dismissed.

10. Learned counsel for respondent No.1/claimant stated that part amount stands already released in favour of the claimant. The Registry is, therefore, directed to release the rest of the amount, alongwith interest, in favour of the claimant through her bank account, after proper identification.

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

Shri Tilak Raj Sood ....Appellant
Versus
Smt. Rajmati & others ...Respondents

FAO No. 379 of 2011
Decided on : 21.10.2016

Motor Vehicles Act, 1988- Section 166- T was the registered owner of the vehicle- he executed an affidavit in favour of T stating that he had sold the vehicle to P and had no objection for transferring the vehicle in the name of P – P also executed an affidavit admitting the purchase – held, that a person who is in possession and control of the vehicle is liable to satisfy the award, therefore, P saddled with liability and T exonerated – appeal allowed. (Para- 9 to 14)

Case referred:
MD Karnataka Road Transport Corpn. & Anr. versus Thippamma & Ors, 2015 AIR SCW 6145

For the Appellant :	Mr. Dheeraj K. Vashishth, Advocate, for the appellant.
For the Respondents:	Mr. Ajay Chandel, Advocate, for respondent No. 1. Nemo for respondent No. 2. Mr. Karan Singh Kanwar, 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 1st September, 2011, made by the Motor Accident Claims Tribunal, Kullu, Himachal Pradesh (for short 'the Tribunal') in Claim Petition No. 56 of 2008, titled as Smt. Rajmati versus Sh. Tilak Raj Sood & others, whereby compensation to the tune of Rs. 4,60,000/- with interest @ 9% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimant and appellant-registered owner was saddled with liability (for short 'the impugned award').

2. The claimant, driver and Pawan Kumar- transferee, have not questioned the impugned award, on any count. Thus, it has attained finality, so far it relates to them.

3. Learned Counsel for the appellant argued that though the appellant was the registered owner of the vehicle bearing registration No. HP-37-2273, but he had sold it to respondent No.3-Pawan Kumar, was in possession and control of the said vehicle at the time of the accident, stand proved before the Tribunal, thus the Tribunal has fallen in an error in saddling the appellant with liability.

4. Learned Counsel for respondent No. 3 argued that appellant is the registered owner of the offending vehicle, all the documents are still in his name and the Tribunal has rightly saddled the appellant with the liability.

5. Heard. Perused.

6. The Tribunal has fallen in an error in saddling the appellant with liability for the following reasons.

7. Admittedly, appellant-Tilak Raj was registered owner of the offending vehicle, but he had executed an affidavit (Ext. RW-2/A) in favour of respondent No. 3-Pawan Kumar, whereby he has stated that he had sold the offending vehicle to Pawan Kumar and he had no objection in case the said vehicle was transferred in the name of Pawan Kumar. Further, he has stated that

till the execution of the said deed, all the liabilities were to be satisfied by him, i.e. the registered owner and thereafter, it is the duty and liability of Pawan Kumar. Pawan Kumar has also executed an affidavit (Ext. RW-2/B), whereby he has admitted that he has purchased the offending vehicle from appellant-Tilak Raj.

8. Both the aforesaid documents do disclose that Pawan Kumar was in possession and control of the offending vehicle at the time of accident.

9. RW-4, Head Constable Saraswati Devi has deposed that she has seized the documents of the offending vehicle, which was in the name of appellant-Tilak Raj, he had executed so many documents including Forms No. 29 & 30 in terms of the mandate of the Motor Vehicles Act and Rules, but the offending vehicle was not transferred till that date. Thus, her statement also supports the contention that the vehicle was sold and in possession of Pawan Kumar.

10. This Court in FAO No.23 of 2010, titled as Vijay Kumar versus Pawna Devi & others, alongwith another connected matter, decided on 06.11.2015, has already determined the said issue and held that the person who is in possession and control of the offending vehicle at the time of accident, is responsible.

11. It is apt to reproduce para-19 of the aforesaid judgment herein:-

> "*19. The Apex Court in the case titled as **HDFC Bank Ltd. versus Kumari Reshma and Ors.,** reported in **2014 AIR SCW 6673,** held that if a person has purchased a vehicle by hire-purchase agreement or an agreement of hypothecation, the person in possession of the vehicle under that agreement is the owner. It is apt to reproduce paras 10, 23 and 24 of the judgment herein:*
>
> > *"10. On a plain reading of the aforesaid definition, it is demonstrable that a person in whose name a motor vehicle stands registered is the owner of the vehicle and, where motor vehicle is the subject of hire-purchase agreement or an agreement of hypothecation, the person in possession of the vehicle under that agreement is the owner. It also stipulates that in case of a minor, the guardian of such a minor shall be treated as the owner. Thus, the intention of the legislature in case of a minor is mandated to treat the guardian of such a minor as the 'owner'. This is the first exception to the definition of the term 'owner'. The second exception that has been carved out is that in relation to a motor vehicle, which is the subject of hire-purchase agreement or an agreement of lease or an agreement of hypothecation, the person in possession of vehicle under that agreement is the owner. Be it noted, the legislature has deliberately carved out these exceptions from registered owners thereby making the guardian of a minor liable, and the person in possession of the vehicle under the agreements mentioned in the dictionary clause to be the owners for the purposes of this Act.*
> >
> > *11. to 22. .....*
> >
> > *23. In the present case, as the facts have been unfurled, the appellant bank had financed the owner for purchase of the vehicle and the owner had entered into a hypothecation agreement with the bank. The borrower had the initial obligation to insure the vehicle, but without insurance he plied the vehicle on the road and the accident took place.*
> >
> > *Had the vehicle been insured, the insurance company would have been liable and not the owner. There is no cavil over the fact that the vehicle was subject of an agreement of hypothecation and was in possession and control under the respondent No. 2. The High Court has proceeded both in the main judgment as well as in the review that the financier steps into the shoes of the owner. Reliance placed on Kachraji Rayamalji (1995 AIR SCW 1491) (supra), in our considered opinion, was inappropriate because in the instant*

case all the documents were filed by the bank. In the said case, two-Judge Bench of this Court had doubted the relationship between the appellant and the respondent therein from the hire-purchase agreement. Be that as it may, the said case rested on its own

facts. The decision in Kailash Nath Kothari (AIR 1997 SC 3444) (supra), the Court fastened the liability on the Corporation regard being had to the definition of the 'owner' who was in control and possession of the vehicle. Similar to the effect is the judgment in Deepa Devi (AIR 2008 SC 735) (supra). Be it stated, in the said case the Court ruled that the State shall be liable to pay the amount of compensation to the claimant and not the registered owner of the vehicle and the insurance company. In the case of Degala Satyanarayanamma (AIR 2008 SC 2493) (supra), the learned Judges distinguished the ratio in Deepa Devi (supra) on the ground that it hinged on its special facts and fastened the liability on the insurer. In Kulsum (supra) , the principle stated in Kailash Nath Kothari (supra) was distinguished and taking note of the fact that at the relevant time, the vehicle in question was insured with it and the policy was very much in force and hence, the insurer was liable to indemnify the owner.

24. On a careful analysis of the principles stated in the foregoing cases, it is found that there is a common thread that the person in possession of the vehicle under the hypothecation agreement has been treated as the owner. Needless to emphasise, if the vehicle is insured, the insurer is bound to indemnify unless there is violation of the terms of the policy under which the insurer can seek exoneration."

12 The Apex Court in the latest judgment in **Civil Appeal No. 5293 of 2010,** titled as **Managing Director, K.S.R.T.C. versus New India Assurance Co. Ltd. & Anr.** with **MD Karnataka Road Transport Corpn. & Anr. versus Thippamma & Ors,** decided on 27.10.2015, reported in **2015 AIR SCW 6145**, has laid down the same principle. It is profitable to reproduce relevant portion of para 32, paras 33 and 34 herein:

"32. .....This Court has held that even when there was an agreement of and vehicle has been insured and agreement holder is treated an owner, the insurer cannot escape the liability to make indemnification.

33. In view of the decision in HDFC Bank Limited v. Reshma and Ors., the insurer cannot escape the liability, when ownership changes due to the hypothecation agreement. In the case of hire also, it cannot escape the liability, even if the ownership changes. Even though, KSRTC is treated as owner under Section 2(30) of the Act of 1988, the registered owner continues to remain liable as per terms and conditions of lease agreement lawfully entered into with KSRTC.

34. In view of the aforesaid discussion, we hold that registered owner, insurer as well as KSRTC would be liable to make the payment of compensation jointly and severally to the claimants and the KSRTC in terms of the lease agreement entered into with the registered owner would be entitled to recover the amount paid to the claimants from the owner as stipulated in the agreement or from the insurer."

13. Applying the tests to the instant case, Pawan Kumar has to satisfy the entire liability.

14. Having said so, the impugned award is modified by providing that Pawan Kumar is saddled with the entire liability and appellant-registered owner is exonerated/discharged.

15. Learned Counsel for the appellant stated at the Bar that the appellant has deposited the entire awarded amount.

16. The amount deposited by the appellant be released in favour of the claimant through payees' account cheque or by depositing the same in her account.

17. Respondent No. 3 is directed to deposit the awarded amount within eight weeks from today. On deposit, the same be released in favour of the appellant through payees' account cheque or by depositing the same in his account.

18. The appeal stands disposed of accordingly, as indicated above.

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

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

Virender Kumar alias Virender Singh & another ..... Appellants
Versus
Puneet Patial & another ..... Respondents

FAO No.199 of 2011
Date of decision: 21.10.2016

Motor Vehicles Act, 1988- Section 166- Compensation of Rs.14,31,162/- was awarded along with interest @ 7.5% per annum from the date of filing of claim petition till realization – claimant had claimed compensation of Rs.10 lacs- therefore, only an amount of Rs. 10 lacs was to be awarded – cost of Rs. 1 lac was also imposed. (Para-4 to 7)

For the appellants: Mr.Tara Singh Chauhan, Advocate.
For the respondents: Mr.Tarun K. Sharma, Advocate, for respondent No.1.
Mr.G.R. Palsra, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 16th February, 2011, passed by the Motor Accident Claims Tribunal, Hamirpur, H.P. (for short, "the Tribunal") in MAC Petition No.24 of 2009, titled as Puneet Patial alias Vinay vs. Shri Jai Ram & others, whereby compensation to the tune of Rs.14,31,162/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimant and the owners and driver came to be saddled with liability (for short "the impugned award").

2. This Court has already decided the issue involved in this appeal in FAO No.177 of 2011, titled as Jai Ram vs. Puneet Patial & others, decided on 27th April, 2012 and all the points have been determined and the award in that case was upheld. The grounds taken in this appeal are similar to that of FAO No.177 of 2011.

3. Having said so, the appeal merits to be dismissed. Dismissed as such.

4. At this stage, learned counsel for the appellants argued that though the case in hand is covered by the judgment 27th April, 2012, passed in FAO No.177 of 2011, but the claimant claimed compensation to the tune of Rs.10,00,000/- in the claim petition, whereas the Tribunal has granted more than that.

5. It appears that the Tribunal has wrongly assessed the compensation while determining issue No.2. Keeping in view the discussions made in paras 39 to 44, I deem it proper to award only Rs.10,00,000/- as claimed by the claimant in claim petition with interest as awarded.

6. The appellants have to bear the costs which are quantified at Rs. 1,00,000/-.

7. Learned counsel for the appellants stated at the Bar that the amount to the tune of Rs.25,000/- stands already deposited. The appellants are directed to deposit the remaining amount in the Registry within six weeks from today and on deposit, the entire amount be released 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.

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

****

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

Tholu (deceased) through LR's .....Appellants
Versus
Sukh Ram and others .....Respondents

RSA No. 445/2006
Decided on : October 22 , 2016

Specific Relief Act, 1963- Section 38- Plaintiff filed civil suit pleading that he is owner in possession of the suit land and defendants are interfering with the same – the suit was decreed by the trial Court- an appeal was filed, which was allowed – held in second appeal that a decree was passed by Civil Judge (Junior Division) Court No. 2 declaring the plaintiff therein and defendant S in the present suit to be owner in possession of the suit land- the judgment will have an overriding affect – revenue entries declaring the plaintiff as owner in possession are wrong and will confer no right over the suit land- the suit was rightly dismissed by the Appellate Court- appeal dismissed. (Para-8 to 16)

For the appellant : Mr. G.R. Palsra, Advocate.
For the respondents : Mr. Atul Jhingan, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral):

Instant appeal has been filed against judgment and decree dated 11.8.2006 rendered by the learned Presiding Officer, Fast Track Court, Mandi, District Mandi, HP in Civil Appeal No. 43/2003, 16/2005, whereby judgment and decree dated 13.12.2002 rendered by the learned Sub Judge 1st Class, Court No. II, Mandi, HP in Civil Suit No. 341/99/98 has been reversed and suit has been dismissed.

2. Briefly stating facts of the case as emerge from the record are that the plaintiff-appellant (herein after referred to as 'plaintiff') filed a suit for injunction against the respondents-defendants (herein after referred to as 'defendants') stating therein that land comprising of Khewat No. 141 Khatauni No. 148, Khasra Nos. 587, 736, 738, 740, 746, 748 Kitas 7 measuring 20-19-16 Bighas, situated in Muhal Tarwai,/177, Illaka Bairkot, Tehsil and District Mandi (herein after, 'suit land') is jointly owned and possessed by him alongwith other co-sharers and defendants have no right, title and interest over the suit land. It is further averred that the plaintiff was in possession of the suit land and defendants are trying to dispossess him from peaceful possession. Since, defendants were causing interference in the suit land, plaintiff was compelled to file the instant suit praying therein for perpetual injunction restraining the defendants from dispossessing him from the suit land and for decree of mandatory injunction.

3. Defendants filed written statement denying the case of the plaintiff in toto stating that plaintiff is wrongly recorded as owner-in-possession of the suit land to the extent of ½ share.

Defendants have also averred that they are in possession of the suit land and entire land is exclusively in their possession. It is further averred that Nika Ram, Het Ram, Bhagat Ram and Gulab Singh have transferred their shares in the land situated at Muhal Tarwai in their favour. Apart from this, defendants also raised plea of adverse possession in the alternative, learned trial Court, on the basis of pleadings of the parties, framed issues and vide impugned judgment dated 13.12.2002, decreed the suit of the plaintiff restraining the defendants from dispossessing the plaintiff from the suit land. Defendants being aggrieved and dissatisfied with the judgment and decree passed by learned trial Court, filed appeal in the Court of Presiding Officer, Fast Track Court, Mandi, which came to be registered as CA No. 43/2003, 16/2005. Learned first appellate Court, on the basis of material adduced before him, allowed the appeal preferred by the defendants, after setting aside the judgment and decree passed by learned trial Court. Being aggrieved with the judgment and decree dated 11.8.2006 passed by Presiding Officer, Fast Track Court, Mandi, plaintiff filed instant regular second appeal, praying therein for quashing of judgment and decree dated 11.8.2006 passed by the first appellate Court.

4. Instant regular second appeal was admitted on 16.5.2007, on the following substantial questions of law:

> "1. Whether the ld. first appellate court has misread, misconstrued and misappreciated the oral as well as documentary evidence of the parties especially Ex.AX which has prejudiced the case of the appellant?
>
> 2. Whether the judgment and decree dated 19.7.2001 has overriding effect over the judgment and decree dated 13.12.2002?
>
> 3. Whether the estoppel wil arise against the respondents/defendants by not taking plea in the trial court with regard to EX. AX?"

5. This matter came up for final hearing before this Court on 2.5.2016, on which date, Mr. G.R. Palsra, argued that judgment and decree passed by first appellate Court is not sustainable as it is against law and facts on record. Mr. Palsra strenuously argued that there is total misreading of oral and documentary evidence on record, by the first appellate Court, as such same can not be allowed to sustain. Mr. Palsra, further stated that great miscarriage of justice has been caused to the plaintiff.

6. Mr. Atul Jhingan, Advocate supported the judgment and decree passed by the first appellate Court. He stated that bare perusal of judgment and decree passed by first appellate Court clearly suggests that the same is based upon correct appreciation of the evidence adduced on record by the respective parties. There is no scope of interference, whatsoever by this Court, as such, same deserves to be upheld. With a view to substantiate aforesaid argument, he invited attention of this Court to judgment dated 19.7.2001 passed by Sub Judge, Court No.2, Mandi, Ext. AX, to demonstrate that land comprised in Khewat No. 141 Khatauni No. 148, Khasra Nos. 587, 736, 738, 740, 746, 748 Kitas 7 measuring 20-19-16 Bighas, situated in Muhal Tarwai,/177, Illaka Bairkot, Tehsil and District Mandi was the subject matter of the civil suit No. 455/99/96, whereby trial Court passed judgment and decree for declaration and consequential relief of injunction.

7. Mr. G.R. Palsra, with a view to rebut aforesaid contention raised by Mr. Atul Jhingan, made this Court to travel through zimni orders passed by first appellate Court to demonstrate that no opportunity, whatsoever, was granted to the present appellant to rebut the correctness, if any, of the judgment Ext. AX placed on record by the defendants in Civil Suit No. 455/99/96. He specifically stated that learned first appellate Court while allowing application under Order 41 Rule 27 CPC filed by defendants, placing on record certified copy of judgment Ext. AX, no opportunity was granted to the plaintiff to rebut the same and as such same could not be read in evidence. He forcefully contended that once judgment and decree passed by learned Sub Judge, Court No. II, Mandi was allowed to be taken on record, it was incumbent upon the first appellate Court to afford opportunity to the plaintiff to rebut the same. He strenuously argued that since no opportunity to rebut Ext. AX was given to the plaintiff, great

prejudice has been caused to him. Mr. Palsra further contended that since decree sought to be relied upon by the defendants was ex parte decree, learned first appellate Court was bound to give opportunity of rebutting as well as to lead cogent and reliable evidence in this regard. This Court, keeping in view aforesaid submissions made on behalf of the respective counsel, came to the conclusion that no opportunity of hearing was given to the plaintiff by the first appellate Court while allowing application under Order 41 Rule 27 CPC preferred by the defendant placing therewith additional document i.e. certified copy of judgment in Civil Suit No. 456/99/96 (Ext. AX) and, accordingly, remanded the case back to the first appellate Court to decide the same afresh. This Court, specifically, with the consent of parties, directed the first appellate Court to afford opportunity to the plaintiff to rebut judgment and decree dated 19.7.2001 by leading oral as well as documentary evidence with further liberty to the plaintiff to cross-examine the same on that issue.

8. Sequel to the direction dated 2.5.2016, learned first appellate Court proceeded to decide the matter afresh in light of observation /finding returned in the aforesaid order and passed order dated 4.8.2016, perusal whereof suggests that notice was given to the parties to put appearance before the Court with the direction to produce evidence, in rebuttal to the document Ext. AX. It appears that, defendant placed on record Nakal Jamabandi for the year 2007-08 of Mohal Tarwai, Ext. RA and copy of impugned order passed by ADM Mandi, Ext. RB and closed rebuttal evidence, whereas record suggests that the plaintiffs did not file any evidence in rebuttal of the document Ext. AX.

9. Pursuant to receipt of order/judgment dated 4.8.2016, passed by ADJ, Mandi, matter was again heard in detail. Now, this Court, after perusing fresh findings recorded by the ADJ-II, Mandi in order dated 4.8.2016, passed in compliance to order passed by this Court, would be taking up substantial question of law for consideration. Keeping in view the controversy as well as text and contents of the substantial question of law, this Court would be taking up all the substantial questions of law together for consideration.

10. Since, the learned Counsel representing the plaintiff had alleged that no opportunity of rebutting document Ext. AX was afforded to by the learned first appellate Court, while allowing application moved on behalf of defendant under Order 41 Rule 27 CPC, this court vide order dated 2.5.2016 remanded the case back to the learned first appellate Court to record fresh finding qua Ext. AX by affording opportunity of hearing to both the parties. Learned first appellate Court vide order dated 4.8.2016 examined validity and applicability of document Ext. AX, afresh after affording due opportunity of hearing to the parties. Perusal of order dated 4.8.2016, clearly suggests that plaintiff did not lead any evidence on record to dispute genuineness and correctness of Ext. AX, perusal whereof clearly suggests that Sukh Ram, defendant filed suit bearing No. 456/99/96 in the Court of Sub Judge, Court No. II, Mandi, for declaration with consequential relief of injunction against several persons, including present appellant/plaintiff on the plea that the land comprising of Khewat No. 141 Khatauni No. 148, Khasra Nos. 587, 736, 738, 740, 746, 748 Kitas 7 measuring 20-19-16 Bighas, situated in Muhal Tarwai,/177, Illaka Bairkot, Tehsil and District Mandi is wrongly recorded in the ownership and possession of the defendant (present plaintiff) and said revenue entries are not binding upon him as well as proforma defendants (defendants herein). Learned Sub Judge, Court No. II, Mandi, on the basis of pleadings as well as evidence adduced on record, decreed the suit filed by plaintiff and held revenue entries in document Ext. PW-1/D showing defendant as owner in possession are wrong and they have no right, title or interest in the suit land, whereas, plaintiff (defendant herein) and proforma defendants were held owners of suit land comprised in Khewat No. 141 Khatauni No. 148, Khasra Nos. 587, 736, 738, 740, 746, 748 Kitas 7 measuring 20-19-16 Bighas, situated in Muhal Tarwai,/177, Illaka Bairkot, Tehsil and District Mandi.

11. It is undisputed that aforesaid judgment passed by Sub Judge, Court No. II was not challenged before higher Court by any of the affected parties and as such same attained finality. Close scrutiny of memo of parties as well as description of suit land given in Civil Suit No. 455/99/96 clearly suggests that the plaintiff herein was a party in that case and suit land as

described in Civil Suit No. 341/99/98, which is subject matter of present appeal was also subject matter of Civil Suit No. 455/99/96. Careful perusal of judgment and decree dated 19.7.2001, Ext. AX clearly suggests that Sukh Ram (defendant) had filed suit against several persons including plaintiff (Tholu) and vide aforesaid judgment, he was declared to be owner in possession of land comprising of Khewat No. 141 Khatauni No. 148, Khasra Nos. 587, 736, 738, 740, 746, 748 Kitas 7 measuring 20-19-16 Bighas, situated in Muhal Tarwai,/177, Illaka Bairkot, Tehsil and District Mandi, which is subject matter of the present appeal.

12. Since this is undisputed before this court that judgment dated 19.7.2001 has attained finality, learned first appellate Court while accepting appeal preferred by defendant, rightly relied upon document Ext. AX and held defendant herein to be owner-in-possession of suit land as described herein above. It is also undisputed, rather duly stands established on record that document Ext. AX was passed prior in time than judgment and decree dated 13.12.2002 passed by Civil Judge (Junior Division), Court No. II, Mandi, whereby plaintiff was held to be owner-in-possession of the suit land, which was admittedly subject matter of Civil Suit No. 455/99/96. Since, suit filed by the defendant Sukh Ram was decided prior to passing of judgment and decree dated 13.12.2002, it had overriding effect on judgment and decree dated 13.12.2002. Perusal of judgment dated 19.7.2001, Ext. AX clearly suggests that the plaintiff Tholu was one of the parties in Civil Suit No. 455/99/96 i.e. suit for declaration filed by Sukh Ram (defendant) and as such plaintiff Tholu is bound by judgment and decree dated 19.7.2001, Ext. AX passed by Sub Judge, in the suit filed by defendant.

13. Since, no document worth the name was placed on record by plaintiff to controvert judgment dated 19.7.2001, passed by Sub Judge, Court No. II, Mandi, this Court sees no illegality or infirmity in the order passed by first appellate Court whereby defendant has been held to be owner in possession of the suit land described herein above. It also emerges from subsequent findings returned by first appellate Court that defendant placed on record order passed by ADM Mandi in Appeal No. 56/89 decided on 28.2.1991 (Ext. RB), perusal whereof suggests that same is with regard to Khasra No. 737, 752, 990, 950, 995, 1025, 1026, 881, 891, 897, 989, 899, 901, 913, 218 and 220. Partition proceedings initiated at the behest of Sukh Ram (defendant) was decided by Assistant Collector on 5.2.1986 wherein plaintiff, Tholu was proceeded ex parte.

14. Hence, this Court, after careful perusal of judgment Ext. AX, has no hesitation to conclude that revenue entries in document Ext. PW-1/B reflecting plaintiff as owner-in-possession are wrong and he has no right, title or interest over the suit land. Perusal of Ext. RB suggests that Khasra numbers as described herein above were not the subject matter of partition proceedings filed by Sukh Ram before Assistant Collector 1st Grade, who decided the partition proceedings on 5.2.1986. Since defendant by placing on record Ext. AX has duly proved on record that he is owner-in-possession of the suit land, plaintiff has no right, title or interest over the suit land. Revenue entries specially Ext. PW-1/D, showing plaintiff as owner in possession have been already declared to be illegal, null and void by the Court vide judgment and decree dated 19.7.2001 in Civil Suit No. 455/99/96.

15. Consequently, in view of detailed discussion, especially specific finding returned by the first appellate Court that document Ext. AX, duly stands proved on record that defendants are exclusive owners-in-possession of the suit land and plaintiff has no right, title or interest over the suit land.

16. As far as question of estoppel against defendants is concerned, same is not attracted in the case of defendants, who admittedly during the pendency of first appeal filed application under Order 41 Rule 27 CPC, placing therein copy of judgment Ext. AX. At this stage, it may be pointed out that the plaintiff laid no challenge to order passed by first appellate Court on the application under Order 41 Rule 27 CPC moved by defendant. Moreover, this Court on the specific plea having been raised by the counsel for the plaintiff that no opportunity to rebut document Ext. AX was afforded by the court below, remanded the case back to the first appellate Court with the direction to examine document, Ext. AX afresh after affording due opportunity to

the parties. Perusal of record suggests that despite there being sufficient opportunity by the first appellate Court, plaintiff failed to controvert correctness of the Ext. AX, as such there is no force in this contention.

17. Substantial questions of law are answered accordingly.

18. Consequently, in view of aforesaid discussion, this Court sees no reason to interfere with the well reasoned judgments and decrees passed by both the Courts below. Accordingly, there is no merit in the appeal and same is dismissed. Pending applications are also disposed of. Interim directions, if any, are also vacated.

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

Sh.Vishwa Nath Machhan s/o late Sh. Raghubir Dass ....Revisionist

Versus

State of H.P. through Secretary (Home) & Others ....Non-revisionists

Crl. Revision Petition No. 100/2016
Order Reserved on 05.09.2016
Date of order: 24.10.2016

Code of Criminal Procedure, 1973- Section 169- A cancellation report was filed by the police-informant filed a protest petition – the Court ordered further investigation- again a cancellation report was prepared – a protest petition was filed but the Court accepted the cancellation report-held, in revision that investigation was conducted twice but no offence was found to have been committed – the grievance of the petitioner is that the judgment of the High Court was violated but the petitioner has a remedy of filing the Execution Petition – encroachment proceedings are pending before Assistant Collector 1st Grade and it is not proper to invoke the criminal proceedings- money was sanctioned and spent on the welfare of the temple – the petitioner has civil remedy and should not resort to criminal proceedings – petition dismissed. (Para-5 to 11)

Cases referred:

Mahendra Pratap Singh Vs. Sarju Singh, AIR 1968 SC 707
Chinnaswamy Reddy Vs. State of Andhra Pradesh, AIR 1962 SC 1788
Johar Vs. Mangal Prasad, AIR 2008 SC 1165

For revisionist	:	In person
For non-revisionist No.1	:	Mr. R. K. Sharma, Dy. A. G.
For non-revisionists No.2 to 4 & 6	:	Mr. G.D. Verma, Sr.Advocate with Mr. B. C. Verma, Advocate
For non-revisionist No.7	:	Mr. Balwant Kukreja, Advocate

The following order of the Court was delivered:

P. S. Rana, J.

Present criminal revision petition is filed under Section 397/401 Code of Criminal Procedure 1973 against order dated 12.01.2012 passed by learned Special Judge (F) Shimla (H.P.) whereby learned Special Judge (F) Shimla accepted the closure report and rejected the protest petition filed by revisionist Vishwa Nath Machhan.

Brief facts of the case:

2. Sh.Vishwa Nath Machhan filed criminal complaint on dated 26.8.2002 before Superintendent of Police Shimla for registration of criminal case against Swami Lal @ Balmani

(Priest) Kandloo temple Sector 4 New Shimla for indiscriminate use of loud speakers/amplifiers in the temple premises causing complete voice nuisance to the residents of locality from 6 AM to 9 AM and from 6 PM to 9 PM. It is alleged that temple is situated on the government land comprised in Khasra No.203 contiguous to plots No.465 to 471 of H.P. Housing Board Sector 4. It is alleged that temple, residential quarters, huts and shops raised upon government land upon khasra No.203 in collusion and connivance with forest officials. It is further alleged that on 06.04.2002 priest of the temple and fifteen local persons in active collusion with Sh. Manoj Kumar Deputy Director Tourism Kasumpti Shimla obtained grant of Rs.2,50,000/- (Two lac fifty thousand) for the temple. It is further alleged that temple is raised in illegal manner upon khasra No.203 owned by State Government. Prayer for registration of FIR under H. P. Instruments of Control of Noises Act, Forest Conservation Act, Indian Forest Act, H.P. Prevention of Specific Corrupt Practices Act and under sections 420, 465, 467,468, 506 and 120-B IPC and under section 13(2) of Prevention of Corruption Act sought. After registration of FIR investigation was conducted and thereafter cancellation report was submitted. After submission of cancellation report revisionist filed protest petition. Upon protest petition order of further investigation passed by learned Judicial Magistrate Ist Class Court No.1 Shimla. Thereafter further investigation was conducted by Addl. S.P. Shimla and Addl. S.P. Shimla after investigation again submitted cancellation report and thereafter learned Special Judge (F) Shimla again ordered for further investigation. Thereafter again cancellation report submitted and after hearing the protest petition filed by revisionist learned Special Judge (F) Shimla accepted the cancellation report. Feeling aggrieved against the cancellation report present revision petition is filed.

3. Court heard revisionist in person and learned Deputy Advocate General appearing on behalf of revisionist No.1 and learned Advocate(s) appearing on behalf of revisionists No.2 to 4, 6 & 7 and Court also perused the entire record carefully.

4. Following points arise for determination:

1) Whether criminal revision petition filed by revisionist under Section 397/401 Code of Criminal Procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of revision petition?

2). Final Order.

Findings upon Point No.1 with reasons:

5. Submission of revisionist that learned Special Judge (F) Shimla has caused grave miscarriage of justice to revisionist by way of accepting cancellation report filed by investigating agency is rejected being devoid of any force for reasons hereinafter mentioned. It is proved on record that further investigation was conducted in the present case twice. It is also proved on record that all the investigating officials have submitted cancellation report after proper investigation of the case. It is also proved on record that temple is constructed upon khasra No.203 owned by H.P. Government. Court has carefully perused the jamabandi for the year 1989-1990 relating to khasra No.203 placed on record prepared by revenue official while discharging official duty under H.P. Land Revenue Act 1954. In ownership column of khasra No.203 name of H.P. Government recorded and in possession column name of H.P. Government and inhabitants of the area recorded. Nature of khasra number recorded as 'Charagah' (Grazing land). Name of revisionist did not figure in ownership column of khasra No.203 upon which temple is constructed for welfare of general public.

6. Submission of revisionist that revisionist also filed CWP(PIL) No.24/2003 title Vishwanath Machhan Vs. Director General of Police Himachal Pradesh & Others and Hon'ble High Court of H.P. in civil writ petition directed to control noise pollution and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. It is held that revisionist has alternative efficacious remedy to file execution petition for implementation of order of Hon'ble High Court of H.P. passed in CWP(PIL) No.24/2003 title Vishwanath Machhan Vs. Director General of Police Himachal Pradesh & Others in order to control noise pollution in accordance with law.

7. Submission of revisionist that accused persons have encroached khasra No.203 in illegal manner and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Order of Collector-cum-DFO Shimla dated 9.9.2005 placed on record. Learned Collector-cum-DFO Shimla has specifically mentioned in order dated 9.9.2005 that encroachment proceedings are pending before Assistant Collector Grade-I Settlement Shimla. In view of the fact that case of encroachment is pending before Assistant Collector Grade-I Settlement Shimla relating to encroachment of khasra No.203 it is held that it is not expedient in the ends of justice to interfere in the order of learned Special Judge (F) Shimla in the present case on this ground.

8. Submission of revisionist that grant of Rupee two lac fifty thousand was granted by the Tourism Department Shimla on 06.04.2002 in illegal manner for temple and illegal water and illegal electricity connection also granted for the temple in collusion with XEN Water Works MC Shimla and SDO Electricity Department Khalini which amounts to corrupt practice on behalf of public officials and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Rupee two lac fifty thousand was sanctioned for welfare of temple which is used by general public at large. Temple is not the property of individual person but temple is used for worship of God by general public. It is well settled law that when there is conflict between interest of general public and individual then interest of general public always prevails. As per cancellation report damage report against members of temple Managing Committee already prepared by officials of forest department. As per cancellation report Rs.2,50,000/- (Two lac fifty thousand) received by temple Managing Committee for temple and same was used for welfare of temple and not used for personal individual benefit. Even proceedings relating to illegal construction by local people over khasra No.203 are pending before Commissioner Municipal Corporation Shimla (H.P.) as per cancellation report. There is also recital in the cancellation report that letters have been issued to concerned public departments to take action against defaulting public officials for procedural irregularity. Temple is not constructed upon land of revisionist but constructed upon khasra No.203 owned by H.P. Government and H.P. Government did not file any revision petition against the order of learned Special Judge (F) Shimla. It is not expedient in the ends of justice to interfere in the order of learned Special Judge (F) Shimla on this ground.

9. Submission of revisionist that by way of voice of loud speakers and amplifiers privacy of revisionist and his family members is disturbed and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Court is of the opinion that disturbance of privacy of revisionist is civil matter and revisionist can seek civil relief under Specific Relief Act 1963 in accordance with law from civil Court.

10. Submission of revisionist that dirty water of temple is diverted towards the land of revisionist and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. It is held that revisionist is at liberty to seek remedy in civil Court as per Specific Relief Act 1963 relating to diversion of dirty water upon his plot. It is held that alternative efficacious civil remedy is available to revisionist in accordance with law in the present case for redressal of his grievances. It is not expedient in the ends of justice to interfere in the order of learned Special Judge (F) Shimla on this ground.

11. Revisional jurisdiction of the High Court should be exercised in the following cases: (1) Where decision or order is grossly erroneous (2) Where there is no compliance of provision of law (3) Where finding of fact is not based on evidence (4) Where judicial discretion is exercised arbitrarily or perversely. See AIR 1968 SC 707 title **Mahendra Pratap Singh Vs. Sarju Singh.** See AIR 1962 SC 1788 title **Chinnaswamy Reddy Vs. State of Andhra Pradesh**. See AIR 2008 SC 1165 title **Johar Vs. Mangal Prasad.** In view of above stated facts it is held that order of learned Special Judge (F) Shimla (H.P.) dated 12.01.2012 is not illegal nor perverse. Point No.1 is answered in negative.

Point No.2 (Final Order).

12. In view of findings upon point No.1 present criminal revision petition is dismissed. Order of learned Special Judge (F) Shimla (H.P.) dated 12.01.2012 is affirmed. Jamabandi for the year 1989-1990 relating to khata No. 149 min khatoni No. 173 min khasra No.203 Mohal Patebag Tehsil and Distt. Shimla (H.P.) placed on record prepared under H.P. Land Revenue Act 1954 by public official in discharge of official duty will form part and parcel of order. File of learned Special Judge (F) Shimla (H.P.) alongwith certified copy of the order be sent back forthwith. Crl. Revision No.100/2016 is disposed of. Pending applications if any also disposed of.

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

Cr.MP(M) No. 1263 of 2016 a/w Cr.M.P(M) Nos. 1296 of 2016.
Decided on: 25th October, 2016

1. **Cr.M.P(M) No. 1263 of 2016**

Sanjeev Kumar @ Sanju .....Petitioner
Versus
State of H.P. .....Respondent.

2. **Cr.M.P(M) No. 1296 of 2015**

Ranvir Sankhyan .....Petitioner
Versus
State of H.P. .....Respondent.

Code of Criminal Procedure, 1973- Section 439- FIR was registered against the petitioners for the commission of offences punishable under Section 302, 382 and 323 read with Section 34 of I.P.C. – the accused had given beatings to A, who died subsequently- many facts have not been explained at this stage – the deceased had driven a motorcycle from Brahampukhar to Shimla, which was not possible, had he sustained grievous injuries – the petitioners are the local residents of the Bilaspur and there is no possibility of their fleeing away from justice- application allowed and petitioners ordered to be released on furnishing personal and surety bonds of Rs. 50,000/- each. (Para- 5 to 13)

For the petitioners : Mr. N.S.Chandel, Advocate and Mr. Dinesh Thakur, Advocate in both the petitions.
For the respondents: Mr. Parmod Thakur, Addl. AG with Mr. Neeraj K. Sharma, Dy. AG.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

This judgment shall dispose of both the petitions filed by Sanjeev Kumar alias Sanju and Ranvir Sankhyan accused in FIR No. 132 of 2016 registered in Police Station West, Shimla under Sections 302, 382 and 323 read with Section 34 IPC against them and their co-accused Brij Lal alias Birju for the grant of bail.

2. The accused-petitioners have been arrested by the police on June 23, 2016. They are presently in custody as the applications for grant of anticipatory bail registered as Cr.M.P.(M) No. 730 of 2016 and Cr.M.P.(M) No. 731 of 2016 filed by them in this Court were dismissed on June 23, 2016 and the petitions Cr.M.P (M) No. 1128 of 2016 and Cr.M.P.(M) No. 1129 of 2016 for regular bail were also dismissed vide judgment dated 26.9.2016. Consequent upon the judgment of this Court dated 26.9.2016, they even had filed separate applications in the trial Court, however, the same also stood dismissed vide order dated 7.10.2016 annexed to these petitions.

3. The allegations against the accused-petitioners and the co-accused, in a nut-shell, are that during the night intervening 24/25.5.2016, they administered beatings to Ankush son of the complainant Smt. Sheela Devi, who succumbed to the injuries he received on his person and died in IGMC, Shimla around 8:30 AM.

4. The record of the case reveals that both the petitioners are resident of District Bilaspur whereas the deceased was resident of Ajay Building, Totu Shimla. Their co-accused Brij Lal alias Birju and Mahender Singh are also residents of district Bilaspur. The star prosecution witness in this case is Madan Lal, who belongs to Village Thandoo, PO Kot Beja, Tehsil Kasauli, District Solan, H.P. The present, as such, is a case where the deceased and the accused as well as Madan Lal, residents of three different districts, allegedly met with each other at Brahmpukhar in district Bilaspur in order to become rich with the help of black magic. How and in what manner, the currency notes were to be produced by way of such magic, the record is silent.

5. The FIR has been registered at the instance of Smt. Sheela, none else but the mother of deceased Ankush. It was reported by her to the police on 24.5.2016 that the deceased left home for Solan and told her that his motorcycle is under repair there and that he is going to bring the same back. However, it was around 9-10 PM, the deceased informed her that she can have dinner and that he might come back to the house late in the night. The deceased knocked the door in the night. She opened the door and inquired from him as to whether he would like to have food or not. The deceased refused and after changing his wearing apparels, he had water and then went to sleep. After sometime, he started vomiting in the toilet. The complainant, on observing the deceased vomiting in the toilet, went to enquire about the cause of vomiting. She observed that the deceased again went to the toilet and after vomiting, he fell unconscious. His lips turned bluish. She called her another son Karan, who took the deceased to the bed room on seeing his condition having worsened. Ambulance (108) was called and the deceased was shifted to IGMC hospital. He was treated at IGMC, however, his condition deteriorated and ultimately he expired at 8:30 AM on 25.5.2016. The ATM card, wrist watch and mobile phone of the deceased were found to be missing. The complainant suspected that her son died on account of some poisonous substance administered by someone to him.

6. On the registration of the FIR, the police swung into action. Madan Lal, who allegedly was in the company of the deceased on 24.5.2016 made statement which was recorded by the I.O during the investigation of the case. Later on, his statement was also recorded under Section 164 Cr.P.C. by learned Addl. CJM, Court No. II, Shimla. As a matter of fact, Madan Lal son of Sh. Ganga Ram, the star prosecution witness, was called over telephone by another Madan Lal son of Jagat Singh r/o of Village Khanog, Tehsil Rampur, District Shimla over cell phone at 6:30 AM. He was called to reach at Solan. Accordingly, he met with another Madan Lal at bus stand Solan. Later on, they came to Shimla and went to a hotel where its owner deceased Ankush was present. They remained in the hotel throughout the day. In the evening, around 10:00 PM, the deceased told both Madan Lal that one Tantrik is known to him. Ankush dialed the number of Trntrik, however, it was switched off. On the following morning, Ankush told Madan Lal aforesaid to accompany him on his motor cycle (bullet) to Kunihar. They reached at Kunihar. There, the deceased searched the Tantrik who told deceased Ankush that he is coming. Ankush called one Suresh Kumar of Jukhala, District Bilaspur over his cell phone. Said Suresh Kumar informed the deceased that there Tantrik is also available. Said Suresh called the deceased and Madan Lal to come to Brahmpukhar in District Bilaspur. Suresh and one Sunil Kumar came there in a Nano Car. They inquired from the deceased about the Tantrik. They were apprised that Tantrik is coming in a short while. After some time, one black coloured car bearing registration No. HP 40 A 9577 arrived there. The same was occupied by the accused persons. One white coloured car also arrived there in which 5 persons were sitting. The Tantrik was in white coloured vehicle. A person alighted from the black coloured car and had conversation with the occupants of white coloured car. After that, black coloured car left Brahmpukhar towards Ghagas side. The same was followed by white coloured car and Nano car, in which deceased Ankush and he (Madan Lal) were traveling along with Suresh Kumar and Sunil.

7. The occupants of black coloured car and white coloured car sat at Dhaba and had drinks. After some time, black coloured car went towards Bilaspur side. White coloured car was stopped by its occupants outside the Dhaba ahead Ghagas. According to Madan Lal, they also stopped Nano car at the Dhaba. The white coloured car, however, was driven by its occupants ahead and the occupants of Nano car were asked to follow them. Both the cars reached at Ghagas. Black coloured car was also lying parked there. According to Madan Lal, he alighted from Nano car and went to the place where black coloured car was lying parked. The deceased was already present there. He noticed the accused persons interacting with each other. Suresh was also with them. When he reached there, they all enraged on the issue that he was told to come only with three persons and not more than that. The accused persons and Suresh started hurling abuses to Madan Lal. The accused persons, however, pushed aside Suresh and started beating him as well as deceased Ankush. They both were pushed inside the car by the accused persons and the same was driven to Deoth road which bifurcates from National Highway Shimla Bilaspur at Brahmpukhar. They were mercilessly beaten up by the accused persons in the car and thrown on the road. Their clothes were also torn. Their cell phones and money was also snatched. The accused threatened them with dire consequences and left that place.

8. According to Madan Lal, he and deceased Ankush, could anyhow or the other, managed to reach Brahmpukhar where their motor cycle was lying parked. The deceased drove the motorcycle to Shimla. He was made to alight from motorcycle by the deceased at Totu whereas he himself went to his house.

9. The statement of another Madan Lal of villalge Khanog Tehsil Rampur, Distt. Shimla has also been recorded under Section 164 Cr.P.C. According to him, it is on 23.5.2016, he called Madan Lal aforesaid to come to Solan and they met at bus stand. They came to Shimla and went to hotel where he used to work. Since Ankush, the owner of the hotel, told him to bring Madan Lal aforesaid to the hotel, therefore, he went to the hotel with said Madan Lal. The deceased and said Madan Lal thereafter went to Brahmpukhar in District Bilaspur. On the next date, he came to know that Ankush fell ill and was vomiting. Also that, he was taken to hospital. After some time, he was informed in the hotel that Ankush has expired.

10. It is seen that all the accused have been booked for the commission of the offence with the allegations, as detailed hereinabove. True it is that allegations against accused persons are that they both along with their co-accused had administered beatings to the deceased and also Madan Lal. The doctor, who conducted the post mortem of the dead body of deceased, has also noticed several injuries on his body, however, at this stage, it is difficult to believe that the occurrence has taken place in the manner as claimed by the police. It remained unexplained as to who was the Tantrik who had to participate in the process of currency notes generation through magic on behalf of deceased and Madan Lal and who was on behalf of complainant party. Why the deceased and Madan Lal were called by Suresh to Brahmpukhar and why the deceased and others went to Ghagas side and who were the occupants of the white coloured car remained unexplained. When it is only Madan Lal and Ankush, who alone had gone from Shimla to Brahmpukhar on being called there by aforesaid Suresh, where was the occasion to the accused persons to have quarreled with Madan Lal or the deceased at the pretext of bringing more persons with them.

11. Interestingly enough, the deceased had himself driven the motorcycle from Brahmpukhar up to Shimla, entirely a hilly terrain. Had the injuries were so grievous, because the deceased died on the following morning at 8:30 AM, how he could have driven the motorcycle to such a long distance and that too entirely a hilly terrain during night hours. The record reveals that the deceased Ankush reached in the house during night itself. Though, his mother, the complainant has not disclosed the exact time, however, he reached during night hours itself, may be early in the morning. In case, at 4:00 AM, they were at Ghagas and thereafter brought to Deoth near Brahmpukhar and if thrown there by the accused, it might have taken considerable time to reach at that place and then in injured condition up to a place at Brahmpukhar where their bike was lying and ultimately at Shimla. Therefore, they could have not reached at Shimla

(Totu) in the night and rather on the following morning. However, Ankush reached in his house at Totu during night itself and even died in the hospital at 8:30 AM.

12. The primary disease, as per the complainant, was vomiting. Whether he was vomiting on account of the beatings administered by the accused persons, is a fact about which, no opinion can be formed, even prima-facie, at this stage. Ankush, no doubt, has died in the hospital at 8:30 AM, however, in the given facts and circumstances of this case, it cannot be said at this stage that it is the accused-petitioners, who had administered beatings to him. Above all, his mother the complainant, had suspected the cause of the death of her son to be administering of poison to him by someone. Whether the Tantrik resorted to any process to generate currency notes, nothing has come on record in this regard nor any investigation qua this aspect of the matter seems to be conducted. Nothing tangible which could have given some clue qua the injuries on the person of deceased Ankush and the cause of vomiting has also come on record.

13. Therefore, in the facts and circumstances, this Court feels that further detention of the accused-petitioners would be warranted. They are local residents of district Bilaspur and there is no likelihood of their fleeing away from justice or not available at the time of trial. Otherwise also, suitable conditions can be imposed upon them while admitting them on bail.

14. In view of the reasons stated hereinabove, these applications succeed and the same are accordingly allowed. Consequently, both the accused-petitioners, who have been arrested in case FIR No. 132 of 2016 dated 25.5.2016 by the police of Police Station (West) Shimla, shall be released on bail subject to their furnishing personal bonds in the sum of Rs. 50,000/- each with one surety each in the like amount to the satisfaction of the learned trial Judge/Judicial Magistrate, Shimla. They shall further abide by the following conditions:

That they shall;

a. regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

b. not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

c. not make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Investigating Officer;

d. not leave the territory of India without the prior permission of the Court.

15. It is clarified that if the petitioners misuse their liberty or violate any of the conditions imposed upon them; the Investigating Agency shall be free to move this Court for cancellation of the bail.

16. The observations hereinabove, shall remain confined to the disposal of these petitions and shall have no bearing on the merits of the case. Both the applications stand disposed of.

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

Som Nath. …Petitioner.

Versus

Handoor Education Society. …Respondent.

CWP No. 2367/2008
Reserved on: 21.10.2016
Decided on: 25.10. 2016

Constitution of India, 1950- Article 226- Petitioner was appointed as driver- his services were terminated after 11 years – Industrial Tribunal dismissed the reference – held, that the petitioner had repeatedly mis-conducted himself - the High Court will not interfere except where the penalty shocks the conscience of the Court – the penalty of termination cannot be said to be disproportionate considering the repeated misconduct of the petitioner – the petitioner was working as driver in a school where strict discipline is to be maintained – encouraging the petitioner and reinstating him in service will amount to subversion of the discipline, which is impermissible – petition dismissed. (Para-6 to 13)

Cases referred:
Collector Singh vs L.M.L. Limited, Kanpur (2015) 2 SCC 410
S.R. Tewari vs. Union of India and another (2013) 6 SCC 602

For the Petitioner: Mr. Dinesh Bhanot, Advocate.
For the Respondent: Mr. Rahul Mahajan, Advocate.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

This writ petition is directed against the award passed by the Industrial Tribunal whereby the reference made by the appropriate Government came to be dismissed.

2. Brief facts of the case are that the petitioner was appointed as a Driver with the respondent in the year 1990. However, his services came to be terminated on 7.8.2001. The petitioner approached the Conciliation Officer and upon failure of conciliation, the matter was referred to the Industrial Tribunal, after reference in this regard was made by the appropriate Government. The Industrial Tribunal, on the basis of the pleadings and evidence led by the parties, dismissed the reference. It is this decision that has been assailed by way of present petition on the ground that the penalty of termination, that too, after the petitioner had put in 11 years of service, is totally disproportionate and nothing but an act of vindictiveness.

3. I have heard the learned counsel for the parties and have perused the material placed on record.

4. Learned counsel for the petitioner would vehemently contend that having put in 11 years of service, the respondent on lame excuse terminated his services, as he was Vice President of the Union and this act was not taken in good taste of the Management and it was only to curb his activities that the order of termination came to be passed. He would further argue that penalty of termination is totally disproportionate to the alleged misconduct and would rely upon the judgment of the Hon'ble Supreme Court in ***Collector Singh*** vs ***L.M.L. Limited, Kanpur*** (2015) 2 SCC 410, more particularly, the observation contained in paras 12 and 14, which reads as under:

> [12] Coming to the case at hand, we are of the view that the punishment of dismissal from service for the misconduct proved against the appellant is disproportionate to the charges. In Ram Kishan vs. Union of India & Ors., 1995 6 SCC 157, the delinquent employee was dismissed from service for using abusive language against superior officer.
>
> On the facts and circumstances of the case, this Court held that the punishment was harsh and disproportionate to the gravity of the charge imputed to the delinquent and modified the penalty to stoppage of two increments with cumulative effect. The Court held as under:-
>
> "It is next to be seen whether imposition of the punishment of dismissal from service is proportionate to the gravity of the imputation. When abusive

language is used by anybody against a superior, it must be understood in the environment in which that person is situated and the circumstances surrounding the event that led to the use of abusive language. No strait-jacket formula could be evolved in adjudging whether the abusive language in the given circumstances would warrant dismissal from service. Each case has to be considered on its own facts. What was the nature of the abusive language used by the appellant was not stated.

On the facts and circumstances of the case, we are of the considered view that the imposition of punishment of dismissal from service is harsh and disproportionate to the gravity of charge imputed to the delinquent constable. Accordingly, we set aside the dismissal order.

Reference may also be made to the decisions of this Court in Rama Kant Misra vs. State of Uttar Pradesh & Ors., 1982 3 SCC 346 and Ved Prakash Gupta vs. Delton Cable India(P) Ltd., 1984 2 SCC 569."

[15] Having said that the punishment of dismissal from service is harsh and disproportionate, this Court in ordinary course would either order reinstatement modifying the punishment or remit the matter back to the disciplinary authority for passing fresh order of punishment. But we are deliberately avoiding the ordinary course. We are doing so because nearly two decades have passed since his termination and over these years the appellant must have been gainfully employed elsewhere. Further, the appellant was born in the year 1955 and has almost reached the age of superannuation. In such circumstances, there cannot be any order of reinstatement and award of lump sum compensation would meet the ends of justice. Considering the length of service of the appellant in the establishment and his deprivation of the job over the years and his gainful employment over the years elsewhere, in our view, lump sum amount of compensation of Rs.5,00,000/- would meet the ends of justice in lieu of reinstatement, back wages, gratuity and in full quit of any other amount payable to the appellant."

5. On the other hand, Mr. Rahul Mahajan, learned counsel for the respondent, would argue that the petitioner was habitual offender and it was for his repeated misconduct that his services came to be terminated as he is not fit enough to be retained in service.

6. Having considered the rival contentions of the parties, I am of the considered view that no fault can be found with the award passed by the Industrial Tribunal. However, before adverting to the relative merits of the case, the judgment of the Hon'ble Supreme Court in Collector Singh's case (supra) needs to be appreciated. In that case the petitioner had thrown jute/cotton waste balls on his superior but realizing his mistake had apologized by submitting a written apology. However, this is not fact situation obtaining in the present case.

7. The misconduct attributed to the petitioner that eventually led to his termination was that on 9.5.2001, RW-3 Satish Kumar, Clerk, had asked the petitioner how he had permitted certain persons to unauthorisedly sit in the school bus, to which the petitioner objected and started abusing RW-3. When his behaviour was objected to, the petitioner stopped the bus and then gave physical beating to RW-3 compelling him to file a written complaint to the School Authority, as per Ex.PW-3/A.

8. A close scrutiny of the testimony of RW-4 Susheel Chand Sharma, Secretary of the respondent-school would reveal that the petitioner is incorrigible and has repeatedly misconducted himself, as would be evident from the perusal of para 11 of the award, which reads thus:

"11. RW-4 Shri Susheel Chand Sharma, Secretary Surindra Public School has stated that he is the Secretary of the school since 1984 and the petitioner was working as Driver and the conduct of the petitioner was not proper, who used to

take private persons in the school bus unauthorizedly. In 2000, a transport committee meeting was held in which the conduct of the petitioner was discussed as per minutes Ex.RW-4/A and the conduct of the petitioner was found unsatisfactory. The explanation was called vide letter Ex.RW-4/B but the petitioner has not given any reply. The management has given oral warning to the petitioner from time to time, who was asked to improve his conduct. In July, 2000, the petitioner took the school bus without permission and when enquired, the petitioner submitted the written reply as per Ex.RW-4/C. In July, 2001 a notice was issued to the petitioner for carrying unauthorized persons in the bus which is Ex.RW-4/D. In May, 2001 the conductor of the bus was on leave. They deputed their Clerk Satish Kumar to help the petitioner but the petitioner allowed certain unauthorized persons into the bus and when Mr. Satish Kumar objected to it, the petitioner abused and slapped him as per complaint Ex.RW-3/B and then the petitioner was placed under suspension vide letter Ex.RW-4/E and the charge sheet is Ex.RW-4/F and the reply of the petitioner is Ex.RW-4/G. The reply of the petitioner was not found justified and they started the enquiry, the petitioner participated in the enquiry along with Satish Inder Nath Banot. The enquiry officer found the petitioner guilty of the charges as per report Ex.RW-3/D and after enquiry second show cause notice was given which is Ex.RW-4/H and its reply is Ex.RW-4/J. The reply was not found satisfactory and the management came to the conclusion that the petitioner is not a fit person to be retained in the job as per order Ex.RW-4/K and then the petitioner was dismissed from service, who was given all benefits as per law and financial dues amounting to Rs. 1520/- was sent to the petitioner which was not accepted by the petitioner and then the petitioner raised the demand notice in which the respondent paid the amount as per letter Ex.RW-4/L. The petitioner is gainfully employed, who has his own vehicles."

9. It is more than settled that unless the punishment imposed by the Disciplinary Authority shakes the conscience of the Court/Tribunal and is so shockingly disproportionate, there is no scope for interference. It is equally settled that the judicial review in such cases is extremely limited and the Court cannot substitute its findings for the findings recorded by the Disciplinary Authority. The law on the subject has been succinctly dealt with by the Hon'ble Supreme Court in ***S.R. Tewari vs. Union of India and another*** (2013) 6 SCC 602, wherein it was observed as under:

> [19] In Commissioner of Income-tax, Bombay & Ors. v. Mahindra & Mahindra Ltd. & Ors., 1984 AIR(SC) 1182, this Court held that various parameters of the court's power of judicial review of administrative or executive action on which the court can interfere had been well settled and it would be redundant to recapitulate the whole catena of decisions. The Court further held:
>
> "It is a settled position that if the action or decision is perverse or is such that no reasonable body of persons, properly informed, could come to, or has been arrived at by the authority misdirecting itself by adopting a wrong approach, or has been influenced by irrelevant or extraneous matters the court would be justified in interfering with the same."
>
> [20] The court can exercise the power of judicial review if there is a manifest error in the exercise of power or the exercise of power is manifestly arbitrary or if the power is exercised on the basis of facts which do not exist and which are patently erroneous. Such exercise of power would stand vitiated. The court may be justified in exercising the power of judicial review if the impugned order suffers from mala fide, dishonest or corrupt practices, for the reason, that the order had been passed by the authority beyond the limits conferred upon the authority by the legislature. Thus, the court has to be satisfied that the order had been passed by the authority only on the grounds of illegal- ity, irrationality and

procedural impropriety before it interferes. The court does not have the expertise to correct the administrative decision. Therefore, the court itself may be fallible and interfering with the order of the authority may impose heavy administrative burden on the State or may lead to unbudgeted expenditure. (Vide: Tata Cellular v. Union of India, 1996 AIR(SC) 11; People s Union for Civil Liberties & Anr. v. Union of India & Ors., 2004 AIR(SC) 456; and State of N.C.T. of Delhi & Anr. v. Sanjeev alias Bittoo, 2005 AIR(SC) 2080).

[21] In Air India Ltd. v. Cochin International Airport Ltd. & Ors., 2000 AIR(SC) 801, this Court explaining the scope of judicial review held that the court must act with great caution and should exercise such power only in furtherance to public interest and not merely on the making out of a legal point. The court must always keep the larger public interest in mind in order to decide whether its intervention is called for or not.

[22] There may be a case where the holders of public offices have forgotten that the offices entrusted to them are a sacred trust and such offices are meant for use and not abuse. Where such trustees turn to dishonest means to gain an undue advantage, the scope of judicial review attains paramount importance. (Vide: Krishan Yadav & Anr. v. State of Haryana & Ors., 1994 AIR(SC) 2166).

[23] The court must keep in mind that judicial review is not akin to adjudication on merit by re-appreciating the evidence as an appellate authority. Thus, the court is devoid of the power to re-appreciate the evidence and come to its own conclusion on the proof of a particular charge, as the scope of judicial review is limited to the process of making the decision and not against the decision itself and in such a situation the court cannot arrive on its own independent finding. (Vide: High Court of Judicature at Bombay through its Registrar v. Udaysingh s/o Ganpatrao Naik Nimbalkar & Ors., 1997 AIR(SC) 2286; Government of Andhra Pradesh & Ors. v. Mohd. Nasrullah Khan, 2006 AIR(SC) 1214; and Union of India & Ors. v. Manab Kumar Guha, 2011 11 SCC 535.

[24] The question of interference on the quantum of punishment, has been considered by this Court in a catena of judgments, and it was held that if the punishment awarded is disproportionate to the gravity of the misconduct, it would be arbitrary, and thus, would violate the mandate of Article 14 of the Constitution. In Ranjit Thakur v. Union of India & Ors., 1987 AIR(SC) 2386, this Court observed as under:

"But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on the aspect, which is otherwise, within the exclusive province of the Court Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. In the present case, the punishment is so stringently disproportionate as to call for and justify interference. It cannot be allowed to remain uncorrected in judicial review." (See also: Union of India & Anr. v. G. Ganayutham (dead by Lrs.), 1997 AIR(SC) 3387; State of Uttar Pradesh & Ors. v. J.P. Saraswat, 2011 4 SCC 545; Chandra Kumar Chopra v. Union of India & Ors., 2012 6 SCC 369; and Registrar General, Patna High Court v. Pandey Gajendra Prasad & Ors., 2012 AIR(SC) 2319).

[25] In B.C. Chaturvedi v. Union of India & Ors., 1996 AIR(SC) 484, this Court after examining various its earlier decisions observed that in exercise of the

powers of judicial review, the court cannot "normally" substitute its own conclusion or penalty. However, if the penalty imposed by an authority "shocks the conscience" of the court, it would appropriately mould the relief either directing the authority to reconsider the penalty imposed and in exceptional and rare cases, in order to shorten the litigation, itself, impose appropriate punishment with cogent reasons in support thereof. While examining the issue of proportionality, court can also consider the circumstances under which the misconduct was committed. In a given case, the prevailing circumstances might have forced the accused to act in a certain manner though he had not intended to do so. The court may further examine the effect, if the order is set aside or substituted by some other penalty. However, it is only in very rare cases that the court might, to shorten the litigation, think of substituting its own view as to the quantum of punishment in place of punishment awarded by the Competent Authority.

[26] In V. Ramana v. A.P.S.R.T.C. & Ors., 2005 AIR(SC) 3417, this Court considered the scope of judicial review as to the quantum of punishment is permissible only if it is found that it is not commensurate with the gravity of the charges and if the court comes to the conclusion that the scope of judicial review as to the quantum of punishment is permissible only if it is found to be "shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards." In a normal course, if the punishment imposed is shockingly disproportionate, it would be appropriate to direct the Disciplinary Authority to reconsider the penalty imposed. However, in order to shorten the litigation, in exceptional and rare cases, the Court itself can impose appropriate punishment by recording cogent reasons in support thereof.

[27] In State of Meghalaya & Ors. v. Mecken Singh N. Marak, 2008 AIR(SC) 2862, this Court observed that a Court or a Tribunal while dealing with the quantum of punishment has to record reasons as to why it is felt that the punishment is not commensurate with the proved charges. In the matter of imposition of sentence, the scope for interference is very limited and restricted to exceptional cases. The punishment imposed by the disciplinary authority or the appellate authority unless shocks the conscience of the court, cannot be subjected to judicial review. (See also: Depot Manager, A.P.S.R.T.C. v. P. Jayaram Reddy, 2009 2 SCC 681.

[28] The role of the court in the matter of departmental proceedings is very limited and the court cannot substitute its own views or findings by replacing the findings arrived at by the authority on detailed appreciation of the evidence on record. In the matter of imposition of sentence, the scope for interference by the court is very limited and restricted to exceptional cases. The punishment imposed by the disciplinary authority or the appellate authority unless shocking to the conscience of the court, cannot be subjected to judicial review. The court has to record reasons as to why the punishment is disproportionate. Failure to give reasons amounts to denial of justice. The mere statement that it is disproportionate would not suffice. (Vide: Union of India & Ors. v. Bodupalli Gopalaswami, 2011 13 SCC 553; and Sanjay Kumar Singh v. Union of India & Ors., 2012 AIR(SC) 1783.

[29] In Union of India & Ors. v. R.K. Sharma, 2001 AIR(SC) 3053, this Court explained the observations made in Ranjit Thakur observing that if the charge was ridiculous, the punishment was harsh or strikingly disproportionate it would warrant interference. However, the said observations in Ranjit Thakur are not to be taken to mean that a court can, while exercising the power of judicial review, interfere with the punishment merely because it considers the punishment to be disproportionate. It was held that only in extreme cases, which

on their face, show perversity or irrationality, there could be judicial review and courts should not interfere merely on compassionate grounds.

[30] The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. (Vide: Rajinder Kumar Kindra v. Delhi Administration, 1984 AIR(SC) 1805; Kuldeep Singh v. Commissioner of Police & Ors., 1999 AIR(SC) 677; Gamini Bala Koteswara Rao & Ors. v. State of Andhra Pradesh thr. Secretary, 2010 AIR(SC) 589; and Babu v. State of Kerala, 2010 9 SCC 189."

10. Adverting to the facts, it would be noticed that earlier to the reference to the Labour Court, a departmental inquiry had been initiated against the petitioner wherein, the Inquiry Officer had found him guilty of the charges. Eventually, second show cause notice was issued to the petitioner, which was duly replied to, however, the reply was not found satisfactory and the respondent came to the conclusion that the petitioner was not a fit person to be retained in the job and accordingly his services were dispensed with and it was this order, which formed the subject matter of adjudication of the matter before the learned Tribunal.

11. Bearing in mind the exposition of law, as set out in S.R. Tiwari case (supra), coupled with repeated misconduct of the petitioner, it cannot be said that the punishment, as imposed upon the petitioner, is in any manner, disproportionate so as to shake the judicial conscience to the misconduct.

12. The petitioner had been working as a Driver in a School where strict discipline has to be maintained by all concerned including the Teachers, Staff, Class-IV employees including Drivers. No one can be permitted to vitiate the atmosphere of the School, that too, by rank insubordination. Encouraging the petitioner and reinstating him in service would virtually amount to subverting discipline, which in a given facts and circumstances of the case, is impermissible.

13. Resultantly, there is no merit in this writ petition and the same is accordingly dismissed. Pending application(s), if any, also stands disposed of, leaving the parties to bear their own costs.

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

Bego Devi .....Petitioner

Versus

State of HP and others .....Respondents.

CWP No. 1912 of 2016 alongwith connected matters.
Judgment reserved on 6.10.2016.
Date of decision: 26th October, 2016.

Industrial Disputes Act, 1947- Section 25- Petitioners were engaged on daily wages- their services were terminated without complying with the provisions of Industrial Disputes Act- a reference was sought but was declined on the ground of delay- held, that the petitioners sought

the reference after 8-12 years – the reference was sought only after the judgment of the High Court, which shows that petitioners are fence sitters – the delay takes away the equity and will not help a person who approaches the Court after the delay- writ petition dismissed.

(Para-5 to 23)

Cases referred:

Ajaib Singh versus Sirhind Cooperative Societies Ltd AIR 1999 SC 1351

Raghubir Singh versus General Manager, Haryana

Roadways, Hissar, 2014 AIR SCW 5515

Pratap Chand versus Himachal Pradesh State Electricity Board and others, being the lead case, decided on 30.12.2014

Prabhakar versus Joint Director Sericulture Department and another AIR 2016 SC 2984

R & M Trust versus Koramangala Residents Vigilance Group and others, (2005) 3 Supreme Court Cases 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

Amit Attri and others versus Anil Verma and others decided on 3rd December, 2014 and ***LPA 270 of 2010***

Delhi Administration and Ors. versus Kaushilya Thakur and Anr., AIR 2012 Supreme Court 2515

Bhem Sen Sharma versus HP University and another decided on 2nd May, 2016

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

Jai Dev Gupta versus State of Himachal Pradesh and another AIR 1998 SC 2819

Union of India and others versus Tarsem Singh (2008) 8 SCC 648,

Asger Ibrahim Amin versus Life Insurance Corporation of India, JT 2015 (9) SC 329

For the petitioner(s):	M/s Rahul Mahajan, Archana Dutt, Jaidev Thakur, Ranjan Sharma, Neel Kamal Sood, Kiran Negi,Naresh Verma, Arush Matlotia, Gaurav Sharma, Advocates, for the petitioners in the respective petitions.
For the respondent(s):	M/s Anup Rattan, Romesh Verma and Varun Chandel, Additional Advocate Generals, with Mr. Kush Sharma, Deputy Advocate General, for the respondents/State. Mr. Vivek Sharma, Advocate, for HPSEB.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Common questions of law and facts are involved in these writ petitions; hence they are clubbed and are taken up together for disposal by this common judgment.

2. It is averred in the writ petitions that the petitioners were engaged by the respondents on daily wage basis in the years 1990, 1992, 1993, 1994, 1995 1996, 1998,1999, 2000, and 2007 respectively as averred in paras 2 and 3 of the writ petitions. Their services were orally terminated by the respondents without complying with the provisions of Section 25-G and F of the Industrial Disputes Act, 1947 somewhere in the years 1990, 1992, 1993, 1995, 1997, 1998, 1999, 2001 to 2004, 2007, 2011 and 2012. At the time of termination, the petitioners were assured by the respondents that they would be re-employed as and when work is available, but

the Department is stated to have appointed the junior persons than the petitioners, who are still continuing but the petitioners have not been given appointment.

3. The petitioners raised Demand/industrial disputes against their termination somewhere in the years 2005 to 2012, in their respective petitions, before the Labour Commissioner for referring the matter to the State Industrial Tribunal-cum-Labour Court, for short 'the Industrial Tribunal', but the Labour Commissioner refused to refer the matter to the Industrial Tribunal for the reason that there was inordinate delay in raising the disputes.

4. The petitioners, by the medium of these writ petitions, have sought a writ of certiorari for quashing the orders made by the Labour Commissioner and a writ of mandamus directing the respondents to refer the disputes for adjudication to the Industrial Tribunal, on the grounds taken in the writ petitions.

5. As discussed hereinabove, petitioners have chosen to remain in deep slumber for not less than 8-12 years and have come out of deep slumber after more than 8 to 12 years. While going through the writ petitions, it appears that the petitioners remained contented with the orders of their termination and had not made any murmur for making reference. It is only after noticing the judgment of the apex Court in ***Ajaib Singh versus Sirhind Cooperative Societies Ltd*** reported in ***AIR 1999 SC 1351***, ***Raghubir Singh versus General Manager, Haryana Roadways, Hissar***, reported in ***2014 AIR SCW 5515***, which has been relied upon by this Court in a batch of writ petitions, CWP No. 9467 of 2014 titled as ***Pratap Chand versus Himachal Pradesh State Electricity Board*** and others, being the lead case, decided on 30.12.2014 and in so many cases, has set aside the orders and directed the Labour Commissioner to make reference to the Industrial Tribunal, reference of which have been made in all the writ petitions. Thus, one comes to an inescapable conclusion that these writ petitions are only because of the judgment made by the apex Court and the judgments made by this Court, is suggestive of the fact that the petitioners were fence-sitter and watching what will happen to other cases. The petitioners have not made any murmur till the judgments were made by the apex Court and by this Court in so many cases.

6. The apex Court in case titled ***Prabhakar versus Joint Director Sericulture Department and another*** reported in ***AIR 2016 SC 2984***, has held that if the dispute survives reference is to be made and if dispute does not survive, reference is not to be made. It is apt to reproduce paras 42 and 43 of the said judgment herein.

> *"42. To summarise, although there is no limitation prescribed under the Act for making a reference Under Section 10(1) of the Act, yet it is for the 'appropriate Government' to consider whether it is expedient or not to make the reference. The words 'at any time' used in Section 10(1) do not admit of any limitation in making an order of reference and laws of limitation are not applicable to proceedings under the Act. However, the policy of industrial adjudication is that very stale claims should not be generally encouraged or allowed inasmuch as unless there is satisfactory explanation for delay as, apart from the obvious risk to industrial peace from the entertainment of claims after long lapse of time, it is necessary also to take into account the unsettling effect which it is likely to have on the employers' financial arrangement and to avoid dislocation of an industry.*
>
> *43. On the application of the aforesaid principle to the facts of the present case, we are of the view that High Court correctly decided the issue holding that the reference at such a belated stage i.e. after fourteen years of termination without any justifiable explanation for delay, the appropriate Government had not jurisdiction or power to make reference of a non-existing dispute."*

7. In all these writ petitions, the petitioners have virtually accepted their termination orders and have not raised any finger for 8-10 years. Thus, the dispute in all these writ petitions does not survive.

8. The writ petitioners are also caught by delay and laches conduct, acquiescence and waiver.

9. 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.

10. 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?"*

11. 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."*

12. 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."*

13. 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."

14. 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 *Bhem Sen Sharma versus HP University and another* decided on 2nd May, 2016, has laid down the similar principles of law.

15. The Apex Court has considered the same issue and point in a case titled as **Delhi Administration and Ors. versus Kaushilya Thakur and Anr.,** reported in **AIR 2012 Supreme Court 2515.** It is apt to reproduce para 10 of the judgment herein:

"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 1000 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 of 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.

(ii) The claim of Ranjodh Kumar Thakur for allotment of land was clearly misconceived and was rightly rejected by the Joint Secretary (L&B), Delhi Administration on the ground that he was not the owner of land comprised in khasra No. 70/2. A bare reading of Sale Deed dated 12.7.1959 executed by Shri Hari Chand in favour of Ranjodh Kumar Thakur shows that the former had sold land forming part of khasra Nos. 166, 167 and 168 of village Kotla and not khasra No.70/2. This being the position, Ranjodh Kumar Thakur did not have the locus to seek allotment of land in terms of the policy framed by the Government of India. The payment of compensation to Ranjodh Kumar Thakur in terms of the award passed by the Land Acquisition Collector and the enhanced compensation determined by the Reference Court cannot lead to an inference that he was the owner of land forming part of Khasra No.70/2. In any case, before issuing a mandamus for allotment of 1000 square yards plot to the writ petitioner, the High

Court should have called upon him to produce some tangible evidence to prove his ownership of land forming part of Khasra No.70/2. Unfortunately, the learned Single Judge and the Division Bench of the High Court did not pay serious attention to the stark reality that Ranjodh Kumar Thakur was not the owner of land mentioned in the application filed by him for allotment of 1000 square yards land."

16. The Apex Court in a case titled as **Chennai Metropolitan Water Supply and Sewerage Board and others versus T.T. Murali Babu,** reported in **(2014) 4 Supreme Court Cases 108,** has taken into consideration all the judgments and the development of law and held that delay cannot be brushed aside without any reason. It is apt to reproduce paras 13 to 17 of the judgment herein:

"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. 335-36, 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."

17. The writ petition can be filed within three years from the date; the cause of action has accrued. If it is not filed within the time the petition is to be dismissed as time barred.

18. The question arose for the first time before the apex Court in case ***Jai Dev Gupta* versus *State of Himachal Pradesh and another*** reported in ***AIR 1998 SC 2819,*** whether the arrears can be restricted only for three years prior to the filing of the writ petition, in terms of the mandate of Limitation Act. The question was answered in affirmative by the apex Court. It is apposite to reproduce paras 2 and 3 of the said judgment herein.

> *"2. Learned Counsel appearing for the appellant submitted that before approaching the Tribunal the appellant was making number of representations to the appropriate authorities claiming the relief and that was the reason for not approaching the Tribunal earlier than May, 1989. We do not think that such an excuse can be advanced to claim the difference in backwages from the year 1971. In Administrator of Union Territory of Daman and Diu v. R. D. Valand, 1995 Supp (4) SCC 593, this Court while setting aside an order of Central Administrative Tribunal has observed that the Tribunal was not justified in putting the clock back by more than 15 years*

and the Tribunal fell into patent error in brushing aside the question of limitation by observing that the respondent has been making representations from time to time and as such the limitation would not come in his way. In the light of the above decision, we cannot entertain the arguments of the learned Counsel for the appellant that the difference in backwages should be paid right from the year 1971. At the same time we do not think that the Tribunal was right in invoking Section 21 of the Administrative Tribunals Act for restricting the difference in backwages by one year.

3. In the facts and circumstances of the case, we hold that the appellant is entitled to get the difference in backwages from May, 1986. The appeal is disposed of accordingly with no order as to costs." [emphasis supplied]

19. The apex Court in another judgment delivered in case ***Union of India and others*** **versus** ***Tarsem Singh*** reported in ***(2008) 8 SCC 648,*** has laid down the same propositions of law and held that arrears should be restricted to three years prior to filing of writ petition. It is apt to reproduce paras 4 to 8 of the said judgment herein.

"4. The principles underlying continuing wrongs and recurring/ successive wrongs have been applied to service law disputes. A continuing wrong refers to a single wrongful act which causes a continuing injury. Recurring/successive wrongs are those which occur periodically, each wrong giving rise to a distinct and separate cause of action. This Court in Balakrishna S.P. Waghmare v. Shree Dhyaneshwar Maharaj Sansthan,, explained the concept of continuing wrong (in the context of Section 23 of Limitation Act, 1908 corresponding to section 22 of Limitation Act, 1963) :

It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury.

5. In M.R. Gupta v. Union of India,, the appellant approached the High Court in 1989 with a grievance in regard to his initial pay fixation with effect from 1.8.1978. The claim was rejected as it was raised after 11 years. This Court applied the principles of continuing wrong and recurring wrongs and reversed the decision. This Court held :

"5……The appellant s grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant s claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant s claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc., would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1.8.1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation, the application cannot be treated as time barred....

6. In Shiv Dass v. Union of India, 2007 9 SCC 274, this Court held:

"8.....The High Court does not ordinarily permit a belated resort to the extraordinary remedy because it is likely to cause confusion and public inconvenience and bring in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third party rights in the meantime is an important factor which also weighs with the High Court in deciding whether or not to exercise such jurisdiction.

10.In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition.... If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years.

7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the re-opening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or re-fixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. In so far as the consequential relief of recovery of arrears for a past period, the principles relating to recurring/successive wrongs will apply. As a consequence, High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition.

8. In this case, the delay of 16 years would affect the consequential claim for arrears. The High Court was not justified in directing payment of arrears relating to 16 years, and that too with interest. It ought to have restricted the relief relating to arrears to only three years before the date of writ petition, or from the date of demand to date of writ petition, whichever was lesser. It ought not to have granted interest on arrears in such circumstances."

20. The apex Court in a latest judgment delivered in case ***Asger Ibrahim Amin*** versus ***Life Insurance Corporation of India*** reported in ***JT 2015 (9) SC 329*** has also laid down the same principles of law. It is profitable to reproduce paras 4, 4.1 and 16 of the said judgment herein.

"4. As regards the issue of delay in matters pertaining to claims of pension, it has already been opined by this Court in Union of India v. Tarsem Singh, 2008 8 SCC 648 that in cases of continuing or successive wrongs, delay and laches or limitation will not thwart the claim so long as the claim, if allowed, does not have any adverse repercussions on the settled third-party rights. This Court held:

7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a

service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the reopening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition.

[emphasis is ours]

4.1 We respectfully concur with these observations which if extrapolated or applied to the factual matrix of the present case would have the effect of restricting the claim for pension, if otherwise sustainable in law, to three years previous to when it was raised in a judicial forum. Such claims recur month to month and would not stand extinguished on the application of the laws of prescription, merely because the legal remedy pertaining to the time barred part of it has become unavailable. This is too well entrenched in our jurisprudence, foreclosing any fresh consideration.

5 to 15……. …. …… ….

16. We thus hold that the termination of services of the Appellant, in essence, was voluntary retirement within the ambit of Rule 31 of the Pension Rules of 1995. The Appellant is entitled for pension, provided he fulfils the condition of refunding of the entire amount of the Corporation's contribution to the Provident Fund along with interest accrued thereon as provided in the Pension Rules of 1995. Considering the huge delay, not explained by proper reasons, on part of the Appellant in approaching the Court, we limit the benefits of arrears of pension payable to the Appellant to three years preceding the date of the petition filed before the High Court. These arrears of pension should be paid to the Appellant in one instalment within four weeks from the date of refund of the entire amount payable by the Appellant in accordance of the Pension Rules of 1995. In the alternative, the Appellant may opt to get the amount of refund adjusted against the arrears of pension. In the latter case, if the amount of arrear is more than the amount of refund required, then the remaining amount shall be paid within two weeks from the date of such request made by the Appellant. However, if the amount of arrears is less than the amount of refund required, then the pension shall be payable on monthly basis after the date on which the amount of refund is entirely adjusted."

[Emphasis supplied]

21. The learned counsel for the petitioners argued that the Government has made references in the cases of similarly situated persons without any objection regarding the delay and have also relied on the judgment delivered by the apex Court in *Civil Appeal No. 9714 of 2016* titled *Basant Singh versus State of H.P. and others* alongwith connected matters. The argument though attractive is devoid of any force for the following reasons.

22. The petitioners have made applications for making references after a considerable delay, after noticing the judgment made by the apex Court read with the judgments made by this Court, as discussed in para 5 supra. It appears that the petitioners were fencers, as discussed hereinabove and made an attempt for making references. The State has made the references perhaps in terms of the judgments made by this Court. The latest judgment was not in

place at that time. Viewed thus, it cannot be said that the petitioners are similarly situated persons.

23. Having said so, the writ petitions are dismissed alongwith pending applications, if any, as indicated hereinabove.

****

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

Hari Singh son of Munshi Ram. ..Revisionist/Tenant.

Vs.

Sh. Devender Pratap son of Karam Singh. …Non-revisionist/Landlord.

Civil Revision No. 8 of 2016.
Order reserved on: 4.8.2016.
Date of Order: October 26, 2016.

H.P. Urban Rent Control Act, 1987- Section 14- Landlord sought eviction of the tenant on the ground of bonafide requirement for personal use – Rent Controller allowed the eviction petition- an appeal was filed, which was dismissed- held in revision that there was no provision for eviction of the tenant in the original Act, however, Supreme Court has applied the provision of amended Act to the pending cases – therefore, this amendment will be applicable to the present case as well- personal requirement includes the requirement of family as well - the choice of accommodation should be left to the landlord as he is the best person to see his needs – brother of the landlord is not a necessary party- petition dismissed. (Para-12 to 18)

Cases referred:
Hari Dass Sharma Vs. Vikash Sood and others, 2013 (5) SCC 243
M.L.Prabhakar Vs. Rajiv Singal, 2001 (2) SCC 355
Siddalingamma and another Vs. Mamtha Shenoy, 2001 (8) SCC 561
Shiv Sarup Gupta Vs. Dr. Mahesh Chand Gupta, 1999 (6) SCC 222
Joginder Pal Vs. Naval Kishore Behal, 2002 (5) SCC 397
Akhileshwar Kumar and others Vs. Mustaqim and others, 2003 (1) SCC 462
Savitri Vs. Sachidanand, 2002 (8) SCC 765
Joginder Pal Vs. Naval Kishore Behal, 2002 (5) SCC 397
Dwarkaprasad Vs. Niranjan and another, 2003 (4) SCC 549
Kailash Chand and others Vs. Dharam Dass, 2005 (5) SCC 375
Masjid Kacha Tank Nahan Vs. Tuffail Mohammed, AIR 1991 SC 455
P.Udayani Devi Vs. V.V.Rajeshwara Prasad Rao and another, AIR 1995 SC 1357
Gurdial Singh and others Vs. Raj Kumar Aneja and others, 2002 SC 1004

For revisionist: Mr.G.R.Palsra, Advocate.
For non-revisionist: Mr. Sanjeev Bhushan, Sr. Advocate with Mr.Vinod Thakur, Advocate.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present civil revision petition is filed under Section 24(5) of H.P Urban Rent Control Act 1987 against the order passed by learned Rent Controller and affirmed by learned Appellate Authority whereby learned Rent Controller passed eviction order against tenant and directed the tenant to hand over and deliver the vacant possession of demised premises to landlord within a period of two months w.e.f. 28.12.2013.

BRIEF FACTS OF THE CASE:

2. Devender Partap landlord filed eviction petition under section 14 of HP Urban Rent Control Act 1987 pleaded therein that premises is non-residential and monthly rent of the premises is Rs.1800/- (One thousand eight hundred) per month. It is pleaded that premises was constructed in the year 1990. It is further pleaded that electricity and water facilities provided in the premises. It is further pleaded that premises is situated in ward No.5 Municipal Council, Sundernagar District Mandi HP. It is further pleaded that premises was let out to tenant in the year 1995. It is further pleaded that landlord sought voluntarily retirement for starting his own business of hosiery and also to settle his son Bikram Pratap Singh in the business. It is further pleaded that there is no other shop available to landlord. Prayer for acceptance of eviction petition sought.

3. Per contra response filed on behalf of tenant pleaded therein that present petition is filed just to harass the tenant. It is further pleaded that premises was constructed prior to 1990. It is further pleaded that premises is in possession of the tenant since 1989. It is further pleaded that landlord has two other shops in the same building. It is further pleaded that son of landlord is a trained Pharmacist and he is serving in a reputed concern and is getting handsome salary. It is pleaded that brothers of landlord is also joint co-owner of premises. Prayer for dismissal of eviction petition sought.

4. As per pleadings of parties learned Rent Controller framed following issues on dated 12.10.2011.

1. Whether premises is required by landlord for his bonafide personal use as alleged?. ...OPP.

2. Whether landlord is entitled for eviction of tenant from premises as claimed?. ...OPP.

3. Whether petition is not maintainable? ...OPR.

4. Relief.

5. Learned Rent Controller decided issues No. 1 and 2 in affirmative and decided issue No.3 in negative. Learned Rent Controller passed eviction order against tenant on dated 28.12.2013.

6. Feeling aggrieved against the eviction order tenant filed appeal before learned Appellate Authority Mandi camp at Sundernagar and learned Appellate Authority affirmed the order of learned Rent Controller and dismissed the appeal on dated 28.11.2015.

7. Feeling aggrieved against the order of learned Rent Controller and learned Ist Appellate Authority tenant filed present revision petition.

8. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionist and also perused entire records carefully.

9. Following points arise for determination in present revision petition:

(1) Whether revision petition filed by tenant is is liable to be accepted as mentioned in memorandum of grounds of revision petition?.

(2) Relief.

10. **Findings upon Point No.1 with reasons.**

10.1 AW1 Devender Partap landlord has filed affidavit Ext AW1/A in examination in chief. There is recital in affidavit that AW1 was posted as Superintendent in H.P. University Shimla and sought voluntarily retirement to start his business of hosiery. There is recital in affidavit that son of AW1 is unemployed and presently he is working at Baddi and AW1 also wants to settle his son in his business. There is further recital in affidavit that AW1 required the premises bonafidely. There is further recital in affidavit that other two shops have been rented. One shop rented to Kamal Kishore in the year 2003 and second shop was rented to M/s Laxmi

Medical Store in the year 2000. There is recital in affidavit that tenant is running sweet shop. There is further recital in affidavit that tenant in the year 1995 assured that he would vacate the shop within five years. There is further recital in affidavit that AW1 has arranged Rs.400000/- (Four lacs) for business purpose. In cross-examination AW1 has admitted that premises is comprised of two stories and AW1 has admitted that 5/6 rooms are situated in the ground floor and 5/6 rooms are situated in the upper floor. AW1 has admitted that he is residing in the upper floor of the premises. AW1 has admitted that he did not file any eviction petition against other tenants. AW1 has admitted that his son is serving at Baddi.

10.2. AW2 Karan Shamsher Singh also filed affidavit Ext AW2/A in examination-in-chief. There is recital in the affidavit that AW2 has seen premises which is rented out by Devender Partap AW1 to Hari Singh tenant. There is further recital in affidavit that AW1 was posted as Superintendent in H.P. University Shimla and sought voluntarily retirement to start his business of hosiery. There is further recital in affidavit that son of AW1 Vikram Partap Singh is unemployed and is working as temporary worker at Baddi and AW1 intends to settle his son in business. There is further recital in affidavit that AW1 bonafide required the premises in dispute. There is further recital in affidavit that other two shops have been rented to different tenants namely Kamal Kishore and M/s Laxmi Medical store in the year 2003 and 2000. There is further recital in affidavit that in the premises in dispute tenant is running sweet shop. There is further recital in affidavit that in the month of September 2010 tenant was requested by AW1 to evict the premises. There is further recital in affidavit that premises was rented out in the year 1995 and tenant has assured that he would vacate the premises within five years. There is further recital in affidavit that AW1 has arranged sum of Rs.400000/- (Four lacs) for business purpose. AW2 has admitted in cross examination that AW1 is his class fellow. AW2 has admitted that son of AW1 is working at Baddi. AW2 has denied suggestion that AW1 is not in position to run business. He has denied suggestion that salary of the son of AW1 is rupees forty to fifty thousand per month.

10.3. AW3 Jitender Thakur has filed affidavit Ext AW3/A in examination-in-chief. There is recital in affidavit that premises was rented out by AW1 to tenant. There is further recital in affidavit that AW1 was posted as Superintendent in H.P.University Shimla and sought voluntarily retirement to start business of hosiery. There is further recital in affidavit that son of AW1 is unemployed and working as temporary worker at Baddi. There is further recital in affidavit that AW1 wants to settle his son in business and bonafidely required premises. There is further recital in affidavit that two other shops were rented to Kamal Kishore and M/s Laxmi Medical Store in the year 2003 and 2000. There is further recital in affidavit that in the month of September 2010 AW1 requested tenant to vacate the premises but tenant declined. There is further recital in affidavit that premises was rented out in the year 1995 and tenant has assured that he would vacate the premises within five years. There is further recital in affidavit that landlord has arranged a sum of Rs.400000/- (Four lacs) for business purpose. In cross examination AW3 Jitender Thakur has admitted that AW1 is his relative. AW3 has admitted that premises is comprised of two stories. AW3 has admitted that in the ground floor shops have been rented out and in the upper floor AW1 is residing with his family members. AW3 has admitted that son of AW1 has qualified B-Pharmacy course and is posted in private company. AW3 has denied suggestion that AW1 intends to give premises to other tenant in order to receive enhanced rent.

10.4. AW4 P.S.Sen Advocate has stated that notice Ext AW4/A was sent at the instance of landlord to tenant through registered post. He has stated that postal receipt is Ext AW4/B and acknowledgment receipt is Ext AW4/C and reply is Ext AW4/D.

10.5 RW1 Hari Singh tenant has filed affidavit Ext RW1/A in examination-in-chief. There is recital in affidavit that RW1 is tenant of shop premises. There is recital in affidavit that premises was rented out in the year 1989 for commercial purpose of running a sweet shop. There is further recital in affidavit that rent of the shop was fixed at Rs.600/- (Six hundred) per month in the year 1989 but with the passage of time rent rate was enhanced from time to time in four times and now the monthly rent of the premises is Rs.1800/- (One thousand eight hundred) per

month. There is further recital in affidavit that tenant is paying rent regularly to landlord. There is further recital in affidavit that landlord has two other additional shops in the same building adjoining to the shop of tenant which have been rented out to two different tenants. There is further recital in affidavit that one shop was rented out to M/s Laxmi Medical Store in the year 1995 and another shop was rented out to Kamal Kishore in the year 2007 for running general store. There is further recital in affidavit that Kamal Kishore expired in the month of November 2011 and after his death his shop rented out to his son Sonu through fresh agreement of tenancy for running business of general store. There is further recital in affidavit that landlord has retired from government service in the year 2002 and now landlord is getting handsome pension from State government. There is further recital in affidavit that son of landlord is trained B Pharmacist and is employed in a reputed company at Baddi and is getting handsome salary. There is further recital in affidavit that premises is not required bonafidely by landlord. There is further recital in affidavit that present petition is filed just to harass the tenant in illegal manner. In cross examination tenant has denied suggestion that premises was given on rent for five years. Tenant has admitted that he received notice from landlord and he also filed response. Tenant has denied suggestion that landlord is in urgent bonafide need of premises. Tenant has denied suggestion that he has not paid bills of water and electricity charges.

10.6 RW2 Narain Singh has filed affidavit Ext RW2/A in examination-in-chief. There is further recital in affidavit that parties are known to RW2. There is further recital in affidavit that Hari Singh is the tenant of shop premises. There is further recital in affidavit that shop was rented out in the year 1989 for commercial purpose for running a sweet shop. There is further recital in affidavit that rent of shop was Rs.600/- (Six hundred) per month in the year 1989 and thereafter with the passage of time rent rate was enhanced from time to time in four times and now as of today the monthly rent of shop is Rs.1800/- (One thousand eight hundred). There is further recital in affidavit that landlord is also owner of other two shops in the same building adjoining to the shop of tenant which have been rented out to two other tenants namely Kamal Kishore and M/s Laxmi Medical Store. There is further recital in affidavit that one shop was rented out to Kamal Kishore in the year 2007 and another shop was rented out to M/s Laxmi Medical Store in the year 1995. There is further recital in affidavit that Kamal Kishore died in the month of November 2011 and after the death of Kamal Kishore the shop was rented out to his son through fresh agreement of tenancy for running business of general store. There is further recital in affidavit that landlord has retired from government service in the year 2002 and now he is getting handsome pension from State government. There is further recital in affidavit that wife of landlord is also retired as C.H.T from government service and she is also getting handsome pension from government. There is further recital in affidavit that son of landlord is trained B Pharmacist and is employed in reputed company at Baddi and is getting handsome salary. In cross examination RW2 Narain Singh has denied suggestion that premises was given for five years only. RW2 has admitted that son of landlord has qualified B Pharmacist course and he is working at Baddi. He has denied suggestion that no shop of landlord remained vacant at any point of time.

11. Following documentaries evidence filed by parties. (1) Ext AW4/A is legal notice given by landlord Devender Partap to tenant Hari Singh. (2) Ext AW4/B is postal receipt. (3) Ext AW4/C is postal acknowledgement. (4) Ext AW4/D is reply to notice given by tenant.

12. Submission of learned Advocate appearing on behalf of tenant that when eviction petition was filed by landlord in the year 2011 at that time ground for eviction of tenant from non-residential premises on ground of personal requirement was not available to landlord and amendment in HP Urban Rent Control Act 1987 came into effect in the year 2012 and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. It is true that in the original act there was no ground for eviction of tenant on the ground of personal requirement relating to non-residential premises. H.P Urban Rent Control (Amendment) Act 2009 was assented by President of India on 28.2.2012 and was published in H.P Rajpatra on 16.3.2012 and ground for eviction of tenant for personal requirement of landlord was also added in commercial premises. It is well settled law that when legislator enacts statute

it creates rights and obligations and its operation is always prospective unless expressly its operation is made retrospective in operation. It is also well settled law that when Apex Court gives decision then Apex Court always declares pre-existing rights and obligations of parties. It is also well settled law that judicial decision of Apex Court qua case of similar nature is operative upon pending cases as per Article 141 of Constitution of India. In case reported in 2013 (5) SCC 243 title Hari Dass Sharma Vs. Vikash Sood and others Hon'ble Apex Court of India applied provisions of Amended Act 2009 upon pending cases also. It is held that in view of case law cited supra provision of H.P Urban Rent Control (Amendment) Act 2009 will also apply to pending cases under H.P Urban Rent Control Act 1987.

13. Submission of learned Advocate appearing on behalf of tenant that landlord has not filed present eviction petition with clean hands and concealed true facts from Court and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Tenant did not adduce any positive evidence on record that landlord has concealed true facts from court. Plea of tenant is rejected on the concept of ipse dixit (An assertion made without proof).

14. Submission of learned Advocate appearing on behalf of tenant that landlord retired in the year 2002 whereas present eviction petition was filed by landlord on 29.4.2011 after gap of long period and this revision petition be allowed on this ground is rejected being devoid of any force for reasons hereinafter mentioned. Ground for eviction of tenant for bonafide personal use in commercial premises accrued to landlord after amendment in H.P Urban Rent Control Act 1987 w.e.f. 16.3.2012 vide Act No.8 of 2012. It is held that it is not expedient in the ends of justice to allow revision petition on this ground.

15. Submission of learned Advocate appearing on behalf of tenant that landlord and his wife are getting handsome pension and their son is serving in reputed company at Baddi and on this ground revision petition be allowed is also rejected being devoid of any force for reasons hereinafter mentioned. It is well settled law that personal requirement of landlord includes requirement of family members also. It is well settled law that tenant cannot dictate terms to landlord. In the present case it is proved on record that landlord has sought voluntarily retirement for running business in the premises. It is held that personal requirement of landlord is bonafide and genuine. See 2001 (2) SCC 355 title M.L.Prabhakar Vs. Rajiv Singal. See 2001 (8) SCC 561 title Siddalingamma and another Vs. Mamtha Shenoy. See 1999 (6) SCC 222 title Shiv Sarup Gupta Vs. Dr. Mahesh Chand Gupta. See 2002 (5) SCC 397 title Joginder Pal Vs. Naval Kishore Behal.

16. Submission of learned Advocate appearing on behalf of tenant that there are other tenants also and landlord did not file any eviction petition against other co-tenants and petition is bad for non-joinder of co-tenant is also rejected being devoid of any force for reasons hereinafter mentioned. It is well settled law that choice of accommodation should be left to subjective choice of landlord only. It is well settled law that landlord is best judge of his need. See 2003 (1) SCC 462 title Akhileshwar Kumar and others Vs. Mustaqim and others. See 2002 (8) SCC 765 title Savitri Vs. Sachidanand. See 2002 (5) SCC 397 title Joginder Pal Vs. Naval Kishore Behal. See 2003 (4) SCC 549 title Dwarkaprasad Vs. Niranjan and another. See 2005 (5) SCC 375 Kailash Chand and others Vs. Dharam Dass.

17. Submission of learned Advocate appearing on behalf of tenant that learned Rent Controller dismissed application of tenant filed under order XXI rule 26 CPC for stay of execution proceedings in execution petition and on this ground revision petition be allowed is also rejected being devoid of any force for reasons hereinafter mentioned. Landlord filed execution petition and in execution petition tenant filed application under Order XXI Rule 26 CPC for stay of execution proceedings. Learned Advocates of both parties admitted before learned Executing Court that appeal filed by tenant against eviction order dismissed on 2.1.2016 by learned Appellate Authority. Learned Executing Court held that execution petition is pending before court since 19.5.2015 and eviction order was passed by learned Rent Controller on 28.12.2013. Learned executing court held that thereafter tenant filed revision petition before High Court of

HP and which remained pending before Hon'ble High Court of HP almost for two years and thereafter revision petition was withdrawn from High Court of HP by tenant on 8.5.2015 and thereafter appeal was filed before learned First Appellate Authority in the year 2015 by tenant and said appeal was dismissed. Learned executing court held that there would be no purpose for delaying the execution proceedings. No stay order of execution proceedings produced before executing court on dated 6.1.2016. It is well settled law that in revision petition High Court should not reverse findings unless findings are perverse. See AIR 1991 SC 455 title Masjid Kacha Tank Nahan Vs. Tuffail Mohammed. See AIR 1995 SC 1357 title P.Udayani Devi Vs. V.V.Rajeshwara Prasad Rao and another. See 2002 SC 1004 title Gurdial Singh and others Vs. Raj Kumar Aneja and others.

18. Submission of learned Advocate appearing on behalf of tenant that brother of landlord is also joint co-owner of demised premises and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Tenant in reply admitted tenancy of landlord in premises at the rate of Rs.1800/- (One thousand eight hundred). Landlord did not seek any relief against his brother in eviction petition. Facts admitted need not to be proved under section 58 of Indian Evidence Act 1872. It is held that brother of landlord is not necessary party in eviction petition. In view of above stated facts and case law cited supra it is held that order of learned Rent Controller and order of learned First Appellate Court are not perverse and are not illegal. In view of above stated facts point No.1 is answered in negative.

Point No.2 (Relief).

19. In view of findings on point No.1 revision petition is dismissed. File of learned Rent Controller and learned First Appellate Authority along with certify copy of order be sent back forthwith. Parties are left to bear their own costs. Revision petition is disposed of. Pending application(s) if any also disposed of.

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

Jagat Ram son of Shri Bhagat Ram ....Applicant/Appellant/defendant

Versus

Pran Nath son of Shri Durga Prasad & others ....Non-applicants/respondents/plaintiffs

CMP No. 5166 of 2016 in RSA No. 219 of 2014
Order Reserved in CMP on 22nd October 2016
Date of Order 26th October 2016

Code of Civil Procedure, 1908- Section 151- High Court passed an order directing the parties to maintain status quo till the disposal of RSA – an application was filed for modification of the order and to carry out the construction- held, that no map of the proposed construction was filed and it is not expedient to permit the parties to carry out the construction- revenue record does not show any structure over the suit land – tenancy of the applicant is in dispute – therefore, it will not be expedient to modify the interim order – application dismissed. (Para-11 to 13)

Cases referred:

Beni Madhav Singh vs. Ram Naresh, (1998)8 SCC 751
State of Rajasthan vs. Harphool Singh (dead) through his LRs., (2000)5 SCC 652
Sucha Singh vs. Nand Singh, 1976 PLJ 183
Gram Panchayat Dari vs. State of Punjab 1965 PLJ 55

For the Applicant: Mr. Janesh Gupta Advocate
For the Non-applicants: Mr. V.B. Verma Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present application is filed under Section 151 of Code of Civil Procedure 1908 for modification of status quo order dated 7.8.2014 passed in RSA No. 219 of 2014 with prayer that applicant be permitted to carry out necessary repairs of existing structure and partially be allowed to extend the house of applicant over vacant land of suit property.

Brief facts of the case

2. Pran Nath and others sons of deceased Durga Parshad filed suit for possession of land entered in Khata No. 225, Khatauni No. 705 Khasra No. 2360 measuring 0-01-43 hectares as per jamabandi for the year 1992-93 situated in Mohal Ghuggar Tehsil Palampur District Kangra H.P. It is pleaded that plaintiffs are co-owners of suit land. It is pleaded that half share of suit land was purchased by father of plaintiffs in the year 1974-75 in auction which was conducted by learned Civil Judge 1st Class Kangra in execution of decree. It is pleaded that suit land remained recorded in revenue record in self ownership and possession of plaintiffs and other co-owners till 1988-89. It is pleaded that plaintiffs are in Army and defendant with the connivance of revenue staff recorded his possession as non-occupancy tenant over the suit land in an illegal manner. It is pleaded that defendant was not inducted as tenant by plaintiffs at any point of time. It is pleaded that no rent was paid by defendant to plaintiffs at any point of time. It is pleaded that possession of defendant is illegal and prayer for decree of possession sought in favour of plaintiffs and against the defendant.

3. Per contra written statement filed on behalf of defendant pleaded therein that plaintiffs are estopped by their act and conduct to file present suit and relationship of tenants and landlord exists between the parties and further pleaded that present suit is not legally and factually maintainable and plaintiffs have no cause of action to file the present suit. Prayer for dismissal of suit sought.

4. Learned Trial Court framed following issues as per pleading of parties on 7.6.1999:-

1. Whether plaintiffs are entitled for the decree of possession as prayed for? .....OPP

2. Whether plaintiffs estopped by their act and conduct to file this suit? .....OPD

3. Whether plaintiffs and defendant are landlord and tenant and this Court has no jurisdiction to try this suit? .....OPD

4. Whether suit of plaintiff is not maintainable as prayed for? .....OPD

5. Whether plaintiffs have no cause of action to file the present suit? .....OPD

6. Relief.

5. Learned Trial Court decided issue No.1 in affirmative and issues Nos. 2 to 5 in negative. Learned Trial Court decreed the suit of plaintiffs partly and passed decree of possession qua share of plaintiffs duly recorded in revenue record.

6. Feeling aggrieved against the judgment and decree passed by learned Trial Court Shri Jagat Ram defendant filed appeal under Section 96 of CPC and same was disposed of by learned Additional District Judge-III Kangra at Dharamshala camp at Palampur on 21.2.2014. Learned first Appellate Court affirmed the judgment and decree passed by learned Trial Court and dismissed the appeal filed by Jagat Ram.

7. Feeling aggrieved against the judgment and decree passed by learned first Appellate Court Jagat Ram filed RSA No. 219 of 2014 title Jagat Ram vs. Pran Nath and others in Hon'ble High Court of H.P.

8. High Court of H.P. on dated 7.8.2014 directed both parties to maintain status quo as of today qua nature and possession of suit land till final disposal of RSA. Shri Jagat Ram has filed present application for modification of interim order dated 7.8.2014 passed by High Court of H.P. in RSA No. 219 of 2014.

9. Court heard learned Advocate appearing on behalf of applicant and learned Advocate appearing on behalf of non-applicants and Court also perused entire record carefuly.

10. Following points arise for determination in civil revision petition:-

Point No.1 Whether application filed under Section 151 CPC by applicant is liable to be accepted as mentioned in memorandum of grounds of application?

Point No.2 Relief.

Findings upon point No.1 with reasons

11. Submission of learned Advocate appearing on behalf of applicant that applicant be permitted to carry out necessary repair of structure situated over the suit land is rejected being devoid of any force for the reasons hereinafter mentioned. Applicant did not file any site plan of structure situated over suit land and applicant also did not file any site plan of proposed repair of structure situated over the suit land. It is not expedient in the ends of justice to allow the applicant to repair the structure in absence of any site plan because as per jamabandi for the year 1992-93 Ext.P5 placed on record in ownership column names of Pran Nath, Prem Ballabh, Anil Kumar and Paras Nath sons of Durga Dass have been recorded as owners of half share of suit property and name of Rattan Chand son of Hari Ram has been recorded as owner of half share of suit property in ownership column. In possession column name of Jagat Ram applicant recorded as non-occupancy tenant. Nature of Khasra No. 2360 has been recorded as Kuhl Awal (Irrigated land). There is no entry of structure in the name of Jagat Ram in record of right Ext.P5 placed on record. Record of right Ext.P5 jamabandi for the year 1992-93 has been prepared by public official in discharge of official duty and is relevant fact under Section 35 of Indian Evidence Act 1872. In view of the fact that there is no entry of structure over suit land as per jamabandi Ext.P5 placed on record it is not expedient in the ends of justice to allow the applicant to repair the structure because tenancy of applicant is in dispute in present RSA and learned Trial Court and learned first Appellate Court have held that applicant is not tenant over suit land and decree of possession has been granted against the applicant by both Courts and entry of non-occupancy tenant in favour of applicant was recorded for the first time in the month of January 1991 by order of Assistant Collector 1st Grade Palampur which is under challenge in present RSA and has not attained the stage of finality. It is well settled law that non-occupancy tenant means tenant at will of landlord. It is well settled law that status of non-occupancy tenant can be terminated at the will of landlord at any point of time unless landlord acquired proprietory rights in accordance with law.

12. Submission of learned Advocate appearing on behalf of applicant that applicant be permitted to partially extend his house over suit land is rejected being devoid of any force for the reasons hereinafter mentioned. Tenancy of applicant is in dispute inter se parties. No receipt of payment of rent is placed on record. It is well settled law that tenancy is bilateral agreement inter se parties. It is well settled law that bilateral agreement of tenancy should be proved by way of adducing oral and documentary evidence. It is well settled law that tenant cannot be permitted to raise new construction over vacant land without express or implied consent of owners of land. It is also well settled law that question of title can be decided by Civil Court. ***See (1998)8 SCC 751 title Beni Madhav Singh vs. Ram Naresh. See (2000)5 SCC 652 title State of Rajasthan vs. Harphool Singh (dead) through his LRs. See 1976 PLJ 183 title Sucha Singh vs. Nand Singh. See 1965 PLJ 55 title Gram Panchayat Dari vs. State of Punjab.*** Dispute inter se parties in present case is about title in suit property. It is not expedient in the ends of justice to allow application filed by applicant till disposal of RSA. In view of above stated facts it is not expedient in the ends of justice to modify interim order dated 7.8.2014. Point No.1 is answered in negative.

Point No. 2 (Relief)

13. In view of findings upon point No.1 application filed under Section 151 CPC is dismissed. Jamabandi Ext.P5 for the year 1992-93 placed on record will form part and parcel of order. Observations will not effect the merits of case in any manner and will be strictly confined for disposal of present application. CMP No. 5166 of 2016 is disposed of.

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

Smt. Parveen .....Petitioner
Versus
State of HP and others ..... Respondents.

CWP No. 2349 of 2016
Judgment reserved on 6.10.2016.
Date of decision: 26th October, 2016.

Industrial Disputes Act, 1947- Section 25- Petitioner was engaged on daily wage basis – her services were terminated without complying with the provisions of Section 25-G and F of Industrial Disputes Act- the respondent No. 2 failed to make the reference on the ground of delay- respondent No. 2 directed to decide the reference within 6 weeks after hearing the parties in view of the judgment of the Supreme Court in **Prabhakar versus Joint Director Sericulture Department and another** reported in **AIR 2016 SC 2984**. (Para-3 to 5)

Case referred:
Prabhakar versus Joint Director Sericulture Department and another, AIR 2016 SC 2984

For the petitioner: Mr. Rahul Mahajan, Advocate.
For the respondents: M/s Anup Rattan, Romesh Verma and 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.

De-linked from CWP No. 1912 of 2016 and taken up separately for disposal.

2. It is averred in the writ petition that the petitioner was engaged by respondent No.1 on daily wage basis in the year 1996. Her services were orally terminated by the respondent No.3, without complying the provisions of Section 25-G and F of the Industrial Disputes Act, 1947, in the year 2011. The petitioner raised Demand/industrial dispute on 07.05.2012, against respondent No.3 for making reference before respondent No.2 but he has failed to make reference till today despite the fact that the matters of similarly situated workmen have already been referred to the Labour Court for determination.

3. The question is-whether the petitioner is caught by delay and laches, is a question to be determined by respondent No.2.

4. In the given circumstances, we deem it proper to direct respondent No. 2 to examine the case of the petitioner if she has raised the dispute on 7.5.2012 and make a decision, within six weeks from today, after hearing the parties in view of the judgment delivered by the apex court in case titled ***Prabhakar versus Joint Director Sericulture Department and an other*** reported in ***AIR 2016 SC 2984***. Ordered accordingly.

5. Parties are directed to cause appearance before the Labour Court on **15th November, 2016.**

****

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

Ram Chander Pathania .....Petitioner.

Vs.

Hindustan Petroleum Corporation Ltd. and others .....Respondents.

CWP No.: 7259 of 2011
Reserved on: 14.09.2016
Date of Decision: 26.10.2016

Constitution of India, 1950- Article 226- Respondents No. 1 and 2 issued an advertisement for allotment of petrol pump- petitioner submitted all the necessary papers- but his case was not considered- he filed objections but the objections were brushed aside – respondents submitted that selection of the land of respondent No. 3 was in accordance with the guidelines – the representation was duly investigated and the grievance regarding financial bid was rectified – held, that petitioner was initially ranked at serial No. 3, whereas, private respondent was ranked at serial No. 1- petitioner filed a complaint against this ranking, which was duly considered and the objections were disposed of – revised merit panel was prepared - the evaluation was corrected even before filing of the writ petition- the petitioner was given 91 marks on the basis of guidelines for the evaluation of the site- the reasons were duly explained in the report – there was no stipulation regarding the visibility of the site from the road- satisfaction regarding suitability of the land cannot be made subject matter of judicial review – petition dismissed. (Para- 9 to 31)

Cases referred:

Tata Cellular Vs. Union of India (1994) 6 Supreme Court Cases 651
Michigan Rubber (India) Limited Vs. State of Karanatka and others (2012) 8 SCC 216
Sanjay Kumar Shukla Vs. Bharat Petroleum Corporation Limited and others (2014) 3 SCC 493

For the petitioner: Ms. Archana Dutt, Advocate, vice Mr. Anup Rattan, Advocate.
For the respondents: Mr. Rahul Mahajan, Advocate, for respondents No. 1 and 2.
Mr. Ashok Thakur, Advocate, for respondent No. 3.
Mr. Varun Chandel, Additional A.G., with Ms. Parul Negi, Dy. A.G., for respondent No. 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this petition, the petitioner has prayed for the following reliefs:

"(i) That the revised merit penal as prepared by the respondents may kindly be quashed and set aside.

(ii) That excess marks (98) allotted to the respondent No. 3 may be declared illegal and in violation of guidelines issued/followed by the respondents.

(iii) That the respondents be directed to reconsider the entire issue strictly in conformity with the guidelines particularly on the aspect of land/site (sale potential, no earth cuttings, no tree cuttings, visibility from road etc.).

(iv) That the respondents be directed to consider the documents with respect to financial aspects of the petitioner and to award marks for moveable and

immoveable assets after considering the evaluation of the land, shares/fixed deposit offered by the petitioner and liquidity bank account amount offered by the petitioner.

(v) That the entire record of the case may kindly be summoned.

Or

Such other orders which this Hon'ble Court deems fit and proper in the facts and circumstances of the case may kindly be passed in favour of the petitioner and against the respondents."

2. The case as put forth by the petitioner in the present writ petition is as under:

Respondents No. 1 and 2 issued an advertisement for allotment of Petrol Pump within two kilometers of vicinity to Village Sulagwan vide advertisement dated 24.10.2010 (not appended with the petition). As per the petitioner, he submitted all necessary papers with regard to land and his financial position and he was fulfilling all necessary conditions as were required for allotment of Petrol Pump as per advertisement dated 24.10.2010. Further as per him, despite the fact that he had placed on record all relevant documents including documents pertaining to his income, moveable immovable assets, however, the documents so placed by him were not correctly appreciated by the respondent-Corporation and that too without assigning any reason whatsoever. It was further his case that he had raised objections with respect to site offered by respondent No. 3 on the ground that the site offered by him was not in consonance with the guidelines of respondent-Corporation as the same was not visible from Sulagwan site and there were trees standing on the same as well as the structure existing on the same, his objections were arbitrarily brushed aside and despite the fact that the site offered by respondent No. 3 was not fulfilling the criteria contemplated in the guidelines of the respondent-Corporation, the same was arbitrarily selected. Feeling aggrieved, he filed the writ petition.

3. In their respective replies filed by the respondents, they denied the allegations of the petitioner and stated that the selection of the site of respondent No. 3 was not in violation of the guidelines issued for selection of retail outlet dealers by the respondent-Corporation. It was further stated in the replies by the respondents that the representation filed by the petitioner against his financial evaluation as well as with regard to his objections to the site offered by respondent No. 3 was got duly investigated and after re-evaluation, the grievance raised by the petitioner with regard to his financial assessment was rectified. Further, his objections raised against the site of respondent No. 3 were found to be without merit. It was further stated in the replies that even after the financial re-evaluation of the petitioner, respondent No. 3 remained at No. 1 as per the assessment of the comparative merit of the candidates as assessed by the evaluation committee. On these basis, it was contended by the respondents that there was no merit in the case as the financial evaluation of the petitioner stood corrected and the assessment of the site of all the applicants was done strictly as per the guidelines issued in this regard by the respondent-Corporation.

4. During the course of arguments, learned counsel for the petitioner relied upon communication dated 4th July, 2014, which was placed on record as Annexure A-1 alongwith CMP No.4264 of 2015 by the petitioner addressed by Sub Divisional Officer (Civil), Bhoranj, District Hamirpur to Deputy Commissioner, Hamirpur, in which it was stated that a joint inspection committee visited the spot on 22.10.2011 and as per the report of the joint inspection committee, the visibility of the proposed site was poor from one side, i.e. Sulgwan town side (i.e. North side of the site) and the PWD authority had issued visibility clearance certificate vide letter dated 18.05.2012 at their own level. She also relied upon another communication on record addressed by Deputy Commissioner, District Hamirpur to Deputy Secretary to the Chief Minister of Himachal Pradesh dated 01.01.2015 on the subject "*Regarding request for issue to open the Petrol Pump*", in which Deputy Commissioner had *inter alia* mentioned that as per the report of Sub Divisional Officer (Civil), the joint inspection committee which had visited the site on 22.10.2011 had not recommended the case for setting up a retail outlet and further no "No

Objection Certificate" can be issued as the matter was pending in this Court and further the matter cannot be proceeded till the decision of CWP No. 7249 of 2011 pending in this Court. On the strength of these two communications, it was argued by learned counsel for the petitioner that the recommendation which was made by the evaluating committee of respondent-Corporation in favour of the private respondent was bad.

5. In response to this, it was submitted by the learned counsel for the respondent that the site of the petitioner as well as private respondent had been evaluated by Selection Committee which was a committee of experts constituted by the replying respondent and the petitioner cannot question the wisdom and experience of the said committee. Carrying out of inspection by the joint inspection committee headed by Sub Divisional Officer, Bhoranj was denied for want of knowledge by the respondent-Corporation on the ground that the respondent-Corporation was not associated by Government officials while conducting the said inspection. It was further pointed out by the learned counsel for the respondent-Corporation that even otherwise, it was clearly contemplated in the Guidelines for Selection of Retail Outlet Dealers (Annexure-P4) that dealership will be offered to No. 1 candidate in the merit panel on the basis of the interview after necessary field verification and that letter of intent will be issued thereafter. It was also pointed out by the learned counsel for the respondent-Corporation that a person who had been issued the letter of intent was further required to fulfill the terms and conditions of the same and there was also provision of post selection scrutiny of merit panel.

6. On 07.07.2016, this Court after hearing all the learned counsel for the parties passed the following order:

> *"During the course of arguments, Mrs. Archana Dutt, learned Counsel appearing for the petitioner, submitted that there are two main challenges with regard to allotment of the retail outlet in favour of the private respondent, i.e. (a) wrong evaluation of the income criteria by the respondent-Corporation; (b) wrong evaluation of the site offered by the private respondent, vis-à-vis condition contemplated at Sr. No. 12 in Clause 13, i.e. visibility from road.*
>
> *Mr. Rahul Mahajan, learned counsel appearing for the respondent-Corporation submitted that after the initial evaluation of the parties, complaints were received from the petitioner as well as from Mr. Rajeev Sharma, one of the participants. The said complaints were duly looked into by the Corporation and the grievances raised in the same were also accordingly redressed. According to him, the contentions which are raised in this writ petition were also raised in the said complaints, which were duly redressed by the respondent-Corporation.*
>
> *A perusal of the record of the case demonstrates that neither the said complaints nor the decision taken by the respondent-Corporation, are on record. Therefore, it is directed that the respondent-Corporation shall place on record both the complaints filed by the present petitioner as well as by Mr. Rajeev Sharma and the decision taken on the said complaints by the respondent-Corporation. Let the needful be done within a period of two weeks.*
>
> *Mr. Rahul Mahajan, learned counsel appearing for the respondent-Corporation, is at liberty to place on record any other documents(s), which may facilitate the adjudication of this case.*
>
> *List for continuation on 03.08.2016."*

7. In compliance to order dated 07.07.2016, the relevant documents stand placed on record by the respondent-Corporation by way of CMP No. 7323 of 2016, which documents with the consent of the parties were permitted to be taken on record vide order dated 14.09.2016. It is evident from the order which was passed by this Court on 07.07.2016 that challenge to the allotment of retail outlet in favour of private respondent was confined by the petitioner on two counts:

> *"A. wrong evaluation of the income criteria by the respondent-Corporation;*

B. wrong evaluation of the site offered by the private respondent, vis-à-vis condition contemplated at Sr. No. 12 in Clause 13, i.e. visibility from road."

8. During the course of arguments, Ms. Archana Dutt, learned counsel for the petitioner addressed this Court on the abovementioned two counts in support of the contention of the petitioner that the allotment of retail outlet in favour of private respondent was not sustainable in law. This Court will deal with both these counts separately.

A. Wrong evaluation of the income criteria by the respondent- Corporation:

9. Guidelines for Selection of Retail Outlet Dealers are appended alongwith the petition and Clause 16 of the said guidelines deals with norms for evaluating the candidates. The initial mark sheet for retail outlet dealership subject matter of the present writ petition dated 25.1.2011 is on record as Annexure R1/2 alongwith reply filed by respondents No. 1 and 2. As per this mark sheet, petitioner was initially ranked at Sr. No. 3, whereas one Shri Rajiv Sharma was ranked at Sr. No. 2 and the private respondent was ranked at Sr. No. 1.

10. Thereafter, as is evident from the records, petitioner filed a complaint against the said merit. A perusal of the said complaint demonstrates that final mark list prepared by the respondent-Corporation was challenged by the petitioner on the following grounds:

"A. Land offered by Sunil Kumar was not properly evaluated and he was given marks in contravention of guidelines 12 & 13 12 and 13.

B. Land of Sunil Kumar was less visible as it was near a curve and there was no visibility from around 100 metres.

C. Trees were standing on the land and a built up structure also existed on the same which required demolition and cutting of rock was also required and as such the site was not suitable for installation of a Petrol Pump.

D. Application of Sunil Kumar should have been rejected out rightly as vacant land was not available as per requirement for establishment of a Petrol Pump.

E. Even if Sunil Kumar had agreed to demolish the building, he cannot be allowed to fell the trees standing on the land without prior sanction as per law.

F. Available frontage was not as per the requirement of HPCCL.

G. Site offered by Sunil Kumar was 80-90 metres from Jolly Convent Public School and installation of Petrol Pump near School would adversely affect the students."

11. It was also mentioned in the said complaint that despite the fact that the petitioner had placed on record documents qua his income as well as moveable and immoveable property, however, zero marks were awarded to him under this head and documents which were placed on record by him in this regard were not considered. As per him, he had also annexed agriculture income certificate for an amount of Rs. 2,40,000/- and had placed on record shares in the name of his unemployed son purchased out of an amount invested in his income, FDRs. and cash shown in the Bank account of the petitioner was also provided, but these documents were not considered.

12. Alongwith CMP No. 7323 of 2016, respondent-Corporation has placed on record copy of communication dated 15.06.2011, vide which the complaints so received by the respondent-Corporation including the complaint of the petitioner were disposed of. A perusal of this communication demonstrates that the complaints so received were duly considered by the Investigating Officer and he advised that the contention of the petitioner stood established to the extent of wrong evaluation of income criteria and the same, accordingly was rectified and thereafter, the petitioner was now scoring 74.18 marks and was placed second in the merit after giving him correct marks for finance. It is further evident from the said communication that the over all merit panel stood unchanged and there was no change in the first empanelled candidate

Sunil Kumar, who was awarded 87.55 marks. It is further apparent from the said communication that the allegations of the petitioner with regard to land offered by Sunil Kumar were not found to be correct. The conclusions arrived at after investigation by the respondent-Corporation on the complaint so filed by the present petitioner are quoted hereinbelow:

> *"In view of above, the investigating officer has advised that the complaint of Shri Ram Chander Pathania stands established and candidate would have scored 74.18 marks and placed second in the merit panel had correct marks for finance were given. Thus the merit panel stands changed. However, there is no change in the status of first empaneled candidate, Shri Sunil Kumar who has been awarded 87.55 marks. The investigating officer has also advised that correct marks have been given by L-1 committee against land for all the candidates.*
>
> *With regard to allegation that the land offered by second candidate is outside the advertised stretch, the investigating officer has advised that allegation could not be substantiated by the complainant. With regards to marks by TEC against visibility & trees, even if zero marks are given by TEC under these sub-heads, even than first empaneled candidate, Shri Sunil Kumar would have scored 88 out of 100, thus a total of 30.8 out of 35 against land a grand total of 84.05 marks. As award of marks by technical evaluation committee were not covered by the investigating officer, 3 member team of MT/BK/AN was appointed by GM NZ to carry out fresh evaluation of all the 3 empanelled candidate.*
>
> *We have now received the report and it has been advised that technical evaluation of the sites offered by all the 3 empanelled candidates were carried out. As per the reports submitted by the team, 94 marks are to be awarded to the first empanelled candidate against 98 given earlier; 91 marks to the complainant Shri Ram Chander Pathania against 99 and 81 to second empanelled candidate against 98. The team has also advised that after taking in cognizance, revised marks by the tam as well as report of SRM JLRO, final marks for first empanelled candidate works out to 86.15, for the complainant 71.38 and 65.86 to Shri Rajiv Sharma, who was earlier placed at merit panel 2. It has been advised that status of first empanelled candidate in the merit panel remains same, however, the complainant now becomes second empanelled candidate.*
>
> *With regard to allegation that there is School, it has been reported that the same is approx. 100 mts. Away from Shri Sunil Kumar site and is in the opposite direction of the offered plot. It has also been advised that there is no guidelines for presence of School in near vicinity of offered plot which may lead to rejection of site. It has been advised that Shri Sunil Kumar has shown a letter from the Jolly Convent School management stating that the School has no objection in setting up a outlet at theoffered site.*
>
> *In view of above, it is recommended that region be advised to proceed further with the first empanelled candidate and suitable replies be sent to the complainants. In case the dealership is not commissioned with the first empanelled candidate, region should revert back to zone for taking further action in the matter as per DSG. Investigation reports submitted by SRM JLRO and the 3 member team are attached."*

13. Thereafter, all the applicants were informed by the respondent-Corporation that as per dealer selection guidelines and merit panel scrutiny of the applications submitted by them, on the basis of the documents provided by the said applicants, the merit panel stood revised as under:

"Name of the candidate		*Revised Merit Panel*
1.	*Shri Sunil Kumar*	*I*
2.	*Shri Ram Chander Pathania*	*II*

3. Shri Rajiv Sharma III"

14. This communication in fact is on record appended with the petition also as Annexure P-8. Therefore, it is apparent from the facts taken note of above that on the basis of a complaint which was filed by the present petitioner against the final merit panel, as was finalized by the respondent-Corporation, the applications and documents submitted by the parties were re-scrutinized by the Investigating Officer and report submitted by the Investigating Officer was perused by the competent authority as per dealership guidelines, on the basis of which, the merit panel was revised by granting appropriate marks to the present petitioner for his financial capability, but the fact of the matter still remains that even in the revised merit panel, private respondent Sunil Kumar still remained as the first empanelled candidate.

15. Incidentally, this grievance which was raised by the petitioner in the writ petition about incorrect assessment of his financial capability had already been met with by the respondent-Corporation even before the writ petition was filed and during the course of arguments, this factual position could not be denied by the learned counsel for the petitioner. Accordingly, challenge to the allotment of retail outlet by the respondent-Corporation in favour of respondent No. 3 on the ground of wrong evaluation of income criteria of the petitioner by respondent-Corporation is totally misconceived and does not has any merit.

B. Wrong evaluation of the site offered by the private respondent, vis-à-vis condition contemplated at Sr. No. 12 in Clause 13, i.e. visibility from road.:

16. Before proceeding with this aspect of the matter, it is relevant to take note of Retail Outlet Site Evaluation Parameters as are contemplated in Clause 13 of the Guidelines for selection of Retail Outlet Dealers, which clause deals with the evaluation of the site offered by the applicants, the relevant extract of the same is quoted hereinbelow:

*"**13. Evaluation of the site offered by the applicants:***

The technical/commercial suitability of the land/site offered by the applicants for any location against an advertisement will be ascertained by a committee of HPCL officers before the interview for that location based on the following parameters:

Retail Outlet Sit Evaluation Parameters			
Sl. No.	Evaluation Parameter	Retail Outlets (Maximum Marks)	
		City/Towns	Highways/Rural
1.	Sales potential	20	15
2.	Frontage	15	12
3.	No earth filling required	8	7
4.	No earth/rock cutting required	6	4
5.	No Low Tension Over Head Line	3	3
6.	No Over Head Telephone Line	3	3
7.	No Trees	3	2
8.	Proximity to culvert (farther from culvert desirable)	2	11
9.	Soil Type (Soft)	7	5
10.	Availability of Power	10	8
11.	Availability of Water	9	8
12.	Visibility from Road	7	9

13.	No Presence of Divider	7	4
14.	Outside Octroi Limits	0	9
	Total	**100**	**100**

Notes

1. Frontage of plot required for dealership will be indicated in the advertisement and plot meeting minimum frontage will be given 80% of the marks and plots with bigger frontage, higher marks upto a maximum of 15 for city outlets and 12 in case of outlets located on Highways/others.

2. In case the land offered is on National Highway the same should meet the criteria as per NHAI guidelines as contained in GOI, Ministry of Road Transport and Highways letter No. RW/NH-33023/19/99-DO-III dated 25.9.03/17.10.03 and further amendment if any, as applicable from time to time, failing which the offered land will not be evaluated as above and the candidate will be treated at par with those candidates who have not offered land. If high-tension overhead line more than 11 KV passes over the plot, the same will be disqualified. However, against item 5, Zero Marks will be given, without disqualifying, if over head electric line is less than or equal to 11 KV, passing through the plot. The shifting of the same will be at the cost of the applicant concerned. The offered land should also meet norms of statutory bodies like forest, explosive etc. and land should be convertible for commercial and petrol pump use.

3. In case the land is located on Highway but within town/city limit, such land will be evaluated on parameters as applicable to town/city and not as applicable to Highway/others as may be applicable as per NHAI Guidelines for setting up retail outlets.

4. During the interview, the site selection report in respect of the site offered by an applicant will be shown to the concerned applicant.

5. The land offered by an applicant for Rural Location (Hamara Pump) and HP Raja would also be evaluated as per the criteria above. However the selected candidate for Hamara Pump and HP Raja category of outlets, after placement of LOI, would be required to fill the land to the satisfaction of HPCL upto plinth level including the retaining wall and offer the same to HPCL for setting up the facilities."

17. The site subject matter of the present writ petition falls under the head "Highway/Rural/Others". A perusal of the relevant extract of Clause 13 of the Guidelines demonstrates that there are maximum marks mentioned against 14 paramaters under Retail Outlet Site Evaluation Parameters. Sr. No. 12 of the same which deals with Visibility from Road provides 9 marks as maximum marks which can be granted against this Sr. No. for a retail outset site which falls on Highway/Rural/Others. In other words, it is not as if visibility from road is a sine qua non for being eligible to be allotted a retail outlet site. It is in this background that this Court will deal with the objections of the petitioner that site has been offered by the respondent-Corporation to private respondent by wrongly evaluating condition contemplated at Sr. No. 12 in Clause 13, i.e. Visibility from Road.

18. Annexure R-1/4 appended with the reply filed by the respondent-Corporation contains Technical Evaluation done by the respondent-Corporation of the Proposed Sites offered by the petitioner as well as respondent Sunil Kumar. At page 96 of the paper-book, technical evaluation of the proposed site of the petitioner has been given based on visit dated 20.05.2011 and as per the said technical evaluation, the petitioner has been granted 91 marks on the basis of the guidelines so framed for allotment of the site. At page 97 of the paper-book, technical evaluation of the proposed site of the private respondent, namely Sunil Kumar is given wherein

Sunil Kumar has been granted 94 marks on the basis of the abovementioned guidelines. Further, a perusal of the technical evaluation of the proposed site of the petitioner as well as private respondent demonstrates that sites of both the parties were accepted, however, the evaluation committee has given more marks to Sunil Kumar and the same have been explained under the heading brief reasons. Details of the marks allotted to the petitioner and private respondent by the evaluating committee are being reproduced hereinbelow:

"TECHNICAL EVALUATION OF THE PROPOSED SITE

Name of the applicant/applicants	**Ram Chander Pathania**			
Name of the Location	IN OR WITHIN 2KMS OF SULAGWAN			
District	HAMIRPUR	Zone		North
State	HP	Region		SHIMLA
Highway	SH	Sales Area		MANDI
Name of the owner(s)		Ram Chander Pathania		
Does Site Meets Local Condition		Yes		
Key Plan of Site		ATTACHED		
Current 7/12 Extract		NA		
Khasra No. of land offered		1380/1255/2, 320/1		
Title Deed for Site Ownership		ATTACHED		
Urban Land Ceiling Clearance		NA		
Non Agriculture Conversion		NA		
Income Tax Clearance		NA		
Non encumbrance certificate		NA		
Area of the Plot (Applied)		>400SQ MTRS		
Total Plot Area available with Applicant/Applicants		>400SQ MTRS		
Encroachment if any		Nil		
A) Existing structures		No		
B) Religious structures		No		
C) Others (Details)		No		
Details of any road		Nil		
Pathway Crossing the land		No		
Suitability of location of the plot		OK		
				Vol. (MS/HSD)
Existing retail outlet volumes kl/month within 15 kms	HPC	1		40
	BPC	1		120
	IOC/IBP	1		80
Proposed retail outlets	HPC	1		80
	BPC	-		
	IOC/IBP		-	
Estimated volumes from site	MS/HSD		15/70	
Importance of location: (Historical place/ Halting point etc.)				
Site: Accepted/Rejected		Accepted		

	HIGHWAY	MARKS
1. Sales potential	OK	15
2. Frontage	>20MTRS	12
3. No earth filling required	3mtrs Avg flg	0
4. No earth/rock cutting required	Nil	4
5. No LT O/H Line	No	3
6. No O/H Tel Line	No	3
7. Number of trees to be cut	Nil	2
8. Proximity to culvert (farther from culvert desired)	No	11
9. Soil type (soft)	Yes	5
10. Availability of Electricity Connection	Yes	8
11. Availability of Water Connection	Yes	8
12. Visibility from Road	Slight curve on one side	7
13. No presence of Divider	NA	4
14. Outside Octroi Limit	NA	9
	Total	**91**

Evaluating committee

Signatures

Name	ADITYA N SINGH	BHARAT KAUL MANISH TANDON
Designation	SR OFFICER-RU	MGR-E&P, JLRO SR MGR-RE, NZ
Date of visit	20.05.11”	

TECHNICAL EVALUATION OF THE PROPOSED SITE

Name of the applicant/applicants	**Sunil Kumar**		
Name of the Location	IN OR WITHIN 2KMS OF SULAGWAN		
District	HAMIRPUR	Zone	North
State	HP	Region	SHIMLA
Highway	SH	Sales Area	MANDI
Name of the owner(s)		Sunil Kumar	
Does Site Meets Local Condition		Yes	
Key Plan of Site		ATTACHED	
Current 7/12 Extract		NA	
Khasra No. of land offered		1532/1171	
Title Deed for Site Ownership		ATTACHED	
Urban Land Ceiling Clearance		NA	
Non Agriculture Conversion		NA	
Income Tax Clearance		NA	
Non encumbrance certificate		NA	
Area of the Plot (Applied)		>400SQ MTRS	
Total Plot Area available with Applicant/Applicants		>400SQ MTRS	
Encroachment if any		Nil	

A)	Existing structures		One House, however applicant has more Area than required (400 SQ Mtrs) apart from house.	
B)	Religious structures		Nil	
C)	Others (Details)		No	
Details of any road			Nil	
Pathway Crossing the land			No	
Suitability of location of the plot			OK	
			Vol. (MS/HSD)	
Existing retail outlet volumes kl/month within 15 kms	HPC	1		40
	BPC	1		120
	IOC/IBP	1		80
Proposed retail outlets	HPC	1		80
	BPC	-		
	IOC/IBP		-	
Estimated volumes from site	MS/HSD		15/70	
Importance of location: (Historical place/ Halting point etc.)				
Site: Accepted/Rejected		Accepted		
		HIGHWAY		MARKS
1. Sales potential		OK		15
2. Frontage		30MTRS		12
3. No earth filling required		1.5 MTRS AVG FLG		3
4. No earth/rock cutting required		Nil		4
5. No LT O/H Line		No		3
6. No O/H Tel Line		No		3
7. Number of trees to be cut		Nil		2
8. Proximity to culvert (farther from culvert desired)		No		11
9. Soil type (soft)		Yes		5
10. Availability of Electricity Connection		Yes		8
11. Availability of Water Connection		Yes		8
12. Visibility from Road		Slight curve on one side		7
13. No presence of Divider		NA		4
14. Outside Octroi Limit		NA		9
		Total		**94**
Evaluating committee				
Signatures				
Name	ADITYA N SINGH		BHARAT KAUL	
	MANISH TANDON			
Designation	SR OFFICER-RU		MGR-E&P, JLRO	
	SR MGR-RE, NZ			
Date of visit	20.05.11”			

19. This site visit was conducted post the complaint filed by the present petitioner against the earlier evaluation. During the course of arguments, learned counsel for the petitioner again and again was harping on this aspect of the matter that respondents No. 1 and 2 could not have had accepted the site of the private respondent because the same was not clearly visible from the road. When this Court called upon the learned counsel for the petitioner to point out from the guidelines as to where was it contemplated in the guidelines that there has to be clear visibility from the road and in case the said visibility was impaired in some manner, then this amounted to outright disqualification, learned counsel for the petitioner could not point out any such provision in the guidelines.

20. On the other hand, learned counsel representing the respondents stated that in fact there was no such stipulation contained in the guidelines that if there was any impairment in the visibility of the site from the road, then the same amounted to outright rejection of the site. As per them, all that the guidelines contained at Sr. No. 12 in Clause 13 of the guidelines was that the maximum marks which could be given to an applicant against the heading Visibility from Road were 9 marks and in the present case, on the basis of the visibility of the site from the road offered by the parties, they were given 7 marks.

21. In this view of the matter, it was argued that there was no merit in the contention of the learned counsel for the petitioner that the evaluation of the private respondent at Sr. No. 1 for the purpose of allotment of the site is in violation of the guidelines so framed by the respondent-Corporation or the sight offered by the private respondent ought to have been rejected simply on the alleged ground that the same was not visible from the road.

22. In my considered view, there is merit in the contention of the learned counsel for the respondents. A perusal of the guidelines clearly demonstrates that there is no such embargo contained in the same that in case site offered by a party is not completely visible from the toad, then the site has to be outrightly rejected. In fact under the heading “Visibility from Road”, 9 marks have been contemplated in the Regulations which obviously means that while assessing the comparative merit of parties, marks under this particular head are to be awarded keeping in view the visibility of the site.

23. Even otherwise, in my considered view, whether or not the site is suitable for the purpose of setting up a retail outlet is a decision which has to be taken by the respondent-Corporation and the satisfaction of the respondent-Corporation cannot be made subject to judicial review until and unless it can be pointed out by a party that the satisfaction was erroneous or not based on merits but was influenced by motive. In the present case, neither any specific motive has been imputed against anyone for evaluating private respondent the most meritorious party nor any malafides have been alleged or proved which could have had vitiated the evaluation so made in favour of the private respondent by the evaluating committee of the respondent-Corporation.

24. While exercising the power of judicial review, this Court is not to see as to what is the final decision which has been arrived at but what this Court has to adjudge is as to whether the course adopted to reach at that final decision is the correct course or not.

25. Coming to the facts of the present case, during the course of arguments, learned counsel for the petitioner could not point out that while arriving at the conclusion that the private respondent was most meritorious applicant, the procedure prescribed in the guidelines for grant of retail outlets was not followed by the respondent-Corporation or that the said decision was a motivated decision.

26. In **Tata Cellular** Vs. **Union of India** (1994) 6 Supreme Court Cases 651, a three Judges Bench of the Hon’ble Supreme Court has held that it is not for the Court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. The Hon’ble Supreme Court has held that the Court is only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary from case to

case. In para 94 of the said judgment, the Hon'ble Supreme Court while laying down the principles of judicial review in the matter of Government's freedom of contract has held as under:

> "94. The principles deducible from the above are: (1) The modem trend points to judicial restraint in administrative action.(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.
>
> Based on these principles we will examine the facts of this case since they commend to us as the correct principles.

27. The Hon'ble Supreme Court in **Michigan Rubber (India) Limited** Vs. **State of Karanatka and others** (2012) 8 Supreme Court Cases 216 has held:

> *"23. From the above decisions, the following principles emerge:*
>
> *(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;*
>
> *(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;*
>
> *(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;*
>
> *(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and*
>
> *(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.*

24. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and

(ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226."

28. The Hon'ble Supreme Court in **Sanjay Kumar Shukla** Vs. **Bharat Petroleum Corporation Limited and others** (2014) 3 Supreme Court Cases 493 has struck a note of caution with regard to exercise of its powers under Article 226 by a High Court particularly in contractual matters. The Hon'ble Supreme Court has in fact held:

"15. We cannot help observing that in the present case exercise of the extraordinary jurisdiction vested in the High Court by Article 226 of the Constitution has been with a somewhat free hand oblivious of the note of caution struck by this Court with regard to such exercise, particularly, in contractual matters. The present, therefore, may be an appropriate occasion to recall some of the observations of this Court in the above context.

16. In Raunaq International Ltd. Vs. I.V.R. Construction Ltd. & Ors.1 , (paragraphs 9,10 and 11) this Court had held as follows :-

"9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be:

(1) the price at which the other side is willing to do the work;

(2) whether the goods or services offered are of the requisite specifications;

(3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;

(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(5) past experience of the tenderer and whether he has successfully completed similar work earlier;

(6) time which will be taken to deliver the goods or services; and often;

(7) the ability of the tenderer to take follow up action, rectify defects or to give post-contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services

become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work — thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers."

17. In Air India Ltd. Vs. Cochin International Airport Ltd. & Ors., there was a further reiteration of the said principle in the following terms:-

"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in Ramana Dayaram Shetty v. International Airport Authority of India, Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India, CCE v. Dunlop India Ltd., Tata Cellular v. Union of India, Ramniklal N. Bhutta v. State of Maharashtra and Raunaq International Ltd. v. I.V.R. Construction Ltd. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene." *(emphasis supplied)*

18. A similar reiteration is to be found in Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd. & Anr.; Tejas Constructions and Infrastructure Private Limited Vs. Municipal Council, Sendhwa and Another and several other pronouncements reference to which would only be repetitive and, therefore, is best avoided.

19. We have felt it necessary to reiterate the need of caution sounded by this Court in the decisions referred to hereinabove in view of the serious consequences that the entertainment of a writ petition in contractual matters, unless justified by public interest, can entail. Delay in the judicial process that seems to have become inevitable could work in different ways. Deprivation of the benefit of a service or facility to the public; escalating costs burdening the public exchequer and abandonment of half completed works and projects due to the ground realities in a fast changing economic/market scenario are some of the pitfalls that may occur.

20. In the present case, fortunately, the litigation has not been very time consuming. Nothing has been suggested on behalf of the Corporation that the establishment of a retail outlet at Areraj, East Champaran District in the State of Bihar is not required as on date. It can, therefore, be safely understood that in the instant case the public of the locality have been deprived of the benefit of the service that the outlet could have generated. We have already indicated that the present litigation initiated by Respondent No. 7 does not constitute a very bonafide exercise on the part of the said Respondent and the entire litigation appears to have been driven by desire to deny the fruits of the selection in which the appellant was found to be the most eligible candidate. Whether the outlet is operated by the appellant or the Respondent No. 7 is of no consequence to the ultimate beneficiaries of the service to be offered by the said outlet. The above highlights the need of caution that was imperative on the part of the High Court while entertaining the writ petition and in passing orders therein. Be that as it may, in the totality of the facts of the present case, we are of the view that it would be just and proper to direct the Corporation, if it is of the view that the operation of the retail outlet is still justified by the exigencies, to award the same to the appellant by completing the requisite formalities in accordance with the procedure laid down by the Corporation itself."

29. Relying upon the said judgment of the Hon'ble Supreme Court, the Hon'ble Division Bench of this Court in LPA No. 62 of 2013, titled **Mr. Sunil Kumar** Vs. **Indian Oil Corporation Ltd. (IOC) & others** has held:

"15. We also deem it proper to record herein that the Apex Court in a recent judgment in the case titled as Sanjay Kumar Shukla Vs. M/s. Bharat Petroleum Corporation Ltd. & Ors., reported in 2014 AIR SCW 4945, has commanded that the Courts should be cautious in entertaining the writ petitions which are aimed at to prevent the eligible candidate to reap the fruits of selection. It is apt to reproduce para 15 of the judgment herein:

"15. In the present case, fortunately, the litigation has not been very time consuming. Nothing has been suggested on behalf of the Corporation that the establishment of a retail outlet at Areraj, East Champaran District in the State of Bihar is not required as on date. It can, therefore, be safely understood that in the instant case the public of the locality have been deprived of the benefit of the service that the outlet could have generated. We have already indicated that the present litigation initiated by Respondent No. 7 does not constitute a very bonafide exercise on the part of the said Respondent and the entire litigation appears to have been driven by desire to deny the fruits of the selection in which the appellant was found to be the most eligible candidate. Whether the outlet is operated by the

appellant or the Respondent No. 7 is of no consequence to the ultimate beneficiaries of the service to be offered by the said outlet. The above highlights the need of caution that was imperative on the part of the High Court while entertaining the writ petition and in passing orders therein. Be that as it may, in the totality of the facts of the present case, we are of the view that it would be just and proper to direct the Corporation, if it is of the view that the operation of the retail outlet is still justified by the exigencies, to award the same to the appellant by completing the requisite formalities in accordance with the procedure laid down by the Corporation itself.

30. Therefore, in light of the discussion held above and the law discussed above, it cannot be said that assessment made by the respondent-Corporation whereby private respondent has been assessed as No. 1 candidate in the merit panel can be faulted with. It cannot be said that the conclusion so arrived at by the respondent-Corporation is either arbitrary or the same has been arrived at in violation of the guidelines framed in this regard by the respondent-Corporation. It could not be pointed out by the petitioner that the conclusion so arrived at by the respondent-Corporation was otherwise arrived on the basis of some ulterior motive or the same was motivated.

31. Therefore, in my considered view, there is no merit in the present petition and the same is accordingly dismissed, so also the pending application(s), if any. Interim orders, if any, also stand vacated. No order as to costs.

****

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

Sh. Satya Parkash .....Petitioner.

Vs.

State of Himachal Pradesh and another .....Respondents.

Cr. Revision No.: 65 of 2010
Reserved on: 20.10.2016
Date of Decision: 26.10.2016

Indian Forest Act, 1927- Section 52- An FIR was registered for transporting the timber in a truck – proceedings for confiscation were initiated, which resulted in the confiscation of the vehicle – the present petitioner was convicted by the trial Court for the commission of offence punishable under Section 42 of Indian Forest Act – he preferred an appeal, which was dismissed- a revision against the order of dismissal was preferred, which was also dismissed- held in revision that the conviction of the petitioner has attained finality – the petitioner cannot be permitted to say after his conviction that he was not transporting the timber or that timber was being transported without his knowledge or without his connivance- petition dismissed. (Para-6 to 9)

For the petitioner: Mr. Rajiv Sirkeck, Advocate.
For the respondents: Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

Petitioner before this Court is aggrieved by the order passed by the Authorized Officer-cum-Divisional Forest Officer, Kotgarh in Case No. 1/98 dated 31.12.2004, vide which the Authorized Officer ordered the confiscation of the Truck of the present petitioner bearing registration No. HP-06-1466 for carrying/transporting timber illegally, as well as the judgment passed by the Court of learned Sessions Judge, Kinnaur Sessions Division at Rampur in Criminal

Appeal No. 08 of 2005 dated 22.12.2009, whereby learned appellate Court while upholding the order so passed by the Authorized Officer dismissed the appeal filed against the same by the petitioner.

2. Brief facts necessary for the adjudication of the present case are that FIR No. 74/98 was registered under Section 379 of the Indian Penal Code read with Sections 41 and 42 of the Indian Forest Act on 08.07.1998 on the facts that one Truck was signalled to stop by the police which was patrolling near Tikker, however, the driver of the Truck did not stop the same and the police party chased the Truck in the Gypsy and intercepted it after 2-3 Kms. near Jarol village and checking of the same revealed some sand as well as Kail sleepers loaded in the same. Though one person ran away taking advantage of the darkness, however, two persons, namely, Satya Parkash, S/o Sh. Daulat Ram, owner and driver of the Truck (i.e. the present petitioner) and Sat Pal, S/o Sh. Beli Ram were taken into custody. When the sleepers were checked, it was found that there was no hammer mark/Khudan mark on the same, which were seven in numbers. On these basis, Truck bearing registration No. HP-06-1466 was confiscated and subsequently produced before the Authorized Officer on 27th May, 1998 alongwith the material loaded in it which included the sand and seven Kail sleepers.

3. I have heard the learned counsel for the parties and also gone through the records of the case as well as the order passed by the Authorized Officer and the judgment passed by the learned appellate Court.

4. Records reveal that the present petitioner alongwith Conductor and Guman Singh faced trial before Sub Divisional Judicial Magistrate, Rampur Bushahr for commission of offences punishable under Section 379 of the Indian Penal Code read with Sections 41 and 42 of the Indian Forest Act. Vide judgment dated 27.09.2003 passed in Criminal Case No. 69-2 of 1999 titled State of H.P. Vs. Satya Prakash, Satya Pal and Guman Singh, accused Guman Singh was acquitted of all the charges and Satya Prakash and Satya Pal were acquitted for commission of offence punishable under Section 379 of the Indian Penal Code, but they were held guilty and convicted for commission of offences punishable under Sections 41 and 42 of the Indian Forest Act.

5. In appeal, the Court of learned Sessions Judge, Kinnaur at Rampur Bushahr in Criminal Appeal No. 8 of 2003, titled Satya Prakash and Satya Pal Vs. State of H.P. vide judgment dated 01.09.2004 acquitted Satya Pal of the charges under Sections 41 and 42 of the Indian Forest Act, however, the conviction and sentence imposed upon the present petitioner was affirmed.

6. This Court is pained to point out that during the course of arguments, the factum of the criminal revision petition having been filed by the petitioner against his conviction having been dismissed by this Court was not brought to the notice of this Court by the learned counsel for the petitioner, which amounts to concealment of material fact. It was the duty of learned counsel for the petitioner as an Officer of the Court to have had apprised this Court of the factum of said criminal revision petition having been dismissed and the conviction of the petitioner for commission of offences punishable under Sections 41 and 42 of the Indian Forest Act having been upheld by this Court

7. This fact was pointed out at the Bar by the learned Deputy Advocate General that the present petitioner in fact had filed a Criminal Revision against the judgment of the Court of learned Sessions Judge, Kinnaur in Criminal Appeal No. 8 of 2003 (i.e. Criminal Revision No. 173 of 2004), which stands dismissed by this Court vide judgment dated 23.11.2010. A copy of the judgment so passed by this Court has been placed on record by the learned Deputy Advocate General.

8. Before proceeding further, it is relevant to take note of the provisions of Section 52B of the Indian Forest Act, 1927, as applicable to the State of Himachal Pradesh, which reads as under:

"52B. Issue of show cause notice confiscation under Section 52A.- (1) No order confiscating any timber (excluding fuelwood) resin, Khair wood and katha, ropes chains, boats or vehicles shall be made under Section 52A except after notice in writing to the person from whom it is seized and considering his objections, if any:

Provided that no order confiscating a motor vehicle shall be made except, after giving notice in writing to the registered owner thereof, if in the opinion of the authorized officer it is practicable to do so, and considering his objection if any.

(2) Without prejudice to the provisions of sub-section (1), no order confiscating any tool, rope, chain, boat or vehicle shall be made under Section 52A if the owner if the tool, rope, chain, boat or vehicle proves to the satisfaction of the authorized officer that it was used in carrying the timber (excluding fuelwood), resin, khair, wood and katha without the knowledge or connivance of the owner himself, his agent, if any and the person-in-charge of the tool, rope, chain, boat or vehicle and that each of them had taken all reasonable and necessary precaution against such use."

9. In the present case, the petitioner before this Court happens to be the driver-cum-owner of the vehicle which was confiscated for commission of offences punishable under Sections 41 and 42 of the Indian Forest Act. The petitioner stands convicted for commission of offence punishable under Sections 41 and 42 of the Indian Penal Code. Therefore, in these circumstances, the petitioner cannot be permitted to say that the timber was either being transported in the vehicle without his knowledge or without his connivance. Keeping in view the fact that the petitioner stands convicted for commission of offences punishable under Sections 41 and 42 of the Indian Forest Act and the vehicle which has been ordered to be confiscated by the Authorized Officer is the same vehicle which was involved in the crime for which the present petitioner stands convicted, I do not find any infirmity with the order so passed by the Authorized Officer of confiscation of vehicle and affirmed in appeal by the learned appellate Court. Accordingly, as there is no merit in the present revision petition, the same is therefore dismissed.

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

Shiam Parshad ... Appellant

Versus

Kashmir Singh & Ors. ... Respondents

RSA No. 227 of 2007
Reserved on: 21.10.2016
Date of decision: 26.10.2016

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for seeking an injunction pleading that he is co-owner in possession and defendant has no right over the same- defendant started collecting construction material and digging foundation in the suit land forcibly- the suit was dismissed by the trial Court- an appeal was preferred, which was dismissed- held in second appeal that villagers are recorded to be in joint possession of the suit land since 1913-14 - witnesses of the defendant and documents proved the possession of the defendant - the entries were wrongly changed in favour of the plaintiff – suit was rightly dismissed by the trial Court- appeal dismissed. (Para-12 to 17)

Case referred:

State of Himachal Pradesh and others Vs. Ajay Vij and others, 2011 (1) Shim.LC 452

For the appellant: Mr. Anuj Nag, Advocate.

For the respondents: Mr. B.C. Verma, Advocate, for respondent No. 1.
None for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of this appeal, the appellant/plaintiff has challenged the judgment and decree passed by the Court of learned Senior Sub Judge, Hamirpur, in Civil Suit No. 282 of 1993/278 of 1994 dated 11.05.2000, vide which learned Senior Sub Judge dismissed the suit filed by the plaintiff, as well as the judgment and decree passed by the Court of learned Presiding Officer/Additional Sessions Judge, Hamirpur in Civil Appeal No. 115 of 2000/RBT 214/2004 dated 19.05.2006, whereby learned Appellate Court dismissed the appeal filed by the present appellant against the judgment and decree passed by learned trial Court.

2. This appeal was admitted on 28.06.2007 by this Court on the following substantial question of law:-

> "Whether the judgments and decrees passed by both the Courts below are not vitiated on the ground that it has failed to take into consideration Section 45 of the H.P. Land Revenue Act where legal presumption of truth is attached to the latest entries in the records of rights?

3. Brief facts necessary for adjudication of the present appeal are that the appellant/plaintiff, hereinafter referred to as the plaintiff, filed a suit for permanent prohibitory injunction against the respondent/defendant, hereinafter referred to as the defendant, for restraining the defendant from raising any sort of construction over the land comprised in Khata No. 123 min, Khatauni No. 144 min, Khasra No. 220 measuring 0-18 Marlas, situated in village Baroha, Tappa Matti Morian, Tehsil and District Hamirpur, H.P. According to the plaintiff, he was owner in possession alongiwth other co-sharers of the suit land as per jamabandi for the year 1989-90 and the defendant who was totally a stranger, had no right and title over the suit land. Despite this, defendant on 24.08.1993 started collecting material and digging foundation in the suit land forcibly and when plaintiff requested the defendant not to do so, defendant threatened the plaintiff with dire consequences. It was on these basis that the suit was filed by the plaintiff.

4. The claim of the plaintiff was contested by the defendant who inter alia mentioned in the written statement that the plaintiff in fact was not in possession of the suit land as the same was in possession of the defendant and the suit was also bad for non joinder of necessary parties. According to the defendant, the suit land was Shamlat in which defendant was also one of the co-sharers. However, the father of the plaintiff had got wrong entry made in his favour without notice to the defendant. It was further the case put up by the defendant that defendant being one of the Tikadarans or proprietor of the Tika had got interest over every inch of Shamlat and whole proprietory body had got right and partition proceedings were pending before the Tehsildar. As per the defendant, his status was that of one of the co-sharers and he was in possession of suit land and his possession had never been objected during the life time of the father of the plaintiff and the land in fact was shown in the joint ownership and possession of all co-sharers except the Khatris. It was further the case of the defendant that old Khasra No. prior to consolidation was 216/1 and this number had come into existence during consolidation in the year 1962-63 and thereafter continued to be in joint ownership of the defendant who was one of the co-sharers in the Shamlat and he was in possession of the same. According to the defendant, he carried out construction over the suit land and also over some portion of Khasra No. 221 by spending huge amount which was never objected to by anyone and construction was complete in all respect when the suit was filed. It was further the case of the defendant that he had also filed suit with regard to the suit land against the opposite party and other proprietors of the Tika and the defendant was declared to be owner of the property and the same thus did not vest in the Panchayat and was accordingly in his possession alongwith other co-sharers. On these basis, it was claimed by the defendant that his possession over the suit land stood established since long and the revenue entries to the contrary were wrongly made by the revenue staff in

collusion with the plaintiff's father and there was no order as to how said entries had come into existence. On these basis, the defendant resisted the claim of the plaintiff.

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

1. Whether the plaintiff is entitled for decree of permanent prohibitory injunction as prayed for? ... OPP
2. Whether in the alternative, the plaintiff is entitled for possession by way of demolition? ... OPP
3. Whether the suit is not maintainable in the present form? ... OPD
4. Whether the suit is bad for necessary parties? .... OPD
5. Whether the plaintiff is estopped to file the suit by his act and conduct? ... OPD
6. Whether the suit is within limitation? ... OP. Parties
7. Relief.

6. On the basis of evidence led by both the parties, learned trial Court returned the following findings to 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:	Yes.
Relief :	Suit dismissed with no order as to costs per operative part of the judgment.

7. Accordingly, learned trial Court dismissed the suit of the plaintiff by holding that the suit land comprised in Khasra No. 220 was earlier Khasra No. 216/1 prior to consolidation as was evident from Ext. D-4 copy of jamabandi for the year 1913-14, copy of jamabandi for the year 1962-63 Ext. D-5 as well as Missal Hakiat for the year 1962-63 Ext. D-6. Learned trial Court took note of the fact that all Tikadarans were shown to be co-sharers in the Shamlat Tika and it was not proved on record by the plaintiff as to how the change was effected in favour of plaintiff in the subsequent copy of jamabandi for the year 1989-90 Ext. PA in which he was shown in possession over the suit land. Learned trial Court relying upon the law laid down by Hon'ble Supreme Court held that when earlier revenue entries stood changed and the change was unauthorized and there was no material to justify change of entry then presumption of correctness attached with the revenue entries stood rebutted. Learned trial Court further held that it was evident from the records that the defendant was in possession of the suit land and he had carried out construction over the same which fact was not disputed by the plaintiff. On these basis, it was held by learned trial Court that the plaintiff in fact was out of possession of the suit land and accordingly was not entitled to relief of permanent injunction. It was further held by learned trial Court that plaintiff was not in possession of the suit land and as it stood established from the records that the construction had been carried over the suit land by the defendant before filing of the suit and no one had objected to it and partition proceedings were pending before the Tehsildar, therefore, the plaintiff was not entitled to relief of possession by way of demolition.

8. In appeal, the findings so returned by learned trial Court were upheld. It was held by learned Appellate Court that the plaintiff had based his claim over the suit land on the basis of entries made in jamabandi for the year 1989-90 but it was apparent from the documents on record that right from the very beginning suit land had been recorded in joint

possession of the villagers being Shamlat and only entries in favour of the plaintiff appeared in the jamabandi for the year 1989-90 Ext. PA. Learned Appellate Court further held that how this change was effected in favour of the plaintiff, was not explained by the plaintiff. No evidence was led on behalf of the plaintiff as to how these entries were changed in his favour or in favour of his father. Learned Appellate Court further held that Rapat Rojnamcha Ext. DW3/A had been held to be unauthorizedly prepared and as such change made vide said Rojnamcha was without the order of the competent revenue authority. It was further held that in these circumstances later revenue entries could not be considered to be correct and no presumption of truth could be attached to the said unauthorized later entries. Accordingly, learned Appellate Court dismissed the appeal filed by the plaintiff by holding that the change in the revenue entries had been made without any order of the competent authority and without any material to justify the same.

9. Mr. Anuj Nag, learned counsel for the appellant argued that the findings which have been returned by both learned Courts below to the effect that presumption of truth was not attached to the latest revenue entries was a finding which was totally perverse as the said findings returned by both learned Courts below were totally contrary to the provisions of Section 45 of the Himachal Pradesh Land Revenue Act. It was argued by Mr. Nag that because presumption of truth was attached to the revenue entries as per the provisions of Section 45 of the Himachal Pradesh Land Revenue Act, therefore, findings to the contrary returned by both learned Courts below were a result of complete misreading and misappreciation of the evidence on record. On these basis, it was urged by Mr. Nag that the judgments and decrees passed by learned Courts below were perverse and not sustainable in law. No other point was urged.

10. Mr. B.C. Verma, learned counsel for respondent No. 1, on the other hand, argued that there was no merit in the present appeal and in fact the findings returned by both Courts below to the effect that the entries in favour of the plaintiff which appeared in the jamabandi for the year 1989-90 Ext. PA remained unexplained and were result of Rapat Rojnamcha Ext. DW3/A which had been held to be unauthorizedly prepared without the order of the competent revenue authority, were correct findings as in the absence of any explanation of the change of revenue entries it cannot be said that in each and every case latest entries in revenue record have to be deemed to be correct. It was further argued by Mr. Verma that the presumption of truth attached to the revenue entries was rebuttable and in the present case, the defendant had successfully rebutted the revenue entries made in favour of the plaintiff in the jamabandi for the year 1989-90 Ext. PA. Mr. Verma further argued that as there was concurrent finding returned against the plaintiff to this effect by both learned Courts below, the same did not even call for any interference by this Court in exercise of its powers under Section 100 C.P.C. On these basis, it was argued by Mr. Verma that the present appeal deserves to be dismissed with costs.

11. I have heard learned counsel for the parties and have also gone through the records of the case as well as judgments and decrees passed by both learned Courts below.

12. It is an undisputed fact that in the previous revenue entries, the suit land was not recorded in possession of the father of the plaintiff as co-sharer. It has come on record that right from the year 1913-14, joint possession of the villagers had been recorded over the suit land and it has come in the testimony of Bali Ram who entered the witness box as DW-5 that the suit land was Shamlat land of all the villagers and the same had not been partitioned and defendant had constructed a Danga and service station over the suit land in the year 1992-93 and the same was not in possession of the plaintiff. The factum of defendant being in possession of the suit land which was Shamlat also stood corroborated by the statement of DW-6 Kishan Chand. Ext. DW3/A i.e. Rojnamcha was prepared by Kanshi Ram, who entered the witness box as DW-3 and was a retired Kanungo. It has come on record that he was posted as Patwari in the year 1968 in the area concerned. This witness stated that there was no order of Naib Tehsildar or Tehsildar to prepare this report nor any Lamberdar of the village was present when the same was prepared. On these basis, it has been held by learned Courts below that it was apparent from the statement of DW-3 that Rojnamcha Ext. DW3/A had been prepared without any authority or

order of a competent revenue authority. Entries in jamabandi for the year 1989-90 are based on Rapat Rojnamcha Ext. DW3/A which learned Courts below held to be unauthorizedly prepared. Therefore, keeping in view the fact that the entries recorded in the jamabandi for the year 1989-90 Ext. PA owe their origin to unauthorizeldy prepared Rojnamcha, there is no sanctity attached with the said entries especially keeping in view the fact that no evidence has been placed on record by the plaintiff as to how this change was effected in favour of the plaintiff and how this revenue entries were changed in his favour or in favour of his father.

13. Section 45 of the Himachal Pradesh Land Revenue Act provides as under:-

> "**45. Presumption in favour of entries in records-of-rights and [periodical] records -** An entry made in a record-of-rights in accordance with the law for the time being in force, or [periodical] record in accordance with the provisions of this Chapter and the rules thereunder, shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted therefore;
>
> Provided that notwithstanding anything contained in this section any entry made, in the areas comprised in Himachal Pradesh immediately before 1st November, 1966 [during the period between the first day of April, 1948 and the first day of April, 1956] in record-of-rights or in [a periodical] record whereby the land is shown as under self cultivation shall not be presumed to be true:
>
> [Provided further that the record-of-rights and periodical record, prepared by means of computerization in the prescribed manner shall be presumed to be true and shall be deemed to have been prepared under this chapter.]"

14. A bare perusal of Section 45 of the Himachal Pradesh Land Revenue Act demonstrates that though presumption of truth is attached to the said entries, however, the said presumption is rebuttable. This Court has held in ***State of Himachal Pradesh and others*** Vs. ***Ajay Vij and others***, ***2011 (1) Shim.LC 452***, as under:-

> "19. There is no foundation for entering plaintiff as tenant on suit land vide jamabandi for the year 1966-67 Ex. DW-1/A. In Durga (deceased) and others v. Milkhi Ram and others, 1969 P.L.J. 105, the Supreme Court has upheld the finding of the High Court that although the presumption would be in favour of the later entries but that presumption was a rebuttable one and it would stand rebutted by the fact that the alteration in the later entries was made unauthorisedly or mistakenly, there being no material to justify the change of entries.
>
> 20. In the present case, there is nothing on record on what basis the entry in jamabandi for the year 1966-67 was made. Once the change in favour of plaintiff in the jamabandi for the year 1966-67 has not been established, the subsequent entries in revenue record are based on change reflected in the jamabandi for the year 1966-67 which was unauthorized, hence respondents cannot take benefit of such change. Therefore, no presumption of truth is attached to revenue record showing plaintiff and thereafter his successor as tenant over the suit land from 1966-67 onwards.

15. Therefore, it is evident from the law as has been discussed above that the presumption of truth attached to said revenue entries is rebuttable.

16. In the present case, in my considered view, the entries recorded in favour of the plaintiff in jamabandi for the year 1989-90 Ext. PA stood rebutted by the defendant. as has been held by both the learned Courts below. Learned counsel for the appellant was not able to persuade this Court that the findings returned to this effect by both learned Courts below were perverse or not borne out from the records of the case. A perusal of the judgments passed by both learned Courts below demonstrates that both the learned Courts below have taken into consideration the entire evidence placed on record and both learned Courts below after

threadbare discussion of the same have come to the conclusion that the plaintiff was not able to explain as to how entries came to be recorded in favour of the plaintiff or his father in the jamabandi for the year 1989-90 Ext. PA.

17. Therefore, in my considered view, the findings returned by both learned Courts below to the effect that the change in revenue entries had been made without any order of the competent authority and there was no material to justify the change of revenue entries, are correct findings and same do not call for any interference. The substantial question of law stands 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 TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of H.P ...Appellant.
Versus
Narinder Paul Sooden *(since deceased)* & others. ...Respondents.

Criminal Appeal No. 163 of 2011
Reserved on: 07.10.2016
Date of judgment: 26.10.2016

Indian Penal Code, 1860- Section 409, 420, 467, 471 and 120-B- **Prevention of Corruption Act, 1988-** Section 52- Accused No. 3 was posted as Chowkidar and was working under the control of accused No. 1 for receiving and supplying material- accused No. 2 was also working in the same store- the accused made a fictitious entry in the stock register showing the dispatch of the 40 bitumen drums worth Rs. 14,000/- - the accused were tried and acquitted by the trial Court- held in appeal that the confession of accused No. 2 was not brought on record – the shortage was not reported immediately – entrustment of bitumen drums was not established – owner and driver of the truck in which bitumen drums were sent were not examined - the trial Court had rightly held that the prosecution version was not proved beyond reasonable doubt- appeal dismissed. (Para-13 to 38)

Cases referred:
K. Prakashan Vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian Vs. State of Tamil Nadu, (2006) 1 SCC 401

For the appellant: Mrs. Meenakshi Sharma, Addl. A.G. with Mr. J.S. Guleria, Asstt. AG.
For respondents No. 2 & 3: Ms. Kanta Thakur Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant-State laying challenge to the judgment dated 15.12.2010, passed by the learned Special Judge, Kangra at Dharamshala, H.P., in Corruption Case No.4-N/1994, under Sections 409, 420, 467, 471, 120-B IPC and under Section 5(2) of the Prevention of Corruption Act, whereby all the accused persons were acquitted.

2. Respondent No.1, Narinder Paul Sooden (hereinafter called as 'accused No.1'), died during the pendency of the appeal, therefore, appeal against him stood abated vide order

dated 16.9.2016. Now, the appeal is maintained by the appellant-State against accused/respondents No.2 and 3 only.

3. As per the prosecution story, brief facts giving rise to the present appeal are that accused Nardev Singh (hereinafter called as 'accused No. 3') was posted as Chowkidar in HPPWD, Sub-Division, Indora, and was working under the control of accused No. 1, for receiving and supplying material, including bitumen drums. Accused, Roop Lal (hereinafter called as 'accused No. 2') was also working under the control of accused No.1 (since deceased) in the same store at Kandrori. The accused persons, in connivance with each other, supplied 40 bitumen drums, worth Rs.14,000/- and converted the same for their own use by making a fictitious entry in the stock of out door register and Bin-card against indent card No.19/1977, dated 11.3.1981. The accused persons had wrongly shown the dispatch of above 40 bitumen drums through departmental truck, bearing registration No.HPK-701, but, in fact, it was transported for sale in a private truck, bearing registration No. HPK-7935. The accused persons forged certain documents and made a fictitious entry in respect of the delivery of 40 bitumen drums in bin-card/indent/MAS register and thus they fraudulently used the above referred documents as genuine. It has further been averred that accused No. 1 dishonestly and fraudulently made double entry in the Bin-card of bitumen drums, Ex. P7. Accused No. 3 made an entry in the outdoor register, Ex. P18, showing false dispatch of 40 bitumen drums from Kandrori Store. A departmental inquiry was conducted and the Executive Engineer reported the matter to the Superintending Engineer, vide letter. Ex. P17. The Superintending Engineer sent the complaint to the Chief Engineer, vide letter Ex. PC, who lodged an FIR at Police Station (Anti Corruption) North Zone, Dharamshala. During the course of investigation, police took into possession all the relevant documents. The specimen signatures/handwritings of the accused persons were also taken before the Judicial Magistrate and the same were sent for comparison to Government Questioned Documents Examiner, Shimla. As per opinion of the Examiner, Ex. P70, entry in the out door register, Ex. P18, marked as Q-4, was opined to have been made by the accused persons. After completion of investigation, challan was presented in the Trial Court.

4. In order to prove its case, the prosecution examined as many as 23 witnesses. Statements of the accused persons under Section 313 Cr.P.C. were recorded, wherein they pleaded not guilty. Five witnesses wee examined by the accused persons in support of their defence.

5. Learned Additional Advocate General has argued that the Court below has acquitted the accused persons on the basis of surmises only, whereas the prosecution has conclusively and beyond all reasonable doubts proved their guilt. She argued that the present appeal may be allowed.

6. On the other hand, learned counsel appearing for accused No.2 & 3, has argued that the prosecution has failed to prove the guilt of the accused persons beyond the shadow of reasonable doubt. She has argued that the Court below has rightly recorded its findings that the prosecution could not prove the pilferage of 40 bitumen drums, thus the judgment of the learned Court below needs no interference.

7. In rebuttal, the learned Additional Advocate General has argued that the testimonies of PW 1, 4 and 13, clearly establish the guilt of the accused persons and the appeal may be allowed.

8. To appreciate the arguments adduced by the learned counsel for the parties, we have gone through the record of the case in detail.

9. PW1 S.K. Aggarwal deposed that at the relevant time he was posted as Chief Engineer North Zone, HPPWD, Dharamshala, and was competent authority for appointment and removal of Class-IV employees, as well as the Junior Engineers. He accorded sanction, vide order, Ex. PA, for initiating prosecution against the accused persons. In his cross-examination, he has deposed that after a lapse of so many years, it is not possible for him to recollect the record, which was seen by him for according sanction. He has further deposed that though the

Superintending Engineer is the appointing and removing authority, but the Chief Engineer is not debarred from appointing and removing the Junior Engineers. It has further been deposed that at the time when the sanction was accorded, the report of the police, against the accused persons, was available. The police record contained all the documents. He has further deposed that he had not started any inquiry against the accused persons, but has only accorded sanction, vide order Ex. PA, for prosecution and recommended to the Government for departmental inquiry, as there was a chance of recovery of loss, but the government did not agree and asked him to proceed further with the case. He has deposed that first of all the loss was detected by the Executive Engineer, Nurpur, who referred the matter to the Superintending Engineer and thereafter to the Chief Engineer. The Executive Engineer, Nurpur made a preliminary inquiry and thereafter reported the matter to the Superintending Engineer, Nurpur. He denied the suggestion that he had not gone through the record of the case nor applied his mind, while according sanction to prosecute the accused persons.

10. PW2, Paras Ram, deposed that in the year 1985, he was employed as Assistant in the office of Chief Engineer (North) Dharamshala, and handed over the relevant record and documents, Ex. P1 to Ex. P11, to the police, vide letter Ex. PB, which bears his signatures.

11. PW3, O.P. Samlok, deposed that in the year 1985, he was posted as Chief Engineer, North Zone, Dharamshala, and at that time, accused No.1 was working as Junior Engineer. He has further stated that on receiving letter, Ex. PC, from S.E., Nurpur, he wrote letter, Ex. PD, which bears his signatures. In the cross-examination, he has admitted that he had not verified anything at his end and forwarded the entire record for action.

12. PW4, Jarnail Singh, stated that he was employed as a Driver in HPPWD since 1965 and during the year 1981 was working as Driver of Truck No. HPK-701, which was owned by HPPWD. He further stated that he used to make entries in the log book of the truck and also to sign it alongwith the challan. The log books, Ex. P12 and P13, pertain to truck No. HPK-701. The entries in the log book were made in his handwriting and whenever the Junior Engineer accompanied the truck, he used to put his signatures on the challans and in the absence of the Junior Engineer, the driver of the truck had to put the signatures on the challans. As per this witness, challans No.154 and 166 were signed by Desh Raj, Junior Engineer, and challans No.156, 158, 160, 161 and 165 were signed by him. It has further been deposed that one log book continued for a month and thereafter was being sent for verification to the department. The log book, Ex. P12, contained the entry of the material carried in the aforesaid truck. In his cross-examination, he has deposed that he is an illiterate person. The entries in Ex. P9, in respect of the challan in question, were made by accused No.2. He did not know about the indent of the material in question, which was carried by him at the relevant time in the truck under reference. Further deposed that he did not know what had been written in the log books, Ex. P12 and Ex. P13, respectively. He also did not know as to by whom these log books were filled in and what were the contents of the challan, which bore his signatures as well as of the challan, Ex. P9.

13. PW5, Kishori Lal, who was posted as Senior Assistant in HPPWD, Nurpur, stated that he used to maintain statement of accounts of the office of SDO, PWD, Indora, where he was working as Assistant in the year 1981. He has deposed that the entries were made in bin-card, Ex. P7, regarding indent No.88/888. He has further stated that there was no indent bearing No.38/888. He also produced the office record, Ex. P14 to Ex.P18, before the Investigating Officer, who impounded it vide memo, Ex. PE. He deposed that Ex. P9 was in the handwriting of accused No.1 and challans No. 166, 172 and 173 were issued by accused No.2, which were handed over to the police vide Memo, Ex. PF. He has further stated that the police had taken into possession record Ex. P22 and Ex. P23, in which signatures of accused No.1 were encircled red and marked Q8 and Q9. He has also identified the signatures of accused No.1, because he has worked with him in Sub Division. It has been further stated by this witness that the writing with red pen, in Ex. P8, was his handwriting and the receipt of 200 drums had been shown, vide entry, Ex.P11/1. He has also identified the signatures of accused No. 1, mark Q5, in Ex. P8. He has also stated that in out-door register, Ex. P19, at page No.38/39, entry qua the supply of 54 drums, vide

indent No.777, had been made on 28.03.1981, 07.04.1981 and 22.04.1981 and the red entries were Ex. P19/1. However, this witness could not clarify as to in whose handwriting these entries were made and who had made entry 3/81, in Ex. P7. In the cross-examination, he has stated that he used to maintain account books his job was not a field job. He has also admitted that accused No.1 had not put his signatures or initials in his presence in all the documents as was stated by him in his examination-in-chief. Therefore, it cannot be said that this witness was conversant with the handwriting of accused No.1. He has further stated that he did not see the statement of accounts for the months of March to June, 1981, and that the matter was not enquired by their office. As per this witness, they used to check the statements of account and tally the same with Bin-card on different occasions after one, two or three months, however, after tallying the same, signatures were not being put on the bin-card or statement of accounts. This witness could not state as to on which date the indent card was checked by him.

14. PW6 Chuni Lal, Beldar, who is an important witness, deposed that at the relevant time he was working as Chowkidar in HPPWD Store, Indora Sub-Division. As per this witness, accused No.3 (Nardev Singh), was also working as Chowkidar with him, accused No.2 (Roop Lal), was store Munshi and accused No.1 (Narinder Pal Soodan), was Junior Engineer. He has further deposed that a vehicle came and the driver of the vehicle asked him to load the drums, on which he refused. Furter stated that accused No. 2 and 3 asked him as to under which authority he was refusing. Around 10.30 PM accused No.2 and 3 loaded 40 drums of bitumen in the vehicle upon which he asked accused No. 2 to make entry in the register, who made the entry and signed the same at page No 137 of the out-door register, which had been marked as Q3 and Q4 and accused No.2 put his signatures in his presence, marked as Q3. He further stated that he asked accused No. 3 to intimate accused No.1 about loading of drums in the truck. He could not clarify on which date and in which truck 40 bitumen drums were moved by the accused persons from the said store. In the cross-examination he stated that Ex. P 18 was not filled in his presence and he could not trace entry of 40 bitumen drums in register, Ex. P 18.

15. PW7 Desh Raj stated that during the year 1981, he was working in Sub Division, Nurpur. He produced muster-roll Ex. P25 and posting order of accused No.2 to the police which were taken into possession vide memo Ex. PG.

16. PW8 Surinder Kumar, stated that during the relevant time, he was posted in Nurpur PWD Division. He has stated that the relevant record was taken into possession by the police in his presence vide memos, Ex. PG and Ex. PF. He also produced log books, Ex. P12 and Ex. P13, pertaining to truck No.HPK-701 containing entries regarding carriage of drums from Kandrori to Nurpur. In the cross-examination, he admitted that log books Ex. P12 and Ex. P13 pertain to field job and his duty was in the office and he had no direct concern with accused No.1.

17. PW9 Parveen Kumar stated that during the relevant time he was posted in Nurpur Division and one indent Ex.P27 was produced by him to the police which was taken into possession vide memo Ex.PH, but he could not tell as to who had issued indent Ex.P27.

18. PW 10, Roshan Lal, produced appointment letter. PW 11, Vyas Dev, stated that he was posted as SDO, HP PWD, Sub Division, Nurpur at the relevant time and through indent Ex.P27 he had received 17 drums and not 40 drums. In the cross-examination, he has stated that earlier to 1986, he was not posted in Nurpur Division. He has further stated that he was having no personal knowledge and was deposing on the basis of record. PW12, Moti Lal, produced letters Ex. PC and PD to the police which were taken into possession vide memo Ex. PE.

19. PW 13, Bhim Singh, was Junior Engineer, who stated that he had taken the charge from accused No.1 on his transfer in the year 1982 and charge report, Ex.P8, was signed by him and accused No.1. He further stated that he had taken 425 bitumen drums in charge and as per MAS register, he received 160 drums of bitumen but there was stock of about 200 bitumen drums. He further stated that he received 40 bitumen drums less in number and that Bin-card, Ex. P7, shows that 200 bitumen drums had been issued and sent to Sub Division, Nurpur and he also got in writing from accused No.1 about the shortage of 40 drums of bitumen at the time of

taking over the charge. Though he stated that through indent No.38/888, 40 drums of bitumen were never sent through challan book, Ex. P9, pertaining to the year 1981 and there was no indent having this number, however, in the out door register, Ex. P18, there was entry at page No.137 regarding sending of 40 bitumen drums to Sub Division No.2, through truck No. HPK-3935. In cross-examination, he deposed that he had conducted physical verification at the time of taking charge from accused No.1, but he did not report about the shortage of 40 bitumen drums to his senior officer. He further deposed that the entry about the material was made in the MAS register, but about the receipt of the material, it was not done in the store. He further deposed that the entry in MAS register, Ex. P11, about 200 drums of bitumen was in the handwriting of accused No.1, but it did not bear initials of any one else. He also deposed that there was cutting in the entry regarding date after the figure 888. He denied that he had received the out door register from the In-charge at the time of taking over the charge from accused No.1 and not seen the out door register but there was mention in the charge report, Ex. P8, about the out-door register. He also could not tell about the red entry in Ex. P8. He further deposed that he had not worked with accused No.3, so he was not conversant with his handwriting. He admitted that entry in outdoor register encircled Q4, was earlier to his taking over the charge and it was not incorporated in his presence. He admitted that signatures and initials by the accused were not made in his presence on the documents as stated in the examination-in-chief.

20. PW14 Desh Raj stated that he was posted as J.E. in Nurpur Sub Division and seen indent Ex.P23, which was issued by him for the supply of 70 bitumen drums from Kandrori, HP PWD store which were supplied by the J.E. Store through challan No.154 and 166 and the entry dated 7.4.1985 Ex.P13 bears the signatures of Karam Chand Gupta, Work Inspector, who was working under him and he was conversant with his handwriting. He further stated that he never issued indent for 40 bitumen drums nor those were sent to him. In cross-examination, he stated that indent number in the indent book was given by the J.E. concerned by adopting his own technique and method. He also stated that the store is handled by the JE/AE/Store Keeper and the Chowkidar, who used to carry the material through private vehicles.

21. PW 15, Bashi Ram, stated that he remained posted as Junior Engineer, PWD Sub Division No.2, Nurpur from 1980 to 1985. He deposed that he received 200 bitumen drums through indent No.16 and made the entry in the MAS register Ex. P11 at page No.130, Ex.P11/A. He stated that after issuance of material in the store, the Store Keeper entered the same in the GR book as well as in the Bin-card of a particular time. He further stated that in case any material was being dispatched from the store, the indent was issued by the requiring official and four copies of the indent were prepared. Two copies of the same were being tagged with the account and the third after obtaining the signatures of the person to whom the material was to be issued, was retained by the storekeeper and fourth remain in the G.R. Book. In the cross-examination, neither he could tell the name of person to whom he sent the indent, Ex. P16, nor he obtained the signatures of the said person.

22. PW16, Naresh Kumar, stated that in the year 1989, he was posted at Indora Sub Division as Assistant and he had handed over stock account 3/1981 list, Ex. P29, to the police which was sent by accused No.1 from the store, which was taken into possession by the police vide memo Ex. PL. PW17, Roshan Lal, remained posted as Executive Engineer from 1979 to 1985 in HPPWD Division, Nurpur and Kandrori Sub Division was within his jurisdiction and Mr. P.D. Gupta, who was posted as Assistant Engineer at Indora Sub Division. He further stated that letter, Ex. P14, was received by him from the Assistant Engineer, with whom accused No.1 was working as Junior Engineer, at the relevant time. He further stated that he wrote letter, Ex. P1, to accused No.1 and on receipt of the same accused No.1 sent reply vide Exhibits P4 to P6 and Ex. P62. He further stated that on the basis of available record he wrote letter, Ex. P17, to the Superintending Engineer for taking appropriate action. In the cross-examination, he could not tell whether any departmental inquiry was conducted against accused No.1. He further stated that there was over writing vide Ex. P14, which was encircled red and not initialed by any one.

He also could not tell as to whether any explanation was sought by him or he took any action. He deposed that he might have called the explanation of the Store Munshi.

23. PW18, Sukhdev Sharma, stated that he was posted as Assistant in PWD Sub Division, Indora in the year 1985 and that the then A.E. Mr. K.L. Gupta and he had produced the documents Ex.P-63 to Ex.P-66 to the police, which were taken into possession vide memo PM. PW 19, P.D. Gupta, stated that at the relevant point of time he was posted as Assistant Engineer in PWD Indora Division and letter, Ex. P14, was written by him to the Xen. PW20, Mohinder Singh, stated that he was posted in the office of Chief Engineer (North) HPPWD, Dharamshala, in the year 1990 and produced letters at the instance of the police, which were seized by the police vide memo, Ex. PX. PW21, Hari Ram, stated that he partly investigated the case and during investigation, the police seized record/documents, Exts.P1 to P11, vide memo, Ex. PB, and that he was conversant with the signatures of police officials, who have investigated the case.

24. PW22, Subhashish, Dy. Government Questioned Documents Examiner, stated that the documents along with specimen handwriting and signatures of the accused were sent by the police vide letter dated 4.2.1987 and 24.2.1988 and he examined the documents along with Expert, namely B. Lal, who had independently examined the case, arrived at the same conclusion and affixed his signatures. He further stated that the detailed reason of his Opinion Report, Ex. P-70, is Ex. P-71, which was in two sheets. He further stated that documents were photographed in the laboratory by the photographer under his supervision and negatives of the original documents in three wallets are Ex. P72 to Ex. P74. In the cross-examination, he has stated that no science is perfect, so the science of comparing handwriting. He has also deposed that he had not admitted or disputed whether it was the handwriting of accused No. 2. He denied that there was no sufficient material for giving opinion qua accused No.1 and 3.

25. PW 23, Kirpa Ram, stated that he partly investigated the case. He further stated that documents Ex. P14 to Ex.P 18 were taken into possession by him, which bear his signatures. He also took into possession one outdoor register Ex. P19, vide memo, Ex. PQ. He further stated that he recorded the statements of the witnesses and further investigation was handed over to Munshi Ram. FIR, Ex. PZ, bear the signatures of Netar Singh, Deputy Superintendent of Police (since deceased), and he can identify his signatures. In the cross-examination, he deposed that investigation was handed over to him by Dy. SP, Dharamshala(Vigilance) and the documents Ex.P14 to Ex.P18 were taken into possession by him from Kishori Lal, who was working as A.E. at the relevant time.

26. DW1 S.L. Gupta was posted as Executive Engineer in Nurpur HP PWD Division and had sent letter Ex.DW1/A to accused No.1, but further stated that this letter was not the same, as Ex.P1, though these letters were issued under his signatures. He also stated that there was cutting on the letter Ex.DW1/A. In cross-examination, he stated that Ex.DW1/A might be different letter than Ex.P1.

27. DW2 Kahan Singh, Reader to ADG(V) stated that original letter Ex.DW2/A had been written by the Chief Engineer (North) to Inspector General of Police (Vigilance).

28. DW3 S.K. Aggarwal, who was also examined as PW1 has stated that letter Ex.PW3/A bear his signatures, and the same was written by him when he was Chief Engineer, Dharamshala and Ex.DW2/A was its photocopy. In cross-examination, he deposed that entry in Bin-card were made by the J.E. and that he had written letter after consulting the relevant record.

29. DW4 T.C. Bhagoria, who was the Superintending Engineer, stated that letter Ex.PW4/A was written by him to the Chief Engineer and reply thereof is Ex.PW4/B.

30. DW5, Lalit Bhusan, stated that there was no entry in the ledger for the month of March, 1981, in respect of indent No.88/888, however, there was an entry in the month of June, 1981 regarding indent No.38/888. The said witness has voluntarily stated that indent No.88/888 was sent to Division Office in the monthly accounts in the month of June, 1981. The

said witness feigned ignorance as to how indent No. 88/888 was changed to 38/888, as the said entry did not pertain to his tenure. He could not depose whether on letter, Ex. PW4/A, written by accused No. 1 to the then Assistant Engineer, Nurpur, any action or not. In cross-examination, he deposed that from March, 1981 to June, 1981, only one indent had been issued and entered as per record in respect of 200 bitumen drums in question. He also could not clarify whether there was only one indent pertaining to 200 bitumen drums for the year 1981. However, self stated that there is one more entry about 200 drums of bitumen in the ledger bearing indent No.49/30 of May, 1981.

31. As per the statement of PW-1, S.K. Aggarwal, who was also examined in defence as DW-3 it is clear that accused No. 2 confessed through a statement that he would compensate the loss of 40 bitumen drums. In this regard, letters, Ex. DW4/A, Ex. DW4/B, stand duly proved. Letter, Ex.PW3/A, written by the Chief Engineer to the Secretary PWD also throws light on the alleged confession of accused No. 2. However, surprisingly, the said statement of accused No. 2 or the preliminary inquiry report was not filed in the Court below and the reason for non-filing of the same is not explained.

32. No explanation has come from the prosecution, as to why PW 13, Bhim Singh, who took charge from accused No.1, did not report the matter to his superiors immediately, if at all there was shortage of the store articles. So, the prosecution has not been able to prove as to how many bitumen drums had been handed over in the charge of accused persons during the period when they remained posted at Kandrori. The prosecution also could not cogently and convincingly prove that how many bitumen drums were entrusted in the custody of the accused persons. In that case it seems that only on the basis of presumption loss of 40 bitumen drums has been projected by the prosecution. If specific quantify of bitumen drums entrusted in the custody of accused persons is not establish, then less quantity of bitumen drums cannot at all be ascertain with certainty. Therefore, in our considered view the prosecution has failed to establish the less quantity of bitumen drums and accused persons cannot be held liable for the loss of unascertained quantity of bitumen drums. PW 13 has specifically admitted that there had been addition in the charge report, Ex.P8, but he could not tell as to who made the addition. As per the testimony of PW5, Kishori Lal, they used to maintain statement of accounts in the office with which he used to tally the Bin-card. However, the said statement of accounts was not produced by the prosecution for the reason best known to it, which creates a doubt about the truthfulness of the prosecution case. For withholding the record of statement of accounts maintained at Kandrori Sub Division, adverse inference has to be drawn against the prosecution and it has to be held that had the statement of accounts been produced, it would have gone against the prosecution. The statement of accounts further shows that there was no mis-appropriation of the bitumen drums, otherwise while checking the Bin-card with the statement of accounts maintained in the office, PW5 would have come to know about the shortage of these store articles, which further negates the prosecution case.

33. Though, it has come on record that in the register, there was an entry that 40 bitumen drums were transported in a private vehicle, i.e. truck No.HPK7935, but the prosecution has neither interrogated the owner nor the driver of the said truck. Furthermore, PW13 did not report about the purchase and loss of 40 bitumen drums to his superior officers. It has also come on record that these bitumen drums were sent to another Sub-division but no efforts have been made by the prosecution to investigate the matter with respect to these facts. After considering the statements of PWs 1, 4, 5, 6, 13 and 16, this Court finds that though these witnesses have tried to support the case of the prosecution as has been discussed hereinabove, but nothing favourable to the prosecution has come out.

34. It is also to be noted that PW5 Kishori Lal, Assistant from the office of Sub Divisional Officer, Kandrori, claimed that they also kept statement of accounts of the material and they used to check the Bin-card with the statement of accounts after one, two or three months and they tallied the articles. Had there been some shortage of bitumen drums in the store, then this shortage would have been reflected in the Bin-card as also in the statement of accounts

maintained in Sub Divisional Office, Kandrori. However, no discrepancy was noticed by the Assistant Engineer, who was having charge of the store, which further belies the claim of the prosecution in this regard.

35. In these circumstances, this Court finds that the findings arrived at by the learned Court below is after appreciating the facts correctly, as the prosecution has failed to prove the guilt of the accused conclusively and beyond reasonable doubt. Hence, this Court finds that the findings of the Court below are not required to be interfered with.

36. The Hon'ble Apex Court, in ***K. Prakashan Vs. P.K. Surenderan (2008) 1 SCC 258,*** has held that when two views are possible, Appellate Court should not reverse the judgment of acquittal merely because the other view was possible. It has also been held that when judgment of trial Court was neither perverse nor suffered from any legal infirmity or non consideration/ misappropriation of evidence on record, reversal thereof by High Court was not justified.

37. The Hon'ble Apex Court in ***T. Subramanian Vs. State of Tamil Nadu, (2006) 1 SCC 401,*** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

38. In these circumstances, we find no illegality in the judgment passed by the learned Court below, as the prosecution has failed to prove the guilt of the accused conclusively and beyond reasonable doubt.

39. In view of the above referred decisions of the Hon'ble Apex Court and the discussion made hereinabove, we find no merit in this appeal and the same is accordingly dismissed. Pending application(s), if any, also stand disposed of.

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

State of H.P. ...Appellant.

Versus

Rajesh Singh ...Respondent.

Cr. Appeal No. 134 of 2014
Judgment reserved on: 28.09.2016
Date of Decision: October 26, 2016

Indian Penal Code, 1860- Section 302- Accused murdered the deceased and stole his belongings- he was tried and acquitted by the trial Court- held in appeal that police suspected the involvement of several persons, who were also interrogated – accused had no animosity with the deceased – it was not established on what basis the accused was arrested – the deceased had consumed alcohol to the extent of 268.24 mg % and possibility of sustaining injuries by way of fall cannot be ruled out- Medical officer specifically stated that deceased was very drunk and he might have marked in co-ordination of thoughts, speech and action, staggering reeling gait with tendency to lurch and fall – stick was not connected to the accused – disclosure statement was also not proved – the recovery of torn business identity card was not connected to the accused as no finger prints were detected on the same – the circumstances do not point to the guilt of the accused- trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.

(Para-6 to 20)

Cases referred:

State of Rajashthan Versus Talevar & Anr., (2011) 11 SCC 666

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

For the Appellant: Mr. Vikram Thakur and Mr. Puneet Rajta, Dy. AGs., for the appellant-State.

For the Respondent: Mr. Ajay Chandel, Advocate, for the respondent.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Assailing the judgment dated 21.12.2013, passed by the Additional Sessions Judge-I, Kangra at Dharamshala, H.P. (Circuit Court, Indora), in Sessions Case (RBT) No.23-I/VII/2013/2010, titled as *The State of Himachal Pradesh Versus Rajesh Singh*, whereby accused stands acquitted, State has filed the present appeal under the provisions of Section 378 of the Code of Criminal Procedure, 1973.

2. It is the case of prosecution that sometime in the night intervening 22/23.05.2010 accused murdered Inder Kant. Thereafter he stole his personal belongings, including mobile phone and identity card. The sim of the Mobile phone as also the identity card were thrown away in the bushes. Later on dead body of the deceased came to be noticed by Uttam Chand (PW.1), who immediately informed the police and his statement under Section 154 Cr.P.C. (Ex.PW.1/A) came to be recorded by Inspector Karam Singh (PW.18). With the preparation of inquest report (Ex.PW.12/B), dead body was sent for postmortem, which was conducted by Dr. Amod Kumar (PW.12) and report (Ex.PW.12/D) taken on record. During the course of investigation, accused made two disclosure statements (Ex.PW.2/D) in the presence of Janak RaJ (PW.2) and (Ex.PW.4/A) in the presence of Rai Singh (PW.4), which led to recovery of incriminating articles vide memos (Ex.PW.2/E, Ex.PW.2/F & Ex.PW.6/A). *Prima facie*, finding the accused to have been involved in the crime, *challan* came to be presented in the Court.

3. The accused was charged under the provisions of Section 302 of the Indian Penal Code for having committed murder of Inder Kant, to which he did not plead guilty and claimed trial.

4. Finding the prosecution not to have established its case against the accused, trial Court acquitted the accused on all counts. The correctness of such findings returned by the trial Court, vide judgment dated 21.12.2013, is subject matter of challenge before this Court.

5. Having heard learned counsel for the parties as also perused the record, we see no reason to interfere with the present appeal.

6. The first question which arises for consideration is the identity of the deceased, which in the instant case, we find not to have been established on record. None has come forward to disclose that the dead body which came to be recovered by the police, postmortem of which was conducted by Dr.Amod Kumar (PW.12), was that of deceased Inder Kant. Deceased Inder Kant was gainfully employed and residing in a hut at Kandrori. Neither has Smt. Pooja Devi (PW.15), wife of the deceased identified the dead body nor has it come on record through the testimony of the employer, that Inder Kant had stopped reporting to duty. Even from the testimony of Rai Singh (PW.5), it cannot be said that the dead body of the deceased was got identified through him. Father and brother of the deceased, who according to the wife had visited the spot, have not been examined in Court nor was the dead body got identified from them.

7. It has come in the testimony of police officials Karam Singh (PW.18) and Joginder Singh (PW.19) that during the course of investigation, police suspected involvement of several other persons who were also interrogated. This included Rai Singh, Rakesh Singh and Jeet Singh and more specifically Subh Karan. Now significantly, these police officials have not ruled out the possibility of involvement of such persons in the crime.

8. It has also come in the testimony of police officials that the accused had no animosity with Inder Kant or motive to murder him.

9. The dead body came to be recovered on 23.05.2010. What led the police to the arrest of the accused has also not emerged on record. Karam Singh (PW.18) does state that till the time he was Incharge of investigation, no person had made any statement with regard to animosity or motive for commission of crime. Joginder Singh (PW.19) simply states that on 22.06.2010, accused was arrested. But on what basis? remains a shrouded secret. But then, this fact alone has not weighed in coming to our conclusion.

10. Joginder Singh admits that it had come in his investigation that deceased Inder Kant was not seen in the company of accused or any other person prior to the commission of crime. He further admits that there was no evidence of the accused having seen lastly in the company of the deceased.

11. Most significantly, Investigating Officer Karam Singh (PW.18), admits that it had come in the FSL report (Ex.PA), as is so also proved on record by Dr. Amod Kumar (PW.12), that at the time of death, the person whose postmortem was conducted, had consumed alcohol, which as per the report (Ex.PA) was 268.24 mg %. Now possibility of the deceased sustaining injuries by way of a fall under the influence of alcohol and dying as a result thereof, has not been ruled out by the prosecution.

12. At this point in time, on this issue, it would be relevant to notice that the deceased died as a result of head injury with "*intracranial haemorrhages with shock with alcoholic intoxication (very drunk)"* and in response to the query put by the Court, Dr. Amod Kumar (PW.12) has deposed that *"At this level of alcohol in the blood the patient/deceased was very drunk in which he may have marked in coordination of thought, speech and action, staggering reeling gait with tendency to lurch and fall vomiting, amnesia coupled with mental confusion. Answer based on Parikh's Text book of jurisprudence and toxicology page 836".*

13. In the instant case, prosecution wants the Court to believe that the accused murdered the deceased Inder Kant with a danda. Now significantly, weapon of offence i.e. danda was found near the spot from where dead body was recovered. But prosecution has failed to link the same to the accused. No finger prints were found on the same

14. Prosecution further wants the Court to believe that on 22.06.2010, accused Rajesh had disclosed to Rai Singh that on 22.05.2010, he had gone with deceased Inder Kant to Bandyal village. For establishing such fact, our attention is invited to the testimony of Rai Singh (PW.5). This circumstance cannot be used against the accused for various reasons: (i) the witness himself alongwith Jeet Singh was a suspect. He was being repeatedly called by the police for interrogation; (ii) the witness had made improvements with regard to his deposition in Court and as such cannot be treated as a trustworthy person; (iii) to whom did this witness narrate such fact remains undisclosed by him, for it is not the case of Joginder Singh (PW.19) that such fact came to be disclosed by this witness; and (iv) Also his version being inculpatory in nature cannot be used against the accused.

15. Prosecution further wants the Court to believe that during the course of interrogation, accused made disclosure statements (Ex.PW.2/D and Ex.PW.4/A) in the presence of Janak Raj (PW.2) and Rai Singh (PW.4) respectively. When we peruse the testimony of these witnesses, we do find that accused led the police party in effecting recovery of certain articles. But what are these articles, which stand recovered by the police? Can it be said that it is a discovery of fact linking the accused to the crime or not. Vide recovery memos (Ex.PW.2/A & Ex.PW.2/F), police recovered one mobile phone and certain toiletries. Then except for the disclosure statement/confessional statement of the accused there is nothing on record, linking the toiletries to deceased Inder Kant and the toiletries are not costly, so as to allure any person to retain the same after murdering someone. And to whom did the mobile belong is a mystery. It is neither linked to the deceased Inder Kant or to the accused.

16. Prosecution further invites our attention to the recovery of sim card issued in the name of Sukh Raj Singh (PW.11) allegedly used by the deceased. Recovery memo (Ex.PW.2/F) is on record to such effect. But then, when we peruse the testimony of Sukh Raj Singh, we do not

find his version to be inspiring in confidence. The deceased was not his relative or hailing from his village or having a special relationship with him. Why would a co-worker give his sim is clearly not borne out from the record. Also no record of calls is placed on record to establish that the very same sim was being used by deceased Inder Kant for having conversation with his wife Smt. Pooja Devi (PW.15) or anyone else in his village.

17. Our attention is also invited to the recovery of torn business identity card, so recovered by the police vide memo (Ex.PW.6/A), allegedly thrown by the accused after tearing it into pieces. On this issue, we find that even such discovery of fact and recovery of evidence do not link the accused to the crime. And this we say so for the reason that no finger prints of the accused were found on the card, so recovered by the police. In fact, we have our doubts as to whether any such card came to be issued in the name of Inder Kant or not. The card has not been issued by the employer. Allegedly it was got prepared privately from a privately run computer centre run by Dilshad Ali (PW.16). On whose instance such card came to be prepared, remains unestablished. Most crucially neither the signatures nor the name of the shop or the stamp are found on the identity card (Ex.P-16). Also this witness admits that he did not approach the police informing that he had prepared the card. His testimony is uninspiring in confidence. The question which arises for consideration is as to how did the police reach to him. In any event, discovery of the card (Ex.P-16) in itself cannot be a circumstance or reason good sufficient enough to convict the accused, more so in the light of law laid down by the Apex Court in *State of Rajashthan Versus Talevar & Anr.,* (2011) 11 SCC 666, wherein the Court observed that:-

> "7. Thus, the sole question remains to be decided whether adverse inference could be drawn against the accused merely on the basis of recoveries made on their disclosure statements.
>
> 7.1 In Gulabi Chand v. State of M.P., AIR 1995 SC 1598 *(1995 SCW 2504),* this Court upheld the conviction for committing dacoity on the basis of recovery of ornaments of the deceased from the possession of the person accused of robbery and murder immediately after the occurrence.
>
> 7.2 In Geetaganda Somaiah v. State of Karnataka, AIR 2007 SC 1355, this Court relied on the judgment in Gulab Chand, *(AIR 1995 SC 1598)* (supra) and observed that simply on the recovery of stolen articles, no inference can be drawn that a person in possession of the stolen articles is guilty of the offence of murder and robbery. But culpability for the aforesaid offences will depend on the facts and circumstances of the case and the nature of evidence adduced.
>
> It has been indicated by this Court in Sanwat Khan v. State of Rajasthan, AIR 1956 SC 54: *(1954 Cr LJ 150),* that no hard and fast rule can be laid down as to what inference should be drawn from certain circumstances.
>
> 7.3 In Tulsiram Kanu v. State, AIR 1954 SC 1 : *(1954 Cri LJ 225),* this Cuort has indicated that the presumption permited to be drawn under Section 114, Illustration (a) of the Evidence Act, 1872 has to be drawn under the 'important time factor'. If the ornaments in possession of the deceased are found in possession of a person soon after the murder, a presumption of guilt may be permitted. But if a long period has expired in the interval, the presumption cannot be drawn having regard to the circumstances of the case.
>
> 7.4 In Earabhadrappa v. State of Karnataka, AIR 1983 SC 446 : *(1983 Cri LJ 846),* this Court held that the nature of the presumption under Illustration (a) of Section 114 of the Evidence Act must depend upon the nature of evidence adduced. No fixed time-limit can be laid down to determine whether possession is recent or otherwise. Each case must be judged on its own facts. the question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according "as the stolen article is or is not calculated to pass readily from hand to hand". If the stolen articles were such as were not likely to pass

readily from hand to hand, the period of one year that elapsed could not be said to be too long particularly when the appellant had been absconding during that period.

7.5 Following such a reasoning, in Sanjay alias Kaka etc. etc. v. The state (NCT of Delhi), AIR 2001 SC 979 : *(2001 Cr LJ 1231),* this Court upheld the conviction by the trial court since disclosure statements were made by the accused persons *on the next day* of the commission of the offence and the property of the deceased was recovered at their instance from the places where they had kept such properties, on the same day. The Court found that the trial Court was justified in holding that the disclosure statements of the accused persons and huge recoveries from them at their instance by itself was a sufficient circumstance on the very next day of the incident which clearly went to show that the accused persons had joined hands to commit the offence of robbery. Therefore, recent and unexplained possession of stolen properties will be taken to be presumptive evidence of the charge of murder as well.

7.6 In Ronny alias Ronald James Alwaris & Ors. V. State of Maharashtra, AIR 1998 SC 1251 : *(1998 Cri LJ 1638),* this Court held that apropos the recovery of articles belonging to the family of the deceased from the possession of the appellants *soon after the robbery and the murder* of the deceased remained unexplained by the accused, and so the presumption under Illustration (a) of Section 114 of the Evidence Act would be attracted:

> "It needs no discussion to conclude that the murder and the robbery of the articles were found to be part of the same transaction. The irresistible conclusion would therefore, be that the appellants and no one else had committed the three murders and the robbery."

(Se also: Baijpur v. State of Madhy Pradesh, AIR 1978 SC 522; and Mukund alias Kundu Mishra & Anr. V. State of Madhya Pradesh, AIR 1997 SC 2622) : *(1997) Cri LJ 3182 : 1997 AIR SCW 2580).*

18. From the material placed on record, prosecution has failed to establish that accused are 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. Circumstances when cumulatively considered do not fully establish completion of chain of events, indicating to the guilt of the accused and no other hypothesis other than the same.

19. 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 committed murder of Inder Kant by intentionally or knowingly causing his death.

20. 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.

21. For all the aforesaid reasons, present appeal, being devoid of merit, is dismissed, so also the pending application(s), if any. Bail bonds furnished by the accused are discharged.

Record of the trial Court be immediately sent back.

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

FAOs (MVA) No. 121 and 122 of 2012.
Date of decision: 28.10.2016.

FAO No. 121 of 2012.

Amrit Pal Singh .....Appellant

Versus

Smt. Geeta Devi and others .....Respondents.

FAO No. 122 of 2012.

Swatanter Singh Sodhi .....Appellant

Versus

Smt. Geeta Devi and others .....Respondents.

Motor Vehicles Act, 1988- Section 166- MACT held the claimant entitled to Rs. 70,729/- along with interest @ 7.5% per annum – the claimant remained admitted in zonal hospital and thereafter in PGI, Chandigarh- MACT had fallen in error in awarding Rs. 28,729/- for the medical expenses – compensation was also to be granted for future expenses- an amount of Rs. 10,000/- awarded under the head future expenses – taking the monthly income of the claimant as Rs. 8,000/- per month and the fact that he was unable to work for two months, compensation of Rs. 15,000/- awarded under the head loss of income, Rs. 20,000/- awarded under the head transportation and attendant charges, Rs. 50,000/- each awarded under the head loss of amenities of life and pain and suffering- compensation of Rs. 1,60,000/- awarded with interest @ 7.5% per annum. (Para-7 to 10)

For the appellant(s): Mr. G.R. Palsara, Advocate.

For the respondent(s): Mr. H.S. Rangra, Advocate, for respondents No. 1 to 5.
Ms. Seema Sood, Advocate, for respondent No.6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

Both these appeals are outcome of one accident, hence are taken up together for disposal by this common judgment.

2. FAO No. 121 of 2012 is directed against the judgment and award dated 7.1.2012, in claim Petition No. 19 of 2007 titled Shri Amrit Pal Singh versus Bhag Chand and others and FAO No. 122 of 2012, is directed against the award dated 7.1.2012 in claim petition No. 18 of 2007 titled Shri Swatanter Singh versus Bhag Chand and others, for short "the impugned awards", passed by the Motor Accident Claims Tribunal (II), Mandi, H.P. hereinafter referred to as "the Tribunal", for short.

3. In both these appeals claimants have sought enhancement of compensation on the grounds taken in the memo of appeals.

4. Driver, owner and insurer have not questioned the impugned awards on any ground, thus the same have attained the finality, so far as the same relate to them.

5. Thus, the only question to be determined in these appeals is-whether the amount awarded is adequate. The answer is in negative for the following reasons.

6. In claim petition No. 19 of 2007, subject matter of FAO No. 121 of 2012, the claimant had sought compensation to the tune of Rs.10,00,000/- as per the break ups given in the claim petition, on account of injuries sustained by him in a motor vehicle accident on 11.9.2006 at 7.50 a.m. The claim petition was resisted by the respondents by filing separate replies.

7. The Tribunal, while determining issue No.4 made discussion and held that the claimant is entitled to compensation to the tune of Rs.70,729/- alongwith interest @ 7.5% per annum from the date of filing the claim petition till its realization.

8. The claimant sustained injuries and remained admitted in Zonal Hospital Mandi, from where he was referred to PGI Chandigarh and remained admitted there up to 25.9.2006. The claimant has given details of amount spent, was attended upon by the attendant at PGI and spent huge amount for his medical expenses, transportation and for food also.

9. The Tribunal has fallen in an error in awarding Rs.28,729/- for the medical expenses, The compensation was also to be granted for "future expenses". By a guess work, it can be safely held that the claimant is entitled to Rs.10,000/- for future expenses, was not in a position to resume his duties for a period of one year and remained out of work for 1 ½ months, as discussed in para 26 of the impugned award. The Tribunal has fallen in an error in awarding Rs.12,000/- under the head "loss of actual income" by taking his income as Rs.8000/- per month. The disability certificate Ext. PW4/A and medical certificate do disclose the disability suffered and the nature of injuries sustained by the claimant respectively. The medical bills are on record as Mark-C1 to C24. Thus, it can be safely held that the claimant was not in a position to work for, at least, two months and Rs.15,000/- was to be awarded under the head "loss of income". Accordingly, the claimant is held entitled to Rs.15,000/- under the head "loss of income". Roughly, it can be safely held that the claimant is entitled to Rs.20,000/- under the head "Transportation and attendant charges" for two months.

10. The Tribunal has also fallen in an error in not awarding compensation under the heads "loss of amenities of life" and "pain and sufferings". The claimant is also held entitled to Rs.50,000/- under the head "loss of amenities of life" and Rs.50,000/- under the head "pain and sufferings". Thus, in all the claimant is entitled to Rs.10,000/- +15,000/-+ Rs.15,000/-+ Rs.20,000/-+Rs.50,000/-+Rs.50,000/-= Rs.1,60,000/- with interest @7.5% per annum, as awarded by the Tribunal.

FAO No. 122 of 2012.

11. In this appeal, the claimant had sought compensation to the tune of Rs.20,00,000/- as per the breaks ups given in the claim petition, on account of injuries sustained by him in a motor vehicle accident on 11.9.2006 at 7.50 a.m. The claim petition was resisted by the respondents by filing separate replies.

12. The Tribunal, while determining issue No.4 made discussion and held that the claimant is entitled to compensation to the tune of Rs.1,44,783/- for "actual loss of income". The claimant sustained injuries and remained admitted in Zonal Hospital Mandi, from where he was referred to PGI Chandigarh and remained admitted there for 4-5 months. The claimant has given details of the amount spent, was attended upon by the attendant at PGI and spent huge amount for his medical expenses transportation, and for food also. The Tribunal has fallen in an error in awarding Rs.9,000/- for attendant charges. At least Rs.15,000/- was to be awarded under the head "cost of attendant charges" and is awarded accordingly. Only 5,000/- was awarded for transportation charges whereas Rs.20,000/- was to be awarded for transportation charges.

13. The claimant remained bed ridden for three months, was drawing salary to the tune of Rs.39,641/- per month. Thus, the claimant has suffered 30% disability as per disability certificate, has affected his income throughout his life.

14. The Tribunal has rightly awarded Rs.1,44,783/- under the head "loss of actual income." The claimant has undergone pain and suffering and is deprived of amenities of life. Thus, Rs.50,000/- was to be awarded under the head "loss of amenities of life" and Rs.50,000/- under the head "pain and sufferings" and Rs.20,000/- under the head "future treatment".

15. Thus, in all, the claimant is entitled to Rs.1,44,783/-+Rs.15,000/-+ Rs.20,000/- + Rs.50,000/-+ Rs.50,000/-+Rs.20,000= Rs.2,99,783/- with interest @7.5% per annum, as awarded by the Tribunal.

16. The insurer is directed to deposit the enhanced amount alongwith interest @ 7.5% per annum, in both the appeals, within eight weeks from today in the Registry. The Registry, on deposit, is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned awards, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification.

17. The amount already deposited by the insurer in the Registry, be released in favour of the claimants, forthwith, strictly in terms of the conditions contained in the impugned awards, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification.

18. Viewed thus, the appeals are disposed of along with pending applications, compensation is enhanced and the impugned awards are modified as indicated hereinabove.

19. 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.

Smt. Anita Devi and others .....Appellants

Versus

Rakesh Chona and another .....Respondents.

FAO (MVA) No. 186 of 2012.
Date of decision: 28.10.2016.

Motor Vehicles Act, 1988- Section 166- the income of the deceased cannot be less than Rs.6,000/- per month – claimants are 6 in number and 1/4th amount is to be deducted towards personal expenses – thus, the claimants have suffered loss of dependency of Rs. 4,500/- per month –the deceased was 51 years of age and multiplier of 10 is applicable – claimants are entitled to Rs. 4,500 x12 x 10= Rs. 5,40,000/- 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 estate, funeral expenses and loss of consortium – thus, claimants are entitled to Rs. 5,40,000/- + 40,000= Rs.5,80,000/- with interest @ 7.5% per annum. (Para- 5 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

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 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 Supreme Court Cases 738

Savita versus Binder Singh & others, 2014 AIR SCW 2053

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

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

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

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

For the appellants: Mr. Umesh Kanwar, Advocate.

For the respondents: Mr. Nimish Gupta, Advocate, for respondent No.1.
Mr.Pritam Singh Chandel, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

This appeal is directed against the judgment and award dated 30.10.2001, passed by the Motor Accident Claims Tribunal, Chamba, H.P. hereinafter referred to as "the Tribunal", for short, in MAC Petition No.20 of 2000, titled *Smt. Anita Devi and others versus Rakesh Chona and another*, whereby compensation to the tune of Rs.2,73,500/- alongwith interest @ 9% per annum with costs assessed at Rs.1,000/- came to be awarded in favour of the claimants and insurer was saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Insurer, owner and 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 claimants have questioned the impugned award 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 following reasons.

5. The claimants have sought compensation to the tune of Rs.5,00,000/-,as per the break-ups given in the claim petition before the Tribunal, on account of death of Bhagwan Singh Bijalwan, who died in a motor vehicle accident involving Bus No. HP-48-3672 on 21.1.2000 at 4.45 PM at Gawal Mandi near Kalhel Tehsil Churah District Chamba, HP. The deceased was a contractor and also an orchardist. He has placed on record the income and other certificates issued by the PWD, which do disclose that the deceased was a contractor but there is no positive proof on the file to hold that what was the monthly income and annual income of the deceased. Having said so, by a guess work, it can be safely said that the deceased was earning not less Rs.6000/- per month. The claimants are six in number and 1/4th was to be deducted in view of the 2nd Schedule attached to the Motor Vehicles Act, 1988, for short "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***. The tribunal has deducted 1/3rd. The deceased was 51 years of age at the time of accident and as per Sarla Verma's case supra, the multiplier applicable was "10" and the Tribunal has fallen in an error in applying the multiplier of "11". Thus, it is held that the multiplier of "10" is just and appropriate multiplier applicable.

6. The Tribunal has fallen in an error in assessing the income of the deceased. Accordingly, it is held that the income of the deceased was not less than Rs.6000/- per month. Claimants are six in number and as per ***Sarla Verma's*** case supra, 1/4th was to be deducted, as discussed supra. After deducting 1/4th, it is held that the claimants have lost source of dependency to the tune of Rs.4500/- per month. Thus, the claimants are held entitled to compensation to the tune of Rs.4500x12x10= Rs.5,40,000/- under the head "loss of source of dependency."

7. In addition, the claimants are also held entitled to compensation under the following four heads:

(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/-

8. Accordingly, the claimants are held entitled to compensation to the tune of Rs.5,40,000+ Rs.40,000= Rs.5,80,000/-.

9. The Tribunal has awarded interest @ 9% per annum. However, interest was to be awarded at the rate of 7.5% per annum, for the following reasons.

10. 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.

11. Accordingly, interest @7.5% per annum is awarded from the date of claim petition till realization of the amount.

12. The insurer is directed to deposit the balance 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 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, after proper verification.

13. The amount already deposited by the insurer in the Registry or before the Tribunal, be released in favour of the claimants, forthwith, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification.

14. Viewed thus, the appeal is disposed of alongwith pending applications, compensation is enhanced and the impugned award is modified as indicated hereinabove.

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.

Shri Anudeep Sharma ....Appellant

Versus

Himachal Roadways Transport Corporation ....Respondent

FAO No. 259 of 2012
Decided on : 28.10.2016

Motor Vehicles Act, 1988- Section 166- An FIR was registered against the claimant – he was tried and convicted by the Criminal Court- Tribunal had rightly held that accident was caused by the rash and negligent driving of the claimant- a person who causes the accident cannot claim compensation for the same - appeal dismissed. (Para-3 to 5)

For the Appellant : Mr. Rajesh Verma, Advocate.

For the Respondents: Mr. Vikrant Thakur, Advocate, for respondent No. 1.
Respondent No. 2 is dead.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the judgment and award, dated 7th May, 2012, made by the Motor Accident Claims Tribunal-II, Sirmaur District at Nahan, H.P. (for short 'the Tribunal') in Claim Petition No. 5-N/2 of 2008, titled as Shri Anudeep Sharma versus Himachal Roadways Transport Corporation & another, whereby the claim petition came to be dismissed (for short 'the impugned award').

2. The Tribunal has rightly made the impugned award for the following reasons.

3. Admittedly, the accident has taken place and FIR No. 43/2004, dated 15.10.2004, under Sections, 279 and 338 of the Indian Penal Code was registered against claimant-Anudeep Sharma in Police Station Pachhad. Investigation was conducted and final charge-sheet came to be presented before the learned Additional Chief Judicial Magistrate, Rajgarh, Camp at Sarahan, District Sirmaur, H.P., which culminated into Criminal Case No. 10/2 of 2006/2005. After facing the trial, claimant Anudeep was sentenced and convicted vide judgment dated 30.12.2006. Copy of the judgment Ext. PW-1/B is on record.

4. In this backdrop, the Tribunal has rightly held that the accident was not caused by respondent No. 2-Narender Kumar, but was the outcome of the rash and negligent driving of the claimant himself.

5. It is a beaten law of the land that a person who has caused the accident himself, cannot claim compensation.

6. Having said so, the impugned award is upheld and the appeal is dismissed.

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

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

Bishan Dass .....Appellant
Versus
Charan Dass and others .....Respondents

RSA No. 234/2009
Reserved on: October 24, 2016
Decided on : October 28, 2016

Specific Relief Act, 1963- Section 5- Plaintiff filed a civil suit for seeking possession pleading that defendants had raised construction over the land of the plaintiff despite objections – the suit was decreed by the trial Court – an appeal was filed, which was dismissed- held in second appeal that Local Commissioner had found encroachment over the suit land- the report was not challenged by the defendants and Court had rightly relied upon the same – the plea of adverse possession was not proved and suit was rightly decreed- appeal dismissed. (Para- 11 to 20)

Case referred:
Karnataka Board of Wakf Vs. Government of India and others., (2004)10 SCC 779

For the appellant : Mr. Ajay Sharma, Advocate.
For the respondents : Mr. R.K. Gautam, Senior Advocate with Mr. Shray Sharma, Advocate, for respondent No.1
None for respondents No. 2 to 5.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral):

Instant appeal has been field against judgment and decree dated 1.4.2008 passed by the learned Additional District Judge, Fast Track Court, Una, District Una, Himachal Pradesh, in Civil Appeal No. 3/2000 RBT No. 227/07/2K, affirming judgment and decree dated 22.11.1999 passed by the learned Senior Sub Judge, Una, in Civil Suit No. 172 of 1989, whereby suit for possession filed by the respondent-plaintiff (herein after, 'plaintiff') was decreed holding him to be entitled to portion denoted by letters ACF in Site Plan Ext. P-1, by demolition of structure /shop raised on it.

2. Briefly stated the facts of the case, as emerge from the record are that the plaintiff filed a suit for possession stating therein that he is owner of land measuring 0-05-42 comprising Khewat No. 110 min, Khatauni no. 200 min, Khasra No. 873 (herein after, 'suit land') as entered in the Misal Hakiat for the year 1986-87 situate at Village Charatgarh, Tehsil & District Una and the land marked by letters ABCDEF in the site is part of the suit land. It is further averred that about six months ago, appellant-defendant No.1 and respondent (herein after, 'defendants') have raised construction over the suit land despite the objections of the plaintiff. Plaintiff asked defendants to remove the super-structure illegally raised over the suit land and to handover vacant possession of the same to him. Defendants refused to do so and as such they are threatening to interfere and to get the electric line laid through the land of the plaintiff. Hence, the suit was filed by the plaintiff praying for decree of possession of suit land by removing super-structure and also for permanent prohibitory injunction restraining the defendant from interfering in the peaceful possession of the plaintiff over the suit land.

3. Defendant, by way of written statement, refuted the claim put forth by the plaintiff and stated that site marked by letters ABCDF is not part of the suit land, rather same is part of land of the defendant. Defendant further claimed that he has constructed four shops on Khasra No. 812 owned and possessed by the defendants alongwith other, whereupon, plaintiff has no right, title or interest. The construction was about 15 years old. It is further pleaded that in case construction is found on the suit land, defendants have become owners by way of adverse possession. Further objection was taken that the plaintiff was estopped to file the suit due to his act and conduct. Defendants prayed for dismissal of the suit.

4. Learned trial Court framed following issues for determination:

"1. Whether the land denoted by letters ABCDEF is part of Khasra No. 873, if so whether this Khasra is owned and possessed by the plaintiff? OPP

2. Whether the defendants have become owner of the land in suit by way of adverse possession as alleged.? OPD

3. Whether the plaintiff is estopped for filing the suit by his act and conduct? OPD

4. Whether the suit is valued properly for the purpose of Court fee and jurisdiction? OPP

5. Whether the plaintiff has cause of action? OPP

6. Relief."

5. Vide judgment and decree dated 22.11.1999, learned Senior Sub Judge, Una decreed the suit of the plaintiff and held him entitled to possession of land as denoted by letters ACF in Site Plan, Ext. P-1 by demolition of structure/ shop raised over it by the defendants and further held that the defendants have no right, title or interest over the said land. Defendants feeling aggrieved filed appeal before the Additional District Judge, Fast Track Court, Una, who also dismissed the appeal vide judgment and decree dated 1.4.2008, upholding the judgment of the learned trial Court. Hence, this regular second appeal.

6. The regular second appeal was admitted on 7.7.2008, on the following substantial questions of law:

> "1. Whether the impugned judgments and decrees passed by the Courts below solely basing the same on the report of the Local Commissioner DW-2 stand vitiated on account of the fact that Ld. Local Commissioner having acted contrary to the instructions issued for the purpose by Financial Commissioner and so also the same are available in the H.P. High Court Rules and Orders?
>
> 2. Whether both the Courts below misread and mis-appreciated the report of the Local Commissioner and oral evidence adduced by the parties with specific reference to Ext. P-1, thereby vitiating the impugned judgments and decrees?"

7. Mr. Ajay Sharma, Advocate vehemently argued that the judgments and decrees passed by both the learned Courts below are not based on correct appreciation of evidence adduced on record by the respective parties, as such, same deserve to be set aside being unsustainable in the eyes of law. Mr. Sharma, further contended that the Courts below while holding plaintiff entitled to possession of land denoted in the site plan, Ext. P-1, miserably failed to appreciate the evidence available on record in its right perspective, as a result of which, great injustice has been caused to the plaintiff. Defendants have admittedly raised construction over their part of land. Mr. Sharma, strenuously argued that if report of the local commissioner is perused, it suggests that same is not executable and the relief prayed for by the plaintiff could not be granted on the basis of same. With a view to substantiate his aforesaid argument, he invited attention of the Court to the report submitted by the local commissioner, to demonstrate that no definite conclusion could have been drawn by the learned Courts below on the basis of report that the defendants have encroached upon the land of the plaintiff by construction over the same. He also invited attention of the Court to the evidence adduced on record by the respective parties to demonstrate that at no point of time, plaintiff was able to prove on record that defendants encroached upon the portion of his land rather, there was overwhelming evidence led on record by the defendants suggesting of the fact that shops were constructed on the land owned and possessed by the defendants. While concluding his arguments, Mr. Sharma, forcefully contended that both the Courts below very conveniently ignored the fact that with the efflux of time, defendants have acquired title by way of adverse possession. In view of this, defendants prayed for dismissal of suit after setting aside judgments and decrees passed by both learned Courts below, which otherwise also are not based on correct appreciation of evidence.

8. Mr. R.K. Gautam, learned Senior Advocate duly assisted by Mr. Shray Sharma, Advocate contended that bare perusal of judgment passed by both the learned Courts below clearly suggests that the Courts below while decreeing the suit have dealt with each and every aspect of the matter meticulously and there is no scope for interference by this Court, whatsoever, especially in view of the concurrent findings recorded by both the learned Courts. Mr. Gautam, while referring to the pleadings, especially, written statement filed by the defendants, forcefully contended that there is clear cut admission on the part of the defendants that they have encroached upon the land by raising construction/shop over the same. In this regard, he invited attention of the Court to specific portion of written statement, wherein defendants have stated that in case construction raised by them is found over the suit land, in that eventuality, they have acquired title by way of adverse possession. While concluding his arguments, Mr. Gautam, forcefully contended that in view of the concurrent findings recorded by both the Courts below, this Court has very limited jurisdiction to re-appreciate the evidence adduced on record.

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

10. Since all the substantial questions of law are interconnected, as such same are being taken up together to avoid repetition of evidence.

11. During the proceedings of the case, this Court, solely with a view to explore answer to aforesaid substantial questions of law, perused entire evidence, be it ocular or documentary, led on record by the respective parties, perusal whereof clearly suggests that the plaintiff while leading cogent and trustworthy evidence successfully proved on record that the defendants encroached upon the portion of land as denoted by letters, ACF in the site plan, Ext. P-1 by raising construction. It is undisputed that the plaintiff is owner-in-possession of the land bearing Khasra No. 873 whereas defendants are owners-in-possession of Khasra No. 812 and both the lands are adjoining to each other. Since plaintiff specifically alleged that the defendants encroached upon particular portion of his land by raising construction, court below, in view of the fact that there was boundary dispute, appointed Shri Vidya Rattan, Assistant Settlement Officer (DW-2) as local commissioner to demarcate the land to ascertain the encroachment by defendants, if any, over the suit land. Perusal of demarcation report, Ext. DW-2/A submitted by local commissioner, clearly suggests that Khasra No. 812/2 as shown in the site plan Ext. P-1 as ACF is part of land bearing Khasra no. 873. Objections were filed to the report by the defendants in the trial Court, which were considered by the trial Court at the time of final decision of the case.

12. DW-2 Vidya Rattan in his statement deposed that he was appointed as local commissioner. He conducted the demarcation as per the instructions of Financial Commissioners and High Court Rules and Orders. He further stated that he conducted demarcation after fixing three permanent points and thereafter furnished report, Ext. DW-2/A. In cross-examination, he stated that the Karukaans of Khasra No. 873 and 812 towards Western side have been corrected vide mutation No. 166 dated 21.4.1995 by the orders of the Settlement Officer. It emerges from the record that objections were filed to the report filed by local commissioner and the same were considered by the trial Court at the time of final decision of the case. Defendants, by way of objections opposed the report of the local commissioner by stating that there is no Khasra No. 711 as stated by the local commissioner in para-V of the report. Defendants further claimed that Khasra No. 711 has been shown by the local commissioner in the Tatima attached with his report and being so the report was not genuine. However, perusal of statement of the local commissioner in the Court suggests that Khasra No. 711 has been written by mistake and factually it was Khasra No. 771 and this fact has been explained by the local commissioner in his statement. Another objection raised by the defendants was that local commissioner has only shown portion ACF to be part of Khasra No. 873, whereas his report is silent qua portion FCD, as shown in the site plan, Ext. P-1.This Court with a view to ascertain the correctness of aforesaid submission having been made by the learned Counsel for the defendant(s) perused the report of local commissioner, Ext. DW-2/A, perusal whereof clearly suggests that the local commissioner being a revenue expert, demarcated the land of the parties on the basis of latest revenue record and prepared Tatima alongwith his report, showing particular portion i.e. encroached portion as 812/2 marked by letters, ACF, in the site plan, Ext. P-1. If the site plan furnished by the plaintiff with the plaint is perused juxtaposing Tatima furnished by the local commissioner alongwith report, it clearly emerges that the land denoted by letter ACF in site plan Ext. P-1 is portion of land bearing Khasra No. 873 and as such local commissioner has rightly depicted portion, ACF, as encroached portion.

13. Local Commissioner in his report has specifically mentioned that after measurement of land of both the parties, he has come to the conclusion that defendants have encroached upon the portion marked by letters ACF shown in the site plan, Ext. P-1. If the land bearing Khasra No. 812/2 marked by ACF, as described in Ext. P-1 is portion of land bearing Khasra No. 873, then land reflected in Ext. P-1 by letters FCD automatically becomes part of Khasra No. 873, owned and possessed by the plaintiff, as such, there is no error as alleged by the defendants, in the report submitted by local commissioner. Record, nowhere suggests that any counter report was filed by the defendants to controvert the report of the local commissioner appointed by the Court. Otherwise also, plaintiff, while appearing as PW-1 categorically deposed that he is owner of Khasra No. 873 and land of the defendants is situate towards North side of the suit land. He specifically stated that defendants constructed shop about 5-6 months after filing of

the suit. Defendants encroached upon the 4 Marla of land. Defendants, by way of written statement, admitted that they have constructed four shops over the land in Khasra No. 812/2, owned and possessed by him, whereas in his statement as DW-4, he stated that he has constructed five shops, out of which four shops are given on rent and in one shop he has installed flour mill, meaning thereby that the plaintiff has rightly stated that defendants forcibly raised construction over the land in the shape of fifth shop during the pendency of suit.

14. Similarly, perusal of document, Ext. P-2, copy of missal hakiat for the year 1986-87 pertaining to the land bearing Khasra No. 873 clearly suggests that the suit land is owned and possessed by the plaintiff. Defendant No. 1, while appearing as DW-1 stated that he is owner of Khasra No. 812 and plaintiff is owner of Khasra No. 873 and these Khasra numbers are adjoining to each other and he stated that he has no concern with Khasra No. 873. He further stated that he has not raised any construction over the land. Since he admitted specifically that Khasra No. 873 is owned and possessed by the plaintiff, there is no dispute, if any, with regard to ownership of the plaintiff as claimed by him in the plaint. At the cost of repetition, it can be stated that the defendants while filing written statement to the suit have, at the first instance, claimed that they have raised four shops over his land bearing Khasra no. 812 but in his statement before the Court, he categorically stated that he has constructed five shops on the land, which was constructed about 20-22 years ago but this Court after perusing pleadings of the parties available on record, specifically written statement filed by the defendants, has every reason to conclude that fifth shop as claimed by the plaintiff was constructed during the pendency of the suit.

15. DW-2 Vidya Rattan, Local Commissioner has clearly proved on record that the land as described in site plan, Ext. P-1 is encroached by the defendants. Hence, this Court, after perusing evidence, be it ocular or documentary, in its entirety, has no hesitation to conclude that both the learned Courts below rightly arrived at conclusion that the defendants have encroached upon the portion of land as denoted by letters, ACF by raising construction over the same. This court has no hesitation to conclude that there is overwhelming evidence on record suggestive of the fact that the plaintiff is owner of the land bearing Khasra No. 873 and defendant without there being any right, title or interest, whatsoever, raised construction over the portion of the suit land, marked by letters, ACF, as such there is no illegality or infirmity in the judgments and decrees passed by the learned Courts below and same deserve to be upheld. Since this Court, while examining evidence had occasion to peruse report of local commissioner Vidya Rattan DW-2, it can be safely stated that local commissioner carried out demarcation strictly in accordance with High Court Rules and Orders and instructions of the Financial Commissioner. There is no illegality or infirmity in the report submitted by local commissioner, Ext. DW-2/A.

16. Similarly, this Court, after perusing entire evidence on record, sees, no force, much less substantial force, in the contentions raised by the learned counsel for the defendant(s). Courts below have correctly appreciated evidence, be it ocular or documentary, adduced by the parties with specific reference to Ext. P-1, rather this Court, after perusing the same, is of the view that there is no error in the report of the local commissioner, as such same was rightly relied by the learned Courts below while decreeing the suit.

17. Now there is no specific averments with regard to timing and circumstances under which, appellant/defendant became owner by way of adverse possession, nor there is any original evidence led on record that defendants acquired the status of owner by way of adverse possession. In this regard, reliance is placed upon the judgment of Hon'ble Apex Court in case of **Karnataka Board of Wakf Vs. Government of India and others.,** (2004)10 SCC 779, wherein it has been held 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. The relevant para-11 of the judgment is reproduced as under:-

> "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, AIR 1964 SC 1254; Parsinni v. Sukhi,)1993) 4 SCC 375 and D.N. Venkatarayappa Vs. State of Karnataka (1997) 7 SCC 567). 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. (See. Dr. Mahesh Chand Sharma v. Raj Kumari Sharma, (1996) 8 SCC 128."

18. Hence, the substantial questions of law are answered accordingly.

19. Learned Counsel for the plaintiff also stated that this Court has limited scope for re-appreciation of evidence in view of concurrent findings recorded by the learned Courts below. 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 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."

20. Consequently, in view of aforesaid discussion, this Court sees no reason to interfere with the well reasoned judgments and decrees passed by both the Courts below. Accordingly, there is no merit in the appeal and same is dismissed. Pending applications are also disposed of. Interim directions, if any, are also vacated.

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

Sh. Chaman Lal s/o Sh. Budh Ram Mahat ....Revisionist/Convict

Versus

Sh.Budhi Singh s/o late Sh. Nanak Chand ....Non-revisionist/Complainant

Crl. Revision Petition No. 196/2015
Order Reserved on 26.09.2016
Date of order: 28.10.2016

Negotiable Instruments Act, 1881- Section 138- Accused issued a cheque of Rs. 5 lacs in discharge of his liability which was dishonoured- the accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held in revision that the defence version was not established – accused had not disputed his signatures on the cheque – he had failed to rebut the presumption under Negotiable Instruments Act- he was rightly convicted- revision dismissed. (Para-11 to 15)

Cases referred:

Anil Handa Vs. Indian Acrylic Ltd., AIR 2000 SC 145

Sampelly Satyanarayana Rao Vs. Indian Renewable Energy Development Agency Ltd., AIR 2016 SC 4363

Mahendra Pratap Singh Vs. Sarju Singh, AIR 1968 SC 707

Chinnaswamy Reddy Vs. State of Andhra Pradesh, AIR 1962 SC 1788

For revisionist : None

For non-revisionist : Mr. Naveen K. Bhardwaj, Advocate

The following order of the Court was delivered:

P. S. Rana, J.

Present criminal revision petition is filed under sections 397 and 401 Code of Criminal Procedure 1973 against judgment dated 12.05.2015 passed by learned Sessions Judge Kullu (H.P.) in criminal appeal No.05 of 2014 title Chaman Lal Vs. Budhi Singh whereby learned Sessions Judge Kullu dismissed the appeal of revisionist filed against judgment and sentence of learned Trial Court. On date of final hearing none appeared on behalf of revisionist. Learned Advocate appearing on behalf of non-revisionist submitted that learned Advocate appearing on behalf of revisionist sought many adjournments for final hearing and present case be disposed of on merits. Case listed for final hearing on 24.12.2015, 16.03.2016, 29.04.2016, 29.06.2016 and 26.09.2016. Court decided to dispose of revision petition on merits. Execution of sentence passed by learned Trial Court suspended by High Court till disposal of criminal revision petition.

Brief facts of the case:

2. Sh. Budhi Singh complainant filed complaint under section 138 of Negotiable Instruments Act 1881. There is recital in the complaint that complainant and accused are well known to each other and were having good friendly relations. There is further recital in the complaint that in the month of May 2010 revisionist was in dire need of money for construction of his house and revisionist approached the complainant and borrowed a sum of Rs.5 lac in presence of witnesses and assured that he would refund the amount within 3-4 months. There is further recital in the complaint that on dated 21.2.2011 complainant demanded back borrowed money from revisionist but revisionist in order to discharge his antecedent liability issued cheque No.460721 dated 21.2.2011 amounting to Rs.5 lac in favour of complainant. There is further recital in complaint that complainant presented the cheque before the bank but the cheque was dishonoured on account of insufficient fund. There is further recital in the complaint that

demand notice was issued to revisionist but despite it revisionist did not pay the amount due. Prayer for conviction of revisionist under section 138 of Negotiable Instruments Act 1881 sought.

3. Learned Trial Court recorded preliminary evidence of complainant and thereafter learned Trial Court held that there are sufficient prima facie grounds to proceed against revisionist for offence punishable under section 138 of Negotiable Instruments Act 1881. Thereafter notice was issued to revisionist by learned Trial Court. Thereafter on 5.12.2012 learned Trial Court issued notice of accusation under section 251 Cr.PC to revisionist for offence punishable under section 138 of Negotiable Instruments Act 1881. Complainant examined two witnesses and revisionist examined one witness. Documentaries evidence also placed on record. On dated 27.11.2013 learned Trial Court convicted the revisionist under section 138 of Negotiable Instruments Act 1881 and sentenced the convict to undergo simple imprisonment for a period of one year. Learned Trial Court also directed the revisionist to pay a sum of Rs.6 lac to complainant. Feeling aggrieved against the judgment and sentence passed by learned Trial Court revisionist filed appeal before learned Sessions Judge Kullu (H.P.) and learned Sessions Judge Kullu (H.P.) dismissed the appeal filed by revisionist on dated 12.5.2015 and affirmed the judgment and sentence passed by learned Trial Court. Feeling aggrieved against the judgment and sentence passed by learned Trial Court and affirmed by learned First Appellate Court revisionist filed the present criminal revision petition.

4. Court perused entire plea pleaded by revisionist in revision petition and Court heard learned Advocate appearing on behalf of non-revisionist and Court also perused the entire record carefully.

5. Following points arise for determination:

1) Whether criminal revision petition filed by revisionist under section 397 and 401 Code of Criminal Procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of revision petition?

4) Final Order.

Findings upon Point No.1 with reasons:

6. CW-1 Sh. Puran Chand Assistant Clerk State Bank of India Manali has sated that he is posted in State Bank of India Manali since 2009 and he has brought the record relating to cheque No.460721 dated 21.2.2011. He has stated that cheque was issued by Sh. Chaman Lal revisionist. He has stated that record relating to issuance of cheque book is Ext.CW1/A. He has stated that account statement is Ext.CW1/B. He has stated that both documents are attested by Branch Manager. He has stated that cheque was dealt with clearing house.

7. CW-2 Sh. Budhi Singh in examination-in-chief has tendered in evidence affidavit Ext.CW2/A, cheque Ext.CW2/B, forwarding letter issued by Uco Bank Ext.CW2/C, memo of dishonour of cheque Ext.CW2/D, notice of demand Ext.CW2/E and postal receipt Ext.CW2/F. There is recital in the affidavit that complainant Budhi Singh and revisionist are well known to each other and revisionist was having good friendly relations with complainant. There is also recital in the affidavit that in the month of May 2010 revisionist was in dire need of money for construction of his house and revisionist approached the complainant and borrowed a sum of Rs.5 lac in presence of witnesses and assured to refund the amount within 3-4 months. There is further recital in the affidavit that on 21.2.2011 complainant demanded back borrowed money from revisionist but revisionist in order to discharge his antecedent liability issued cheque No.460721 dated 21.2.2011 and thereafter he presented the said cheque before the bank but cheque was dishonoured with the remarks “insufficient funds” in the account of revisionist. There is further recital in the affidavit that revisionist was served with demand notice dated 17.3.2011 but despite demand notice revisionist did not pay the amount due. There is further recital in the affidavit that revisionist was not having sufficient fund in his account. CW2 has denied suggestion that he did not give money to revisionist. CW2 has denied suggestion that revisionist has not issued cheque Ext.CW2/B. CW2 has denied suggestion that cheque was given to Sh. Parma Nand. CW2 has denied suggestion that false case has been filed against revisionist.

8. Statement of revisionist recorded under section 313 Code of Criminal Procedure 1973. Revisionist has stated that he issued cheque to Sh. Parma Nand with whom sale transaction was under process.

9. Revisionist also adduced DW-1 Sh. Bal Krishan as defence evidence. DW-1 Sh. Bal Krishan Manager Uco Bank Kullu has stated that he is posted in the bank since 2012 and he has brought the summoned record. He has stated that statement of account of Sh. Budhi Singh is Ext.DW1/A. He has stated that there was amount of Rs.67,707/- (Sixty seven thousand seven hundred seven) in the account of Sh. Budhi Singh. In cross-examination he has admitted that on 6.1.2009 there was amount of Rs.1,10,000/- (One lac ten thousand) in the account of Sh. Budhi Singh. He has stated that on 14.3.2011 an amount of Rs.5,21,158/- (Five lac twenty one thousand one hundred fifty eight) were deposited.

10. Following documentaries evidence tendered by parties: (1) Ext.CW1/A is cheque book record of Chaman Lal (2) Ext.CW1/B is statement of account of Sh. Chaman Lal (3) Ext.CW2/B is cheque to the tune of Rs.5 lac dated 21.2.2011 issued in favour of Budhi Singh by revisionist. (4) Ext.CW2/C is forwarding letter of UCO Bank Kullu (5) Ext.CW2/D is memo relating to dishonour of cheque on account of insufficient funds. (6) Ext.CW2/E is demand legal notice given by complainant to revisionist (7) Ext.CW2/F is postal receipt (8) Ext.DW1/A is statement of account of complainant.

11. Plea of revisionist in revision petition that cheque was issued to Sh. Parma Nand because he intended to purchase land from Sh. Parma Nand and on this ground revision petition be accepted is rejected being devoid of any force for reasons hereinafter mentioned. Revisionist did not examine Sh.Parma Nand in the Court in order to prove that cheque in dispute was given to Sh.Parma Nand. Sole testimony of revisionist is not sufficient to hold that cheque was given to Sh.Parma Nand. Court has carefully perused the cheque Ext.CW2/B placed on record. Cheque Ext.CW2/B is issued in the name of Sh.Budhi Singh complainant in consideration amount of Rs.5 lac on dated 21.2.2011 and is signed by revisionist. As per section 139 of Negotiable Instruments Act 1881 there is presumption in favour of holder of the cheque. Revisionist did not adduce any positive cogent and reliable independent evidence on record in order to rebut the presumption. See AIR 2000 SC 145 title **Anil Handa Vs. Indian Acrylic Ltd.**

12. Plea of revisionist in revision petition that learned Trial Court and learned First Appellate Court have not properly appreciated oral as well as documentaries evidence placed on record and judgments are perverse and based upon non-appreciation of oral as well as documentaries evidence is also rejected being devoid of any force for reasons hereinafter mentioned. Court has carefully perused the judgments passed by learned Trial Court and affirmed by learned First Appellate Court. Learned Trial Court and learned First Appellate Court have properly appreciated oral as well as documentaries evidence placed on record with reliable reasons. Offence under section 138 of Negotiable Instruments Act 1881 is completed when following facts are proved: (1) Issuance of cheque (2) Presentation of cheque before bank (3) Return of cheque unpaid on account of insufficient fund (4) Giving notice in writing to accused demanding payment of cheque amount (5) Failure of accused to make payment within 15 days of demand notice. It is held that above stated facts are *sine qua non* for completion of offence under section 138 of Negotiable Instruments Act 1881. In the present case all the ingredients are proved against revisionist beyond reasonable doubt.

13. Revisionist has not disputed his signatures upon cheque Ext.CW2/B. It is well settled law that when signatures admitted upon cheque then presumption of debt in favour of holder of cheque is arises. See AIR 2016 SC 4363 title **Sampelly Satyanarayana Rao Vs. Indian Renewable Energy Development Agency Ltd.**

14. Plea of revisionist in revision petition that judgments passed by learned Trial Court and affirmed by learned First Appellate Court are perverse *ipso facto* and on this ground revision petition be accepted is also rejected being devoid of any force for reasons hereinafter mentioned. It is well settled law that High Court can interfere in revision petition only when

following factors are established: (1) Where decision is grossly erroneous (2) Where there is no compliance of provision of law (3) Where finding of fact is not based upon evidence (4) Where material evidence of parties is not considered (5) Where judicial discretion is exercised arbitrarily or perversely. See AIR 1968 SC 707 title **Mahendra Pratap Singh Vs. Sarju Singh.** See AIR 1962 SC 1788 title **Chinnaswamy Reddy Vs. State of Andhra Pradesh**. Above stated facts are not established by revisionist in accordance with law. Even as per section 118 of Negotiable Instruments Act 1881 there is presumption unless contrary is proved relating to (1) Consideration (2) Date (3) Time of acceptance (4) Time of transfer (5) Order of endorsements (6) Stamps (7) Holder is holder in due course. Section 118 of Negotiable Instruments Act 1881 lays special rule of evidence applicable to Negotiable Instruments Act 1881 and presumption is one of law as per section 118 of Negotiable Instruments Act 1881. Courts are under legal obligation to presume presumptions as mentioned under section 118 of the Act unless contrary is proved. In the present case revisionist did not rebut presumption as mentioned under section 118 of Negotiable Instruments Act 1881. Simple statement of revisionist under section 313 Cr.PC is not sufficient to rebut presumption of section 118 of Negotiable Instruments Act 1881. In view of above stated facts point No.1 is answered in negative.

Point No.2 (Final Order).

15. In view of findings upon point No.1 present criminal revision petition is dismissed. Judgment and sentence passed by learned Trial Court and affirmed by learned First Appellate Court are affirmed. Records of learned Trial Court and learned First Appellate Court be sent back forthwith alongwith certified copy of the order. Crl. Revision No.196/2015 is disposed of. Pending applications if any also disposed of.

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

ICICI Lombard General Insurance Co. Ltd. .....Appellant

Versus

Shimli Devi and others ..... Respondents

FAO No.73 of 2012
Decided on : 28.10.2016

Code of Civil Procedure, 1908- Order 41 Rule 27- An application for placing on record, copy of verification report submitted by investigator along with licence verification report filed- held, that the report is misconceived and against the purpose of granting compensation – application dismissed. (Para-10)

For the appellant: Mr.Jagdish Thakur, Advocate.
For the respondents: Mr.Tara Singh Chauhan, Advocate, for respondents No.1 and 2.
Mr.Dheeraj K. Vashista, Advocate, for respondent No.3.
Mr.Ajay Sharma, 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 30th November, 2011, passed by Motor Accident Claims Tribunal, Fast Track Court, Una, District Una, H.P., (for short, the Tribunal), whereby compensation to the tune of Rs.1,95,000/, with interest at the rate of 7.5% per annum from the date of filing of the petition till payment, came to be awarded in favour of the claimants, and the insurer was saddled with the liability, (for short, the impugned award).

2. The claimants, the driver and the owner 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 insurer has challenged the impugned award by way of instant appeal, on the grounds taken in the memo of appeal.

4. The claimants, being the parents of the deceased, invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, 1988, (for short, the Act), for grant of compensation to the tune of Rs.10.00 lacs, as per the break-ups given in the claim petition, on account of the death of Chandan Bhatia.

5. Respondents resisted the claim petition by filing replies.

6. Following issues were framed by the Tribunal:

> "1. Whether deceased Chandan Bhatia died due to rash and negligent driving of tractor by respondent No.1 on 20.4.2009 at about 11.05 P.M. at Chowki Maniar, Tehsil Bangana, District Una, bearing registrar No.HP-20C-4897? OPP
>
> *2. If issue No.1 is proved in affirmative, whether petitioners are entitled to compensation, if so, how much and from whom? OPP*
>
> *3. Whether the petition is not maintainable in the present form? OPR 1&2*
>
> *4. Whether the respondent No.1 was not holding valid and effective driving license at the time of accident? OPR-3*
>
> *5. Whether the tractor bearing registration HP-20C-4897 was being used without route permit fitness certificate and in violation of terms and conditions of insurance policy? OPR-3*
>
> *6. Relief."*

7. Claimants examined four witnesses, i.e. PW-1 Dr. Rajiv Angra, PW-2 HC Malkiat Singh, PW-3 Charan Dass and claimant Shimli Devi stepped into the witness box as PW-4. Respondents have not examined any witness, except respondent No.2, who stepped into the witness box as RW-1.

8. The Tribunal, after examining the pleadings and the evidence, held that the accident was the outcome of rash and negligent driving of the driver. There is no dispute about the said findings. Accordingly, the findings returned by the Tribunal on issue No.1 are upheld.

9. Before issue No.2 is dealt with, I deem it proper to deal with issues No.3 to 5. Onus to prove the said issues was on the insurer, has not led any evidence. The Tribunal has rightly decided issues No.3 to 5 and saddled the insurer with the liability.

10. It is worthwhile to mention here that the appellant, during the pendency of the instant appeal, has moved application, being CMP No.104 of 2012, under Order 41 Rule 27 read with Section 151 of the Code of Civil Procedure for placing on record copy of the verification report submitted by the Investigator alongwith the licence verification report, is misconceived and is against the purpose of granting compensation under the Act. Hence, dismissed.

11. As far as issue No.2 is concerned, the Tribunal has rightly assessed the compensation and made the award.

12. Having said so, there is no merit in the appeal filed by the appellant/insurer and the same is dismissed. Consequently, the impugned award is upheld.

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

Kamaljeet and others .....Appellants
Versus
Dharam Dass .....Respondent

RSA No. 215/2009
Reserved on: October 22, 2016
Decided on : October 28, 2016

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for declaration and injunction pleading that revenue entries showing his share as 5/23 measuring 10 marlas is illegal and the plaintiffs are owners in possession of the suit land to the extent of 44/46 shares- sale deed stated to have been executed by the plaintiffs for the consideration of Rs. 16,500/- is null and void and a result of misrepresentation – suit was dismissed by the trial Court- an appeal was preferred, which was also dismissed- held in second appeal that the execution of the sale deed was duly proved by the evidence of the defendant – Sub-registrar proved that sale deed was read over and explained to the parties – it was duly established that sale deed was executed voluntarily – the High Court has limited power to interfere with the concurrent findings of facts – appeal dismissed. (Para-10 to 24)

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

For the appellant **:** Mr. Neel Kamal Sharma, Advocate.
For the respondent **:** Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral):

Instant regular second appeal has been filed against judgment and decree dated 4.3.2009 passed by the learned District Judge, Hamirpur, HP, in Civil Appeal No. 87 of 2007 affirming judgment and decree dated 10.5.2007 passed by the learned Civil Judge (Senior Division), Hamirpur, HP in Civil Suit No. 359 of 1999 RBT No. 30 of 2007, whereby suit of the appellants-plaintiffs (herein after referred to as 'plaintiffs') for declaration has been dismissed.

2. Briefly stated the facts of the case as emerge from the record are that Giano Devi (deceased plaintiff No.1) and Hem Raj plaintiff No. 2 filed a suit in the Court of learned Civil Judge (Senior Division), Hamirpur for declaration that the sale deed dated 16.9.1999 (Ext. D-4) stated to have been executed by the plaintiffs in favour of the respondent-defendant (herein after referred to as 'defendant') in respect of suit land denoted by Khata No. 34, Khatauni No. 45, Khasra No. 286/84 measuring 2 Kanal 6 Marla as per the copy of Jamabandi for the year 1996-97 situated in Tikka Ghugan, PO Aghar, Tappa Mehalata, Tehsil and District Hamirpur to the extent of 5/23 share measuring 10 Marla is illegal, null and void being the result of fraud and misrepresentation with the consequential relief of permanent prohibitory injunction restraining the defendant from interfering with the suit land in any manner whatsoever. Plaintiffs averred in the plaint that they are owners-in-possession of the suit land to the extent of 44/46 shares. Plaintiff No.1 was an illiterate and *Pardanasheeni* woman. Defendant approached the plaintiff with the request to sell the land measuring 5 Marla out of the suit land. Plaintiff further averred that plaintiff No.1 was to sell only 3 Marla from her share and 2 Marla from the share of her son, plaintiff No. 2, for a consideration of Rs.16,500/-. Plaintiffs averred that the plaintiffs were made to sit outside the office of the Sub Registrar Hamirpur. Papers were purchased by the defendant and the plaintiffs were told that they would be selling only 5 Marla of land. The sale deed was also

got written by the defendant and contents were never explained to the plaintiffs. Plaintiffs were taken inside the office of Sub Registrar Hamirpur, who also enquired from them regarding the extent of the land being sold by them and the plaintiffs specifically informed him that they were only selling 5 Marla of land. Defendant got mentioned in the sale deed that the plaintiffs had sold 10 Marla of land to the defendant, which was not correct. Plaintiffs were never explained the terms of the sale deed and plaintiff No.2 was made to consume liquor and sale deed was got executed in state of intoxication. Defendant had also agreed to pay a sum of Rs.10,000/- to the plaintiffs but this fact was also not got incorporated in the sale deed. Suit land was worth more than Rs.50,000/-. Defendant taking advantage of the sale deed was threatening to change the nature of the suit land and to alienate the same without any right to do so as such they were compelled to file suit as referred to above.

3. Defendant by way of written statement, refuted the claim of the plaintiffs raising preliminary objections with regard to maintainability, estoppel and plaint being bad for want of better particulars. Defendant also denied the allegations of the plaintiffs on merits by stating that plaintiff No.1 was not a *Pardanasheen* woman and had been managing her affairs herself. She had sold land to different persons including the defendant in the year 1990-91. Plaintiffs had received an amount of Rs.30,000/-. The sale consideration was mentioned less in order to avoid the liability of stamp duty. Plaintiffs had utilized the amount by constructing a house and the sale was for necessity. Sale deed was executed at the instance of the plaintiffs. Whole consideration had been paid and the small amount, which was agreed to be paid at the time of attestation of mutation, remained payable, which defendant was ready and willing to pay. Sale deed was explained to the plaintiffs not only by the deed writer but also by the Sub Registrar. Defendant prayed for dismissal of the suit.

4. Replication was filed by the plaintiffs. Learned trial Court framed following issues on 11.1.2002:

1. Whether the plaintiffs are entitled for the relief of declaration to the effect that the sale deed dated 16.9.1999 executed by the plaintiffs in favour of the defendant is illegal, null and void as claimed? OPP
2. Whether the sale is the result of fraud and misrepresentation as alleged, if so its effect? OPP
3. Whether the plaintiffs are entitled for permanent prohibitory injunction as claimed? OPP
4. Whether the suit is not maintainable as alleged? OPD
5. Whether the suit is bad for want of better necessary particulars as alleged? OPD
6. Whether the plaintiffs are estopped from filing the present suit by their act and conduct? OPD
7. Relief.

5. Subsequently, the learned trial Court, on the basis of material adduced on record by the respective parties, dismissed the suit of the plaintiffs vide judgment and decreed dated 10.5.2007. Plaintiffs filed appeal before District Judge, Hamirpur, who also dismissed the appeal vide judgment and decree dated 4.3.2009. Hence, this regular second appeal.

6. The regular second appeal was admitted on 6.5.2010, on the following substantial question of law:

> "Whether the findings of the Court below are a result of complete misreading, misinterpretation of the evidence and material on record and against the settled position of law?"

7. Mr. Neel Kamal Sharma, Advocate, vehemently argued that judgments and decrees passed by both the Courts below are not sustainable and liable to be set aside. He further

contended that the Courts below have miserably failed to appreciate the evidence adduced by the respective parties in right perspective, as a result of which erroneous findings have been returned to the detriment of the plaintiffs. With a view to substantiate his aforesaid argument, he invited attention of the Court to the judgments passed by the Courts below to suggest that same are against the facts, evidence and law, and as such can not be allowed to sustain. Mr. Sharma further argued that the suit of the plaintiffs has been dismissed in slipshod manner and there is no proper application of mind while analyzing the evidence, be it ocular or documentary, adduced on record by the plaintiffs. While concluding his arguments, Mr. Sharma forcefully contended that the findings of the trial Court on issues No.1,2,3 and 6 which were further upheld by the first appellate Court, are totally illegal and erroneous because there was no occasion for the trial Court to draw a presumption regarding registration of document and learned trial Court miserably failed to appreciate the cross-examination of PW-3, wherein factum regarding registration of sale deed in question was admitted. He further contended that both the Courts below have not appreciated the fact that Giano Devi was a rustic and *Pardanasheen* lady. In the aforesaid background, Mr. Sharma prayed for decreeing the suit after setting aside the judgments and decrees passed by both the Courts below.

8. Mr. G.D. Verma, learned Senior Counsel duly assisted by Mr. B.C. Verma, Advocate, supported the judgments and decrees passed by both the Courts below. Mr. Verma, while referring to the judgments of Courts below stated that a bare perusal of same suggests that same are based on correct appreciation of evidence adduced on record by respective parties and as such there was no scope for interference by this Court, whatsoever, especially in view of concurrent findings of facts and law recorded by the Courts below. With a view to substantiate his aforesaid argument, Mr. Verma made this Court to peruse the evidence adduced on record by both the parities, to demonstrate that at no point of time, plaintiffs were able to prove on record that the sale deed Ext. D-4, was result of fraud and misrepresentation. Mr. Verma, forcefully contended that the plaintiffs by making averments in the plaint, made an attempt to demonstrate that sale deed was result of fraud played upon them but if the evidence led on record is read in its entirety, it nowhere suggests that at any point of time, Hem Raj was made to consume liquor, rather it stands duly proved from the statement of Sub Registrar (DW-1A) Netar Singh that at the time of registration of sale deed, plaintiff Giano Devi was duly asked by him with regard to contents of sale deed, wherein it was written that she was selling suit land i.e. 10 Marla for total consideration of Rs.16,500/-. While concluding his arguments, Mr. Verma forcefully contended that it stands duly proved on record that sale deed was duly executed in accordance with law. Plaintiffs were not able to prove on record that the sale deed was result of fraud and misrepresentation and as such this Court has no occasion to interfere with the well reasoned judgments and decrees passed by both the courts below, perusal whereof clearly suggests that both the Courts below have dealt with each and every aspect of the matter meticulously. He also reminded this court of its limited scope of interference in the concurrent findings of facts and law recorded by both the Courts below and in this regard he placed reliance on the judgment passed by Hon'ble Apex Court in **Laxmidevamma and Others vs. Ranganath and Others**, (2015)4 SCC 264.

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

10. During proceedings of the case, this Court had an occasion to peruse the pleadings as well as evidence led on record by respective parties, perusal whereof nowhere suggests that both the Courts below have misread and mis-interpreted the evidence, rather this Court after perusing the same, has no reason to differ with the findings recorded by both the courts below, which otherwise appear to be based on correct appreciation of evidence. Moreover, during the submissions having been made by Mr. Neel Kamal Sharma, he was not able to point out any illegality or infirmity, which in turn could compel this Court to draw conclusion that the judgments passed by both the courts below are perverse. But this court solely with a view to explore answer to the substantial question of law, reproduced herein above, critically examined evidence available on record to ascertain genuineness and correctness of the claim having been

put forth by the plaintiffs to reach a just and fair decision in the matter. Though the plaintiffs by making averments in the plaint made an attempt to prove that the sale deed Ext. D-4 was a result of fraud by taking advantage of the ignorance of the plaintiffs but there is no evidence led on record in this regard. Plaintiffs further claimed that plaintiff No.1, who was a *pardanasheen* lady had no knowledge whatsoever with regard to the contents of sale deed. Plaintiffs further claimed that plaintiff No.2 Hem Raj was made to consume liquor at the relevant time and they were made to sit outside the office of Tehsildar but no credible evidence has been led on record in this regard.

11. PW-1 Hem Raj stated that Giano Devi was his mother and they had filed suit for declaration that sale deed dated 16.9.1999 was null and void because same was obtained by defendant by playing fraud upon them. He further stated that instead of 5 Marla, 10 Marla of land was purchased, for which plaintiffs never agreed. He further stated that they were made to sit outside the office of Tehsildar but the fact remains that in his examination-in-chief, he categorically stated that they appeared before Tehsildar at 5 PM and stated that they had sold 5 Marla of land to the defendant. He further stated that contents of sale deed were not read over to them and he was made to consume liquor by playing fraud. In his cross-examination, he admitted that he was a matriculate. He did not know that if some papers were purchased in the name of vendors but careful perusal of the cross-examination clearly suggests that he admitted his signatures on Ext. D1, Ext. D2(copy of sale deed) and endorsement, Ext. D-3. He stated that he does not know the average value of land in area. His mother had executed Will in his favour. She had given property to his children and not to him, which compels this Court to draw inference that deceased Giano Devi did not have confidence in Hem Raj.

12. PW-2 Bidhi Singh stated that plaintiffs had consented to sell land at the rate of Rs.8,000/- per Marla but the defendant played fraud with them and purchased more land for lesser value. Registry was put up before the Sub Tehsildar at 5.00 PM and he had no time to verify the same. In his cross-examination, he stated that he was a *Lambardar* of area for the last 30 years. He admitted sale of suit land to defendant. He appeared as a witness of sale deed. Being Lambardar, he had appeared as witness in 500-600 cases. He admitted his signatures on Ext. D-4. He admitted that sale deed was read over by Deed Writer also.

13. Conjoint reading of evidence of plaintiffs clearly suggests that suit land was agreed to be sold by the plaintiffs to the defendant and sale deed was put before the Sub Registrar at 5 PM on 16.9.1999. Perusal of statement of PW-2 Bidhi singh clearly suggests that contents of sale deed were read over by the Deed Writer to the respective parties. Close scrutiny of aforesaid witness duly establishes that pursuant to agreement arrived at between the parties, sale deed Ext. D-4 was executed and same was placed before Sub Registrar and contents of same were read over and explained to the plaintiffs before registering the same.

14. DW-1 Dharam Dass deposed that he purchased 10 Marlas of land from plaintiffs for a consideration of Rs.16,500/- vide sale deed Ext. D-4. He further stated that sale deed was got executed by plaintiffs, Giano Devi and Hem Raj, which was read over and explained to them and thereafter Hem Raj signed the same and Giano Devi put her thumb impression on the same, admitting same to be correct. He categorically stated that aforesaid process was repeated before Sub Registrar also. It has come in his statement that a sum of Rs.10,000/- was paid before Sub Registrar and balance was to be paid at the time of delivery of possession. In cross-examination, he reiterated what he stated in his examination-in-chief by stating that he had discussion with Giano Devi qua purchase of 10 Marla. He specifically denied that Hem Raj was made to consume liquor on that day. He denied the suggestion that sale deed was put before Sub Registrar in the evening. He also denied the suggestion that plaintiffs had agreed to sell only 5 Marla of land.

15. DW-1A (six DW-2) Nater Singh, Sub Registrar deposed that sale deed, Ext. D-4 was placed before him and a sum of Rs.10,000/- was paid to the vendors in his presence. He stated that he read over the sale deed to the parties, who admitted the same to be correct and then attested it.

16. DW-2 Kishore Kumar Sharma, Deed Writer, stated that he scribed the sale deed Ext. D-4 at the behest of vendors and he wrote in its whatever, he was told to write by Hem Raj and Giano Devi and they had sold suit land to the defendant for Rs.16,500/-. In cross-examination, he stated that he did not know Giano Devi, Dharam Dass and Hem Raj, personally. Giano Devi was illiterate. He feigned ignorance about the fact whether registry was placed before Sub Registrar at 5 PM.

17. DW-3 Relu Ram is marginal witness of sale deed Ext. D-4. he stated that Giano Devi and Hem Raj sold 10 Marla of land to the defendant for Rs.16,500/-. Vendors attested the sale deed in the presence of Sub Registrar, where a sum of Rs.10,000/- was paid as part payment. He also signed the sale deed as marginal witness. In cross-examination, he stated that Tehsildar had come to the office on that day at about 5 PM. He stated that he does not know if Hem Raj was made to consume liquor by Dharam Dass on that day.

18. DW-4 Ramesh Chand has only proved on record average value of land in the area, Ext. DW-4/A.

19. DW-5 Jagar Nath Sharma, is a Registration Clerk in the office of Tehsildar, Hamirpur. He testified that Ext. DW-5/A was true copy of sale deed No. 250 dated 19.4.2005. He also proved on record another sale deed Ext. DW-5/B and endorsement Ext. DW-5/C. He proved on record sale deed dated 17.8.1982 Ext. DW-5/D and its endorsement Ext. DW-5/E. He also proved sale deed Ext. D-4 and its endorsement Ext. DW-5/E.

20. Conjoint reading of aforesaid evidence led on record by defendant leaves no doubt that defendant successfully proved on record that sale deed Ext. D-4 was duly executed by plaintiffs namely Giano Devi and Hem Raj whereby they sold 10 Marla of land to the defendant for consideration of Rs.16,500/-. It duly stands proved on record that sale deed was registered by Sub Registrar DW-1/A, who himself stated before the Court that sale deed Ext. D-4 was placed before him and a sum of Rs.10,000/- was paid to the vendors in his presence. It has come in his statement that he read over contents of sale deed to the parties, who admitted same to be correct. There is nothing in the cross-examination of aforesaid witness from where it can be inferred that DW-1A Nater Singh falsely stated with regard to execution of sale deed. Similarly, there is nothing in his cross-examination suggestive of the fact that DW-1A who was a government servant had any motive to falsely depose against the plaintiff No.2, whereas, plaintiffs who examined himself as PW-1, placed reliance on the statement of PW-2 Bidhi Singh, who was Lambardar of area. In his cross-examination, he himself admitted that he appeared as witness of sale deed being Lambardar in 500-600 cases. There is nothing in his statement which could be sufficient for the Courts below to disbelieve the overwhelming evidence put forth by defendant to prove correctness of Ext. D-4 rather admission made by this witness in cross-examination with regard to his being witness in a number of sale deeds, speaks volumes.

21. Hence, this Court, after reading entire evidence, has no hesitation to conclude that defendant by leading cogent evidence was able to prove that sale deed Ext. D-4 was executed by the plaintiffs on their own volition, after receiving major portion of payment, in the presence of Sub Registrar, who himself entered the witness box to depose that at the time of registration of sale deed, contents of same were read over the parties.

22. Hence, this Court sees no misreading or misinterpretation of evidence. Substantial question of law is answered accordingly.

23. 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 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."

24. Consequently, in view of aforesaid discussion, this Court sees no reason to interfere with the well reasoned judgments and decrees passed by both the Courts below. Accordingly, there is no merit in the appeal and same is dismissed. Pending applications are also disposed of. Interim directions, if any, are also vacated.

****

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

Kishori Lal ...Appellant.

Versus

Tulsi Ram and others ...Respondents.

FAO No. 126 of 2015
Decided on: 28.10.2016

Motor Vehicles Act, 1988- Section 166- Injured remained admitted in the hospital for a pretty long time – the injured had suffered 100% permanent disability and is bed ridden – the claimant was agriculturist and his income cannot be less than Rs. 5,000/- per month- he will not be in a position to earn anything in view of the disability – his age was 32 years at the time of the accident and multiplier of 15 has to be applied- thus, claimant is entitled to Rs. 5,000 X 12 X 15= Rs. 9,00,000/- as loss of income- MACT had awarded attendant charges for 18 months, which is not proper as the attendant would be required throughout the life- taking the minimum wages into consideration, Rs. 3,000/- per month awarded towards attendant charges and compensation of Rs. 3000 x 12x 15= Rs. 5,40,000/- awarded towards attendant charges- Rs.1 lac awarded for future treatment- Rs. 1,50,000/- awarded under the head pain and suffering and Rs. 1,50,000/- awarded under the head loss of amenities of life – Rs. 30,000/- awarded for wheel chair – total compensation of Rs. 20,28,341/- awarded with interest @7.5% per annum from the date of filing of the claim petition till realization. (Para- 13 to 27)

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 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 versus Sabir and others, (2015) 7 SCC 252

For the appellant: Mr. Sandeep K. Sharma, Advocate.

For the respondents: Mr. G.R. Palsra, 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. *(Oral)*

Subject matter of this appeal is award, dated 1st January, 2014, made by the Motor Accident Claims Tribunal (III), Mandi, H.P. (for short "the Tribunal") in Claim Petition No. 29/2011, titled as Kishori Lal versus Tulsi Ram and others, whereby compensation to the tune of ₹ 9,49,000/- 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 the insurer was saddled with liability (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 ₹ twenty seven 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 Naresh Kumar, while driving Alto Car (taxi), bearing registration No. HP-01K-2192, rashly and negligently, on 25th September, 2010, at about 3.45 P.M. at place Nouna, Balichowki, District Mandi, in which the claimant-injured sustained injuries.

6. The claim petition was resisted by the respondents and the following issues came to be framed by the Tribunal on 13th December, 2011:

> *"1. Whether on 25.9.2010 respondent No. 2 was driving the Alto Car bearing No. HP-01K-2192 in a rash and negligent manner causing grievous injuries to the petitioner, as alleged? OPP*
>
> *2. If issue No. 1 is proved in affirmative, whether the petitioner is entitled for grant of compensation, if so to what extent and from whom? OPP*
>
> *3. Whether the vehicle was driven without valid and effective R.C., route permit and fitness certificate? If so its effect? OPR-3*
>
> *4. Whether the respondent No. 2 was not holding valid and effective driving licence, as alleged? OPR-3*
>
> *5. Relief."*

7. The claimant-injured examined five witnesses and has himself appeared in the witness box as PW-1 in support of his claim. The driver and owner-insured of the offending vehicle also appeared in the witness box as RW-1 and RW-2, respectively. The insurer has not led any evidence in support of its defence.

Issue No. 1:

8. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimant-injured has proved that he became the victim of the vehicular accident, which was caused by the driver of the offending vehicle. The said findings have not been questioned by the owner-insured, driver and insurer of the offending vehicle. 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 determine issues No. 3 and 4.

Issues No. 3 and 4:

10. 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 and the same was being driven without valid documents, has not led any evidence. The Tribunal has rightly made the discussion in para 11 of the impugned award. Even, the same have not been questioned by the insurer. Accordingly, the findings returned by the Tribunal on issues No. 3 and 4 are also upheld.

Issue No. 2:

11. The perusal of the record does disclose that the claimant-injured was operated upon for spine (D-12) injury at PGI Chandigarh and remained admitted in various hospitals for a pretty long time, as is evident from the documentary evidence on the file. The disability certificate is also on the record as Ext. PW-4/A, in terms of which the claimant-injured has suffered 100% permanent disability, due to which he has been totally paralyzed, incapacitated, disabled and is bed ridden.

12. It is beaten law of land that in an injury case, the compensation is to be awarded under pecuniary and non-pecuniary heads by making guess work.

13. 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**.

14. This Court has also laid down the same principle in a series of cases.

15. The claimant-injured has pleaded that he was earning ₹ 15,000/- per month being an agriculturist and horticulturist. The Tribunal, after making the guess work, has assessed his monthly income to be ₹ 3600/- per month, which is not legally and factually correct. There are pleadings and evidence on the file, which have remained unrebutted, that the claimant-injured was having land, which is proved by the extract of jamabandi, Ext. PW-1/G. It stands also proved that he was an agriculturist and horticulturist by profession. Thus, it can be safely held that he was earning not less than ₹ 5,000/- per month.

16. Because of the 100% disability suffered by the claimant-injured, he is not in a position to earn anything. The claimant-injured has examined Dr. Sandeep Vaidya as PW-4, who was one of the members of the Medical Board, which has issued the disability certificate. It is apt to reproduce the statement of Dr. Sandeep Vaidya (PW-4) herein:

> *"Stated that I am posted as M.O. at ZH Mandi since January, 2006. I was a member of Medical Board constituted for the purpose of determination of disability. One Sh. Kishori Lal was examined by the board on 25-8-2012 and after examination issued a permanent disability certificate of 100% in relation to dorsal spine. The certificate is Ex. PW-4/A which is correct as per record. These injuries mentioned in Ex. PW-4/A are possible in motor vehicular accident. I have also put my signature in Ex. PW-4/A which is in red circle.*
>
> *xxx By Sh. B.C. Singh Adv. xxx*
>
> *Nil. Opportunity given.*
>
> *xxx by Sh. Dikan Rana Adv. xxx*
>
> *The injuries are not curable now."*

17. Accordingly, it is held that the claimant-injured has lost total income to the tune of ₹ 5,000/- per month.

18. The age of the claimant-injured was 32 years at the time of the accident, which is not in dispute. The Tribunal has applied the multiplier of '17', which is not just and appropriate.

Multiplier of '15' was to be applied in view of the second Schedule appended with the MV Act read with the law laid down by the Apex Court in the case titled as **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, the Tribunal has fallen in an error.

19. Having said so, the claimant-injured has lost source of income to the tune of ₹ 5,000/- x 12 x 15 = ₹ 9,00,000/-.

20. The Tribunal has awarded ₹ 36,000/- under the head 'attendant charges' @ ₹ 2,000/- per month for a period of eighteen months only. The Tribunal has fallen in an error in holding that the claimant-injured would have been requiring the services of an attendant for a period of eighteen months for the reason that the doctor, while appearing in the witness box as PW-4, has specifically stated in his cross-examination that the injuries suffered by the claimant-injured are not curable. Meaning thereby, he will require the services of an attendant throughout his life and as on today or at the time of the accident, even the minimum wages for engaging the services of an attendant are not less than ₹ 3,000/- per month. Thus, the claimant-injured is held entitled to the attendant charges to the tune of ₹ 3,000/- x 12 x 15 = ₹ 5,40,000/-

21. The Tribunal has awarded ₹ 1,25,147/- for the medical expenses incurred, while taking note of the memo, receipts and the bills, in para 21 of the impugned award, but, it has fallen in an error in not granting compensation for future treatment, which would not have been less than ₹ 1,00,000/-. Accordingly, the claimant-injured is held entitled to compensation to the tune of ₹ 2,25,147/- under the head 'medical expenses past and future'.

22. The amount of compensation to the tune of ₹ 5,000/- awarded under the head 'special diet' and ₹ 28,194/- under the head 'transportation charges' is maintained.

23. The Tribunal has also committed a legal mistake in awarding compensation under the head 'pain and sufferings' to the tune of ₹ 20,000/-.

24. The Apex Court in its latest decision in the case titled as **Jakir Hussein versus 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 entire life etc. It is apt to reproduce paragraphs 11 and 18 of the judgment herein:

> *"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."

25. 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 ₹ 1,50,000/- under the head 'pain and sufferings' and ₹ 1,50,000/- under the head 'loss of amenities of life'.

26. The claimant-injured will require wheel chair due to the said injury, thus, I deem it proper to award ₹ 30,000/- under the head 'wheel chair'.

27. Having glance of the above discussions, the claimant-injured is held entitled to total compensation to the tune of ₹ 9,00,000/- + ₹ 5,40,000/- + ₹ 2,25,147/- + ₹ 5,000/- + ₹ 28,194/- + ₹ 1,50,000/- + ₹ 1,50,000/- + ₹ 30,000/- = ₹ 20,28,341/- with interest @ 7.5% per annum from the date of the claim petition till its realization.

28. In view of the above, the amount of compensation is enhanced, impugned award is modified, as indicated hereinabove and the appeal is allowed.

29. 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.

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

****

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

FAOs No. 67 & 342 of 2011
Reserved on: 07.10.2016
Decided on: 28.10.2016

FAO No. 67 of 2011

Smt. Krishna and others ...Appellants.

Versus

National Insurance Company and others ...Respondents.

FAO No. 342 of 2011

National Insurance Company Ltd. ...Appellant.

Versus

Smt. Kubja Devi and others ...Respondents.

Motor Vehicles Act, 1988- Section 166- The owner claimed that she was minor at the time of accident- certificate of matriculation examination was placed on record, which shows that she was minor at the time of the accident – Section 2(30) provides that the guardian of the minor has to be treated as minor – hence, B was rightly treated to be the owner- his risk was not covered in terms of the policy and legal representatives cannot file claim petition for his death.

(Para-14 to 18)

Motor Vehicles Act, 1988- Section 167- Deceased was working as conductor with the vehicle – claimants have legal right to claim compensation in terms of Workmen Compensation Act as the deceased was an employee of the insured – legal representatives have an option to file the claim petition either before Workmen Compensation Commissioner or before MACT. (Para-34 to 38)

Cases referred:

HDFC Bank Ltd. versus Kumari Reshma and Ors., reported in 2014 AIR SCW 6673
United India Insurance co. Ltd. Versus Shila Datta & Ors., reported in 2011 AIR SCW 6541
Josphine James versus United India Insurance Co. Ltd. & Anr., reported in 2013 AIR SCW 6633

FAO No. 67 of 2011

For the appellants:	Ms. Sheetal Kimta, Advocate.
For the respondents:	Mr. Deepak Bhasin, Advocate, for respondent No. 1. Mr. Vivek Darhel, Advocate, vice Mr. V.S. Chauhan, Advocate, for respondent No. 1. Respondent No. 3 already ex-parte. Mr. Amit Sharma, Advocate, for respondent No. 4.

FAO No. 342 of 2011

For the appellants:	Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Ishan Thakur, Advocate.
For the respondents:	Nemo for respondents No. 1 to 5. Mr. Vivek Darhel, Advocate, vice Mr. V.S. Chauhan, Advocate, for respondent No. 6. Ms. Sheetal Kimta, Advocate, for respondent No. 7. Respondent No. 8 already ex-parte. Mr. Amit Sharma, Advocate, for respondent No. 9 (being Court guardian for respondent No. 4 in FAO No. 67 of 2011).

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Both these appeals are outcome of one vehicular accident. Thus, I deem it proper to determine both these appeals by this common judgment.

2. Subject matter of **FAO No. 67 of 2011** is award, dated 27th September, 2010, made by the Motor Accident Claims Tribunal (III), Simla, H.P. (for short "the Tribunal") in M.A.C. Petition No. 8-S/2 of 2005/01, titled as Smt. Krishna and others versus National Insurance Company and others, whereby the claim petition filed by the claimants came to be dismissed (for short "impugned award-I").

3. **FAO No. 342 of 2011** is directed against award, dated 7th December, 2010, made by the Tribunal in M.A.C. Petition No. 54-S/2 of 2005/02, titled as Smt. Kubja Devi and others versus Poonam Kumari and others, whereby compensation to the tune of ₹ 6,73,000/- with interest @ 7% per annum from the date of petition till its realization came to be awarded in favour of the claimants and insurer came to be saddled with liability (for short "impugned award-II").

4. It order to determine these appeals, it is necessary to give a brief resume of the facts of the case, the womb of which has given birth to the appeals in hand.

5. Bharat Singh and Madan Lal became the victims of the vehicular accident, which was allegedly caused by the driver, namely Shri Rakesh Chandel, while driving truck bearing registration No. HP-09-2227, rashly and negligently on 13th April, 2001, at about 3.00 P.M., at place Sonu Bangla, near Durga Mata Temple, P.S. Boileauganj, in which both, Bharat Singh and Madan Lal, and the driver of the offending vehicle sustained injuries and succumbed to the

injuries, constraining the claimants to file claim petitions before the Tribunal for grant of compensation, as per the break-ups given in the respective memo of claim petitions.

6. Both the claim petitions were resisted by the respondents on the grounds taken in the respective memo of objections.

7. Following issues came to be framed by the Tribunal in M.A.C. Petition No. 8-S/2 of 2005/01 (subject matter of FAO No. 67 of 2011):

"1. Whether the deceased sustained fatal injuries due to rash and negligent driving on the part of the driver of the vehicle involved in the accident, as alleged? OPP

1-A. Whether the alleged mishap took place on account of mechanical defect developed in the vehicle all of a sudden? OPR

2. Whether the petition is bad for non-joinder of necessary parties? OPR-3

3. Whether the petition is not maintainable as alleged? OPR

4. Whether the insurer is not liable to indemnify the insured as alleged? OPR

5. To what amount the petitioners are entitled to receive as compensation? OPP

5-A. Whether the petition is not maintainable as respondent Punam was minor at the time of accident? OPR

6. Relief."

8. It is also apt to reproduce the issues framed by the Tribunal in M.A.C. Petition No. 54-S/2 of 2005/02 (subject matter of FAO No. 342 of 2011):

"1. Whether the Madan Lal deceased sustained fatal injuries due to rash and negligent driving on the part of Rajesh Chandel the driver of the vehicle No. HP-09-2227? OPP

2. Whether the accident occurred due to sudden failing of the vehicle? OPR-1

3. Whether the insurer is not liable to indemnify the insured as alleged? OPR

4. To what amount the petitioners are entitled to receive as compensation? OPP

5-A. Whether the petition is not maintainable as respondent Punam was minor at the time of accident? OPR

5. Relief."

9. Parties in both the claim petitions have led evidence.

10. The Tribunal, after scanning the evidence, oral as well as documentary, dismissed the claim petition filed by the legal representatives of deceased-Bharat Singh, i.e. M.A.C. Petition No. 8-S/2 of 2005/01, in terms of impugned award-I, on the ground that the deceased-Bharat Singh was the owner and insured of the offending vehicle, thus, the claim petition was not maintainable. The said award has been questioned by the claimants by the medium of FAO No. 67 of 2011.

11. The claim petition filed by the legal representatives of deceased-Madan Lal, i.e. M.A.C. Petition No. 54-S/2 of 2005/02, was granted in terms of impugned award-II, compensation came to be awarded in favour of the claimants and the insurer was saddled with liability. The insurer has called in question the said award by the medium of FAO No. 342 of 2011.

12. It is apt to record herein that the insurer has not questioned the findings recorded against it by the Tribunal in M.A.C. Petition No. 8-S/2 of 2005/01 (subject matter of FAO No. 67 of 2011).

13. The following questions arise for consideration in both these appeals:

(i) Whether Poonam Kanwar was minor at the time when the offending vehicle was purchased in her name and at the time of accident?

(ii) Whether, in the given circumstances of the case, deceased-Bharat Singh can be said to be the owner and insured of the offending vehicle at the relevant point of time?

(iii) Whether deceased-Madan Lal was employed as a conductor with the offending vehicle at the relevant point of time and his risk was covered?

14. Poonam Kanwar filed the reply in both the claim petitions and has not denied, rather, admitted that she was minor at the time when offending vehicle was purchased and at the time of the accident. While going through the registration certificate of the offending vehicle, Mark-A, which is at page 139 of the paper book of M.A.C. Petition No. 8-S/2 of 2005/01, it is nowhere recorded that Poonam Kanwar was a minor. But the fact of the matter is that she has herself admitted that she was minor at the time of the purchase of the offending vehicle. Poonam Kanwar has also placed on record the certificate of her matriculation examination, which is at page 63 of the record of FAO No. 67 of 2011 and page No. 84 of the record of FAO No. 342 of 2011, in terms of which her date of birth is 3rd June, 1984. Meaning thereby, she was minor at the time when the offending vehicle was purchased/registered on 19th May, 2000, and on the date of accident, i.e. 13th April, 2001.

15. Section 2 (30) of the Motor Vehicles Act, 1988 (for short "MV Act") defines "owner", which reads as under:

"2. .....

(30) "owner" means a person in whose name a motor vehicle stands registered, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase agreement, or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement."

16. The said provision of law contains an exception that in case a vehicle is purchased in the name of a minor, the guardian of such minor is to be treated as owner. Thus, deceased-Bharat Singh is to be treated as the owner as well as the insured of the offending vehicle.

17. My this view is fortified by the judgment rendered by the Apex Court in the case titled as **HDFC Bank Ltd. versus Kumari Reshma and Ors.,** reported in **2014 AIR SCW 6673.** It is apt to reproduce para 10 of the judgment herein:

"10. On a plain reading of the aforesaid definition, it is demonstrable that a person in whose name a motor vehicle stands registered is the owner of the vehicle and, where motor vehicle is the subject of hire-purchase agreement or an agreement of hypothecation, the person in possession of the vehicle under that agreement is the owner. It also stipulates that in case of a minor, the guardian of such a minor shall be treated as the owner. Thus, the intention of the legislature in case of a minor is mandated to treat the guardian of such a minor as the 'owner'. This is the first exception to the definition of the term 'owner'. The second exception that has been carved out is that in relation to a motor vehicle, which is the subject of hire-purchase agreement or an agreement of lease or an agreement of hypothecation, the person in possession of vehicle under that agreement is the owner. Be it noted, the legislature has deliberately carved out these exceptions from registered owners thereby making the guardian of a minor liable, and the person in possession of the vehicle under the agreements mentioned in the dictionary clause to be the owners for the purposes of this Act."

(Emphasis added)

18. Viewed thus, the Tribunal has rightly held that the deceased-Bharat Singh was the owner-insured of the offending vehicle, his risk was also not covered in terms of the insurance

policy, Ext. RA, and the legal representatives of owner-insured cannot file a claim petition for claiming compensation.

19. Questions No. (i) and (ii) are answered accordingly.

20. In view of the above, the impugned award-I is upheld and FAO No. 67 of 2011 is dismissed.

FAO No. 342 of 2011:

21. The insurer has questioned impugned award-II on the grounds taken in the memo of appeal in hand.

22. The claimants, legal representatives of driver and owner-insured of the offending vehicle have not questioned impugned award-II on any ground, thus, has attained finality so far it relates to them.

Issues No. 1 & 2:

23. There is no dispute viz-a-viz issues No. 1 and 2. However, I have gone through the impugned award-II. The Tribunal has rightly held that the accident was outcome of rashness and negligence. Thus, the findings returned by the Tribunal on issues No. 1 and 2 are upheld.

Issues No. 3 and 5-A:

24. The Tribunal, while making discussions in paras 11 to 16 of the impugned award-II, held that the driver of the offending vehicle was having a valid and effective driving licence, deceased-Madan Lal was employed as conductor with the offending vehicle and was not a gratuitous passenger.

25. The insurer has not led any evidence to prove that deceased-Madan Lal was a gratuitous passenger. The claimants have pleaded that deceased-Madan Lal was employed as a conductor with the offending vehicle and Poonam Kanwar, has also appeared in the witness box as RW-3, and specifically stated that her father, deceased-Bharat Singh, had employed deceased-Madan Lal as conductor with the offending vehicle, thus, was an employee.

26. The perusal of insurance policy, Ex. RA in FAO No. 67 of 2011, does disclose that the risk was covered. Even otherwise, deceased-Madan Lal was a third party, the offending vehicle was insured and the insurer has to indemnify the insured.

27. The driving licence (Ext. RW-4/A) of the driver of the offending vehicle is on the record of FAO No. 342 of 2011 at page No. 144, the perusal of which does disclose that the driving licence was valid for 'LMV' with effect from 2nd January, 1997 to 1st January, 2002, and was also effective for 'Heavy Goods Vehicle' with effect from 2nd September, 1998.

28. Shri Rameshwar Singh, Registration Assistant from the office of R&LA (Urban), Shimla (RW-4) has deposed that the driving licence (Ext. RW-4/A) of the driver of the offending vehicle was endorsed for heavy goods vehicle vide endorsement No. 758, dated 2nd September, 1998.

29. Thus, on the face of it, the driving licence of the driver of the offending vehicle was valid at the time of the accident.

30. It is apt to record herein that the Tribunal while determining issues No. 3, 4 and 5-A in M.A.C. Petition No. 8-S/2 of 2005/01, subject matter of FAO No. 67 of 2011, has recorded the finding in para 20 of impugned award-I, that the driver of the offending vehicle was holding a valid and effective driving licence to drive the offending vehicle. The insurer has not questioned the said finding. Thus, on this count also, the insurer is precluded from contesting this appeal on the ground that the driver of the offending vehicle was not having a valid and effective driving licence.

31. Learned counsel for the insurer argued that the final award in M.A.C. Petition No. 8-S/2 of 2005/01, subject matter of FAO No. 67 of 2011, was not against the insurer, it had no occasion to question the said finding.

32. The argument is attractive and legally sound, but the fact of the matter is that when appeal, i.e. FAO No. 67 of 2011, was filed, it was for the insurer to invoke the jurisdiction of this Court in terms of Order 41 Rule 22 of the Code of Civil Procedure (for short "CPC") to file cross-objections, has chosen not to do so despite the fact that it has already filed appeal, i.e. FAO No. 342 of 2011, against impugned award-II.

33. Having said so, the Tribunal has rightly returned findings on issues No. 3 and 5-A, are, accordingly, upheld.

Issue No. 4:

34. Learned Senior Counsel for the appellant-insurer, in alternative, also argued that deceased-Madan Lal was working as conductor with the offending vehicle, thus, the compensation was to be awarded as per the mandate of Workmen's Compensation Act, 1923 (for short "WC Act") and the amount awarded by the Tribunal is excessive. The argument, though attractive, is devoid of any force for the following reasons:

35. Admittedly, deceased-Madan Lal was working as a conductor with the offending vehicle. Thus, the claimants have a legal right to claim compensation in terms of the 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."*

36. While going through the said provision 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.

37. This Court in ***FAO No. 363 of 2006*** titled ***Smt. Rajo Devi versus Sh. Madan Lal Sharma and others*** decided on 2.5.2014, ***FAO No. 530 of 2009*** titled ***Oriental Insurance Co. Ltd. versus Smt. Kamlo and others*** decided 25.7.2014 and ***FAO No. 227 of 20***06 titled ***National Insurance Co. Ltd. versus Nishan Surya and anothe***r decided 3.1.2014, has laid down the similar principles of law.

38. Now, the question is - whether the amount awarded is excessive? The answer is in the negative for the reason that the insurer cannot question the adequacy of compensation unless it has obtained permission in terms of Section 170 of the MV Act.

39. 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.

40. 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.

41. 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.

42. 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."

43. Thus, the insurer can question the adequacy of compensation only if it has sought permission under Section 170 of the MV Act.

44. In the present case, no such permission has been sought by the insurer. Thus, the insurer is precluded from questioning the adequacy of compensation.

45. However, I have gone through the discussions made by the Tribunal in paras 17 to 19 of impugned award-II and am of the considered view that the amount awarded is meagre, but, the claimants have not questioned the same, is reluctantly upheld.

46. Question No. (iii) is replied accordingly.

47. Having said so, impugned award-II is upheld and FAO No. 342 of 2011 is dismissed.

48. Registry to release the awarded amount in FAO No. 342 of 2011 in favour of the claimants strictly as per the terms and conditions contained in impugned award-II through payee's account cheque or by depositing the same in their respective bank accounts.

49. Send down the records after placing copy of the judgment on each of the Tribunal's files.

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

National Insurance Company Ltd. .....Appellant

Versus

Ashwani Kumar & others ..... Respondents

FAO No.53 of 2012
Date of decision: 28.10.2016

Motor Vehicles Act, 1988- Section 149- Deceased was a third party and the Tribunal had rightly directed the insurer to satisfy the award with a right to recovery. (Para-4)

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.
Mr.Nipun Sharma, Advocate vice Mr.Surinder Saklani, Advocate for respondent No.2.
Mr.G.S. Rathour, 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 18th October, 2011, passed by the Motor Accident Claims Tribunal, Hamirpur, H.P., (for short, "the Tribunal") in MAC Petition No.20 of 2008, titled Ashwani Kumar vs. Ram Parkash Chouhan & others, whereby a sum of Rs.2,72,156/- alongwith interest at the rate of 7.5% per annum came to be awarded as

compensation in favour of the claimant and the insurer came to be saddled with the liability, with right of recovery from the owner (for short the "impugned award"). .

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

3. Feeling aggrieved, the insurer has challenged the impugned award by way of instant appeal, on the grounds taken in the memo of appeal.

4. The deceased was a third party. Therefore, the Tribunal has rightly directed the insurer to satisfy the impugned award at the first instance and recover the same from the owner. I wonder why the insurer has filed the instant appeal.

5. Having said so, the impugned award is upheld and the appeal is dismissed.

6. Registry is directed to release the award amount in favour of the claimant, through payees' account cheque or by depositing the amount in his bank account.

7. 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.

The New India Assurance Co. Ltd. .....Appellant

Versus

Ruma Kaushik and others ..... Respondents

FAO No.117 of 2012 &
CO No.251 of 2012
Decided on : 28.10.2016

Motor Vehicles Act, 1988- Section 166- Deceased was an advocate by profession – his monthly income cannot be less than Rs. 30,000/- - 1/3rd income was to be deducted towards personal expenses- loss of dependency will be Rs. 20,000/- per month- age of the deceased was 42 years – multiplier of 13 is applicable- claimants are entitled to Rs. 20,000 x 12 x 13= Rs. 31,20,000/- under the head loss of dependency- claimants are also entitled to Rs. 10,000/- each under the heads loss of estate, loss of love and affection, loss of consortium and funeral expenses- thus, total amount of Rs. 31,60,000/- awarded along with interest @ 7.5% per annum from the date of filing of claim petition till realization. (Para-13 to 18)

Cases referred:

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.B.M. Chauhan, Advocate.

For the respondents: Mr.Satyen Vaidya, Senior Advocate, with Mr.Vivek Sharma, Advocate, for respondents No.1 and 2.
Mr.Naveen K. Bhardwaj, 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 27th December, 2011, passed by Motor Accident Claims Tribunal, Shimla, District Shimla, H.P., (for short, the Tribunal), whereby compensation to the tune of Rs.24.00 lacs, without interest, and costs to the tune of Rs.5,000/-,

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. The driver-cum-owner has not questioned the impugned award on any count, thus, the same has attained finality so far as it relates to him.

3. Feeling aggrieved, the insurer has challenged the impugned award by way of instant appeal, on the grounds taken in the memo of appeal.

4. The claimants have also questioned the impugned award by the medium of Cross Objections No.251 of 2012, on the ground of adequacy of compensation.

5. Claimants, being the widow and the son of deceased Sandeep Kaushik, invoked the jurisdiction of the Tribunal, under Section 166 of the Motor Vehicles Act, 1988, (for short, the Act), for grant of compensation to the tune of Rs.40.00 lacs, as per the break-ups given in the claim petition.

6. Respondents resisted the claim petition by filing replies.

7. Following issues were framed by the Tribunal:

"1. Whether Sh. Sandeep Kaushik had died due to rash and negligent driving of Mahindra Pik-up No.CH-03X-3606 by respondent No.1.? 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 accident took place due to rash and negligent driving of car No.HP-03C-2700 by Sh.Sandeep Kaushik? OPR-1

4. If issue No.3 is proved in affirmative, whether the respondents are not liable to pay compensation as alleged? OPR-1

5. Whether the respondent No.1 was not holding a valid and effective driving licence at the relevant time? OPR-2

6. Whether the vehicle in question was being driven at the time of accident in contravention of the terms and conditions of the insurance policy, if so its effect? OPR-2

7. Whether the petition is bad for non-joinder of necessary parties? OPR-2

8. Relief."

8. Claimants examined six witnesses, i.e. PW-1 HHC Jeet Singh, PW-2 Sanjay Jaicte, PW-3 Vimal Gupta, PW-4 Dr.Parvinder Singh, PW-5 Ruma Kaushik (claimant) and PW-6 Ram Swaroop. Respondents have examined three witnesses including respondent No.1 Suraj Pal (RW-1), Ravi Dutt (RW-2) and Dr.Mohan Singh Nijjar (RW-3).

9. The Tribunal, after examining the pleadings and the evidence, held that the accident was the outcome of rash and negligent driving of the driver of the offending vehicle, namely, Suraj Pal. There is no dispute about the said findings. Accordingly, the findings returned by the Tribunal on issues No.1 and 3 are upheld.

10. Before issue No.2 is dealt with, I deem it proper to deal with issues No.4 to 7.

11. Onus to prove issue No.4 was on respondent No.1, i.e. owner-cum-driver of the offending vehicle. The Tribunal has decided the said issue against the owner-cum-driver, has not questioned the said findings. Accordingly, the findings returned on issue No.4 are upheld.

12. The Tribunal decided issues No.5 to 7 in favour of the insurer and against the owner and the claimants have not questioned the said findings. Accordingly, the findings returned on these issues are upheld.

Issue No.2

13. The deceased was an Advocate by profession, was 42 years of age at the time of accident, which is not in dispute. Claimants, in order to prove the earnings of the deceased,

proved on record the income tax returns Ext.PW-2/A and Ext.PW-2/B. The Tribunal, after evaluating the material on record, has rightly held in paragraph 21 of the impugned award that the gross monthly income of the deceased was not less than Rs.30,000/-. In view of the law laid down by 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,** 1/3rd was to be deducted from the monthly income of the deceased. Thus, after making deductions, the Tribunal has rightly held that the dependants lost source of dependency to the tune of Rs.20,000/- per month.

14. The Tribunal has fallen into an error in applying the multiplier '10', whereas keeping in view the age of the deceased i.e. 42 years at the time of accident and having regard to the judgment of the Apex Court in **Sarla Verma's case (supra)** read with the 2nd Schedule attached with the Act, it is held that multiplier of '13' is just and appropriate, and is applied accordingly.

15. Having said so, the claimants are held entitled to Rs.20,000/- x 12 x 13 = Rs.31,20,000/- under the head 'loss of source of dependency'.

16. In addition, the claimants are also held entitled to Rs.10,000/- each, i.e. Rs.40,000/- in all, under the heads 'loss of estate', 'loss of love and affection', 'loss of consortium' and 'funeral expenses'.

17. Thus, the claimants are held entitled to Rs.31,20,000/- + Rs.40,000/- = Rs.31,60,000/-.

18. The Tribunal has also gone astray in not awarding interest. Accordingly, it is held that amount of compensation shall carry interest at the rate of 7.5% per annum from the date of filing of the claim petition till realization.

19. It is also worthwhile to note that the claimants are third party and the insurer has been directed to satisfy the award amount, with right of recovery.

20. In view of the above discussion, there is no merit in the appeal filed by the insurer and the same is disposed of as such. The cross objections filed by the claimants are allowed, the impugned award is modified and amount of compensation is enhanced. The insurer is directed to deposit the entire amount alongwith interest within six weeks and on deposit, the Registry is directed to release the same in favour of the claimants, through their respective bank accounts forthwith. Needless to say that the insurer is at liberty to lay motion for recovery of the amount before the Tribunal.

21. The appeal as well as cross objections are disposed of accordingly.

****

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

United India Insurance Company Limited ...Appellant.

Versus

Smt. Satinder Kaur alias Surinder Kaur and others ...Respondents.

FAO No. 60 of 2011
Decided on: 28.10.2016

Motor Vehicles Act, 1988- Section 149- Driver had a valid and effective driving licence – it was not proved on record that vehicle was being driven in violation of the terms and conditions of the policy- the insurer was rightly held liable in these circumstances- appeal dismissed. (Para-14)

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 Supreme Court Cases 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 Supreme Court Cases 738
Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & Ors. 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 Supreme Court Cases 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

For the appellant: Mr. Suneet Goel, Advocate.
For the respondents: Mr. Vivek Chandel, Advocate, for respondents No. 1 to 4.
Mr. Ajay Sharma, Advocate, for respondents No. 5 and 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is award, dated 31st December, 2010, made by the Motor Accident Claims Tribunal, Fast Track Court, Una, District Una, HP (for short "the Tribunal") in M.A.C. Petition No. 4/2008, titled as Smt. Satinder Kaur and others versus Navdeep Kaushal and others, whereby compensation to the tune of ₹ 3,22,000/- with interest @ 7% per annum from the date of filing of the petition came to be awarded in favour of the claimants and the insurer was saddled with liability (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. Appellant-insurer has called in question the impugned award on the ground that the Tribunal has fallen in an error in saddling it with liability.

4. In order to determine the issue involved in this appeal, it is necessary to give a flashback of the case, the womb of which has given birth to the appeal in hand.

5. The claimants invoked the jurisdiction of the Tribunal in terms of the mandate of Section 163-A of the Motor Vehicles Act, 1988 (for short "MV Act") for grant of compensation to the tune of ₹ ten lacs, as per the break-ups given in the claim petition, on the ground that they became the victims of the vehicular accident, which was caused by the driver, namely Shri Ashish Kaushal, while driving motorcycle, bearing registration No. HP-20B-6516, rashly and negligently, on 3rd November, 2006, at about 6.00 A.M., at Village Tahliwal, District Una, in which Balbir Singh sustained injuries and succumbed to the said injuries on 9th November, 2006.

6. The respondents in the claim petition resisted the same on the grounds taken in the respective memo of objections.

7. On the pleadings of the parties, the following issues came to be framed by the Tribunal on 11th September, 2008:

> *"1. Whether the petitioners are entitled to compensation, if so, how much and from whom? OPP*
>
> *2. Whether the petition is bad for non-joinder of necessary parties as alleged? OPR-1&2*
>
> *3. Whether the petition is not maintainable? OPR-1&2*

4. Whether the respondent No. 2 was not holding any valid and effective driving licence at the time of accident in question, if so, its effect? OPR-3

5. Whether the motorcycle in question was being used against the terms and conditions of insurance policy? OPR-3

6. Relief."

8. The parties have led evidence.

9. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation to the tune of ₹ 3,22,000/- in favour of the claimants and saddled the insurer with liability in terms of the impugned award.

10. The appellant has questioned the said impugned award on the grounds taken in the memo of the appeal. The appeal is meritless and deserves to the dismissed for the following reasons:

11. Before dealing with issue No. 1, I deem it proper to determine issues No. 2 to 5.

Issue No. 2 & 3:

12. It was for the owner-insured and driver of the offending vehicle to prove both these issues, have not led any evidence to this effect. However, I have gone through the impugned award. The Tribunal has rightly made discussion in paras 12 and 13 of the impugned award, needs no interference. Moreover, the owner-insured and driver of the offending vehicle have not questioned the said findings. Accordingly, the findings returned by the Tribunal on issues No. 2 and 3 are upheld.

Issues No. 4 and 5:

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 offending vehicle was being driven in violation of the terms and conditions of the insurance policy, has not led any evidence, thus, has failed to discharge the onus.

14. The driving licence is on the record as Ext. RA, the perusal of which does disclose that the driver of the offending vehicle was having a valid and effective driving licence. There is not even a single iota of evidence on the file to prove that the offending vehicle was being driven in violation of the terms and conditions of the insurance policy. Accordingly, the findings returned by the Tribunal on issues No. 4 and 5 are upheld.

Issue No. 1:

15. The claimants have proved that the driver, namely Shri Ashish Kaushal, while driving the motorcycle, bearing registration No. HP-20B-6516, rashly and negligently, on 3rd November, 2006, at about 6.00 A.M., at Village Tahliwal, District Una, rammed the same from the wrong side into the scooter of the deceased, due to which Balbir Singh sustained injuries and succumbed to the said injuries on 9th November, 2006. The said findings have not been questioned by the owner-insured and driver of the offending vehicle.

16. Keeping in view the facts of the case, the Tribunal has fallen in an error in assessing the compensation for the reasons to be recorded hereinafter.

17. The question is - whether the Tribunal or Appellate Court is/are within its/their jurisdiction to enhance the compensation without the prayer being made for the same?

18. This Court in series of cases, i.e., in ***FAO No. 663 of 2008*** titled ***Mani Devi versus Sh. Baldev and another*** decided on 7.8.2015, ***FAO No. 224 of 2008*** titled ***Hem Ram and another versus Krishan Ram and another*** decided on 29.5.2015, alongwith connected matters, ***FAO No.226 of 2006*** titled ***United India Insurance Co. Ltd. versus Kulwant Kaur and another*** decided on 8.3.2014 and ***FAO No.524 of 2007*** titled ***Jagdish versus Rahul Bus services and others*** decided on 15.5.2015, has held that in case the claimant has not

questioned the award, the Court, while hearing the appeal, can *suo motu* modify the award and enhance the compensation.

19. This Court in **FAO No.203 of 2010,** titled as **Nati Devi and another Maya Devi and others,** alongwith connected matters decided on 20.5.2016, has held that if any order is required to be passed and impugned award is to be modified or reversed, the appellate Court has power to do so, in order to achieve the goal of social legislation, without their being any cross appeal or cross-objections. It is apt to reproduce paras 15 to 32 of the said judgment herein.

> "15. Now, the question is whether the Appellate Court while hearing an appeal under Section 173 of the Act can pass such an order which ought to have been passed by the Tribunal, without there being any appeal or cross objections from the person against whom the order has been made. The answer is in the affirmative for the reasons given hereinabove, read with the mandate of the Apex Court and of the High Courts.
>
> 16. Part VII and Order 41 of the CPC deal with the powers and the scope of the Appellate Court in appeal proceedings.
>
> 17. The Apex Court in **Sharanamma and others vs. Managing Director, Divisional Contr., North-East Karnataka Road Transport Corporation, (2013) 11 SCC 517,** has held that there are no fetters on the powers of the appellate Court to consider the entire case on facts and law, while hearing an appeal under Section 173 of the Act. It is apt to reproduce paragraphs 10, 11 and 12 of the said decision hereunder:
>
> > *"10. When an Appeal is filed under Section 173 of the Motor Vehicles Act, 1939 (hereinafter shall be referred to as the 'Act'), before the High Court, the normal Rules which apply to Appeals before the High Court are applicable to such an Appeal also. Even otherwise, it is well settled position of law that when an Appeal is provided for, the whole case is open before the Appellate Court and by necessary implication, it can exercise all powers incidental thereto in order to exercise that power effectively. A bare reading of Section 173 of the Act also reflects that there is no curtailment or limitations on the powers of the Appellate Court to consider the entire case on facts and law.*
> >
> > *11. It is well settled that the right of Appeal is a substantive right and the questions of fact and law are at large and are open to Review by the Appellate Court. Thus, such powers and duties are necessarily to be exercised so as to make the provision of law effective.*
> >
> > *12. Generally, finding of fact recorded by Tribunal should not be interfered with in an Appeal until and unless it is proved that glaring discrepancy or mistake has taken place. If the assessment of compensation by the Tribunal was fair and reasonable and the award of the Tribunal was neither contrary nor inconsistent with the relevant facts as per the evidence available on record then as mentioned hereinabove, the High Court would not interfere in the Appeal. In the case in hand, nothing could be pointed out to us as to what were the glaring discrepancies or mistakes in the impugned Award of the Tribunal, which necessitated the Appellate Court to take a different view in the matter."*
>
> 18. It is also beaten law of the land that Claims Tribunal is within its powers to award compensation more/higher than claimed and compensation can be enhanced by the appellate Court while deciding the appeal under Section 173 of the Act, even in the absence of any appeal or cross objections. The Apex Court in

the case of **Nagappa versus Gurudayal Singh and others,** reported in **AIR 2003 Supreme Court 674** has taken the same view**.** 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."*

19. The Apex Court In the cases, titled as **State of Haryana and another versus Jasbir Kaur and others,** reported in **AIR 2003 Supreme Court 3696, The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another,** reported in **AIR 2003 Supreme Court 4172, A.P.S.R.T.C. & another versus M. Ramadevi & others,** reported in **2008 AIR SCW 1213,** and **Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr.,** reported in **2009 AIR SCW 3717,** while discussing 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, has 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.

20. The Apex Court in another case titled as **Ningamma & another versus United India Insurance Co. Ltd.,** reported in **2009 AIR(SCW) 4916,** held that the Court is duty bound to award just compensation to which the claimants are entitled to. It is profitable to reproduce paragraph 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."*

21. The Apex Court in a latest judgment in a case titled **Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service,** reported in **2013 AIR SCW 5800,** has specifically held that compensation can be enhanced while deciding the appeal, even though prayer for enhancing the compensation is not made by way of appeal or cross appeal/objections. It is apt to reproduce paragraph 9 of the judgment herein:

> *"9. In view of the aforesaid decision of this Court, we are of the view that the legal representatives of the deceased are entitled to the compensation as mentioned under the various heads in the table as provided above in this judgment even though certain claims were not preferred by them as we are of the view that they are legally and legitimately entitled for the said claims. Accordingly we award the compensation, more than what was claimed by them as it is the statutory duty of the Tribunal and the appellate court to award just and reasonable compensation to the legal representatives of the deceased to mitigate their hardship and agony as held by this Court in a catena of cases. Therefore, this Court has awarded just and reasonable compensation in favour of the appellants as they filed application claiming compensation under Section 166 of the M.V. Act. Keeping in view the aforesaid relevant facts and legal evidence on record and in the absence of rebuttal evidence adduced by the respondent, we determine just and reasonable compensation by awarding a total sum of Rs. 16,96,000/- with interest @ 7.5% from the date of filing the claim petition till the date payment is made to the appellants."*

22. The Apex Court in a latest judgment in the case titled as **Smt. Savita versus Bindar Singh & others,** reported in **2014 AIR SCW 2053,** has laid down the same proposition of law and held that the Tribunal as well as the Appellate Court can ignore the claim made by the claimant in the application for compensation. It is apt to reproduce paragraph 6 of the judgment herein:

"6. After considering the decisions of this Court in Santosh Devi as well as Rajesh v. Rajbir Singh (supra), we are of the opinion that it is the duty of the Court to fix a just compensation. At the time of fixing such compensation, the court should not succumb to the niceties or technicalities to grant just compensation in favour of the claimant. It is the duty of the court to equate, as far as possible, the misery on account of the accident with the compensation so that the injured or the dependants should not face the vagaries of life on account of discontinuance of the income earned by the victim. Therefore, it will be the bounden duty of the Tribunal to award just, equitable, fair and reasonable compensation judging the situation prevailing at that point of time with reference to the settled principles on assessment of damages. In doing so, the Tribunal can also ignore the claim made by the claimant in the application for compensation with the prime object to assess the award based on the principle that the award should be just, equitable, fair and reasonable compensation."

22-A. The Apex Court in **Giani Ram vs. Ramjilal, 1969 (1) SCC 813,** held that Order 41 Rule 33 CPC empowers the appellate Court to pass any decree which justice may require. It is apt to reproduce paragraphs 8 and 9 of the said decision hereunder:

"8. Order 41, Rule 33 of the CPC was enacted to meet a situation of the nature arising in this case. In so far as it is material, the rule provides:

"The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

The expression "which ought to have been passed" means "which ought in law to have been passed". If the Appellate Court is of the view that any decree which ought in law to have been passed, but was in fact not passed by the subordinate court, it may pass or make such further or other decree or order as the justice of the case may require.

9. If the claim of the respondents to retain any part of the property after the death of Jwala is negatived, it would, be perpetrating gave injustice to deny to the widow and the two daughters their share in the property to which they are in law entitled. In our view, the case was one in which the power under Order 41, Rule 33, CPC ought to have been exercised and the claim not only of the three sons but also of the widow and the two daughters ought to have been decreed."

23. The Apex Court in the cases in **Narayanarao (dead) through LRs and others vs. Sudarshan, 1995 Supp.(4) SCC 463, Mahant Dhangir and another vs. Madan Mohan and others, 1987 (Supp.) SCC 528** and in **T.N. Rajasekar vs. N. Kasiviswanathan and others, AIR 2005 SC 3794** held that the High Court, in order to do complete justice to the parties, can invoke the powers under Order 41 Rule 33 of the CPC and pass orders accordingly.

24. The Apex Court in **Delhi Electric Supply Undertaking vs. Basanti Devi and another, JT 1999 (7) SC 486,** while replying upon its earlier decision in Mahant Dhangir (supra), it was held as under in paragraph 19:

> *"19. Conditions as laid in provision of Order 41, Rule 33 are satisfied in the present case. When circumstances exist which necessitate the exercise of discretion conferred by Rule 33, the Court cannot be found wanting when it comes to exercise its powers."*

25. This Court in **H.P. Road Transport Corporation vs. Pt. Jai Ram and etc. etc., AIR 1980 Himachal Pradesh 16,** held that under Order 41 Rule 33 of the CPC, wide powers have been given to the appellate Court and once it is seized of a matter in its appellate jurisdiction, it is within its power to do complete justice between all the concerned parties. It is apt to reproduce relevant portion of paragraph No.39 and paragraph 40 of the said decision hereunder:

> *".....Moreover, theme of Order 41 and especially the wide powers given to the Court under Rule 33 of Order 41 suggests that the intention of the Legislature is to see that 'once the Court is seized of a matter in its appellate jurisdiction, it is able to do complete justice between all the concerned parties. To us, therefore, it is very clear that the provision enabling a respondent to file cross-objections made in Rule 22 is a procedural provision under which even if a respondent has not preferred any appeal, the Court is enabled to do complete justice to the parties by allowing the respondent concerned to prefer cross-objections within the period of limitation. Under these circumstances, with great respect to the learned Judges of the Allahabad High Court, we find ourselves unable to accept their view that provision enabling a respondent to file cross-objections is a substantive provision and not a procedural one.*
>
> *40. In view of our finding that provision for filing cross-objections contemplated by Order 41, Rule 22 is a procedural provision, the ratio of the above referred two decisions of the Supreme Court would at once be attracted, and this Court being seized of an appellate jurisdiction conferred by Section 110-D of the Motor Vehicles Act, It has to exercise that jurisdiction in the same manner in which it exercises its other appellate jurisdiction allowing the respondents in such appeals to prefer cross-objections."*

26. Keeping in view the ratio of the judgment supra, it can safely be held that the appellate Court is competent to pass any order in the interest of justice.

27. The High Court of Rajasthan, while dilating upon the powers of the Appellate Court under Order 41 Rule 33, held in **United India Insurance Co. Ltd. vs. Dama Ram and others, 1994 ACJ 692,** that the appellate Court can rectify the error invoking Order 41, Rule 33 even in the absence of Cross Objections or appeal by the claimants. It is apt to reproduce paragraph 7 of the said decision hereunder:

> *"7. The Tribunal has not passed award in any case against the owner (insured) of the vehicle. It has passed awards against the appellant insurance company only. It is not in dispute that the Tribunal has categorically held that the said accident took place due to rash and negligent driving of the truck by its driver. As such his employer, namely, Mohd. Rafiq, owner of the said truck, was liable for his negligent act. Thus the Tribunal committed a serious error in not*

making liable the owner and driver of the offending truck to pay the said amounts of compensation. This error can well be corrected by this court by invoking the provisions of Order 41, Rule 33, Civil Procedure Code, even if no cross-objection or appeal has been filed by the claimants-respondents. It has been observed in Kok Singh v. Deokabai AIR 1976 SC 634, paras 6 and 7, as follows:

In Giani Ram v. Ramji Lal AIR 1969 SC 1144, the court said that in Order 41, Rule 33, the expression 'which ought to have been passed' means 'what ought in law to have been passed' and if an appellate court is of the view that any decree which ought in law to have been passed was in fact not passed by the court below, it may pass or make such further or other decree or order as the justice of the case may require.

(7) Therefore, we hold that even if the respondent did not file any appeal from the decree of the trial court, that was no bar to the High Court passing a decree in favour of the respondent for the enforcement of the charge.

Reference of Murari Lal v. Gomati Devi 1986 ACJ 316 (Rajasthan), may also be made here. Similar view has been taken by me while deciding United India Ins. Co. Ltd. v. Dhali 1992 ACJ 1057 (Rajasthan)."

28. The High Court of Orissa at Cuttack, in **M. Adu Ama vs. Inja Bangaru Raja and another, 1995 ACJ, 670,** has laid down the same principle of law.

29. This High Court in **Himachal Road Transport Corporation vs. Saroj Devi and others, 2002 ACJ 1146,** held that appellate Court is not precluded from passing order which it considers just in the facts of the case, without there being any cross objection or cross appeal. It is profitable to reproduce paragraph 15 of the said decision hereunder:

"15. Keeping in view the aforesaid decisions of Supreme Court and different High Courts including this Court , we feel that there being no prohibition in law, i.e., either under Motor Vehicles Act or under the provisions of Civil Procedure Code, this Court is not precluded from passing order which it considers just in the circumstances of a case without there being either cross-objection or cross-appeal. As such we are further of the view that Order 41, Rule 33 is fully applicable to the appeals under the Motor Vehicles Act."

30. In **National Insurance Co. Ltd. vs. Mast Ram and others, 2004 ACJ 1039,** the question arose before this High Court was – Whether the appellate Court can modify the award in the absence of cross-appeal. This High Court answered in the affirmative. It is apt to reproduce paragraph 13 of the said judgment hereunder:

"13. Because of what has been held in this judgment, it is felt necessary to exercise power vested in this court under Order 41, Rule 33 of the Civil Procedure Code to set aside the findings in the operative portion of the award requiring the appellant to pay the amount and then to recover it from the 'insurer' (it should have been 'insured'?). This is a direction in the impugned award that needs to be set aside. On this aspect, Mr. Sharma had argued that there is no cross-appeal by the owner of the vehicle. To meet such a situation, legislature had enacted Order 41, Rule 33 in the Civil Procedure Code

> *even in cases where an appeal is not filed by a party, like the owner in the present appeal. As such, this plea cannot be accepted."*

31. This High Court in **LAC Solan and another vs. Bhoop Ram, 1997(2) Sim.L.C. 229,** modified the awards in exercise of powers under Order 41 Rule 33 of the CPC.

32. Faced with the similar situation, the Jammu and Kashmir High Court, in **State Bank of India vs. M/s Sharma Provision Store and another, AIR 1999 J&K 128,** held that a High Court can pass a decree which ought to have been passed by the trial Court. It is apt to reproduce relevant portion of paragraph 7 of the said decision hereunder:

> *"7. …This is an exceptional situation which authorises this Court in the present appeal to pass such decree as ought to have been passed or as the nature of the case demands. Similarly discretion vested in this Court under the aforesaid provision of law will not be refused to be exercised simply because respondents have not either filed an appeal or cross-objections."*

20. The Tribunal has assessed the income of the deceased at ₹ 2400/- per month, which is legally and factually not correct. The claimants have specifically pleaded that the deceased was a carpenter by profession, which fact is not in dispute. So, he would have been earning not less than ₹ 4500/- per month. However, the claimants have pleaded that the deceased was earning ₹ 3200/- per month, is reluctantly maintained.

21. The Tribunal has also fallen in an error in deducting one third towards the personal expenses of the deceased. The claimants are four in number, thus, one fourth was to be deducted 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.** Accordingly, it is held that the claimants have lost source of dependency to the tune of ₹ 2400/- per month.

22. Admittedly, the deceased was 32 years of age at the time of the accident. The Tribunal has applied the multiplier of '16', is just and appropriate in view of the ratio laid down by the Apex Court in **Sarla Verma and Reshma Kumari's cases (supra)** read with the Second Schedule appended with the MV Act.

23. Viewed thus, it is held that the claimants are entitled to compensation to the tune of ₹ 2400 x 12 x 16 = ₹ 4,60,800/- under the head 'loss of dependency'.

24. The claimants are also held entitled to compensation to the tune of ₹ 10,000/- each under the heads 'loss of consortium', 'loss of estate', 'loss of love and affection' and 'funeral expenses'.

25. The Tribunal has also committed a legal mistake in awarding interest @ 7% per annum, which was to be awarded as per the prevailing rates.

26. 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.

27. Having said so, I deem it proper to enhance the rate of interest from 7% per annum to 7.5% per annum from the date of filing of the claim petition till its realization.

28. Having said so, compensation to the tune of ₹ 4,60,800/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- = ₹ 5,00,800/- with interest @ 7.5% per annum from the date of the claim petition till its realization is awarded in favour of the claimants and the insurer is saddled with liability.

29. The enhanced awarded amount be deposited 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.

30. Having glance of the above discussions, the impugned award is modified, as indicated hereinabove, and the appeal is disposed of accordingly.

31. 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.

United India Insurance Company Ltd. .....Appellant

Versus

Romesh Chand and others ..... Respondents

FAO No.31 of 2012
Decided on: 28.10.2016

Motor Vehicles Act, 1988- Section 149- Driver was competent to drive light motor vehicle – he was driving a tractor, which falls in the definition of light motor vehicle- however, the licence had expired on 31.3.2002 and was renewed w.e.f. 27.11.2002 – accident had taken place on 22.11.2002 – thus, driver did not have a valid licence on the date of accident- owner had committed the breach of the terms and conditions of the policy – hence, owner saddled with liability- insurer directed to satisfy the award with the right to recovery. (Para- 6 to 12)

Cases referred:

Ram Babu Tiwari vs. United India Insurance Co.Ltd. & Ors, 2008 AIR SCW 6512

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 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 Supreme Court Cases 738

Savita versus Binder Singh & others, 2014 AIR SCW 2053

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

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

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

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

For the appellant: Mr.Vivek Negi, Advocate.
For the respondents: Mr.G.R. Palsara, Advocate, for respondent No.1.
Mr.Umesh Kanwar, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This appeal is directed against the award, dated 10th October, 2011, passed by Motor Accident Claims Tribunal-II, Mandi, District Mandi, H.P., (for short, the Tribunal), whereby compensation to the tune of Rs.1,81,600/, with interest at the rate of 6% per annum from the date of filing of the petition till deposit, came to be awarded in favour of the claimant, and the insurer was saddled with the liability, (for short, the impugned award).

2. The claimants, the driver and the owner 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 insurer has challenged the impugned award by way of instant appeal, on the grounds taken in the memo of appeal.

4. Learned counsel for the appellant/insurer argued that the driver of the offending vehicle was not having a valid and effective driving licence, on the date of accident. Therefore, it was submitted that the Tribunal has wrongly saddled the insurer with the liability.

5. On the other hand, the learned counsel for the respondents supported the impugned award for the reasons given therein.

6. I have heard the learned counsel for the parties and gone through the record. From the submissions made by the learned counsel for the appellant, the dispute revolves around issue No.3 which is reproduced below:

> *"3. Whether respondent No.2 was not having a valid and effective driving license at the time of accident? OPR-3"*

7. The Tribunal, while determining the said issue, has recorded in paragraph 40 of the impugned award that the driver was having a valid driving license to drive the offending vehicle, i.e. tractor. Driving licence has been proved as Ext.R-3, a perusal of which makes it abundantly clear that the driver of the offending vehicle was competent to drive Light Motor Vehicle. The offending vehicle i.e. tractor, in terms of Section 2(21) of the Motor Vehicle Act, 1988, (for short, the Act), comes under the definition of "light motor vehicle".

8. A perusal of the driving licence Ext.R-3 further discloses that it was valid and effective from 1st April, 1999 to 31st March, 2002, was to be renewed from 1st April, 2002. However, the driving licence came to be renewed on and with effect from 27th November, 2002. The accident had taken place on 22nd November, 2002, meaning thereby that the driving licence was not valid and effective at the time of accident and was got renewed afterwards.

9. The Apex Court in **Ram Babu Tiwari vs. United India Insurance Co.Ltd. & Ors, 2008 AIR SCW 6512,** has held that the licence is not valid in case it was not renewed on the date of its expiry and renewed from a subsequent date. It is apt to reproduce paragraphs 13 and 19 of the said decision hereunder:

> *"13. The question as to whether the owner of a vehicle had taken care to inform himself as to whether the driver entrusted to drive the vehicle was having a licence or not is essentially a question fact. However, in this case, it stands admitted that as on the date of accident, namely, on 27.1.1996, the driver did not hold any licence. Furthermore, it is beyond dispute that he had a licence only for one year*

and for about 3 years thereafter, he failed and neglected to renew his licence. His licence was renewed only on and from 7.2.1996.

....
.....

19. The principle laid down in Kusum Rai (supra) has been reiterated in Ishwar Chandra & Ors. v. Oriental Insurance Co. Ltd. & Ors. [(2007) 10 SCC 650], referring to sub-section (1) of Section 15 of the Act, this Court stated the law, thus :

"9. From a bare perusal of the said provision, it would appear that the licence is renewed in terms of the said Act and the rules framed thereunder. The proviso appended to Section 15 (1) of the Act in no uncertain terms states that whereas the original licence granted despite expiry remains valid for a period of 30 days from the date of expiry, if any application for renewal thereof is filed thereafter, the same would be renewed from the date of its renewal. The accident took place 28-4-1995. As on the said date, the renewal application had not been filed, the driver did not have a valid licence on the date when the vehicle met with the accident.""

10. Similar view has been taken by this Court in FAO No.308 of 2008, titled Partap Chand and another vs. Harinder Kumar and another and connected appeal, decided on 5.6.2015.

11. Therefore, the driver of the offending vehicle cannot be said to be having a valid and effective driving licence at the relevant point of time. In the given circumstances, it can safely be held that the owner has committed willful breach for the simple reason that the driver of the offending vehicle was not having a valid and effective driving licence at the time of accident.

12. Having said so, the impugned award is modified and the owner is saddled with the liability. Keeping in view the fact that the claimant is a third party, the insurer has to satisfy the impugned award at the first instance and lay motion for recovery from the owner. Ordered accordingly.

13. As far as interest is concerned, the Tribunal has awarded interest at the rate of 6% per annum. It is beaten law of 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 Supreme Court Cases 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 Supreme Court Cases 738*; *Smt. Savita versus Binder Singh & others*, reported in *2014 AIR SCW 2053*; *Kalpanaraj & Ors. 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 Supreme Court Cases 433*, and *Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another*,** reported in ***(2015) 4 Supreme Court Cases 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**.

14. Accordingly, it is held that the amount of compensation shall carry interest at the rate of 7.5% per annum from the date of filing of the claim petition till the deposit thereof. The insurer is directed to deposit the entire amount alongwith interest within four weeks from today, if not already deposited. The Registry is directed to release the amount in favour of the claimant through his bank account forthwith. The insurer is at liberty to file application for effecting recovery before the Tribunal.

15. The appeal stands disposed of accordingly.

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

Veena Devi .....Appellant

Versus

Rajesh Kumar & others ..... Respondents

FAO No.384 of 2011

Date of decision: 28.10.2016

Motor Vehicles Act, 1988- Section 166- An award was passed by the Tribunal, which was upheld in appeal, therefore, it is ordered that the impugned award will be governed by the decision in the appeal and the judgment shall form the part of this judgment as well.

(Para-2 and 3)

For the appellant: Mr.Rajiv Rai, Advocate.

For the respondents: Respondents No.1 and 2 ex-parte.
Mr.Anil Negi, Proxy Counsel, 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 20th May, 2011, made by the Motor Accident Claims Tribunal, Bilaspur, Himachal Pradesh (for short "the Tribunal") in M.A.C. No.68 of 2007, titled Veena Devi vs. Rajesh Kumar & others, whereby compensation to the tune of Rs.4,91,500/-, with interest at the rate of 7.5% per annum, came to be awarded in favour of the claimant (for short the "impugned award").

2. Learned counsel for the appellant stated that the insurer challenged the impugned award by the medium of FAO No.273 of 2011, titled Oriental Insurance Co. Ltd. vs. Veena Devi and others, which came to be dismissed vide judgment dated 19th September, 2014, whereby the award impugned in the instant appeal stands upheld. It is informed that the said decision has attained finality.

3. Having said so, the instant appeal is disposed of by providing that the same shall also be governed by the judgment, dated 19.9.2014, passed by this Court in FAO No. 273 of 2011 and connected matters. Copy of the aforesaid judgment shall form part of this judgment also.

4. Registry is directed to release the award amount in favour of the claimant strictly as per the terms and conditions contained in the impugned award by depositing the same in her bank account or through payee's account cheque.

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

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